



Association of Christian Philosophers of India (2)

**THE CONSTITUTION OF INDIA
A Philosophical Review**

Edited by
George Panthanmackel

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Papers Presented at the ACPI Annual Meeting
Held at *Shanthi Kiran*, Mangalore
October 24-27, 2001

Media House
Delhi
2003

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PREFACE

Every Constitution has a philosophy of its own. For the philosophy underlying the Indian Constitution we must reflect its Preamble:

*“We, the people of india, having solemnly resolved to constitute India into a sovereign socialist secular democratic republic and to secure to all its citizens:
justice, social, economic and political;
liberty of thought, expression, belief, faith and worship;
equality of status and of opportunity; and to promote among them all;
fraternity assuring the dignity of the individual and the unity and integrity of the Nation;
in our constituent assembly this twenty-sixth day of november, 1949, do hereby adopt,
enact and give to ourselves this constitution.”*

For a proper understanding and appreciation of the philosophy embodied in the Constitution, we must turn to the various expressions contained in this Preamble:

WE, THE PEOPLE OF INDIA means the ultimate sovereignty and authority of the people of India. The Preamble declares in unequivocal terms that the source of all authority under the Constitution is the people of India and that there is no subordination to any external authority. It is SOVEREIGN as it has the independent power to legislate on any subject without being controlled by any other State or external power. As a REPUBLIC, it has a government by the people and for the people headed by an elected President. Hence it is a DEMOCRATIC republic. It is democratic not only from the political but also from the social standpoint. In other words, it envisages not only a democratic form of government but also a democratic society which is SOCIALISTIC and SECULAR. The Constitution envisages a socialistic pattern of society where the principal means of production are under social ownership or control and there is equitable distribution of wealth. However, it is not that type of State socialism which involves ‘nationalisation’ of *all* means of production, and abolition of private property. Instead of a total nationalisation of all property, it envisages a ‘mixed economy,’ but aims at offering ‘equal opportunity’ to all, and the abolition of ‘vested interests.’ The socialistic society should also be secular. The secular objective of the State has been specifically expressed by inserting the word ‘secular’ in the Preamble by 42nd Amendment of the Constitution in 1976. It means that the State protects all religions equally and does not uphold any religion as the State religion. In this way, the State promotes JUSTICE, which is the absence of any arbitrary distinction of human and human in social, economic and political sphere. Justice guarantees LIBERTY of thought, expression, belief, faith and worship. Liberty nourishes EQUALITY of status and of opportunity. Equality furthers FRATENITY among all sections of people composed of so many races, religions, languages and cultures. A fraternity cannot be maintained unless the dignity of each of its citizens is upheld. The Constitution seeks to achieve this objective by guaranteeing equal fundamental rights to each individual. The philosophy contained in the Preamble has been further highlighted by emphasising that each individual shall not only have the fundamental rights, but also a corresponding fundamental duty, such as to uphold the

sovereignty, unity and integrity of the nation by maintaining secularism and fellowship among all the people of India.

The fittest tribute to the Indian Constitution – adopted by the Constituent Assembly on November 26, 1949 and coming into force on January 26, 1950 – is its enduring and encompassing nature in vivid contrast to several other Constitutions of the world. The Constitution has always preserved, articulated and inculcated a sense of national identity shared by a billion people despite their ethnic, linguistic, religious, regional, social, political, economic, philosophical, ideological, and other cultural diversities and disparities. Thanks to the remarkable philosophical vision of *unity-in-diversity*, or *one-in-many*, of its founding fathers who – in conformity with the rich cultural traditions of our motherland – wanted this document to be large hearted enough to accommodate within its ambit the entire spectrum of pluralities without compromising its inherent universality and underlying unity, and thus defining nationhood as a celebration of unimpeachable plurality in unison with its citizens. The steady stream of inspiration flowed from this philosophical vision implicit in the Constitution ensured the integration of our society by warding off formidable challenge to its authority while retaining its own legitimacy and credibility very much manifest in its adoption of parliamentary form of democracy, in the incorporation of the fundamental human rights, in the envisioning of a federal structure of governance with power to be shared between the Union and the States, in the categorical assertion that the State would be resolutely secular and equidistant from the religious affiliations of its citizens, in the insistence on the necessity of safeguarding minority rights, and in the ensuring of Reservation for the Scheduled Castes and the Scheduled Tribes. This philosophical vision of the founding Fathers of the Constitution—the driving force for the members of the Association of the Christian Philosophers of India (ACPI) to dwell on the topic “The Social Reality of India: Philosophical Reflections based on the Indian Constitution”—calls for a philosophical response to it, especially in the wake of the setting up of the National Commission for the Review of the Working of the Constitution by the NDA Government and the Commission’s recommendations.

The book mostly contains papers presented at the ACPI annual conference. Dr. Valerian Rodrigues’s *Engaging with the Indian Constitution* highlights the wonderful way in which our Constitution upholds the principle of equality while extending protection to the disadvantaged groups. Dr. Johnson Puthenpurackal offers a philosophical reflection on *Freedom in the Indian Constitution*. Our freedom as Indians challenges us to keep on growing in our being Indian. Dr. Varghese Manimala speaks on *Human Rights and Fundamental Rights* having their basis on our being human. Dr. George Panthanmackel discovers the *Metaphysical Foundation of Indian Secularism* in the notion of Being as one in many—the ontological principle of unity in diversity. The paper of Dr. Stanislaus Swamikannu *Nationalism and Regionalism in the Indian Constitution* points at a healthy tension between nationalism and regionalism in the Constitution. On posing the question *Equality: Egalitarian or Complementary?* Dr. John Sequeira interprets equality in the Constitution as multidimensional complementarity. Ms. Nancy Rita D’Souza finds *Women in the Indian Constitution* being guaranteed basic equality while much of it is denied to them through the Personal Laws. While investigating into the issue of *Freedom*

of the Media: A Fair Balance? Ms. Shashikala Gurpur-Murphy emphasizes the importance of maintaining a fair balance between freedom of the media and the freedom of citizens as envisioned by the founding Fathers of the Constitution. Dr. Antony Mookenthottam's article *Conversion and the Constitution of India* elucidates conversion as an inalienable human right implied in the freedom granted to propagate religion by the Constitution. Dr. Victor Machado's expose *Minorities in the Indian Constitution* delineates the constitutional complexities inherent in the term 'minorities' and urges them to participate more fully in the public life of the nation. The article of Dr. Thomas Kadankavil *Rights of the Minorities and Weaker Sections: A Philosophical Perspective* justifies the Constitutional rights of the minorities and weaker sections and demonstrates that they have already been founded on the sublime philosophical premise: 'Equals have to be treated equally and unequals ought not to be treated equally.'

I would like to express my gratitude to all those without whom this volume would not have been completed. The ACPI—its General Body and more directly its Executive Committee—has been the encouraging force behind this publication. On behalf of ACPI, I would like to acknowledge our gratitude to *Media House, Delhi* for publishing this volume, and in a very special way to *Missio, Aachen* for the financial help towards printing it.

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INTRODUCTION

Engaging with the Indian Constitution

Dr. Valerian Rodriguez

There has been a growing interest to engage afresh with the Indian Constitution in several quarters. In the political parlance this interest was expressed in the appointment of a review commission to look into the working of the Indian Constitution and the opposition expressed towards such an exercise by several political parties. In the academic arena there have been several exercises reflecting sustained engagement with the text. Important theoretical reflections emerging from India such as secularism are caught in the different readings of the text. Further, certain themes of global debates today such as justice, rights, community and multiculturalism are seen by many as having their characteristic articulation in the Indian Constitution text.

Significance of Constitution Today

The significance of the Constitution for us today is much more than in the early decades of independence when there was a widely shared agreement on the essentials of public life and the laws and institutions required to sustain them. Conflict regarding the essential of public life today is one of the main reasons for taking recourse to the Constitution. The earlier consensus itself was the product of the public deliberation that took place at various levels on the eve of independence and in its aftermath, particularly in the Constituent Assembly Debates. The Constitution of India can be considered as one of the singular expressions of such deliberation. In other words, widely shared agreement regarding the essentials of public life and the Constitution of India were in consonance with each other. The former itself was the product of decades of struggles for national independence. It was in the crucible of these struggles that such an agreement was fashioned. In this situation one did not have to invoke the Constitution as there was a public consensus on it.

Today there seems to be little agreement on the essentials of public life and our shared togetherness. There seems to be several contending visions around which public life threatens to parcel itself out. These visions operate at various levels and are anchored around diverse perceptions of the desirable good life. We need to ask the question whether these visions can be squared with the basic framework of the Constitution and to what extent. Conversely we need to reflect on what would happen if this Constitution is replaced and made to tune up with one of these visions. It might be too presumptuous today to expect a single vision to satisfy all sections of public life in India. However, we can still agree on a framework which can sustain diverse visions and ways of life and on the basis of which the latter can arrive at common but sustained agreements. This suggests the heightened significance of the Constitution today.

Granville Austin calls the Indian Constitution as the *cornerstone of the nation*. The metaphor of cornerstone may not be very attractive. No one is seriously bothered about the cornerstone once it is laid out. In fact, the metaphor of 'Grammar' to denote the

Constitution seems to be more suggestive than cornerstone. Constitution and rule of law are to a polity what a grammar is to a language. A grammar sustains a communication order intelligible across and provides the codes governing such a communication. Grammar sets the standard for good language. Similarly a Constitution sets the standard for the public life to the extent that such a life is shared across. Constitution has an interface with moral life too. The moral domain in any society may be caught in intractable contestations and a Constitution may not do away with such contestations. However, it can and should provide mechanisms for negotiation between them. We need to ask how our Constitution foots the bill.

Indian Constitution and Social Order

In spite of Ivor Jennings contemporaneous critique of the Constitution as ridden with contradictions and as the paradise of lawyers, Indian Constitution came to terms with the profound complexity of India and with the normative questions of how to enable people caught in this complexity to strive after a good life. For the purpose it did not merely foreground certain ideals but a definitive order of rights and enabling provisions. It made place not merely for individual rights but group claims as well. It did not hold aloft a single conception of any good life in a decisive sense and generally took it for a fact that there are pluralities of such conceptions, which not merely be permitted sufferance but enabled to be pursued as well. At the same time, the Constitution admitted certain reasonable limits for the pursuit of these conceptions and persuaded them to keep a broad conception of public good in view. But across the board it built up preferential provisions for disadvantaged groups. It underscored many expressions of disadvantage and held up enabling provisions to offset specific forms of disadvantage. It tried to avoid the pitfalls of both liberalism and Marxism and their corresponding economic expression either in terms of a market based or centralized economy. It embodied a democratic conception of governance which was not merely representative but which was demonstrably accountable at all levels from the locality to the nation as a whole.

As a text the Constitution of India was built over the bricks and mortar of a number of pretexts made of previous constitutional arrangements, reports of commissions, resolutions of organized bodies, memoranda and declarations of conferences. It took into account other similar texts found elsewhere and incorporated some of their facts into itself.

Giving expression to the above concerns and being a text embodying in itself many texts and appreciating several others, the Constitution of India became the greatest text that India as a nation produced. Being informed by the earlier constitutional developments was not its weakness but a way of incorporating the national movement within itself. It's disposition to learn from other constitutions demonstrated its openness to the world. If nationalism could be termed as a religion, then the Indian Constitution could be construed as its scripture.

Rights and Enabling Provisions

The Indian Constitution spells out a large number of rights under fundamental rights and elsewhere in the Constitution. These rights are vested in citizens and sometimes in any person (Art.14) subject to the law of state in India. To everyone there is an equal access to these rights. To facilitate access to these rights and sometimes to provide a weightage to the disadvantaged, these rights are appropriately qualified. Such access and weightage is based on the membership of the concerned in a disadvantaged group such as scheduled castes, scheduled tribe, backward class or women. Thus the Constitution upholds both individual rights and group differentiated rights.

If conditions arise which threaten a regime of rights, then to enable the sustenance and reproduction of such regime certain restrictions could be placed on the exercise of rights (Art.19(3), Emergency provision etc.) Therefore, rights are traded off not merely with rights but also to ensure the conditions for the sustenance of an order of rights.

Often a distinction is made between fundamental rights and socio-economic rights. Such distinction is a very provisional one. Several socio-economic provisions are built into fundamental rights as well as there are many civic rights in the directive principles of state policy. There are Supreme Court judgments suggesting that Directive Principles of State Policy are as fundamental as the Fundamental Rights.

Group Rights

A number of provisions of the Constitution are meant to ensure the sustenance of distinct culture and identity of demarcated group. We can identify the following groups in this regard.

- Cultural and Ethnic groups
- Religious and Linguistic minorities
- Linguistic identities
- Historical Regions
- Deprived Regions

Schedule V and VI, Article 371 and other provisions of the Constitution refer to the distinctive identity of ethnic groups and their right to ensure such identity. For the purpose autonomous regions and districts are suggested where the life of these groups could thrive. With respect to a number of these provisions, the President of India is directly held accountable and expected to place a report on the concerned issues before the Parliament.

Often these groups are associated with the disadvantaged group such as the SCs. However, if we carefully read the constitutional provisions the ethnic groups are seen both in terms of difference and disadvantage. To the extent these groups are disadvantaged they are entitled for enabling provisions to offset the disadvantage. In addition, the Constitution provides for the defence of their distinctive identities. The

rights of others to encroach into the space bounded by difference are to that extent qualified.

Articles 29 and 30 of the Constitution explicitly ensure protection of the identity of linguistic and religious minorities. There are, however, many other provisions of the Constitution, which defend such identity. The right to freedom of conscience, speech, profession and propagation of one's faith etc. can be cited in this regard.

Linguistic identities are often coextensive with cultural identities. It is in a linguistic community that a culture's distinctive values, valuations, beliefs and hallowed practices find expression, reflection and defence. The federal division of power in India is mainly an acknowledgment of the distinct linguistic identity of different regions. The Indian National Congress upheld the policy of constituting provinces on linguistic basis in 1920's itself. There was some setback to such an understanding in the wake of the demand for Pakistan and partition of India but widespread movements in India on the demand to carve out linguistic states and their success is an indication of the perspective embodied in the Constitution .

Certain regions in India are marked out for different treatment as they are distinct and the terms of their affiliation to India are distinct. The widely known provision in this regard has been Art. 370 of the Constitution investing special powers on Jammu and Kashmir. Against the Hindutva mobilization denouncing this provision what is to be noted is that this article embodies a specific mode of extending consideration to difference, a principle employed widely to reach out to other social constituencies in India.

A cultural region in India may contain distinct areas with their specific identity and concerns. The Constitution initially identified Andhra, Maharashtra, Gujarat and Assam as containing such areas and made special provisions for them particularly under Article 371. Subsequently several states in the North-East and Sikkim were brought within the ambit of this article. Recently the Government of Karnataka has decided to recommend the inclusion of Hyderabad-Karnataka within the scope of this article.

In this context it might be noteworthy to mention that Indian Constitution adopts a complex notion of federalism made of several tiers. There is the union, the states, the sub-state regions and local government. Under the 73rd and 74th constitutional amendments local government are now invested with distinct rights and powers which are not subject to the whims and fancies of state governments.

Need to Review the Constitution

Unlike the claim of the scriptures, the constitutional text does not have the luxury to remain unchanged as it needs to relate itself to the changing life of the nation and the challenges before it. Several provisions of the Constitution have witnessed major changes overtime throwing up disequilibria within the text. The Constitution text itself was subject to the inordinate influences of several contingent factors such as the partition of the country. New issues and concerns injected their own mark on the text without

necessarily reconciling it with the text as a whole. Even when the text was formulated there were several contending positions that attempted to pull it in their direction and the disagreements were not reconciled through an ideal-speech-like situation, but often through subtle pressures and the deployment of the overwhelming presence of the Congress in the Assembly.

Several Constitutional provisions have been subjected to judicial scrutiny and many propositions have been elaborated by the Higher Judiciary today which find near universal judicial consensus. But clarity and universal legal nod have rarely accompanied judgments on several issues. There are hugely differencing judgments on many issues. Sometimes these interventions have made the text being bogged down under its own weight. Besides, several Commissions and Committees have attempted to qualify the Constitutional text in their own distinctive ways. The Administrative Reforms Commission and the Sarkaria Commission Reports could be cited in this regard.

Further, the last fifty and odd years of India as a nation-state and a republic negotiating its way in the comity of nations has witnessed profound changes. The world outside foregrounded the Indian Constitution at the moment of its initial formulations little, except in terms of huge but substantially thin generalities. But the presence of that world is pervasive in India today and its presence is increasingly growing. In a way Indian Constitution is pre-Westphalian and deeply caught in insular notions of sovereignty. In the world today such insular notions can scarcely be defensible.

One of the noblest features of the Indian Constitution is its Catholicity and the courage to be open to the world. Against certain pronounced viewpoints in the Constituent Assembly, the Constitution upheld an inclusive and differentiated conception of citizenship and gave expression to plural and variegated perspective of nationhood. Today, there are numerous problems before us such as environmental degradation and pollution, drug trafficking, diseases such as aids, terrorism, protection of historical sites and monuments etc. which can be attended to only on a global basis.

While India has more or less sustained in the course of democracy that its Constitution outlined the health of several public institutions in India is sadly wanting. The relation that was spelled out between different institutions and powers need to be looked afresh on the basis of the experience of last 50 years. There are new actors on the political scene today, who could be hardly foreseen at the time of independence. They need to find a space in the constitutional articulation.

Our electoral system and parliamentary democracy, coordinated with the system, have thrown up a host of significant concerns for the health of our polity. They are also central to the concept of governance, denoting state-civil society interface. These concerns were hardly envisaged earlier in the proportions they present themselves today. The various constitutional amendments such as the anti-defection provisions have not succeeded in reining in the deleterious tendencies manifest in our system of representation.

Equalitarian outpowering are reflected large in the Indian Constitution against which stands the social reality of India. We may have survived as a nation but the mode of survival is represented by our sprawling slums, dirt and squalor, glaring poverty, illiteracy and malnutrition, disregard towards the disadvantaged, state coercion rampant everywhere and intolerance towards the different and the other. Our tendency to centralize the polity has proved to be a grave-digger from the Mauryan State onwards as it siphons off huge resources to feed the sprawling but parasitical state apparatuses.

The imperative of constituting the state institutions on the eve of the withdrawal of colonial power in India may have justified the generosity displayed towards the bureaucratic apparatuses in India. In the wake of implementing a socialist pattern of society, the planning process and the license-permit raj bureaucracy has grown in India like an Octopus. Instead of constitutionally facilitating the growth of bureaucracy the pertinent question today is how to restrict and contain it.

The state-citizen interface is one of the important issues that confronts us today. Given the routing of the citizen's options in terms of the response of state organs, there are huge risks of settling distorting and reorienting such options to the detriment of the interests of the citizens. Laws for the offences committed by state agents on innocent citizens are still at a primitive stage in India. The doctrines of eminent domain and public trust still rule the roost in several important arenas of public policy in India.

The coalition of political parties in power particularly its dominant partner, the BJP, evoke deep suspicions among section of the public in India as the ideological moorings of these parties evoke profound fears of partisanship and elitism. However, it may not be possible for us to wait for a moment when an ideal context is available to debate on constitutional issues. In fact, discussing these issues may itself shape such a context rather than waiting for one. The arguments favoring an engagement with the Constitution on a major scale are much more demanding than inhibitive in the present political context.

Constitutional Review and our Present Concerns

The Constitution may not be responsible for all that ails our polity. We have the apt reminder in this regard in Dr. Ambedkar's concluding comments at that constituent assembly – 'whether you have failed the constitution or the constitution has failed you.' In a way a large part of the blame has to be borne by the Indian Polity for our failures. The grammar was there but we cared little for our linguistic capacity. The skeleton was there but we did not concern ourselves in implanting nerves and sinews into it.

While there is no doubt that Constitution-reforms do not hold a solution to our ailments, they can help in tightening the loose ends: in setting priorities, in rearticulating and realigning issues and taking stock of changes and challenges. That such a situation exists is indubitable. Many may suggest that there are weightier issues to attend today than tinkering with the Constitution. You cannot catch a tiger by its tail, but while catching a tiger its tail too may be useful. Even if we grant that other issues are more important,

constitutional engagement may not be a matter to ignore. Using a Marxist formulation one can say that while attending to the principal contradiction, secondary contradictions cannot be neglected. A constitutional platform too may strike a moral note binding our fractured polity.

Given the role that Constitution can play in handling the challenges before us, we require not merely piecemeal changes here and there but a much more wholistic look at the Constitution.

FREEDOM IN INDIAN CONSTITUTION

A Philosophical Look

Dr. Johnson Puthenpurackal

Freedom is considered as a priceless pearl, which the humans price so high, that they are prepared to give anything to acquire, to protect and to preserve it.¹ It has been subjected to scrutinizing study from various angles, discussed and reflected upon by people of different walks of life, fought for and dreamt about by those under oppression, sung and written about by poets and thinkers. There is no dearth of literature on freedom. Still, freedom remains an enigmatic notion, enabling and inviting renewed reflection and thought.

There is a general consensus among the philosophers and non-philosophers alike that freedom is one of the characteristics by which the humans are distinguished from the non-humans. 'To be human' necessarily implies 'to be free.' Provisionally freedom may be defined as 'transcendence from necessity.' All creatures, including the humans, are thrown to some necessity or givenness. In the case of the non-humans, there is hardly any chance of 'standing out' from their givenness; they are condemned to it. The birds are necessitated to make their nests in the very same way they have been doing from the beginning of creation. They cannot improve upon it. But the humans are not condemned to their givenness or necessity; they can transcend it, and thus they are able to grow and create themselves by merit of their freedom.

This paper is a philosophical study on 'Freedom in the Indian Constitution'. The Constitution gives much more than a mere promise of freedom to the citizens; it tries rather to be as specific as possible in clarifying the type of freedom, guaranteed in the Constitution, in the various areas of public life. From a philosophical point of view, freedom as promised in the Constitution is only a *freedom of choice*: a freedom that every citizen of India is entitled to have.² This study begins with a clarification of the Fundamental Right to Freedom; it is followed by a complementary elucidation of the duty of the State and of the citizens. The final part of the study is devoted to some philosophical reflections.

I. The Fundamental Right to Freedom

¹ It is borne out by numerous facts: thousands are laying down their lives for the sake of getting back and protecting the freedom of their country. No promise of material helps and comforts of life could deter them from struggling for the value of freedom. Many of the asylums built for the beggars are found to be running short of inmates, since they prefer a life of freedom as beggars rather than a life in curtailment in the asylums, despite the conveniences provided. Hence it is rightly said that man is an animal that is most difficult to be tamed. When an animal is tamed, it is surrendering its freedom to the humans. Certain animals are more easily tamed than the others. But the humans are almost impossible to be tamed, as they do not want to surrender their freedom to anyone.

² In our concluding section we shall refer to this point, and make some philosophical reflections as to how freedom in the Indian Constitution is to be understood both in its face value and in its deeper meaning.

The 'Preamble' sets the tone of the Constitution: "We, the people of India, having solemnly resolved to constitute India into a *sovereign, socialist, secular, democratic* republic, and to secure to all its citizens, *justice*: social, economic and political; *liberty* of thought, expression, belief, faith and worship; *equality* of status and of opportunity; and to promote among them all, *fraternity*, assuring the dignity of the individual, and unity and integrity of the Nation,..." It shows the general purpose behind the several provisions of the Constitution, and thus it is not to be regarded as a source of any substantive power, prohibition or limitation.³ As the Preamble sets forth the goal of Indian political society, it can be invoked to determine the ambit of the Fundamental Rights and the Directives, since the ideals of *democracy, socialism* and *secularism*⁴ are highlighted in it.

The freedom envisaged in the Constitution is given a general setting in the Preamble: a setting that *emphasizes* the equality of the citizens, *guarantees* justice to them, and *promotes* the dignity of the individuals and the integrity of the Nation. Hence the freedom set in this setting not only cannot jeopardize any of these fundamental values, but it has to contribute towards a realization of them.⁵ It is not just one of the values set forth in the Constitution; freedom rather is the queen of all values, as it serves as the steps and means to attain them.

The freedom that is guaranteed in the Constitution is mostly contained in the section on "Fundamental rights."⁶ We shall limit ourselves in this paper to a keener and deeper look into those aspects and areas in 'fundamental rights' that directly deal with the question of freedom.⁷ Before it considers the question of the 'right to freedom', the Constitution speaks of the '*right to equality*', underlining the equality of all the citizens before the law, by which all discriminations against any citizen are to be strictly avoided. Thus our Constitution wants to make it amply clear that one's freedom should not in any way be a hindrance to that of others, since all are equal in their right to freedom.

³ Durga Das Basu, *Constitutional Law of India*, 6th ed (New Delhi: Prentice-Hall of India, 1991), 1.

⁴ The insertion of two terms, socialism and secularism, in the Constitution has given much confusion to the commentators and legal interpreters of the same. The term 'socialism' is to be understood, not in the strict sense of 'state ownership', but in a wider sense of 'equal opportunity to each individual for progress'. The use of the term 'secularism' in the Constitution is confusing, since Arts. 25-30 emphasize the different aspects of Religious freedom. Despite the vagueness of the meaning of this term, it is something great that the Indian Constitution upholds Religious freedom without making it a Theocratic Nation. For more about it, cf., Durga Das Basu, *Constitutional Law of India*, 2-3.

⁵ Freedom is thus given a special status in the constitution. It has to help to realize the various values both positively and negatively.

⁶ The inclusion of a section on the 'fundamental rights' in the Indian Constitution was a daring step on the part of the Fathers of the Constitution, since there were no fundamental rights under any of the Government of India Acts, as they were based on the English doctrine of the sovereignty of Parliament. Indian Constitution contains the section on 'Fundamental Rights' as a safeguard to individual freedom and rights. Regarding the possibility of the amendment of 'Fundamental Rights', there were much debates and different rulings by the supreme court; the present position is that the fundamental rights may be repealed or curtailed by passing a Constitution Amendment Act. Cf., Durga Das Basu, *Constitutional Law of India*, pp. 11ff.

⁷ This is necessitated by the fact that there is another paper, exclusively dealing with the question of 'fundamental rights and human rights'.

The section on the '*Right to Freedom*' (Art., 19) speaks of six areas of public life, with regard to which freedom is specifically guaranteed by the Constitution. While guaranteeing the right to freedom to the individuals, the state reserves its right to place 'reasonable restrictions' on the individuals' freedom. The 'right to freedom' (Art., 19) is intended to protect the freedom of the individuals against *State Action* other than in the legitimate exercise of its power to regulate private rights in the public interest. The Constitution, by giving a list of individual liberties and the possible legal restraints or 'reasonable restrictions'⁸ on them, tries to strike a balance between individual liberty and social control.

A. Freedom of Speech and Expression

It implies the right to express one's convictions and opinions freely by speaking, writing, printing, or by any other means of media. Communication of ideas involves a second party to whom the ideas are communicated. Thus the freedom of expression means the freedom to 'publicize' one's views. This freedom of speech and expression can be restricted by the state on the ground that (1) it endangers the security of the State, (2) it tarnishes the friendly relations with foreign States, (3) it destroys the public peace, order and safety, (4) it goes against decency or morality, (5) it amounts to a contempt of court, (6) it defames the reputation of others, (7) it instigates to commit serious offences, and (8) it goes against the sovereignty and integrity of India. In imposing restrictions on the freedom of expression, a reasonable balance must be struck between the need for freedom for a democratic system of government and the social interest for the prevention of disorder and anarchy.

B. Freedom of Assembly

This guarantees the freedom of the citizens to gather together in any number, provided it is peaceable, unarmed and is held at a public place. Restrictions on this freedom can be made for the reasons mentioned above in connection with the 'freedom of expression'.

C. Freedom to Form Association or Unions

The citizens have the right and freedom to 'form' associations or unions for any lawful purpose, and to continue or discontinue as members in an existent one. The right to form association does not include any guaranteed right of collective bargaining or strike.

D. Freedom of Movement throughout the Territory of India

⁸ The ambit of 'reasonable restrictions' is not exhaustively determined by law; it is subject to the supervision of the court. For more on the legal implications of this question, cf., Durga Das Basu, *Constitutional Law of India*, 36-44.

What is referred to here is not one's freedom to travel anywhere in India, but the freedom to move or to shift from one part of the territory to another without any discriminatory barriers.⁹

E. Freedom of Residence anywhere in India

The object of this clause is same as that of the above one, namely, to remove all internal barriers within India regarding one's place of residence.

F. Freedom of Private Property: *Omitted*

By the 44th amendment act of 1978 the right of a citizen to acquire, hold and dispose of property has ceased to be a fundamental right.¹⁰

G. Freedom to Take up any Profession, Trade or Business

Every citizen has the right to choose one's own employment or to take up any trade, subject to the limits imposed by the state in the interest of public welfare. This freedom does not confer on anyone the monopoly-right of a particular business.

After having enumerated the various areas of freedom guaranteed in Article 19 of the Constitution, it affirms once again the value it gives to personal liberty in Article 21: "No person shall be deprived of his life or personal liberty except according to procedure established by law." The right to life includes the right to live with human dignity and decency; and personal liberty means freedom from the physical restraint of a person.¹¹ This article is included in the Constitution to prevent encroachment upon personal liberty by the Executive. The privilege of this Article is available to citizens and non-citizens alike, and even to a prisoner subject to the limitations imposed by his conviction under the law.

H. Freedom of Conscience and Religion

Article 25(1) of the Constitution reads as follows: "Subject to public order, morality and health, and to other provisions in this Part,¹² all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion." The Constitution provides this freedom to both citizens and non-citizens, not merely to entertain a religious belief, but to exhibit one's religious convictions in word and action.¹³ The Constitution gives the freedom to 'propagate' one's religious belief to others; it is to be understood in the sense of one's right to communicate or to expose one's beliefs to another person, respecting the latter's freedom to adopt another religion.

⁹ The freedom that is referred to here has some overlapping with Art. 21 that deals with 'personal liberty'.

¹⁰ By reason of the omission of this clause of article 19, if a competent legislature deprives a person of his property, he is not entitled to question the reasonableness of such a restriction.

¹¹ Cf., Durga Das Basu, *Constitutional Law of India*, 72-73.

¹² Part III of the Constitution that deals with 'fundamental rights'.

¹³ In fact matters of conscience come in contact with the state only when they become articulate.

The Constitution provides every citizen of India the right to conserve one's distinct language, script or culture (art., 29: 1), and the right not to be denied admission to any state-aided educational institutions on ground only of religion, race, caste or language (art., 29: 2). It is in view of protecting the cultural heritage of the minorities,¹⁴ which stands in real danger of being swallowed up by that of the majority, that this article is included in the Constitution. A minority group's cultural heritage can be preserved and made to grow only with the help of some educational institution which will cater to this need, and hence the Constitution gives them the freedom to establish such institutions (art., 30). The second part of Article 29 gives the citizens, especially the minority groups, an additional protection against any discrimination based on caste, religion or language.

After guaranteeing the various fundamental rights, the Constitution concludes this part by affirming that every citizen has the right to move the Supreme Court for the enforcement of the fundamental rights (art., 32).¹⁵ Thus the Constitution, by giving a legal guarantee of protection to the guarantee of fundamental rights, underlines the importance it places on the fundamental rights of the citizens.

II. The Duty of the State and of the Citizens

The Constitution is not merely content with a promise of the right of freedom to the citizens; it gives in its Part IV some basic principles and guidelines to the State in the governance of the country and in the making of the laws,¹⁶ and a reminder to the citizens of their duty to the State.

A. Directive Principles for the State

The Constitution wants that the State, being a 'welfare' one, create the necessary and conducive atmosphere for the realization of the fundamental rights by appropriate legislation.¹⁷ Until and unless the directives are implemented, the 'rights' and freedom of the individuals cannot be ensured.

Articles 38-51 elaborate the various directive principles with which the State has to be guided in the way in which it governs and makes laws. It will suffice here to give a gist of the important Directives. The State has to secure a social order for the promotion of multifarious justice of the people, which implies that inequalities be eliminated and equal opportunities be facilitated for the welfare of the people (art., 38). The State is directed to

¹⁴ The term 'minority' is not defined in the constitution. But it is taken to mean any community that is numerically less than 50% of the population of the state.

¹⁵ The right to move the Supreme Court where a fundamental right has been infringed is itself a fundamental right. Durga Das Basu, *Constitutional Law of India*, 116.

¹⁶ These directives and guidelines *per se* are not enforceable in the courts; they are to be implemented by legislation.

¹⁷ In the earlier decisions of the Supreme Court, it paid little attention to the Directives in Part IV on the ground that the court had little to do with them, until implemented by legislation. But later decisions show that the Directives are not in any way subordinate to the Fundamental Rights, rather they complement each other. Cf. Durga Das Basu, *Constitutional Law of India*, 125ff.

create opportunities for an adequate means of livelihood for all the citizens. Special mention is made of the need to develop conditions of freedom for the children and the youth by protecting them against exploitation (art., 39f). In the 42nd Amendment Act of 1976 a new clause (39A) is added, asking the State that no citizen be denied justice by reason of economic and other disabilities. Thus the promise of freedom becomes more concrete, especially in the case of the economically and socially underprivileged. The State has the responsibility to ensure the freedom of the workers by seeing to the decent working conditions and just wages. The right to a decent life can be realized only insofar as all have the opportunity to be educated, which is directed by Article 45 of the Constitution.¹⁸ The freedom of the weaker sections of the society, such as the SC and ST groups, is specially referred to in the Constitution (art., 46), since they are easily susceptible to be exploited.

The various directive principles that are given in Part IV of the Constitution enjoin a serious responsibility on the State to safeguard the promise of the fundamental rights. Even though these directives and guidelines *per se* are not enforceable in the courts, the moral conscience of the State is constantly challenged while making the laws. In inserting this Part to the Constitution, its formulators had the good and noble intention of helping the Indians to be free citizens in reality. Despite the slowness of the State to implement this Part by appropriate laws, India can take pride in the fact that its citizens do enjoy a freedom, unthinkable for most others in the world.

B. Fundamental Duties of the Citizens

In the 42nd Amendment Act of 1976 an additional section (Part IV A) is inserted into the Constitution under the title 'Fundamental Duties'.¹⁹ It consists of just one Article with ten subdivisions, enumerating the various duties of the citizens of India. Accordingly, it is the duty of every citizen of India to abide by the Constitution and to respect the symbols of its ideal, such as the national flag and the national anthem (a), to cherish and uphold the ideals that motivated the struggle for freedom (b), to uphold and protect the sovereignty, unity and integrity of India (c), to render national service when called upon to do so (d), to promote the harmony and spirit of brotherhood transcending the various divisive factors (e), to value the rich heritage of ours (f), to protect the Nature and respect all living creatures (g), to develop the scientific temper and the spirit of inquiry (h), to safeguard public property (i), and to strive towards excellence in all spheres (j).

The fundamental rights promised in the Constitution can be realized only insofar as they are complemented with the directive principles from the part of the State, and the fundamental duties from the part of the citizens. Just as the Directives, so the Fundamental Duties have no legal sanction for their violation, unless implemented by legislation. One who does not care for one's *duties*, cannot claim the privilege of *rights*.

¹⁸ The Constitution wants that the State provide the opportunity for free and compulsory education for all children until the age of fourteen years. This should have been carried out by 1959 as per the directives given in the constitution. But unfortunately it is not realized even now in most of the states of India. Thus the Part IV of the constitution remains a mere exhortation.

¹⁹ This section was inserted on the recommendation of the Swaran Singh Committee.

The moral value of Fundamental Duties would be “not to smother rights but to establish a democratic balance,”²⁰ “by making the people conscious of their duties equally as they are conscious of their rights.”²¹

The inclusion of Fundamental Duties in the Constitution has given a more complete picture of the notion of freedom as a Fundamental Right. India as a free Nation, vowed to the freedom of its citizens, gives a guarantee of freedom in its Constitution by making it a Fundamental Right. Thus by the fundamental right of freedom all the citizens of India *can be* free. The Constitution, after having made a solemn promise of freedom as a fundamental right, makes a twofold reminder: first of all through the ‘Directive Principles’ the State is reminded of its responsibility to its citizens to create a conducive atmosphere for the citizens to be free by appropriate legislation; secondly through the ‘Fundamental Duties’ the citizens are reminded of their responsibility to the State. Only when the State and the citizens are mutually responsible to each other, there can abide a responsible freedom as envisaged in the Constitution.

III. Philosophical Reflections

The freedom that is promised in the Constitution is to be taken as the *freedom of the citizens of India*. But it is ordinarily taken, and justifiably so, as a freedom of choice: as an Indian I am not curtailed, but free to decide for myself. But when we look at it from a philosophical point of view, we can see freedom in its ontological sense. Freedom is always linked to Being; when one is able to choose to be oneself, to be one’s Being, one is said to be ontologically free. It is a freedom for one’s Being. What one *is* or one’s Being is not anything that is statically given; but rather one *can* be, what one *is* (Being). If one *can* be what one *is*, then one *ought* to be so. Thus we find the trilogy, *is-can-ought*, as closely linked. This needs to be further clarified in relation to the freedom promised in the Indian Constitution.

Being, in the contemporary philosophical understanding, is not a static notion or a dead label, but is to be taken in the dynamic sense. Thus *my being Indian* speaks at the same time of the twofold dimension of the *already* and the *not yet*. I am *already* an Indian, but at the same time *not yet*. This dialectics challenges me to move from the *already* to the *not yet*. What I am already is not merely to be preserved or maintained, but is to be developed by the constant process of becoming more and better of myself. Thus my being Indian calls me to try to be more of an Indian. This is what is implied in what is said above, ‘what one *is*, one *can* be’. Every Indian, by his/her freedom, has the ability to improve upon his/her being an Indian. Thus freedom implies ‘self-creativity’: my *freedom as Indian* implies that I keep on creating my *Being as Indian*.

Freedom implies not only one’s *self-creativity* but also one’s *ought-character* or *ethicality*. If I am given, by my freedom, the capacity to create myself or my Being, then

²⁰ Mrs. Indira Gandhi in the Lok Sabha on 28th Oct., 1976. As quoted by Durga Das Basu, *The Constitutional Law of India*, p. 135, note 5.

²¹ The Law Minister in the Lok Sabha on 26th Oct., 1976. As quoted by Durga Das Basu, *The Constitutional Law of India*, p. 135, note 5.

I *ought* to strive towards it. It is an ethical demand that is ingrained in my Being. As an Indian I am ethically challenged to keep on growing in my being an Indian. Only in the light of the ethical or ought-character of freedom can we understand what is traditionally referred to as *freedom for* and *freedom from*. Indians as ‘ought to be’ are free *for* being Indians, and free *from* not being Indians. Thus as far as the freedom of the Indians is concerned, the greatest ethical ought or value is ‘to be Indian’ and the greatest ethical evil is ‘not to be Indian’. The section on ‘fundamental duties’ given in the Constitution reminds every Indian citizen of his/her ethical responsibility *to be Indian*.

Our investigation into the notion of freedom in the Indian Constitution makes us realize that *India is free* and *Indians are free*. It can throw us into a complacency or self-satisfaction about this achievement on a par with anyone in the world. It is true that Indians are today thrown open to more possibilities, gathered at random from all over the globe. The picture of present India with its wholesale embrace of globalization-policy confirms our craze for the freedom of choice. The overemphasis on such a freedom has created extreme ‘individualism’ to the detriment of the Indian Social Ethos.²² Freedom has become a powerful tool in the hands of a very small minority to exploit the majority. Our philosophical reflection shows that we cannot merely be satisfied with such a *freedom of choice*.²³

The Freedom of the Indians, promised in the Constitution and enabled by the timely State legislation, has to be appropriated by every citizen of India. To use the language of Gabriel Marcel, freedom is to be taken as a *grace*,²⁴ as an invocation to be free. Thus I become free by my creative response to the appeal of my Being—my being Indian. Standing rooted in the cultural-historical heritage of my Being, I respond to its appeal and invocation. If *Dharma*, *Satya*, *Ahimsa*, justice, peace and integrity are the constitutive values of my Being Indian, my freedom demands that these be appropriated, and thus I grow in my ontological freedom. But in order to grow in and to move towards freedom, I need to have freedom as the ‘springboard’ of movement. Freedom is thus the *whence* and the *whither*, the *basis* that enables me to grow, and the *goal* towards which I grow. If all the Indians were to be convinced of their freedom, not as a privilege, but as a collective responsibility to the freedom of everyone and to the common good, there would have been an *India*, different from what it is today.

²² Studies are in abundance on the evil effects of globalization. In a recently held International Congress on Intercultural Philosophy (Bangalore, 17-20 September 2001) to study the theme “Interaction and Asymmetry between Cultures in the Context of Globalization” has been unanimous in voicing its concern at the all-encompassing monoculture that is swallowing up the whole world.

²³ The freedom of choice, according to Heidegger, will end up in an *uprooted* freedom, in which case one becomes blind to one’s historical heritage.

²⁴ Sartre, as different from Marcel, takes freedom as a *condemnation*. It is a terrible yoke that is placed on me against my own freedom.

HUMAN RIGHTS AND FUNDAMENTAL RIGHTS

Dr. Varghese Manimala

I. Introduction

In this paper our intention is to make a study of the Human Rights as understood by the general public and as indicated in the Charter of Human Rights, and to make a study of the Fundamental Rights of the Indian citizen as enshrined in the Indian Constitution. Since the Human Rights are more basic, first we shall deal with them and then we shall see the Fundamental Rights as an explication of the Human Rights. Humankind is in the process of evolution, and in this long journey the notion of rights, laws, duties, etc., have come into existence. Human rights and fundamental rights are of twentieth century coinage, but that does not mean the human beings in the previous centuries were not aware of them. They were not given concrete expression or laws were not framed for their propagation and punishments were not enforced for their violation. Today human beings have become more and more aware of these rights, and individual and collective voices are raised against their violation. In recent times, a lot of literature too has appeared about them. The nations who violate these rights are despised and international opinion goes against their favour and sometimes inviting sanctions. But the sad side is that even those who proclaim to be champions of Human Rights violate them but escape the sanctions, as they are powerful forces. Let us briefly look at the Human Rights and then proceed to the Fundamental Rights in our Constitution.

II. Human Rights

Today Human Rights have become a subject of great debate as their violation continues unabated, and yet many people seek redress of their rights when they are violated. *Human Rights* is a twentieth century name for what has been traditionally known as natural rights or the rights of man.

II. 1. History of Human Rights

In this section we shall try to trace the development of history leading to Human Rights. Human Rights is an evolution from the concept of natural rights, propounded by Sophocles 400 years before Christ, Blackstone in the 17th century and several writers and philosophers. Although much has been said and written about them they still remain purely an ideal in many countries of the world, and surprisingly many countries have not yet signed the charter of Human Rights. In the history of thought John Locke, the philosopher, is often quoted as an authority on the subject, and he wrote on the rights to life, liberty and property. The Bill of Rights enacted by the English Parliament after the “Glorious Revolution” in 1689 named also the right to trial by jury, and prescribed that in

all courts of law excessive bail should not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.²⁵

Locke's theory and English Bill of Rights had a great influence throughout the civilized world. In Virginia in 1776 a Bill of Rights was adopted by a representative convention, and its first clause proclaimed, "that all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any contract, deprive or divest their posterity: namely, the enjoyment of life and liberty, with the means of acquiring and possessing property and pursuing and obtaining happiness." Here the 'right to happiness' is added to the list of Bill of Rights and that of Locke. The same word occurs in the Declaration of Independence issued by the thirteen American States in July 1776: "We hold these truths to be self-evident: that all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness." The United States Constitution of 1789 with subsequent amendments defines these rights in greater detail. It specified the following as rights of people: 'freedom of speech and the press, the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures;' and the right to the free exercise of religion. Later amendments made slavery illegal and the rights of the citizens of the United States to vote irrespective of race, colour or previous condition of servitude. Similarly, the Declaration of the Rights of Man and the Citizen issued by Constituent Assembly in France follows closely the English and American models. It declares that 'men are born and remain free and equal in rights,' indeed that, 'the purpose of all political association is the conservation of the natural and inalienable rights of man: these rights are liberty, property, security, and resistance to oppression.' Besides property, which is held to be 'an inviolable and sacred right,' the French Declaration specifies the right to free speech, a free press, religious freedom, and freedom from arbitrary arrest.²⁶

The need for affirming the human rights was perceived soon after the First World War by the League of Nations. American President Roosevelt in his address to the Congress on January 6, 1941, outlined the four essential features of a new-world order: freedom of speech and expression, freedom of religion, freedom from want, and freedom from fear. He also made it clear that individual freedom of speech and worship should go hand in hand with such wider human rights as economic and social welfare, and peace and security for all peoples and persons. When the United Nations was created after the Second World War, one of the first and most important tasks assigned to it was what Winston Churchill called 'the enthronement of human rights'.²⁷ The first documentation on Human Rights is seen in the Charter of the United Nations adopted at San Francisco on June 25, 1945. Its preamble itself says that its object is to affirm faith in fundamental human rights. On December 10, 1948, the Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations. The purpose of this beautiful document was put in these terms: "It is the basic international statement of the inalienable

²⁵ See Maurice Cranston, *What are Human Rights?* (London: The Bodley Head, 1973), 1.

²⁶ *Ibid.*, 2.

²⁷ *Ibid.*, 3. See also George Lobo, *Human Rights in Indian Situation* (New Delhi: CBCI Centre, Ashok Place, 1991), 9-10.

rights of all members of the human family. It is intended to serve as a common standard achievement for all peoples and all nations in the effort to secure universal and effective recognition and observance of the rights and freedoms it lists.”²⁸ Neither the Charter nor the Universal Declaration had any binding force. This deficiency was sought to be removed by the U. N. General Assembly by adopting in December 1966, two covenants for the observance of Human Rights. These covenants are (1) The covenant on civil and political rights, and (2) The covenant on economic, social and cultural rights. The covenant on civil and political rights related to legally enforceable rights of the individual while the covenant on economic, social and cultural rights was addressed to States to implement them by legislation. The two covenants came into force in December 1976 after the ratification by the requisite number of member states, i.e., 35. Many other States have ratified subsequently numbering 69 at the end of 1981. The USA has not ratified these covenants. The effect of ratification is that the ratifying States are obliged to bring legislation to ensure that the rights proclaimed in the covenants are made enforceable.²⁹

The Declaration of Human Rights by the UN was, indeed, a great achievement, symbol of legal victory of the thought of “human equality”. But we should not think that this is a child of the Enlightenment; it is much more ancient. Citizens of ancient Greek cities enjoyed such rights as *isogoria* or equal freedom of speech, and *isonomia* or equality before the law; and these are prominent among the rights claimed in the modern world. After the breakdown of Greek city-states the Stoic philosophers formulated the doctrine of ‘natural rights’ as something which belonged to all human beings at all times; these rights were not the particular privileges of citizens of particular cities, but something to which every human being everywhere was entitled, in virtue of the simple fact of being human and rational.³⁰ The Greeks, particularly Aristotle and the Stoics, developed the notion of the *natural law*, according to which, each being had its own inherent value. They created the ideal of democracy wherein the citizen had certain basic rights simply by being born into the society. However, the Stoics thought of humanity in hierarchical orders. At the bottom were the slaves, then came children, then women and then at the top free male adults. Children and women had very limited rights, slaves none at all. In practice, democracy in Greece was built in favour of ten percent of the free population, and that too at the expense of ninety percent of slaves. Even today it is about the same proportion that is enjoying the fruits of democracy largely at the expense of the poor and dominated classes.³¹ The greatest contribution to the legal system came from the Romans. They spoke not only of the particular laws of each nation, but of a *jus gentium* or “common law of all humans” (*commune omnium hominum jus*). Here indeed was the basis for claiming a right simply on the grounds of one’s humanity, which is common to all human beings. This again applied only to the higher classes of society.³²

²⁸ See Jayant Chaudhary, *Textbook of Human Rights* (New Delhi: Dominant Publishers and Distributors, 2000), 27.

²⁹ Cf. M. G. Chitkara, *Human Rights: Commitment and Betrayal*, in the Afterword of Justice P. C. Balakrishna Menon (New Delhi: APH Publishing Corporation, 1996), xxi.

³⁰ Cf. Cranston, *What are Human Rights?*, 2

³¹ Cf. Lobo, *Human Rights*, 5.

³² Cf. *Ibid.*, 5-6.

The *Magna Carta* of medieval England (1215) was an important development in the history of human rights. Although basically it is a feudal document conceding certain rights to barons in return for their allegiance and obedience to the Crown; it had certain traces of universalism. The Charter contains germs of the principle that there are certain individual rights that the sovereign may not infringe. The *Petition of Rights* of 1628 was in the context of the Parliament's independence from the Crown, however limited the representative character of the Parliament at that time might have been. Another big step forward was taken in the direction of human rights with the *English Bill of Rights* of 1689. The Bill was of a revolutionary nature, although it contained a limited number of rights and was subject to revision by the legislators.

While the Anglo-Saxon tradition on Human Rights had a strong religious basis, the human rights concept in Europe arose with a secular bias. It had continuity with the Greco-Roman idea of the "natural law." The human rights movement began as a reaction to papal and royal absolutism. Appeal was made to "reason" and "natural law" to safeguard human beings from the oppressive consequences of the State claiming God-given inalienable authority over people. Rousseau proposed a theory of Social Contract between the people and the sovereign. As papacy felt threatened this was strongly disapproved by the Church.

The slogan of "Liberty, Fraternity and Equality" of the French Revolution had a strong influence on the movement. As we know this revolution marks a decisive stage in the history of human evolution. After the storming of the Bastille on July 14, 1789, a landmark document in the history of human rights was framed under the title: *Declaration of the Rights of Man and the Citizen*. Among the other rights it notes: (1) "Men are born and remain free and equal in rights... preservation of the inalienable rights of man; these rights are liberty, property, security and resistance to oppression. (2) The source of all sovereignty resides essentially in the nation... Law is the expression of the general will... No man may be accused, arrested, or detained except in the cases determined by law, and according to the forms prescribed thereby."³³

Although the human rights are now widely accepted, in the past there were thinkers like Hume, Burke, Bentham, Austin, Hegelian Idealists, and the positivists who were opposed to the doctrine of equal rights for all. Even in the world of today there are people who in practice do not acknowledge the fact of human rights; and we witness to the fact that human rights violations galore. Some legal systems of countries pay lip service to the idea of human rights, for example according the Article 125 of the Soviet Constitution: "Citizens of the USSR are guaranteed by law (a) freedom of speech; (b) freedom of the press; (c) freedom of the assembly, including the holding of mass meetings; (d) freedom of street processions and demonstrations."³⁴

³³ Cf. Ibid., 7-9.

³⁴ As quoted by Cranston, *Human Rights*, 4.

II. 2. The Notion of Rights and Human Rights

We have to ask the question 'what is meant by the expression all human beings have rights?' The term 'right' itself is a bit ambiguous. Firstly, we can think of right as something, which is conceded and enforced by the law of the realm. The right to vote, the right for free speech, right to form assembly, etc., are such rights. But there may be other positive laws of the states which may not be applicable to all. They may be called *positive rights*. Further, we can think also of *moral rights*. But the moral right is not enforceable like the positive right. Human rights are both moral rights and positive rights. It is important to keep in mind what is and what ought to be. Human rights are *universal* because they are not derived from a particular position of a person or the work he/she performs. They are belonging to the human person.

The human rights are justified not because they are enforceable but because they are acknowledged as rights of all human beings. These rights cannot be 'justified' like other rights which are earned or are acquired by the enactment of special roles. Human rights are not bought, nor are they created by any other special contractual undertaking. They are not exclusive. Rights such as 'the Right to Property', 'the Right to Liberty', the Right to Freedom of Religion', etc., belong to the set of Human Rights. Almost all the constitutions of the different countries of the world acknowledge and approve the Human Rights, although very many governments do not enforce them, and are negligent in punishing the guilty. Protection of the Human Rights is a task of all the governments and in particular that of the UN. The United Nations has continued to talk about Human Rights, passing resolutions, holding meetings of special councils and commissions, initiating covenants, reprimanding the nations who violate the human rights, etc. But much of this remains on paper, that is the sad side of reality.

The basic rights enshrined in the Declaration of Human Rights are the Right to Life, which will include the right to protect life in its entirety and to have proper means of livelihood so that one can maintain one's life. Protection from attacks, dangers, war, etc., is included in this right. The Right to Liberty will consist of freedom of movement, and freedom of speech and expression. This will also include right to freedom of peaceful assembly and association. We know that these are curtailed very often by many nations under various pretexts. Of course, we do not deny that the misuse of this freedom has to be dealt with determination. Right to property is acknowledged as a human right. Everyone has the right to whatever property he has honestly and lawfully acquired, except that which is lawfully demanded of him as taxation by the system of government under which he lives. Besides these rights human being has various social and economic rights which are acknowledged and recommended by the Charter of Human Rights. Equality of all human beings and security of all are considered as Human Rights. Right to Education is considered as one of the human rights, and parents can determine what education should be given to their children. It should be directed to the fulfilment of one's personality. Political life and freedom are considered as the rights of the human being. Also an individual has the right to engage in whatever occupation he/she finds worthwhile. Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in the scientific advancement and its benefits. Every human being has the right to work and free choice of employment, and also right

to just and favourable conditions of work and protection against unemployment. The payment for work has to be done without any discrimination. The right to form trade unions is seen as one of the human rights. Similarly all have the right to leisure, reasonable limitation of working hours and periodic holidays with pay. While the Charter thus lists a good many rights of the human being, it does not fail to point out the duty of individuals to work for the common good.

In recent years there is a great interest evinced by many agencies in Human Rights issue. In the past few decades the various religious agencies too have brought out various documents supporting the issue of Human Rights. We shall just indicate some of the documents of the Catholic Church, which directly allude to the need of implementing the Human Rights. Pope John XXIII through his encyclicals especially *Pacem in Terris* has made a fervent appeal to all the nations to respect and practice Human Rights. A passage from *Gaudium et Spes (Church in the Modern World)* may be in place here:

... At the same time, however, there is a growing awareness of the exalted dignity proper to the human person, since he stands above all things, and his rights and duties are universal and inviolable. Therefore, there must be made available to all men everything necessary for leading a life truly human, such as food, clothing, and shelter; the right to choose a state of life freely and to found a family, the right to education, to employment, to a good reputation, to respect, to appropriate information, to activity in accord with the right norm of one's own conscience, to protection of privacy and to rightful freedom, even in matters religious.³⁵

The Church is appreciative of the task done by the United Nations to uphold the Human Rights. Various other documents of the Church like *Mater et Magistra*, *Populorum progressio*, *Octogesimo Adveniens*, *Justice in the World*, *Evangelii Nuntiandi*, *Redemptor Hominis*, *Dives in Misericordia* deal briefly or at length about Human Rights. These documents specially portray Church's concern for proclaiming peace and justice in the world.

II. 3. Future of Human Rights

One of the important issues that concern the world today is the future of Human Rights. In the wake of the violation of these rights by powerful and developed countries it appears that the future of Human Rights is rather bleak unless there is concerted effort on the part of world organizations and peoples. One of the needs of the hour is that UN has to become really powerful enough to control nations like USA who dictate terms as to its mode of functioning, and ensure that their interests are protected even at the cost of rights of others. Article 55 of the Charter of Human Rights stipulates that the United Nations shall promote 'respect for, and observance of, human rights and fundamental freedoms', and article 56 wants that all the members pledge themselves for joint and separate action in co-operation. Human Rights will remain an ideal unless there is some enforcing agency with powers to punish those who infringe them.

³⁵ GS. 26.1. This document deals with this topic at length as its aim is to open the eyes of the Church to issues that concern the modern world. Perhaps, this is one of the most appealing documents of the Vatican II.

The Universal Declaration of 1948 was not presented to the world, even by those who framed it, as something to be taken *au pied de la lettre*. It was put forward as a provisional document, a statement of ideals: "Now therefore the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations. ..." But even the General Assembly was not satisfied with this pious utterance. The Commission on Human Rights was instructed in 1948 'as a matter of policy' to complete the task of producing something that would be legally binding, namely 'a draft convention on human rights and draft measures of implementation'. The covenant was expected to transform nominal rights into positive rights. As the proceedings of the UN began to slow down some members of the United Nations Commission on Human Rights began to mistrust the whole enterprise. They started to protest that the setting up of any international machinery for the implementation of human rights 'would tend to undermine the sovereignty and independence of States'. In 1950 the majority of the Commission was still in favour of some system of implementation. There were various proposals regarding the establishment of an international court of human rights, of ad hoc committees or permanent organs, which would settle disputes arising out of the interpretation or application of the covenant or otherwise supervise the observance of its provisions, and to which either states alone or individuals and groups as well as states, might submit petitions or applications. The Covenant on Civil and Political Rights, together with the further Covenant on Economic and Social Rights, was approved by the General Assembly of the United Nations in December 1966, by a substantial majority. But approval did not go much further. One proposal which seemed likely to be salvaged to provide some small measure of concrete protection for human rights through United Nations was the Indian idea, revived in 1965 by Costa Rica, for appointing a High Commissioner for Human Rights. This proposal also has not yet come through. A great deal had been said in the various organs of the UN about human rights, and especially about the economic and social rights. But nothing remotely resembling action took place. In fact, on the matter of implementation, the covenant on economic and social rights has nothing to offer. The right of self-determination has practically nullified the covenants. The United Nations alone is not the only organization interested in human rights. Various councils and organizations like the Council of Europe at Strasbourg try to promote human rights.³⁶

In the past, international courts of justice have dealt only incidentally and peripherally with human rights. Courts must protect the human rights of those who need most or whose rights have been violated. The Covenants of the United Nations have remained purely ideal. Although the language of the Covenant is generally of 'binding' nature, the signatories giving 'undertakings' and 'guarantees', its main effect is to reinforce the conception of human rights as ideals or objectives towards which the governments of the world can happily gaze. If the Covenant on Economic and Social Rights had not been associated with the Covenant on Political and Civil Rights it might well have been ratified more widely and more briskly. The thought of Political and Civil Rights is bound to be more disturbing: precisely because the rights it names are universal rights, and rights which claim immediate recognition. Quite often the UN discussions have centred

³⁶ Cf. Cranston, *Human Rights*, 54-60.

more on economic and social rights and less and less on political and civil rights. Another reason why the human rights do not become effective is that the states are permitted to control the rights of individuals under the pretext of 'protection of democracy', 'public order', 'law and order problem', etc. As far as positive law is concerned most invasions of men's rights and liberties *are* lawful. In those states where human rights are limited to the point of non-existence, those restrictions are perfectly 'lawful' and 'valid' in positive law. The question we have to ask in considering restrictions on human rights is whether those restrictions have the authority of natural law or morality or justice. We need an impartial body to decide these things, an international court to arbitrate.³⁷

If rights are differently understood in different places, so will there in different places be different limitations placed on the exercise of certain rights. For example, the right to freedom of expression and action is universally limited by the rule that others shall not be injured by anyone's use of this liberty; such use, we say, becomes an 'abuse' of the right to liberty. A consideration of the limitations which may be placed on human rights is thus as important as an analysis of the rights themselves; otherwise muddle-headed claims for rights are countered by equally muddle-headed arguments about the needs of public order and security. Sometimes too much is made of the supposed antithesis between security and freedom. But to claim the traditional rights of man is to claim, among other things, both security and liberty. Security is not something which is at odds with human rights, because it is itself a human right; it is nothing other than the right to life re-stated. The security of the individual is bound up with the security of the community; the private enjoyment of the right depends on the common enjoyment of the right. The demand for liberty and security is not the demand for two things which can only with difficulty be balanced or reconciled: it is a demand for two things which naturally belong together.³⁸

In this age when there is such large scale violation of human rights in many parts of the world, a normal question that arises in the mind of all right thinking people is that what is the future of human rights? Will they survive or once again the law of the jungle take its place in human society? All of us need to realise that it is not only certain individuals who have these rights as their monopoly but all human beings should become capable of enjoying them. It is by the enjoyment of the true freedom both by the individual and the community that the human rights will reach their goal. We know that our freedom in its full sense is in peril. Human rights, in the deeper meaning, are suffering suffocation. The needs of the many are drowned by the greed of the few. Regarding India, for example, the battle for human rights has to begin with new vigour to be launched, not by political parties which have betrayed the trust India made with destiny in August 1947, but by the vast hungry masses of men, women and children if *swaraj* is to be kept alive.³⁹ We know that violations against human rights are growing by leaps and bounds; hope seems to be bleak with regard to the protection of these rights. Even Secretary General of UN, Kofi Annan, once frankly admitted: "It is shocking to think that nearly half of us – 3 billion

³⁷ Cf. Ibid., 72-80.

³⁸ Cf. Ibid., 83-85.

³⁹ See V. R. Krishna Iyer, "Human Rights Scenario: Grim Realities, Hopeful Hues," in *Human Rights 2000* (Bangalore: Vigil India Movement, 2000), 4.

out of the 6 billion – are entering the new era in abject poverty, with \$ 3 a day, or less, to live. That is one thing we must really change. It is also shocking that people in so many places today are exposed to violence and brutality. The twentieth century has been the most murderous in human history. We must make sure the twenty-first is more peaceful, and more humane.”⁴⁰ Perhaps we have become too deaf to the voices of the people who cry for redress of their rights. We read daily in the newspapers how the rights of human beings are blatantly violated, yet we have become so benumbed that our conscience, perhaps, has lost its capacity to challenge us. Let us hope that the people with a new vision will be able to fight for the just rights of human beings all over the world without consideration for caste, colour, race, or nation.

III. Fundamental Rights

After having discussed at some length about Human Rights, now it is our task to turn our attention to the second part of our paper, i.e., on Fundamental Rights as we see in the Indian Constitution. The notion of fundamental rights as enshrined in our Constitution is, indeed, unique. There were no fundamental rights under any of the Government of India Acts because they were founded on the English doctrine of sovereignty of Parliament which was repugnant to any limitations upon the authority of Parliament, by way of safeguarding individual rights. For the same reason, the Simon Commission had rejected the idea of enacting declarations of fundamental rights on the ground that they were practically useless. But nationalist opinion, since the time of the Nehru Report, was definitely in favour of a Bill of Rights, because the experience gained from the British regime was that a subservient Legislature might occasionally help the Executive in committing inroads upon individual liberty. So, the Constitution of India embodied a number of Fundamental Rights in Part III of the Constitution, which are available not only against the Executive but also are limitations upon the powers of the Legislature. But though the model has been taken from the United States, the Indian Constitution does not go so far, and rather effects a compromise between the doctrines of Parliamentary sovereignty and judicial supremacy.⁴¹

These rights are basic and human, hence they flow from natural rights and human rights. These rights represent the basic values cherished by the people of this country since Vedic times and they are meant to protect the dignity of the individual and create conditions in which human beings can develop their personality to the fullest extent. These rights provide an atmosphere suited for the growth and smooth functioning of the society. These rights are wide ranging and comprehensive and they fall under six heads: right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights, and right to Constitutional remedies. These are not privileges or favours but basic rights to which every citizen is entitled. However, since they are not absolute or unlimited, their exercise can be reasonably restricted by the State on various grounds.⁴²

⁴⁰ As quoted by Krishna Iyer, *Ibid.*

⁴¹ Cf. Durgas Das Basu, *Constitutional Law of India*, 6th edn. (Calcutta: Prentice-Hall, 1991), 11.

⁴² See P. D. Mathew, *Do You Know Your Fundamental Rights?* (Delhi: Indian Social Institute, 1992), 1.

We shall dwell briefly with various types of fundamental rights assured in the Indian Constitution:

III. 1. Right to Equality (Art. 14-18): This right states the equality of all citizens before law. The principle of equality does not mean that every law must have universal application for all who are not by nature, attainment or circumstances, in the same position, as the varying needs of different classes of persons often require separate treatment. Also this principle does not take away from the State the power of classifying persons for legitimate purposes. But such classification should be reasonable and must be based upon some real and substantial distinction bearing a real and just relation to the object sought to be attained, and the classification cannot be made arbitrarily and without any substantial basis. For a permissible classification two conditions must be fulfilled: (1) that the classification must be founded on an intelligible *differentia* which distinguishes persons or things that are grouped together from others left out of the group, and (2) that, that *differentia* must have a rational relation to the object sought to be achieved by the statute in question. What is necessary is that there must a *nexus* between the basis of classification and the object of the Act under consideration. To the question what are the conditions for a reasonable classification, it is not easy to give all the circumstances under which a classification may be considered reasonable. The basis of classification may be geographical, historical, difference in time, or based on the difference in the nature of persons, trade, calling or occupation, etc. The guarantee of equality extends to rights as well as privileges.⁴³

While the State has reasonable right for classification of person, Art. 15 of the Constitution forbids such any discrimination on certain grounds like religion, race, caste, sex, place of birth, etc. Access to public places also is not to be denied. But the article expressly states that the State is authorised to make reservations for backward classes and castes, for women and children, or the socially underprivileged. Also equality of opportunity should be provided (Art. 16) for all citizens, regardless of caste, religion, race, sex, descent, place of birth, etc., for employment or appointment to any office under the State. Here too reservation is permissible. Abolition of *untouchability* is made an important issue here (Art. 17); it is a crime punishable under the law. Abolition of titles is also mentioned under this right.

III. 2. Right to Freedom (Art. 19). Under this right comes various expressions of the aspect of freedom. All citizens have the right to (a) freedom of speech and expression, (b) to assemble peaceably and without arms, (c) to form associations or unions, (d) to move freely throughout the territory of India, (e) to reside and settle in any part of the territory of India, and (f) to practice any profession, or to carry on any occupation, trade or business.⁴⁴

⁴³ Cf. Basu, *Constitutional Law*, pp. 20-22. As the reasons for which the State will have to make discrimination are innumerable we are not in a position to state all those in a short paper like this. Books on Constitutional Law give all the circumstances under which the State may be forced to make denial of equality for certain citizens.

⁴⁴ *Ibid.*, 36. As there is separate paper leading with the Right to Freedom, I leave out the discussion on the subject.

III. 3. Right Against Conviction (Art. 20): The Constitution says: “No person shall be convicted of any offence except for violation of a law at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. No person shall be prosecuted and punished for the same offence more than once. No person accused of any offence shall be compelled to be a witness against himself.” The article guarantees that a person must not be convicted of any offence except for the violation of a law in force at the time of the commission of the act. This means the criminal law has no retrospective effect. In awarding penalty the law in force at the time of commission has to be taken into account; and a person should not be prosecuted and punished for the same offence for more than once, this is immunity from double punishment. This article also grants the privilege of self-incrimination.⁴⁵

III. 4. Right to Protection of Life and Personal Liberty (Art. 21): “No person shall be deprived of his life or personal liberty except according to procedure established by law.” The objective of this article is to prevent encroachment upon personal liberty by the Executive save in accordance with law, and in conformity with the provisions thereof. It is for this reason that the confinement of an under-trial prisoner or the arrest and detention of a person by the police under the Code of Criminal Procedure is considered legal. The reason for which a person is deprived of one’s life or personal liberty should be fair and just, and not arbitrary. It is for the Court to decide by the exercise of its power of judicial review, whether the deprivation of life or personal liberty in a given case is by procedure which is reasonable, fair and just or otherwise. When the law has been often misused by the Executive especially in the case of the poor and other deprived persons the Court has often entered in to set matters right. But at the same time many who could not have access to the court have suffered due to the ‘unreasonable’ use of the law. This article can be suspended during Emergency prevailing in the country. Prior to 1976, the Supreme Court had held that notwithstanding the suspension of Art. 21, it was still open to a person imprisoned or detained to challenge such order on any ground outside Art. 21, e.g., that the order was *ultravires* or *mala fide* or based on extraneous considerations.⁴⁶

III. 5. Protection Against Arrest and Detention in Certain Cases (Art. 22): When a person is arrested, under the ordinary law of the land he must be informed soon after the arrest of the grounds of his/her arrest, and an arrested person must be given the opportunity to consult a lawyer of his choice and to be defended by him. An arrested person must be produced before a Magistrate within 24 hours of his arrest (excluding the time required for bringing him/her to the Magistrate). No person can be detained in custody beyond 24 hours without the authority of the Magistrate. Art. 22 does not form a complete code of constitutional safeguards relating to preventive detention. Since it deprives the person of his liberty, restrictions placed on a person preventively detained must be minimal in so far as that is consistent with the effectiveness of detention. The right to be informed of the grounds of arrest is a safeguard so that on learning the reasons the person arrested will be in a position to make an application to the appropriate Court for bail, or move the High Court for habeas corpus. The intimation will also enable the

⁴⁵ Cf. *Ibid.*, 64-70, and also Mathew, *Fundamental Rights*, 8-9.

⁴⁶ Cf. Basu, *Constitutional Law*, 71-76, also Mathew, *Fundamental Rights*, 9-10.

arrested person to prepare his/her defence in time for the purposes of trial. The arrested person has also the right to consult a legal adviser of his/her choice, ever since the moment of his/her arrest and also to have effective interview with the lawyer out of the hearing of the police, though it may be in their presence. The right extend to any person who is arrested, whether under the general law or under a special statute. The government is also bound to give free legal aid to an indigent person, provided it can be proved that he is a *pauper* and the State needs to come to his/her assistance. The object of the framers of the Constitution in giving a constitutional status to preventive detention was that though they recognized the necessity of law for preventive detention, they wanted to provide certain safeguards to prevent an abuse of power.⁴⁷

III. 6. Right Against Exploitation (Art. 23-24): This right forbids trafficking in human beings and *begar* and other similar forms of forced labour. When a person is employed against his/her will, even if it is for remuneration or other consideration, it is forced labour. It is immaterial whether there is a contract or whether the compulsion is due to economic reasons or legal provisions. This right also forbids employing of children below the age of fourteen.

III. 7. Freedom of Religion (Art. 25-28): Subject to the restrictions the Constitution imposes every person has a fundamental right not merely to entertain such religious belief as may be approved of by his/her judgment of conscience but to exhibit his/her belief and ideas in such overt acts as are enjoined or sanctioned by his/her religion and further to propagate his/her religious views for the edification of others. Such a freedom is subject to public order, morality or health. Propagation of faith does not mean 'conversion' for the other person is also entitled to 'freedom of conscience'; but of course the other person has the freedom to adopt another religion through the free exercise of his/her conscience. Since India is a secular State equal rights are given to all citizens in respect of freedom of conscience and religion. The religions have the right to own and administer institutions, own and acquire movable and immovable properties, and to administer the property in accordance with the law. This right also excludes the power for the State to levy any religious tax from any citizen, and to promote any particular religion in government owned institutions. Religious instruction is forbidden in educational institutions wholly maintained by the State funds.⁴⁸

III. 8. Cultural and Educational Rights (Art. 29 – 30): These rights as envisioned in the Constitution seems mainly applicable to minorities – linguistic, religious, etc. The linguistic minority has the right to retain its language and teach it through their educational institutions. The right to conserve the language includes the right to agitate for the protection of that language, including political agitation. All linguistic and religious minorities have also the right to establish and administer educational institutions of their choice. The right is to establish institutions which will effectively serve the needs of the community and the scholars who resort to such institutions. Hence establishment of institutions of high grade is also included in this right. The right would be nugatory if the scholars of such institutions are debarred from such opportunities for higher education or

⁴⁷ Cf. Basu, *Constitutional Law*, 77-81. Also Mathew, *Fundamental Rights*, 10-11.

⁴⁸ Cf. Basu, *Constitutional Law*, 86-92, and also Mathew, *Fundamental Rights*, 12-13.

for a useful career in life. But this right is not an absolute right in the sense that the State shall have no right to regulate the administration of the institutions established by the minority communities. If they are mismanaged, or the purpose for which they have been established is not served the State has the right to intervene. In granting aid the State is not supposed to discriminate any educational institution on the ground that it is under the management of a minority, whether based on religion or language. As the notion of minority has not been defined by the Constitution, the general understanding is that the members of the community should be less than 50%. Whether a community is a 'minority' is to be determined with reference to the particular legislation which is impugned.⁴⁹

Earlier right to property was considered as a fundamental right, but with the 44th amendment of the Constitution it has been reduced to a legal right the violation of which can be questioned in the court. The main argument in favour of abolition of private property was that it stood in the way of progressive or socialistic legislation.

III. 9. Right to Constitutional Remedies (Art. 32-35 & 359): The Constitution of India guarantees not only Fundamental Rights but also adequate provisions to enforce them. The citizen can move the Supreme Court where a fundamental right has been infringed. Thus, the right to enforce all the fundamental rights is itself made a Fundamental Right in the Constitution under Art. 32. The Supreme Court has the power to issue directions or orders or writs including those in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto*, and *certiorari*, for the enforcement of any Fundamental Right under Art. 32 (2) and 32 (3).

III. 9. (a) Habeas Corpus: It literally means "you have the body." This writ is one of the most important safeguards of the liberty of a person. This remedy is always available in the case of deprivation of personal liberty or an illegal detention. On an application, the court is empowered to direct that the detained person be produced before it and is entitled to enquire into the grounds of his/her detention. If the court is satisfied that such detention is illegal, it can order the immediate release of the person. This writ is meant only to determine the legality or illegality of a detention. Normally, it is for the arrested person to make an application for *habeas corpus*. But for any reason he/she is unable to do so, a relative or friend can also make the application for his/her release. The reasons which may prompt the court to issue the writs of *habeas corpus* are: (i) the law under which the detention is made is invalid (*ultra vires*), (ii) the law under which the order of detention has been made violates various Articles of the Constitution like 14, 19, 22(1), 22(2), 22(5), etc., (iii) the authority who issued the order of detention has no jurisdiction to do so, (iv) the intention of the authority is *mala fide*, (v) the detention is without any legal justification. Under Art. 226 of the Constitution the High Courts also have power to issue writs for the enforcement of Fundamental Rights and for any other purpose.⁵⁰

III. 9. (b) Writ of Mandamus: The literal meaning of the term is "we command". The writ of *mandamus* is a command directed by the Supreme Court to any person,

⁴⁹ See Basu, *Constitutional Law*, pp. 93-97.

⁵⁰ Cf. Mathew, *Fundamental Rights*, pp. 18-19.

corporation, inferior court or tribunal, compelling them to do something specific pertaining to their office and duty. It commands the person to whom it is addressed to perform some public or judicial duty which he has refused to perform and the performance of which cannot be enforced by another adequate legal remedy. A writ of mandamus may be issued under the following circumstances: (i) the petitioner must have the legal right to compel the performance of some legal duty owing to him by the respondent, (ii) the legal right of the applicant must be existing on the date of his/her application, (iii) the duty imposed on the opposite party must be one emerging from a statute, hence it cannot be issued to enforce departmental instructions or orders not having any statutory force, (iv) the petitioner must satisfy that he/she has already demanded the performance of his/her duty but the authority has refused to act, (v) he/she must also satisfy that there is no effective alternative remedy.⁵¹

III. 9. (c) Writ of Prohibition : This is also known as *judicial writ*. It is issued by a superior court to an inferior one to prevent it from exercising jurisdiction with which it is not legally vested. It is issued in respect of pending proceedings forbidding the tribunal or the court from continuing the proceedings. A writ of *prohibition* may be issued on an application supported by an affidavit. If a judge or any party proceeds with the case in spite of a writ of *prohibition*, contempt of court proceedings can be started against the person concerned.⁵²

III. 9. (d) Writ of Quo Warranto: The terms mean “by what order”. This writ is issued to prevent illegal assumption or use of public office by anybody. It is issued against a person who claims or usurps any office, franchise or liberty. The writ requires the person to whom it is issued on what authority he/she supports his/her claim. It can oust him/her from the office if the claim is not well founded. Hence it is in the nature of an *injunction*. There are certain conditions requisite for the issue of *quo warranto*: (i) the office must be public, (ii) the office must have been created by a statute or by the Constitution itself, (iii) the respondent must have assumed the office on his/her own, (iv) the respondent is not appointed to the office in accordance with the law, or he/she is not legally qualified to hold the office, (v) the respondent continues to exercise the office till the date of the application.⁵³

III. 9. (e) Writ of Certiorari: Literally it means “to be more fully informed of.” This writ is issued by a court and is directed to the judge or other officers of its subordinate court. It requires the subordinate court to transfer the record of a proceeding pending before it to the superior court to be tried there, in order to ensure the applicant sure and speedy justice. In India the writ of certiorari is mostly used for quashing the decision of the inferior courts or tribunals.⁵⁴

The above mentioned are the fundamental rights of the citizens of the India. Having seen the Human Rights and the Fundamental Rights, perhaps, we are in a position to compare

⁵¹ See Ibid. , 19-20.

⁵² Ibid.

⁵³ See Ibid. , 20-21.

⁵⁴ Cf. Ibid.

some of the relevant aspects of both the rights. The Fundamental Rights incorporated in the Indian Constitution have a close similarity with United Nations Declaration of Human Rights of 1948 in form and content which would be evident from the following:⁵⁵

Fundamental Rights under the Indian Constitution	UN Declaration of Human Rights
Article 14: The State shall not deny to any person equality before the law or the equal protection of laws.	Article 7(1): All are equal before the law and are entitled without any discrimination to equal protection of the law.
Art. 15: The State shall not discriminate against any citizen on grounds of religion, race, caste, sex, place of birth or any of them.	Art. 7(2): All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.
Art. 16(1): There shall be equality of opportunity for all citizens in matters relating to employment.	Art. 21(2): Everyone has the right of equal access to public service in his country.
Art. 19(1) (a) : All citizens shall have the right to freedom of speech and expression.	Art. 19: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.
Art. 19(1)(b): Right to assemble peacefully without arms.	Art. 20(1): Everyone has the right to freedom of peaceful assembly and association.
Art. 19(1)(c): Right to form unions and associations.	Art. 23(4): Everyone has the right to form and to join trade unions for the protection of his interests.
Art. 19(1)(d): Right to reside and settle in any part of the territory of India.	Art. 13(1): Everyone has the right to freedom of movement and residence within the borders of each state.
Art. 19(1)(f): Right to acquire, hold and dispose of property.	Art. 17(1): Everyone has the right to own property alone as well as in association with others.
Art. 20(1): No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, not to be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence, i.e. no subjection to ex-post facto laws.	Art. 11(2): No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

⁵⁵ Chitkara, *Human Rights*, 161-164.

Art. 21: No person shall be deprived of his life and personal liberty except according to the procedure established by law.	Art. 9 & 13(2): No one shall be subjected to arbitrary arrest, detention or exile. Everyone has the right to leave any country, including his own, and to return to his country.
Art. 23: Traffic in human beings and beggary and other similar forms of forced labour are prohibited.	Art. 4: No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.
Art. 25(1): All persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion.	Art. 18: Everyone has the right to freedom of thought, conscience and religion, this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.
Art. 29(1): Citizens residing in the territory of India having a distinct language, script or culture of its own shall have the right to conserve the same.	Art. 22: Everyone, as member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.
Art. 30(1): All minorities whether based on religion or language, shall have the right to establish and administer educational institutions of their own choice.	Art. 26(1): Parents have a prior right to choose the kind of education that shall be given to their children.
Art. 31(1): No one shall be deprived of his property save by authority of law. Proposed to be deleted as fundamental right and is placed just in the category of a constitutional right.	Art. 17(2): No one shall be arbitrarily deprived of his property.
Art. 32: The right to move the Supreme Court by appropriate proceedings for the enforcement of the right conferred by this part is guaranteed.	Art. 8: Everyone has the right to an effective remedy by competent national tribunal for acts violating the fundamental rights granted to him by constitution or by law.

IV. Basis of Human and Fundamental Rights

Since as philosophers we are reflecting upon these rights it may be good to look at the philosophical foundation of these rights. In Western philosophy the concept of human and fundamental rights as normative predates classical Greek philosophy, and is likely that they are grounded in ancient religious teachings and myths. Greeks, in general, viewed nature as the norm to measure human behaviour. Conventional morality was held to be rooted in common social opinion and not to have evolved from knowledge or wisdom. They also held that conventional morality and natural law could overlap. Aristotle held that both law and 'political order' are grounded upon the nature of man. Man is called to live in the State or *polis*, and in that sense man is 'political'. In order to live in a State man should be endowed with 'rational communication'. The human being endowed with the soul and body is a *person*.

It was Boethius who gave a classical definition for person: "Person is an individual substance of a rational nature." For Aristotle and later philosophical tradition, a person is the highest being in nature whose essence is unique and incommunicable. But Aristotle was selective in applying the notion of personality to every member of the society, and went as far as to justify the institution of slavery. The Stoics were the first and foremost contributors to natural law theory. They stressed on the obligation of all rational beings to respect one another as equals.

In Christian tradition Thomas Aquinas and other philosophers tried to reinterpret the natural law in a theological tradition. Natural law was considered as divinely willed. Thomas considered natural laws to be knowable through the faculty of human reason; here the emphasis was on law, obligations, and justice rather than on rights. In the context of discussing natural law St. Thomas indicated human being's need, under the natural law, for personal rights, civil and political rights, economic, social and cultural rights.

Two thinkers stand out in shaping the modern approach to the rights of man; they are John Locke and Jean-Jacques Rousseau. Locke held that in the 'condition of nature' man had natural rights, above all, the right to life, liberty and property. State has no power to take away these rights. Perhaps, Locke's position had influenced the drafters of the American Declaration of Independence of 1776, which says: "We hold these truths to be self-evident: that all men are created equal, that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness." Rousseau's notion of 'social contract' had tremendous influence on the French Revolution. His famous phrase was: "Man is born free, and everywhere he is in chains." The American and French Revolutions gave social effect to the idea of universal individual "equality before law." For J. S. Mill the concept of individual or human rights is based on a dynamic theory of individualism, holding at first that such rights are best respected when individuals are left alone, and later postulating a "social welfare" function of government to replace the noninterference function.

One of the main contributions to the human rights theory, particularly to the ideas of freedom and equality, has come from the clash between liberal individualism (represented by capitalism) and socialist collectivism (represented by Marxism). Freedom

for the liberals was the right to determine one's own affairs. The Marxist critique advocated the abolition of capitalism in favour of economic collectivism.

The notion of human rights has been defined in a variety of ways by philosophers seeking to clarify its meaning and applications. Human rights definitions usually focus upon the idea that human rights includes all human persons and is linked in a very basic way to being human. In this context, a right is a principle of justification with respect to what is due to each person, and which each person must dutifully respect in others, in virtue of being human. This what Jacque Maritain gave expression to:

The human person possesses rights because of the very fact that it is a person, a whole, master of itself and of its acts, and which consequently is not merely a means to an end, but an end which must be treated as such. The dignity of the human person? The expression means nothing if it does not signify that by virtue of natural law, the human person has the right to be respected, is the subject of rights, possesses rights. These are things which are owed to man because of the very fact that he is man.⁵⁶

This is what distinguishes human rights from other legal rights. Philosophers in modern times have tried to interpret human rights in the context of the human community and individuals. Also the sections of the society when they are deprived of their rights it is looked upon as violation of human rights. Of late, we have seen the cry of the *dalits* for the recognition of their rights as human rights and to punish the guilty who constantly violate their rights, and do not even give respect as human persons. People are responsible individually for their lives and also the lives and rights of others. Today there is more and more a stress on the 'common responsibility'. Our world being an intersubjective world we are all responsible for the rights of all our fellow-human beings, just as we are responsible for our own rights. It is a good development to note that, in general, human beings have become aware of their rights as persons and citizens. Also human rights are not seen in isolation but in relation to the world in which we live. The issues like ecology have gained great importance because they affect the life of the persons.

It may be in place to mention the notion of right or duty in the Indian context. In Indian thought we do not come across an exact equivalent for the term 'human rights' or 'fundamental rights'. Perhaps, the most suitable term we can discover is *dharma* which can be translated both as 'duty' and 'right'. In India they seem to have given more importance to the concept of 'duty' than 'right'. When each one performs his/her *dharma* the society will be functioning as a well-oiled machine. In addition, the *dharma* was considered to be executed at various levels – there is *dharma* at the level of the society as human beings, *manava dharma*, there is *dharma* at the level of the group, *kula dharma*, and finally the individual's *dharma*, *svadharma*. For the smooth functioning of the society all these aspects of *dharma* have to be fulfilled. Then there will not be violation of rights, each one will be concerned about the protection of the rights of others.

V. Conclusion

⁵⁶ *The Rights of Man*, London, 1944, 37; As quoted by Cranston, *Human Rights*, 7.

We have analysed in some detail both the notion of human rights and fundamental rights, and their basis in philosophy. Today there is a cry for respect of human and fundamental rights of man, although they are frequently violated both on the national and international level. Just as there is an awareness growing regarding human rights, perhaps we need to become more alert to the need of the protection of rights. In a consumeristic society the main goal is exploitation of others, to attain one's goal at any cost whatever be the suffering it may cost to others. The nations oppress other nations and make them their vassals through economic and military supremacy, globalization and other modern forms of slavery. Hence the awakening of the conscience at the global level has become a necessity. Today what the whole world stands in need of is a recognition of the rights of all irrespective of region, race, nationality, caste, or creed. Although we are moving towards a 'global village' with respect to information and availability of facilities there is an alarmingly growing rate of oppression by the developed countries without any regard for the rights of others. The accumulation of resources is going on unchecked and this impoverishes some, at times leading to abject poverty and death. In such a situation the 'right to protest' should be upheld by the international bodies, and the guilty should be brought to book and made answerable. Otherwise the future of human and fundamental rights will remain bleak. In spite of its lack of power to enforce, the human rights doctrine has been revived and popularized in the present century and remains one of the most potent concepts to motivate juristic, social, political and philosophical thought. There seems to be regaining of its prominence in national and international law and politics. Man seems to be in a quandary, on the one hand war and oppression of human beings go on unabated, yet there is also a big majority of people of good will who seek peace, justice and harmony. Will modern man be capable enough to come out of this quagmire and make his/her life worth living? The answer depends on the capacity of the human beings of today to heed to the call of the conscience to become more authentic. Let us hope that all the nations on earth will earnestly seek for the upholding of the human and fundamental rights so that the future generation may succeed to live in a world established in *dharma* or justice.

COMMITMENT TO THE METAPHYSICAL FOUNDATION OF INDIAN SECULARISM

Dr. George Panthanmackel

India has been a rich mosaic of many religions for a long time with not only an obvious and prominent presence of Muslims for over a millennium but Christians from the first century, Jews from the time of the fall of Jerusalem, Parsis from the seventh century, and Sikhs from the time of its very origin as well. Besides Hinduism, Buddhism and Jainism were dominant religions for many hundreds of years. However, political and cultural developments in the last few decades have forcefully challenged this broad and absorptive secular fabric of our society that emerged in the days of the freedom struggle in the form of Nehruvian secularism, a sublime doctrine looked upon as an imposition as it failed to show its metaphysical foundation due to the domination or misinterpretation of the so-called '*advaitic* vision' that overlooked the multidimensionality of reality. Secularism will, I am sure, take deeper roots in the hearts of the millions, slowly but steadily, if we change our vision of reality from being purely monistic or individualistic to plurality which presupposes both 'unism' and interdependence, a commitment to one in many. Here an attempt is made to look for the metaphysical foundation of Indian secularism - with an earnest commitment to the same foundation - from a distinct vision of Being and reality, which will conform well to the secular ethos of our republic.

1. Indian Secularism

Communal fanaticism has been prevalent in our society ever since the failure of the Indian Revolt of 1857 and the consolidation of the British Raj thereafter. Communal harmony is a must for the preservation of such a society and the responsibility for communal peace rests with every citizen of India. There have been, broadly speaking, three approaches to the communal problem. These are: Marxist, communal, and secularist⁵⁷.

1.1. Marxist Approach

This Marxist approach to the communal problem has been formed by the communist theory of nationalities. Its fundamental formulation has remained unchanged. For the Marxists, India consisted of several ethno-linguistic and religious nationalities. The

⁵⁷ Manju Subash, "Secularism under Stress", *National Unity and Religious Minorities*, Ed. by M.M.Sankhdher & K.K.Wadhwa (New Delhi: Gitanjali Publishing House, 1991), 73-83.

doctrinal formulation on religious minorities has undergone a major change after partition. The general doctrine on 'nationalities' held that they must be treated as equal in status entitled to self-determination. It was on this premise that the Communist Part of India supported the All India Muslim League's demand for Pakistan. The Marxists hold that communalism is an evil which has victimised all the communities. Communalism, meaning hatred of communities other than one's own, is a product of 'false consciousness' aggravated by the current form of capitalism. Undeveloped class-consciousness leads to irrational hostilities (i.e., between communities instead of classes) exploited by the vested interests to the detriment of the true interests of the masses.

Marxists defined their role as consisting of espousal of minority rights, an uncompromising opposition to Hindu communalism, and upholding of a radical anti-religious version of secularism. National integration can come about only when people free themselves of superstition and hostilities born of it.

1.2. Communalist Approach

There are two variants of the communalist approach to national integration. One postulates abolition of conflict arising from religious difference by overcoming those differences through 'Hinduisation' or 'Indianisation'; the other advocates 'permissive communalism' for the minorities equating it with 'secularism', and thus claiming it to be the best framework for national integration.

1.3. Secularist Approach

Secularism in India does not mean animosity towards religion. It implies equal respect for all religion. It has nothing against private religious feeling or the individual pursuit of religion but it definitely demands the exclusion of religion from public life or from affairs of the state. It is a technique of building a national political community in a situation of religious pluralism. Pluralism and secularism are twins. As against monistic conception of society, pluralism denotes that in a social structure there are distinct cultural units revealing themselves as a multi-layered society, having plurality of religions, castes, sects, cults etc. While secularism seeks out the fundamental unity in the core ideas of different religions and is, therefore, a cohesive force, communalism lays maximum emphasis on the exclusive features and is, thus, a divisive force. Nothing can be more dangerous to a multi-religious, multi-racial, multi-cultural, and multi-lingual society than the communal approach which believes that all Indians, irrespective of religious, linguistic, socio-economic differences, constitute a single nation. The conflicts between different social groups, in the pre-independence era, were (to a great extent) due to the divisive policies of foreign rulers who encouraged indiscriminately cultural specificities and minority rights which different groups valued, and they were entitled to do so. In the independent Indian Union, the state treats all religions with equal respect, allowing freedom of religion in matters of belief, practice and propagation. This was seen as the quintessential expression of Indian Secularism which provided the intellectual ambience for national integration.

Indian politics, since Independence, has been a battleground for these three approaches. In the first decade and a half after independence, the secularist approach dominated our national life under the leadership of Pandit Jawaharlal Nehru. Nehru was more concerned about building a future India that would be free of ethno-religious strife. In the post-partition India, he became particularly concerned about the protection of the minorities. He had a powerful historical sense, and from history he drew the conclusion that India had been far too often a victim of divisive forces from within. He was impatient of sectarian attachments, which were evidence of 'backwardness' to be overcome in the interest of national development. His strategy was threefold: to accommodate some, to resist others, and to build structures and processes of the state that would contain, or dissolve the sources of conflict. The Nehruvian-secularist approach has found its embodiment in the Indian Constitution, which admits of no political minorities. Under Article 30 of our Constitution, the religious minorities have been given the opportunity to open and run their own schools, if they so choose. They can practise and propagate their faiths. Certain customary laws of marriage and inheritance are protected in the case of Muslims, Christians and Parsis. There is no reservation of seats for any minority (except for the Scheduled Castes and the Scheduled Tribes as a whole) either in the state services or in the legislatures. We have single member common constituencies and no separate electorates any longer.

When the Constitution of India was framed, it did not contain the word 'secular'. This word was introduced in the Preamble of the Constitution by subsequent amendment. Despite the fact that the word 'secular' found no explicit mention in the Constitution as initially drafted, there can be no doubt that our Founding Fathers intended to give our polity a secular character. They inserted a number of provisions in the Constitution for the protection of the minorities. Articles 25 to 30 enacted for this purpose reflect the concern of the Founding Fathers for the protection of the interests of the minorities. In order to bring about integration of the different sections of the population, the framers of the Constitution did away with separate electorates and introduced the system of joint electorates, so that every candidate in an election has to look for support of all sections of the society. Special safeguards, guaranteed for the minorities, were a kind of a Charter of Rights for the minorities so that none might have a feeling that any section of the population consisted of first class citizens and the other of second class citizens. The result was that minorities gave up their claims for reservation of seats. The object of Article 25 to 30 was to preserve the rights of religious and linguistic minorities, to keep them from the vicissitudes of political controversy. These provisions enshrined a befitting pledge to the minorities in the Constitution of the country. Thus, Indian secularism is neither anti-God nor pro-God; it treats alike the devout, the agnostic and the atheist. It 'brackets' God from the matters of the State and ensures that no one shall be discriminated against on the ground of religion. The constitution, at the same time, expressly guarantees freedom of conscience and the right to profess and propagate religion. The Constitution-makers were conscious of the deep attachment the vast masses of our country had towards religion. To allay all apprehensions of interference by the Legislature and the Executive in matters of religion, the rights mentioned in Articles 25 to 30 were made a part of the fundamental rights⁵⁸.

⁵⁸ H.R.Khanna, "The Constitution and Minority Rights", *National Unity and Religious Minorities*, 162-163.

It is a matter of concern that despite the fact that more than 54 years have passed since India became free and we proclaimed our faith in the secular character of the State, we have not been able to bring genuine and lasting fusion and integration between different religious communities. It is because of a strong persistence of group identity. As there has been a movement towards integration (as meant by Nehruvian secularism), there has also been a counter movement of group-identity at work. The migrated ethnic and cultural groups, religious sects (especially the fundamentalistic ones), regional political parties, clubs, unions, and corporations embody this counter movement of group identity. All these become powerful with varying degree of influence on the value orientations and policy decisions at the centre. These counter movements of subcultures, substructures, and subgroups have been often characterised by many leaders as harmful to national integration. These leaders seem to be unaware of the undercurrents of these movements. For the members of these movements, without some group association, it is difficult for individuals to survive. The society around them has become so complex, the bureaucracy so impersonal, that no individual today can defend one's rights by oneself. Individual fulfilment requires that the values and motivations are brought within the reach of one's everyday life and are concretised within realisable emotional bonds. The sense of belonging to a movement or voluntary association seems to fulfil these needs. These reflections suggest that a society based upon the principles of either radical individualism or homogeneity may not be the best kind of society. Individual freedom and growth is enhanced by these plural movements or associations.⁵⁹ Hence, genuine national integration should recognize, accept, and respect pluralism, the foundational principle of secularism.

2. Metaphysical Foundation of Secularism

2.1. Pluralism

Pluralism characterizes the modern society in various ways. A pluralist society displays a high degree of heterogeneity in comparison to a homogeneous one. The principles arising from social pluralism guarantee not only individual rights, but the equal rights of the various societies against trespass. This is the division of society into numerous groups and sub-groups with varying interests, each of which considers itself equal to the others, and with various norms and values. The system of norms and values extends from absolute values accepted as universally valid to moral norms and values adapted to a plural context. The tendency in the plural social context is for the individual to be integrated only partially into any given social group. With the partial social integration and the division of functions in modern society, there is an increasing differentiation of roles. The individual plays various roles as father, worker, a member of an association, citizen, etc. However, since pluralism is a partial social integration, it provides a norm or orientation for collective action. It helps individuals to see that the common good - which unifies all the individuals and thereby serves as the principle of unity of society - is the

⁵⁹ Jose Kananaikil, "Nation-state, Cultural Pluralism and Power Relations", *Secularism: Concept and Practice*, Ed. by A. K. Lal (New Delhi: Concept Publishing Company, 1998), 168-171.

social goal⁶⁰. Hence we can be sure that genuine pluralism implies a kind of fundamental unity.

2.2. Unity as the Foundation of Pluralism

Unity is the process by which a being is not divided in itself, but divided from everything else. The meaning of unity presupposes that it comes from the comparison of two or more *different* things⁶¹. It is the coherence of an intrinsically plural being. Hence unity too presupposes plurality. A being is all the more united in itself, and so distinguished from others, the more intimate its connection with others is. Unity and plurality, 'unism' and pluralism are inseparably related. There is no unity without plurality, and no plurality without unity. They found and sustain each other. One is in the other; the other is in the one. They are the two sides of Being which is in some way or something.

2.3. Being as One in Many: Metaphysical Foundation of Secularism

The problem of one and many is fundamental to human experience. Both poles seem to be equiprimordial to any intelligent awareness. 'The many' is inescapable for any experience which is spatio-temporal in its form consisting in the manifold of sensations that are spread out in space and that succeed one another in time. But to a human experience there belongs also from the beginning a unity, which allows the manifold items in it to be ordered and related among themselves; if this did not happen, there would be only a chaotic flux of impressions comparable to the flux which briefly passes through consciousness when we are overcome by dizziness or are about to lose consciousness⁶². Is this unity of experience imposed entirely by the human mind giving an illusion of unity? That might be the Kantian epistemology, in which it is the human mind which imposes unity upon the given forms of space and time by unifying the spatio-temporal data brought together under the categories of the Understanding in the unity of apperception. However, it would be impossible for the mind to impose a unity on the manifold of sensations unless the conditions for such a unity were already there in the sensations themselves. If the flux of sensations were endlessly varied, we could never emerge from the state of dizziness, leaving us helpless to construct any kind of unity. But in fact the same sensations keep coming back, and we are able to recognize them. It is the repetition, the recurrence of what has been, that makes possible the construction of a unified experience; this repetition lies in the given, the raw data of experience. Unity then is not a creation of the human mind, but a discovery of what has already been there, a discovery which is never complete⁶³.

There has also been in many individuals and schools of thought a metaphysical awareness of this discovery of the underlying unity of all things. Such persons and

⁶⁰ Manfred Hättich, "Pluralism", *Sacramentum Mundi*, Ed. by Karl Rahner & Co., Vol. 5, Bangalore: TPI, 1978, 33-34.

⁶¹ Lourencino-Bruno Puntel, "Unity", *Sacramentum Mund*, Vol. 6, 323-324.

⁶² John Macquarrie, "The One and the Many: Complementarity of Religions", in *Meeting of Religions*, ed. by Thomas A. Aykara (Bangalore: Dharmaram Publications, 1978), 168.

⁶³ *Ibid.*, 168-169.

schools have been seized of an awareness of a single Reality embracing all the manifestations of the manifold in itself and expressing itself in them. The metaphysical vision of an all-embracing unity has found expression in various monistic philosophies. The most illustrious representative philosopher of monism in ancient Greece was Parmenides. For him reality is one and unchanging. That which changes is that which is not, and thus unreality. The thought of Parmenides may be compared with that of Sankara. For him too, there is one unchanging reality, Brahman⁶⁴.

But from the earliest times there have been also philosophers who are openly pluralist. In ancient Greece, the priority of the multiple and the changing over the one has usually been ascribed to Heraclitus. But the typical pluralist philosophy has also been empiricist, in contrast to the rationalistic approach of monism, evident in modern and contemporary times reaching its most extreme form in Nietzsche and the postmodernists who championed pluralism and contingency. For them there is no beginning, no end, no absolute centre, but just the endless proliferation of contingent occasions. This view lies at the opposite extreme of Parmenides, Sankara and the like⁶⁵.

Perhaps, it is difficult to find anywhere a thoroughgoing monism or pluralism. Most advocates of monism have thought of the One implying at least some sort of differentiation in itself. They are in tacit agreement with Radhakrishnan's view that the One is so far from being empty that it is characterized by a fullness that it surpasses comprehension. At the other extreme, is it possible to find a thoroughgoing pluralism? Here even Nietzsche, who denied that there is either beginning or end or middle, nonetheless taught a doctrine of eternal recurrence. Thus we have to conclude that the extreme forms both of monism and of pluralism are untenable⁶⁶. In the words of John Macquarrie, "The highest unity is that which already conceals within itself the richest diversity, while sheer diversity devoid of anything unifying is unthinkable. The one and the many do not stand in stark opposition to each other, for each implies the other"⁶⁷. But how do they imply each other? The question of their mutual implication calls for further ontological analysis. For the philosophical position of monism, of dualism, of radical pluralism, all depend upon the ontological solution offered to the problem of one and many: how can Being be *identical and diverse* at the same time?

In reality, every being belongs to Being. Everywhere Being reveals itself as an absolute. Every finite being is a whole being, a complete being; yet it is not the whole of Being. For it does not contain all reality, since there are beings outside of it. A particular being participates in Being. The particular being that participates in Being is a complete being, a subsistent whole unlike a part which is not a complete whole. The particular being, which is limited, is an imperfect being. It does not contain other particular beings; nor does it possess their perfection. Hence it does not contain all perfection. Consequently, it is imperfect. It does not mean that it is unfinished in itself. The perfection of every particular being belongs itself wholly to Being, and by that token it is to be distinguished

⁶⁴ Ibid., 169-171.

⁶⁵ Ibid., 171.

⁶⁶ Ibid., 173-174.

⁶⁷ Ibid., 174.

from every other being. In this way Being possesses an absolute character. It is not opposed to anything. Consequently, it penetrates and envelops everything. Nevertheless, Being manifests some relativity, since the real is broken up into multiple unities which participate in Being. In other words, the participation of beings in Being is an undeniable fact. But how can we explain the fact that the distinct beings in Being preserve their autonomy? This is the fundamental metaphysical problem of one and many that calls for fresh attempts aiming at a solution. Being as one-in-many can be the result of such an attempt⁶⁸. *Being is one*: Being is that which is in some way. Insofar as it is in some way, it is one. *Being is many*: Being is that which is in some way. Insofar as Being is in some way, each being is in its own way. Insofar as each being is in its own way, all beings are in their own ways. When all beings are in their own ways, there would be a plurality of beings that are many. In this sense, Being is many. *Being is one-in-many*: Being is that which is in some way. Insofar as Being is in some way, it is one. However, each being is in its own way. Insofar as each being is in its own way, all beings are in their own ways which are many. In other words, Being which is in some way, is also in its own way. Being is in beings, i.e., One is in many. Therefore, Being is one-in-many.

Conclusion

Being as one in many is the ontological principle of unity in diversity, which finds its expression in the concept of secularism enshrined in the Indian Constitution. Secularism holds the belief that everything which promotes diversity strengthens unity; anything which encourages uniformity threatens unity. We are united because we are diverse. We are a single nation because the Constitution entitles each one of us to an identity, which does not compel us to choose an identity that violates the natural, inherent, ontological principle of one in many. Secularism demands of us an honest commitment to this metaphysical or foundational principle by promoting not merely tolerance but ‘communion of religions’ as well. Nehruvian secularism is a ‘tolerant secularism’, an ideology imposed upon a people who never wanted to separate religion from politics. Today we need to go beyond it to a ‘communion secularism’ in which the other religion is a recognized and respected partner in dialogue irrespective of its being a majority or minority.

Communion secularism can be a remedy against the signs of weariness about secularist world view began to emerge in the 1960s. In his inaugural address (1961), John F. Kennedy proclaimed that ‘the rights of man’ came not from ‘the generosity of the state’ but from ‘the hand of God’. This was a reassertion of the religious foundations of politics exactly as Gandhi had affirmed throughout his public life. In Nicaragua, some catholic theologians formulated ‘a theology of liberation’, incorporating some elements of Marxian methodology, to overthrow a tyrannical dictatorship in 1978. In Poland, the Church supported the Solidarity Movement in its fight for universal human rights. In Iran, the return of organised religion as the foe of a westernised secular society was proclaimed in the 1978 revolution. Around the same time and throughout the 1980s, Hindu communalism, Sikh fundamentalism, and Muslim resistance began to vie with each other for public prominence. Besides, the collapse of the Soviet Block and the softening

⁶⁸ George Panthanmackel, *Coming and Going*, Vol. 1 (Bangalore: ATC, 1993), 265-266.

of Chinese communism have resulted in a religious resurgence among millions of people. A similar desecularisation is reported from Japan and the Scandinavian countries. In short, contrary to what was believed a hundred years ago, religion has not disappeared from the Earth. Ironically, public visibility of religion has been aided in various ways by the facilities of the modern world. More than ever before, religious pilgrimages have become the order of the day. Improved economic conditions, easier and faster travel, media attention, etc., have transformed religious activities into public performances. While multitudes move millions watch. Images of the midnight Christmas mass in St. Peter's Square in Rome, or of Haj pilgrims gathered in Mecca, or of Kumbh mela, are vivid in the minds of people⁶⁹.

Are we going to keep all these religions away from politics and the daily lives of citizens? The larger issue of secularism versus communalism can be resolved only in the mega political society. Hence what we need today is not the separation of religion from politics-an impossible task indeed-but a harmonious promotion of all of them by the State in view of communion of all peoples, of all religions, ultimately based on the metaphysical foundation of one in many to which we have to commit ourselves. Whereas democracy is a natural outcome of this metaphysical principle, the so-called cultural nationalism of the religious fundamentalists violates it. The attitude of the fundamentalists towards the Indian unity in diversity (one in many) is as intolerant as their abhorrence of anything that stands in their way since they practise a politics of hatred. Note Golwalkar's 1948 statement: 'Unfortunately, the great latitude allowed to all individuals and groups resulted in the creation of many faiths and sects. The vastness of our motherland fostered many dialects which in time became so many sister languages, and gradually the grand unity in all the diversities of life began to crumble away'⁷⁰. Here Golwalkar fails to perceive the complementarity of many faiths, sects, dialects and languages, which can promote a communion of diversities and, thus, a true secularism if one is committed to the foundational metaphysical principle of one in many.

⁶⁹ T.N.Madan, "Keep the Faith", *The Times of India* (Bangalore: Wednesday, March 28, 2001), 12.

⁷⁰ Purushottam Agrawal, "One Notion Theory", *Hindustan Times* (New Delhi: Friday, February 23, 2001), 10.

NATIONALISM AND REGIONALISM

In the Indian Constitution

Dr. Stanislaus Swamikannu

01. Introduction

This age of mass media takes legitimate pride in making concepts like ‘far away’, ‘remote’, ‘distant’, ‘difficult to reach’ etc., look almost meaningless. Our epoch has seen, as never before, a multiplication of international peace pacts, thus proclaiming the victory of dialogue and consensus over barbaric wars. We are living in an era of international conventions, global planning in order to save planet earth, to understand different cultures and religions, to eradicate poverty and want. We see the whole world slowly coming under the grip of liberalization and globalization. Every possible boundary is being systematically broken down. The whole world is turning into a global village. Media world is desperately trying to put a stop to the fury of liberalization and globalization even in print media. M.P. Veerendrakumar, the Vice-president of Indian News Service, concludes his article with these remarks: “Allowing foreign investment in the print media will be the beginning of the end of the country’s sovereignty, freedom and *nationalism* (italics added).”⁷¹ In such a context, it might sound anachronistic to speak about ‘Nationalism and Regionalism.’

Can we interpret the title ‘Nationalism and Regionalism’ to mean ‘Unity versus Diversity (or plurality)’ or ‘Universalism versus Particularism’? Some do interpret the title in the above senses, which gives a negative connotation to regionalism as communalism. What does our Constitution say about this opposition? Our Constitution is very careful in not opposing these two concepts.

Is nationalism opposed to regionalism ? It would appear so! But a closer look at the origin and the nature of these concepts reveal a common desire that links both: the *harmonious development of all*.

It is not an exaggeration to say that every individual is partly regionalistic and partly nationalistic. Thus, s/he carries a split personality. It can be further affirmed that the tendency for regionalistic sentiment has primacy over the nationalistic sentiment.

02. Nationalism

⁷¹ M.P. Veerendrakumar, “Formula for Disaster,” in *The Week* (Oct. 21 2001), 79.

Nationalism in General and the Different Definitions: Ethnocentrism and Nationalism

Men do not become nationalists because of biology. They are not born nationalists. They acquire national consciousness and become national patriots because the political, economic, and social conditions and thought of their time make them so.⁷² In other words, nationalism is “an ideological movement for the attainment and maintenance of self government and independence on behalf of a group, some of whose members conceive it to constitute an actual or potential ‘nation like all others.’”⁷³ Nationalism basically “fuses three ideals: collective self-determination of the people, the expression of national character and individuality, and the vertical division of the world into unique nations.”⁷⁴

A.D. Smith, an eminent scholar in the field of nationalism and the different theories on nationalism, elucidates the difference between nationalism so defined as an ideological concept and construct and the ‘ancient’ version exhibited in the early Jewish and Greek history. He acknowledges that these early communities expressed a form of nationalism which he terms as ‘ethnocentrism’ and which ought to be separated from the ‘polycentric’ nationalism of modern times. He argues that these ‘two types of nationalism’ were founded upon fundamentally opposing conceptions. For the ethnocentric nationalist, explains Smith, “both ‘power’ and ‘value’ inhere in this cultural group” which is “the vessel of wisdom, beauty, holiness, culture.” In contrast, the polycentric nationalist “starts from the premise that there are many centers of real power; other groups do have valuable and genuinely noble ideas and institutions “ which could be borrowed or adapted. Even when polycentric nationalism is concerned with “the collective self,” Smith claims that it conceives its role differently. “It seeks to join the ‘family of nations,’ the international drama of the world, and alone significant- while round about the ‘nations of the world,’ heathen and barbarian, formed the undifferentiated chorus in the background.” If one reflected on “the traditional, exclusive and solipsist conception,” the other was “outward looking, multi-centered.” Smith concludes that some of the confusions over the question of the antiquity of nationalism have sprung from the failure to distinguish between these two types of nationalism. In a subsequent article, Smith removes altogether the label “nationalism” when referring to ethnocentric movements, thus demonstrating the “greater appreciation of the disjunction between these two outlooks.” He adds: “It seems better to employ a separate term for the older vision.”⁷⁵

Indian Nationalism and its Origins

⁷² R. Suntharalingam, *Indian Nationalism : An Historical Analysis* (Delhi: Vikas Publishing Kouse Pvt. Ltd.), 43.

⁷³ A.D. Smith, *Theories of Nationalism* (London: 1971), 23.

⁷⁴ Ibid., 171.

⁷⁵ A. D. Smith, “Ethnocentrism, Nationalism and Social Change,” *International Journal of Comparative Sociology*, XIII: I (1972), 10ff.

Most writers on Indian nationalism are seemingly in agreement that nationalism in India was essentially anti-colonial in nature and manifestation. Regardless of the groups which started the movement, and irrespective of their actual reasons for doing so, nationalism in India represented as a challenge to the *status quo* imposed by the British and sought to bring about its eventual liquidation.⁷⁶ The course of nationalism in India is intimately connected with the history of the Indian National Congress, founded in 1885, which would turn out to be the first and the most dominant nationalist institution. The history of the Indian National Congress is very important in understanding the nature of nationalism in India. Right from its inception, the Indian National Congress was beset with a number of problems like, lack of interest in the members, inner conflicts along fairly well-defined lines, regionalism on various grounds which began to emerge in different parts of the country, its foreign patronage which meant dependence on the British and the acrimonious Moderate-Extremist conflict in the Congress. These problems within the history of the Indian National Congress did colour the nature of Nationalism that would be born in India and the Constitution which would require. In a sense, the members of the Indian National Congress already experienced quite a few problems that a country of diverse cultures and religions like India could potentially have. For example, if the Constitution is very particular in pointing out the *secular character* of the nation, it had already experienced a number of religious conflicts even before the Independence.

Nationalism in the Indian Constitution

Secularism

When India gained independence, with the partition of the country, we had the option to become either a Hindu state, in response to Pakistan declaring itself as the Islamic state, or remain a secular state, as envisaged movement. Given the religious character of the people of India, it would have been very difficult to introduce the term 'secular' in the Constitution and declare the country secular.⁷⁷ Thanks to the enlightened and democratic mindset of the early leaders that we have at least the secular character clearly in the Preamble from 1976, thus making '*secularism*' one of the three pillars of the constitution along with 'sovereignty' and 'socialism.' In spite of subtle forms of manipulation by ill-begotten pseudo-religious leaders⁷⁸ who wanted to turn India into a religion (Hindu?)-dominated political entity, the communal politics based on language, culture, region, etc., and the confusion in the ranks of the secularists, India has retained to a certain extent its secular character. It is an achievement of the Constitution.

⁷⁶ R. Suntharalingam, *Indian National: An historical Analysis*, 41.

⁷⁷ What our early leaders intended by the word 'secular' was that the State should observe religious neutrality by according equal treatment to all religions and religious minorities (Cf. The preamble of the Constitution). Their intention was not secularization of the state in the sense of its complete separation from religion. They were well aware of the fact that India was a country inhabited by people with diverse religious beliefs and creeds.

⁷⁸ In his pamphlet *We or Our Nation Defined*, written in 1930, Golwalker, one of the founding fathers of RSS asserts that India ought to be exclusively a Hindu nation. "Hindustan is the land of the Hindus and is the *terra firma* for the Hindu nation alone to flourish upon."

The spirit of the Constitution can be described as follows. Secular character of the state is exhibited when it remains distant from, and distinct from using religion for political end. A secular state in the pursuit of state activities, governmental obligation and administrative duties should exhibit a capacity to show respectful indifference to religious and indeed keep vigilant distance from the politics of religious communalism.

A secular state, whose government derives its legitimacy and authority on the basis of the secular election, has no moral or political justification for deviation from its secular foundations. A secular state should not tolerate interference and encroachment of civic authority by non-secular, much less anti-secular elements, forces, groups and formation – even in the form of political parties.

Sovereignty

The preamble to the Constitution declares that India is a sovereign democratic Republic. The right of the people to determine the form of government under which they would live and to frame their own constitution is a sign of ‘collective self –determination, the expression of national character and individuality.’ Justice M. Hidayatullah’s comment on the preamble is apt: the Preamble to the Indian Constitution “resembles the Declaration of Independence of the United states of America.”⁷⁹ A modern state is based on a Constitution – the fundamental, secular, man-made law of the land.

Socialism

What we mean by socialism in the Indian Constitution may not have its historical overtones. Here it refers mainly to a welfare-state system. Jawaharlal Nehru emphasized in a speech in the Constituent Assembly on the imperative of India to move into the modern world of science and technology for bringing into existence a social order in which there would be rapid rise in the standards of living with equitable distribution of wealth and equal opportunities for all to carve out a career for themselves so that all of them may live with dignity and happiness.

Fundamental Rights

The Constitution confers and guarantees every citizen certain Fundamental Rights enshrined in Part III, Articles 13-51. The inclusion of a Declaration of Fundamental Rights in the Indian Constitution was indeed of more than formal import. It was with a specific purpose that these declarations were inserted prior to the functional provisions of the Constitution. Guaranteeing Fundamental Rights to its citizens makes India a nation among other nations of the world.

Citizenship

⁷⁹ M. Hidayatullah, *Democracy in India and the Judicial Process*, 51.

The right to the citizenship conferred on the people of India in part II of the Constitution makes them Indians or Indian nationals, which in turn implies the coming into existence of a separate nation. The modern Indian state is an association of citizens, equal and free, irrespective of caste, creed, colour, sex, language, region, domicile or status. The state of India is not a federation of religions, nor an aggregation of religious communities. Citizens of India, in law and by the Constitution are members of a common unified national polity.

03. Regionalism

Regionalism in General and the Different Definitions Existing

The term ‘Regionalism’ spontaneously points to separatism, communalism, racism and the like. In politics it refers to a variety of problems like that of right of minorities, administrative decentralization, local self-government and autonomy, counter movement to any exaggeration or oppressive form of centralization, the cult of home land and earth and local patriotism. In social science, regionalism refers to eliminating factors contributing to heterogeneity and coalescing factors that promote homogeneity.

Regionalism is derived from the word region. “A region is a homogeneous area with physical and cultural characteristics distinct from those of neighboring areas. As part of a national domain, a region is sufficiently unified to have a consciousness of its customs and ideals and thus possesses a sense of identity distinct from the rest of the country.”⁸⁰ It is a fact that a human being is born with a territorial loyalty. We do feel a sense of ‘being at home’ in our native soil. It gives us a familiarity which can never be enjoyed anywhere. Familiar sounds, people, events, spots, customs, language, etc. make one feel that s/he belongs there. In short, no doubt, it gives a sense of identity or ‘at home’-ness.

Indian Regionalism and its Origins

Regionalism in the context of India is a vague concept and has both positive and negative dimensions. Positively “it embodies a quest for fulfillment on the part of an area.”⁸¹ Negatively it “reflects a psyche of relative deprivation”⁸² on the part of a people or an area. Both the positive and negative dimensions can be manipulated by those with vested interests. Those who call themselves federalists in mind-set can see in regionalism an occasion for local autonomy and administrative decentralization. The negative dimension of feeling deprived of something can be manipulated by an elite of that region to strengthen their political position. Unchecked negative dimension can lead to demand for secession.

⁸⁰ *International Encyclopedia of the Social Sciences*, Vol. 13 (New York: Macmillan, 1968), 377.

⁸¹ Narain Iqbal, “A conceptual Analysis in the Indian context” in Akhtar Majeed (Ed.), *Regionalism Development Tensions in India* (New Delhi: Cosmo Publications, 1984), 22.

⁸² Narain, *op.cit.*, 22-23.

Regionalism can be classified into three categories, supra-state regionalism, inter-state regionalism and intra-state regionalism.⁸³ The supra-state regionalism is formed by forging an identity by a group of states against other group of states or even against the Union. The group identity formed here is usually negative in character. Such type is also 'issue-specific'. For example, the language issue between the North and the South of India. The inter-state regionalism is co-terminus with state boundaries. Since natural resources like water need to be shared by adjacent states there is the possibility of inter-state regional disputes. The famous Kauvery water problem between Karnataka and Tamil Nadu is a good example. In intra-state regionalism, a part of state develops the quest for self-identity and self-development positively, and negatively, it expresses a psyche of deprivation or exploitation in relation to the other parts of the same state. This phenomenon is also called sub-regionalism. Telengana in Andhra Pradesh, Vidharbha in Maharashtra and Saurashtra in Gujarat are examples of this form of regionalism. The main consideration behind the sub-regionalism are economic development and political power sharing.

Regionalism in India is a complex amalgam of economic, geographical, historico-cultural, politico-administrative and psyche factors. Often the major types of regionalism overlap each other. I am convinced that regional sentiment is an important factor in the political ordering of affairs in any democracy. For proper management of regionalism, administrative institution can be set up at regional level in the states and for proper regional coordination units of political parties should be set up at regional level also.

Regionalism in India manifests the genuine democratic ethos of the country and needs its proper accommodation in the Indian federation.

Regionalism in the Indian Constitution

We can see in a remote way an acceptance of regional identity if we read the Indian Constitution under Article 3, which provides for the creation of new states, altering the existing boundaries etc. We notice a sincere concern for regionalism in the positive sense already in the Objective Resolution approved by the Constitution Assembly on January 22, 1947. We read the following in the guideline number 6: "(in the proposed Constitution) adequate safeguards shall be provided for minorities, backward and tribal areas, and depressed and other backward classes...."⁸⁴

Anup Chand Kapur, in his book *The Indian Political System*, writes: "India has its own specific and in some cases unique features and all exert deep influence on Indian politics which make her political system distinct from others, especially that of Western countries."⁸⁵ He further enumerates the following specific features: Traditionalism and

⁸³ Narain Iqbal, "Cultural Pluralism, National Integration and Democracy in India," in K.R. Bombwall (Ed) *National Power and State Autonomy* (Meerut: Meenakshi Prakashan, 1978), 186.

⁸⁴ *Constitution Assembly Debates*, Vol.II, 317.

⁸⁵ Anup Chand Kapur, *The Indian Political System*, 12th edition (New Delhi: S. Chand & Company (Pvt) LTD., 1989), 1.

Modernity, Regional Diversity, Linguistic Differences, Linguistic States, Religious Diversity, Scheduled Castes, Caste System, Differences in life-style. Distinction in age, Status conscious society, Attitudes towards authority, Poverty the most basic of all facts.⁸⁶ This list is a good but not an exhaustive selection of the Indian scene. A country with which diversity had to have a system of government which would guarantee a strong government at the centre and equally efficient State governments which would guarantee a strong government at the centre and equally efficient State governments which would take care of the development of their particular regions.

The attachment to one's own region, language, culture and other societal loyalties has deep roots in the soil and history of India. Provisions have been made to incorporate this desire or attachment to one's own in our Constitution. The report on Indian Constitutional Reforms (1918) pointed out, the present map of British India was shaped by military, political, or administrative exigencies or conveniences of the moment and with small regard to the natural affinities or wishes of the people.⁸⁷

04. Nationalism and Regionalism

What Is at Stake in This Debate?

In India, "the basic issue is not of regionalism *versus* nationalism but one of right ordering loyalties between the regional and the national identities."⁸⁸

In a well-attended national convention on "Communalism and the Threat to Diversity" where there was representation from all ideologies and economic backgrounds, a number of things were discussed openly and in their consolidated statement, the participants came to realize that in the whole dialogue between communalism, regionalism, nationalism etc. 'identity' became a central concept.

The Question of Identity

Richard Hofstadter writes: "Memory is the thread of personal identity, history of public identity."⁸⁹ He further avers that "[t]o visit a people who have no history is like going into a wilderness where there are no roads to direct the traveller".⁹⁰ Memory (history) is so much a part and parcel of one's self understanding and identity that hardly any one would doubt the significance of this thesis. However, when one asks how one forms the memory of the past (to form one's self-understanding or identity), then the issue becomes more complex. Does one remember everything of the past? Or, does one make a selection? Why does one remember and prize some events and neglect some others? Why is one selective? What motivates one's selective reading of history? Is there some

⁸⁶ Ibid., 1-27.

⁸⁷ *Report on Indian Constitution Reforms* (Calcutta: Government of India Press, 1918), 28.

⁸⁸ Narain Iqbal, "A Conceptual Analysis in the Indian Context" in *Regionalism, Developmental Tensions in India*, ed. Akhtar Majeed (New Delhi: Cosmo Publications, 1984), 33.

⁸⁹ R. Hofstadter, *The Progressive Historians* (New York: 1968), 3.

⁹⁰ Ibid.

constant element that withstands all the vicissitudes of history? When searching for the memory of the past where does one stop? Why does one stop there? Why does one accept something, event, some person, etc., as the beginning point? These questions enigmatize the concept of identity.

Derrida, the French Philosopher who made a name with his strategy of 'Deconstruction' asks similar questions with regard to the identities of Western philosophy, text, culture, race, sex, tradition, nation, continent, etc. In this context, we shall repeat the response that Derrida gave to Rodolphe Gasche during a 'roundtable discussion on Translation' which is pertinent. Gasche's question to Derrida with reference to Heidegger's difficulties with the 'unthought' of the Greek language was formulated as follows:

The Heideggerian return cannot be a return to the Greek mother tongue (and to Greek thought), but to something in it, cracking it apart, and which it renders only imperfectly. [...] How do you situate yourself in relation to Heidegger's at least implicit recognition of a fundamental lack in every mother tongue, in this case the Greek language, but also in every language in general?⁹¹

Derrida's response is twofold: First there is nothing like an uncontaminated archi-mother tongue, some kernel that is intact; second, the conviction that there exists something like an archi-mother tongue and an intact kernel "sets in motion every kind of desire, every kind of tongue, appeal, address."⁹² Derrida calls this conviction "a terrible necessity. [...] the desire for the untouchable, for virginity."⁹³ The desire for such an intact kernel is nothing but a desire for an absolute origin or presence or arche that is uncontaminated. Derrida has been questioning through his philosophy of deconstruction such an uncontaminated absolute origin or presence. The following words of Derrida in response to Gasche express this in a playful way:

I would oppose desire to necessity, to *ananke*. The *ananke* is that there is no intact kernel and there never has been one. That's what one wants to forget, and to forget that one has forgotten it. It's not that something has been forgotten; rather, one wants to forget that there is nothing to forget, that there has been nothing to forget. But one can only forget that there has never been an intact kernel.⁹⁴

As we can already guess, Derrida's point is that the desire for an intact kernel is another form of reinstating the hierarchical oppositions original/derivative, primary/secondary, kernel/peripheral. Within a hierarchical oppositional structure, identity of something or someone would be as seen as a reproduction of, an imitation of and a copy of an original. This is a static way of understanding identity. Already in *Of Grammatology* Derrida pointed this out:

The value of the transcendental arche(archie)[origin] must make its necessity felt before letting itself be erased. The concept of the arche-trace must comply with both that

⁹¹ J Derrida, *The Ear of the Other*, trans. Peggy Kamuf et al. (New York: Schocken, 1985), 113.

⁹² Ibid., 116.

⁹³ Ibid.

⁹⁴ Ibid., 115-116. Cf. also Derrida.. "Sendings: on Representation." 298-300.

necessity and that erasure. It is in fact contradictory and not acceptable within the logic of identity. The trace is not only the disappearance of the origin [...] it means that the origin did not even disappear, that it was never constituted except reciprocally by a non-origin, the trace, which thus becomes the origin of the origin.⁹⁵

Derrida's replies to question about identities of the Western philosophical tradition and cultures in general are in the same vein. He says: "Every culture is haunted by its other."⁹⁶ With regard to the identity of Judeo-Christianity he makes the following observation: "Judeo-Christianity is an extremely complex entity which, in large part, only constituted itself qua Judeo-Christianity by its assimilation into the schemas of Greek philosophy. Hence what we know as Christian and Jewish theology today is a cultural ensemble which has already been largely 'Hellenized.'"⁹⁷ He goes a step further and affirms that not only is Judeo-Christianity 'a cultural ensemble,' but so is Greek philosophy a similar hybrid. He expresses it as follows: "From the very beginnings of Greek philosophy the selfidentity of the Logos is already fissured and divided."⁹⁸ However, the 'otherness' which fissures the allegedly unified and solid Greek philosophy is not necessarily something that comes from outside. Greek philosophy or for that matter any tradition is always already divided in itself. Thus, for Derrida, "identity presupposes alterity."⁹⁹

With regard to the production of meaning in a text Derrida observes a similar logic at work. Concerning the nature of texts he writes the following in his essay 'Plato's Pharmacy'¹⁰⁰: "A text is not a text unless it hides form the first comer, from the first glance, the law of its composition and the rules of its game. A text remains, moreover, forever imperceptible."¹⁰¹ What the foregoing citation claims is not that a text does not have any meaning. Indeed, one can try to understand and appropriate the meaning of a text. However, as S. IJsseling expresses it – what to our view appears as an adequate interpretation of this text – the appropriation of the meaning of a text goes essentially hand in hand with an expropriation.¹⁰² In another context,¹⁰³ discussing the concept of identity within the phenomenon of mimesis. IJsseling makes a similar statement which clarifies Derrida's understanding of identity. He writes : "identity consists [...] neither in

⁹⁵ J. Derrida, *Of Grammatology*, trans. Gayatri Spivak (Baltimore: Johns Hopkins University Press, 1976), 61.

⁹⁶ J. Derrida, "Jacques Derrida: Deconstruction and the Other," in *Dialogues with Contemporary Continental Thinkers*, ed. R. Kearney (Manchester: Manchester University Press), 116.

⁹⁷ Ibid.: Cf. also G. Bennington, "Mosaic Fragment: if Derrida were an Egyptian.....," in *Derrida : A critical Reader*, 17-26.

⁹⁸ "Jacques Derrida: Deconstruction and the Other," in *Dialogues with Contemporary Continental Thinkers*, ed. R. Kearney (Manchester: Manchester University Press), 117.

⁹⁹ Ibid., Cf. also S. Critchley, "Black Socrates? Questioning the Philosophical Tradition". In *Radical Philosophy* 68 (Jan/Feb 1995), 17-26.

¹⁰⁰ J. Derrida. "The Deconstruction of Actuality: An Interview with Jacques Derrida," in *Radical Philosophy* 68 (Autumn 1994), 61-172.

¹⁰¹ Ibid., 63.

¹⁰² Cf S. IJsseling, "Derrida over text en context," 14: "Hij [de tekst] is het eigendom van niemand, maar kan misschien wel tot op zekere hoogte toegeëigend worden, bijvoorbeeld in de act van het lezen en schrijven. *Deze toeëigening gaat wexenlijk gepaard met een onteigening*". (italics added).

¹⁰³ Mimesis: Over schijn en zijn, (Baarn: Ambo, 1990).

the complete possession of nor in a pure presence to oneself, but in mimesis, it becomes appropriated and allocated and this appropriation and allocation goes hand in hand with an expropriation and absence.”¹⁰⁴ In other words, deconstruction is not simply a nihilistic reduction of meaning to non-meaning, instead, it affirms a radical emancipation of meaning into a play of otherness (alterity). What is at stake in all this is the following: deconstruction denounces the attempt to reduce the signifying process (the production of meaning) to a totalized system of absolute knowledge – to a meaning that could be possessed once and for all.

In reflecting on the violent events of 1989, Derrida explicitly raises the question of identity. This time, the phenomenon of European identity.¹⁰⁵ He is very concrete when he raises the question of European identity today.

Hope, fear, and trembling are commensurate with the sign that are coming to us from everywhere in Europe, where, precisely in the name of identity, be it cultural or not, the worst violences, those that we recognize all too well without yet having thought them through, the crimes of xenophobia, racism, anti-Semitism, religious or nationalist fanaticism, are being unleashed, mixed up, mixed up with each other, but also, and there is nothing fortuitous in this, mixed in with the breath, with the very ‘spirit’ of the promise.¹⁰⁶

Starting from such a concrete situation of today, he presents two interrelated axioms on European identity which in his view can be transferred to all types of identity. First, there are frantic attempts at unifying Europe. There are celebrations of such reunions. With regard to this first axiom, quoting a remark of Francois Mitterand, the President of France, Derrida surmises: “Reunion ‘ is today an official word [...] Ministerial speeches and documents make great use of it; they help explain a remark of Francois Mitterand, the President of the Republic, who said (perhaps while also presiding over the European Community) that Europe ‘is returning in its history and its geography like one who is returning home ‘ (*chez soi*).”¹⁰⁷ In other words, we can go home again? Was there a home called Europe? “Has it ever existed?”¹⁰⁸ In other words, to interpret Derrida’s first axiom, we could say that we can’t go home again, not only because the home we once knew has changed beyond recognition, but because there never was a home.

If the identity of oneself is enigmatic and complex enough, the identity of the other or alterity is even more complex. In his interview ‘The Deconstruction of Actuality,’

¹⁰⁴ Ibid., 29: “Identiteit bestaat derhalve niet in het volledig bezitten van noch in een zuivere aanwezigheid aan zichzelf, maar wordt in de mimesis toegeëigend en toegewezen en deze toeëigening en toewijzing gaan gepaard met een onteigening en een afwezigheid.” Cf. also id., “Jacques Derrida: Schrijven in de Marge,” in *Jacques Derrida: Een inleiding in zijn denken*, ed. Samuel Ijsseling (Baarn: Ambo, 1986), 26.

¹⁰⁵ J Derrida, *The Other Heading: Reflections on Today’s Europe*. (hereafter as Oh) trans. Pascale-Anne Brault and Michael B. Naas (Bloomington/Indianapolis: Indiana University Press, 1992).

¹⁰⁶ Ibid., 6: Cf. also Arnulf Camps. “The Identity of Europe and Cultural Plurality,” in *Studies in Interreligion Dialogue* ½ (1991).

¹⁰⁷ OH, 8.

¹⁰⁸ Ibid., 7-8.

commenting on the nature of alterity, as an unexpected, absolute arrival, Derrida makes a useful observation concerning the identity of ‘the other’:

There would be no event, no history, unless a ‘come hither’ opened out and addressed itself to someone, to someone else whom I cannot and must not define in advance – not as subject, self, consciousness,’ nor even as animal, God, person, man or woman, living or dead [...] Absolute *arrivals must not be required to begin by stating their identity* [italics added]; [...] The kind of absolute arrivals I am trying to describe are similar to births, the arrival of babies, [...] the child that arrives is always unforeseen. It speaks of itself from the *origin* of a different world, or from a *different* origin of this one.¹⁰⁹

Thus both the identity of oneself and the identity of ‘the other’ are more complex than one would initially think.

The Enigma of Identity Claims

While many of them insist on the need to emphasize the particularity of one’s own tradition (national or regional), none of them asks the following question: How does one form the identity of one’s own tradition? It is our contention that in the debates concerning nationalism and regionalism, the question is not given its due importance. Nevertheless, this question forms, in our view, the crux of the problem.

In both nationalism and regionalism, an implicit claim is being made for ‘identity.’ By positing a centre or a foundation, whether in the form of a person, reality, idea, story, myth, ritual, etc., as the absolute origin of one’s identity, they make a claim for certainty. In this sense, we are of the view that in articulation of one’s own identity; be it national or regional, traditions have recourse (explicitly or implicitly) to philosophical presuppositions. When these philosophical presuppositions (based on absolute beginnings) are questioned, the identity claims of these traditions flounder.

The difficulty lies not in looking for a foundation or centre or origin. Instead, it lies in the way in which this origin or foundation is interpreted, understood and articulated. In other words, the trouble starts when one attempts to understand the origin of one’s tradition or when one tries to formulate one’s identity (self-understanding) in isolation, without taking into consideration that which the origin necessarily excludes and represses. To put it differently, the search for an identity or essence or self-understanding of one’s own tradition in isolation, independent of its relatedness to other traditions, necessarily leads to totalization. It makes one’s own tradition an island, a windowless monad, an isolated atom, a self-sufficient and self-functioning signification system. The result can be as well a monolithic unity as an unrelated plurality of ‘monolithic unities’ or an arbitrary pluralism when the model presented collapses. This means that the confidence one claims to have of having formed a distinct identity of one’s own tradition (in our case nationalism and regionalism) is enigmatic and complex. Deconstruction, as we have already explained, is struggling with this enigma of identity.

¹⁰⁹ J Derrida, “The Deconstruction of Actuality: An Interview with Jacques Derrida,” in *Radical Philosophy* 68 (Autumn 1994), 32.

What intrigues us is the fact that some authors, who hold that loyalty to one's own tradition is important and necessary, also acknowledge that the truth and identity of one's own tradition cannot be formed independently of others. They rightly affirm that the identity of one's own tradition is dynamic and relational. In other words, the original and foundational experience of a particular tradition itself has meaning and truth only in relation to everything that is other than particular tradition. While it is possible to refer to such an other, the latter can never be completely determined. In this context the question that arises is the following: How does one arrive at the truth and identity of one's own particular tradition? Could it be arrived at in isolation? It requires a context. Such a context can never be sufficiently restricted. Any attempt at limiting the context would entail complicity to one or another form of logocentrism or totalization. Nationalism and regionalism, if they are made absolute, turn out to be different forms of totalization.

The demand that loyalty to one's own tradition is a must can be accepted. Otherwise as different authors rightly point out, there would be nothing to hold on to. However, what goes unnoticed in all this adherence to one's own tradition and convictions is the fact that the self-understanding of one's own tradition has been formed in splendid isolation, not sufficiently taking into consideration the wider context. The focal meaning or origin around which the identity of one's own tradition is constructed has to be placed in ever widening contexts, which include not only other traditions but the whole of humanity and also the whole of reality.

05. Conclusion

Those who framed the Indian Constitution were aware of the inherent problems in the subcontinent. The Constitution was framed keeping in mind these problems. I believe that the Constitution has sufficient provisions for a healthy nationalism and a meaningful regionalism. The two are kept in a happy tension. Whenever required, the subsequent leaders had the courage and vision to sustain this, even by amending the Constitution. But unfortunately, the leaders we have are blind to this tension, which was guaranteed, and started using the Constitution to serve their personal or political ambitions. The obvious result of all this is that the leaders are working for the development of their pet projects, leaving the aspirations of the multitude, who legitimately raise their voice in protest. This can be branded as communalism.

Disturbing events in the recent past in the country's body politic have caused a lot of concern to many Indians. Many of us have watched helplessly as the country's social fabric is being rent apart with communal and caste riots which have brought us dangerously close to civil war-like situation.

This is a situation perceived by different people in different ways. The national press and media used slogans like national unity and integrity to condemn such incidents as uncivilized. But there were also people who started thinking in a profound way at the reality of communalism and made very valuable comments. They said that the recent political developments in India are dominated by the tragic and systematic suppression of

various groups. Linguistic and religious minorities, various regional identities, the scheduled castes and scheduled tribes and the other backward classes constitute these suppressed groups.

In the face of this rather depressing social and political situation, these same people appealed to a strive for unity in diversity, by charting out a different road that combines growth with equality and unity, by devising a multi-layered process of autonomy that recognizes both disjunctions and conjunctions in the various caste, tribal, national, regional and religious identities

There is growing consciousness of the fact that the rejection of the legitimate aspirations and democratic urges and upsurges of the underprivileged and discriminated people that constitute the gravest threat to the very diversity that had been the basis of Indian unity and diversity. Legitimate aspirations of the people should be respected and they should not be branded as anti-nationals. What is being questioned in many circles today is the entire process of nation-building and economic development, which had marginalized the dalits, tribals, the religious and linguistic minorities and the regional identities on the periphery.

In the light of the above considerations I would like to pose the following questions for our perusal: Who am I? What gives me my identity? Does my family, my caste, my religion, my state, my language, my country, my continent, my world or reality as a whole? When I work for the poor and the marginalized, am I a communalist? Is it possible to build a nation in India by maintaining an artificial neutrality? Can we think as Indians ?

EQUALITY

Egalitarian or complementary?

Dr. John Sequeira

Introduction

The word equality in its modern usage sanctions three distinct types of equality. 1) Natural equality, the likeness or sameness in essential characteristics shared by the members of a species, as when humans are said to be naturally equal in possession of human nature and in all that this implies. 2) Political equality, a status of parity among citizens that connotes the denial of privilege before the law, an application of the same laws to all persons in the same way, and a possession of the same fundamental rights and privileges to share in and influence government. 3) Social equality, the parity of mutual acceptance within a certain stratum of society or the negation of all social class distinctions within the totality of a society. Social equality or inequality is usually considered to be based on cultural, economic, occupational, or other non-legal similarities and differences. This type of equality is presumed to affect a “classless” society.¹¹⁰

The possibility of an absolutely arithmetical equality, both in political or social order is not seriously advocated anymore today. In the social and political orders, equality is considered to be satisfied by the exclusion of arbitrary and unreasonable discrimination and by freedom from legal, social, or economic pressures to remain in a fixed class.¹¹¹ Equality that we envisage in this paper is to be identified with open opportunities and available choices proportionate to personal abilities and individual needs, taking into consideration their natural complementarities and specific differences.

For our convenience we will divide the paper into three parts. In the first part we intend to make an elaborate study of those articles of the Indian constitution, which confer on Indian citizens the right to equality. The second part of the article will deal with the development of the concept of equality in the history of political philosophy. This study is undertaken in order to equip ourselves with a better understanding of the topic in question, to pinpoint certain philosophical issues relevant to political and social equality. This would involve in seeing the whole problem of equality in its natural and

¹¹⁰ P.A. Woelfl., “Equality” in *New Catholic Encyclopedia*, vol.V (Jack and Heraty & Associates, Inc., Palatine, Illinois, 1981), 497.

¹¹¹ Woelfl 1981, 497.

multidimensional order taking into consideration the blocks that threaten equality, and proposing solutions for a better understanding of it.

I. Concept of Equality in the Indian Constitution

The preamble of the Indian constitution together with the articles fourteen to eighteen exclusively deal with the right of equality. Hence to understand the concept of equality one should begin with a detailed analysis of these articles.

The preamble: *We, the people of India, having solemnly resolved to constitute India into a (SOVEREIGN, SOCIALIST, SECULAR, DEMOCRATIC REPUBLIC)¹¹² and to secure to all its citizens:*

Justice, social, economic and political
Liberty of thought, expression, belief, faith and worship
Equality of status and of opportunity; and to promote among them all;
Fraternity assuring the dignity of the individual and the unity and integrity¹¹³ of the nation;
In our constituent assembly this twenty-sixth day of November 1949, do hereby adopt, enact and give to ourselves this Constitution.

It is enough to note that the very preamble which is the foundation of our constitution gives emphasis on equality of status and opportunities to every citizen.

Equality before Law (Art. 14): *The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.*

The article 14 uses two expressions, viz., “equality before law” and “equal protection of the law” which require our serious consideration. The expression equality before law finds a place in almost all written constitutions, which guarantee fundamental rights.¹¹⁴ Both these expressions are also used in the Universal Declaration of Human Rights.¹¹⁵ They aim at establishing what is called, “equality of status” as mentioned in the Preamble of the constitution. These both expressions although look identical a distinction has to be made in their right understanding. While “equality before law” is somewhat a negative

¹¹² The words Socialist, and Secular were added to the original preamble on its 42nd amendment by the constitution Act, 1976, sec.2. for *Sovereign Democratic Republic*.

¹¹³ The word integrity was added to the original preamble on its 42nd amendment by the constitution Act, 1976, sec.2. for unity of India.

¹¹⁴ The Constitution of USA in section one of 14th amendment says, “No state shall deny to any person within its jurisdiction the equal protection of the law.” Burma – section 13 reads, “All citizens irrespective of birth, religion, sex or race are equal before the law; that is to say, there shall not be any arbitrary discrimination between one citizen or class of citizens and another. Eire – section 40 (1) “All citizens shall, as human persons be held equal before the law. Chile – Article 10 – “All inhabitants of the Republic are assured equality before the law.”

¹¹⁵ Article 7 of Universal Declaration of Human Rights says: “All are equal before the law and are entitled without any discrimination, to equal protection of the law.

concept implying the absence of any special privilege in favour of individuals and the equal subject of all the classes to the ordinary law, “equal protection of the law” is a more positive concept implying equality of treatment in equal circumstances.¹¹⁶ However, the dominant idea in both expressions is of equal justice. Patanjali Shastri has rightly observed this when he says, “the second expression is the corollary to the first and it is difficult to imagine a situation in which the violation of the equal protection of laws will not be the violation of the equality before the law.”¹¹⁷

Equality before the Law

The concept equality does not mean absolute equality among human beings, which is physically not possible to achieve. It is a concept implying absence of any special privilege by reason of birth, creed or the like in favour of any individual, and also the equal subject of all individuals and classes to the ordinary laws of the land. As Dr. Jennings puts it, “Equality before the law means that among equals the law should be equal and should be equally administered, that like should be treated alike. The right to sue and be sued, to prosecute and be prosecuted for the same kind of action should be same for all citizens of full age and understanding without distinctions of race, religion, wealth, social status or political influence.”¹¹⁸

The guarantee of equality before law is an aspect of what Dicey calls the rule of law in England.¹¹⁹ It means that no human is above the law and that every person, irrespective of one’s rank or condition is subject to the jurisdiction of ordinary courts. “With us,” Dicey wrote, “every official from the Prime Minister down to constable or a collector of taxes is under the same responsibility for every act done without legal jurisdiction as any other citizen.” Rule of law requires that no person shall be subjected to harsh, uncivilized or discriminatory treatment even when the object is the securing of the paramount exigencies of law and order.”¹²⁰

Equal Protection of the Law

¹¹⁶ Dicey, Law of the Constitution, 49

¹¹⁷ J. N. Pandey, Constitutional Law of India (Allahabad: Central Law Agency, 1999), 70

¹¹⁸ Jennings, Law of the Constitution, 49.

¹¹⁹ Dicey, Law of Constitution, 202-203.

¹²⁰ Rubinder Singh vs. Union of India, AIR 1983 SC65. Professor Dicey gave three meanings of the rule of law. They are: 1) Absence of Arbitrary power or Supremacy of the law. It means the absolute supremacy of law as proposed to the arbitrary power of the Government. In other words, a man may be punished for a breach of law, but he can be punished for nothing else. 2) Equality before the Law: It means subjection of all classes to the ordinary law of the land administered by ordinary law courts. No body can be above the law with the sole exception of the monarch who can do no wrong. See J.N. Pandey, Constitutional Law of India (Allahabad: Central Law Agency, 1999), 70

The guarantee of equal protection of law is similar to one embedded in the 14th amendment of the American constitution.¹²¹ This has been interpreted to mean subjection to equal law applying to all in the same circumstances. All persons in the similar circumstances shall be treated alike both in the privileges conferred and liabilities imposed by the laws. Equal law should be applied to all in the same situation, and there should be no discrimination between one person and another. The ruler of law imposes a duty upon the state to take special measure to prevent and punish brutality by police methodology. The rule of law embodied in article 14 is the basic feature of the Indian constitution and hence it cannot be destroyed even by an amendment of the constitution under article 368 of the constitution.¹²²

Exceptions to the Article

The above article on equality is, however, not an absolute rule and there are a number of exceptions to this: 1. Equality before the law does not mean the “powers of the private citizens are the same as the powers of the public officials.” Thus, a police officer has the power to arrest while no private person has this power. This is not the violation of the rule of law. The rule of law does require that these powers should be clearly defined by law and the abuse of authority by public officers must be punished by ordinary courts in the same manner as illegal acts committed by private persons. 2. The rule of law does not prevent certain classes of persons being subject to special rules. Thus members of the armed forces are controlled by military laws. 3. Ministers and other executive bodies are given very wide discretionary powers by statute. Under this provision a minister may be allowed “to act as he thinks fit” or “if he is satisfied”. 4. Certain members of society are governed by special rules in their professions, i.e., lawyers, doctors, nurses, members of armed forces and police. Such classes of people are treated differently from ordinary citizens.

Exclusion of Article 14: The scope of right to equality under the article 14 has been considerably restricted by the 42 Amendment Act, 1976. The new article 31C added by the Amendment Act provides that laws made by the state for implementing the Directive Principles contained in clause b or c of Article 39 cannot be challenged on the ground that they are violative of Article 14. Such laws will thus be an exception to Article 14 of the Constitution. Where the Article 31C comes in, the article 14 goes out.

Article 14 permits classification but prohibits class legislation: The equal protection of laws guaranteed by article 14 does not mean that all laws must be general in character. It does not mean that these laws have a universal application, because by nature, attainment or circumstance are not in the same position and require according to different classes separate treatment. From the very nature of the society there should be different laws in different places and the legislature controls the policy and enacts laws in the best interests of the safety and security of the state. In fact identical treatment in unequal circumstances

¹²¹ The 14th amendment says, “Nor shall any state deny to any person equal protection of laws.”

¹²² Pandey 1999, 71

would amount to inequality. Thus a reasonable classification is paramount to progress of any society.

Keeping this principle in mind the Article 14 does promote a healthy classification. However, the classification must not be arbitrary, artificial or evasive and must be based on some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislation. The article allows the classification based on two following conditions: 1. The classification must be founded on an intelligible *differentia* which distinguishes persons or things that are grouped together from others left out of the group. 2. The *differentia* must have a rational relation to the object sought to be achieved by the Act.

Thus the article 14 basing itself on the classification provided by the statute is permitted to make classifications in the areas such as geographical location, vocational, difference in time, difference in nature of persons, trade or callings or occupations etc. It, however, condemns any type of class legislation.

Prohibition of Discrimination on grounds of religion, race, caste, sex or place of birth (Art 15):

The state shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth or any of them.

*No citizen shall, on grounds only of religion, race, caste, sex or place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to -
Access to shops, public restaurants, hotels and places of public entertainment or
the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of general public.*

3. Nothing in this article shall prevent the state from making any special provision for women and children.

*Nothing in this article or clause 2 of the article 29 shall prevent the state from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and the scheduled tribes.*¹²³

In a sense, the general and abstract principle of equality laid down in article 14 is spelt out for certain situations in greater detail in article 15 and in some of the following articles which speak of equality. However, the article 15 is limited to citizens while article 14 extends to all persons. Secondly, article 15 clauses 1 and 2 are both limited to discrimination on the ground of religion, race, sex, place of birth or any of them. Thirdly, the article permits the state to make special provisions for women and children. Fourthly, the article also permits the state to make any special provision for socially and educationally backward classes of citizens: Scheduled Castes and Scheduled Tribes.

¹²³ Added by the Constitution (First Amendment) Act, 1951, sec. 2.

The article 29 deals with the protection of interests of minorities. It reads: 1. Any section of the citizens residing in the territory of India or any part thereof having a distinct language, or script or culture of its own shall have right to conserve the same. 2. No citizen shall be denied admission into any educational institution maintained by the state or receiving aid out of the state funds on grounds only of religion, race, sex, language or any of them.

Article 14 prohibits the state from denying to any person equality before the law, whereas article 15 protects the citizens against any type of discrimination. Thus the article uses the word discrimination, which means making an adverse distinction with regard to or distinguishing unfavourably from others. The word only excludes the other possibilities of discrimination coming under the purview of the article 15. Thus, for example, Reservation in medical colleges, University-wise reservations do not come under this discrimination.

It is also to be noted that Reservation of certain posts exclusively for women, special provisions made for women and children, and reservation of seats for women in local bodies or in educational institutions are coming under this article.

Equality of Opportunity in matters of public employment (Art. 16):

There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state.

No citizens shall, on grounds only of religion, race cast, sex, decent, place of birth, residence or any of them, be intelligible for, or discriminated against in respect of, any employment or office under the State.

Nothing in this article shall prevent the Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office (under the government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory)¹²⁴ prior to such employment or appointment.

Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

4a. Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion of any class or classes of posts in the services under the State in favour of Scheduled Casts and the Scheduled Tribes which, in the opinion of State are not adequately represented in the services under the State.¹²⁵

4b. Nothing in this article shall prevent the state from considering any unfulfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause 4 or 4a as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty percent reservation on total number of vacancies of that year.¹²⁶

¹²⁴ Substituted by the Constitution (Seventh Amendment) Act, 1956, sec. 29 and sch., for “under any State specified in the First Schedule or any local or other authority within its territory, any requirement as to residence within that State.”

¹²⁵ Inserted by the Constitution (seventy-seventh Amendment) Act, 1995, sec. 2.

¹²⁶ Inserted by the Constitution (eighty – first Amendment) Act, 2000, sec. 2.

Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

The main objective of article 16 is to create a constitutional right to equality of opportunity and employment in public offices. This article is confined to citizens as distinguished from other persons. Further, it is confined to employment or appointment to an office “under the state.”

Certain exceptions to the right created by the clause 1 and 2 of article 16 flow from clauses 3, 4, and 5 of the article. These relate respectively to a requirement of residence if sanctioned by parliamentary legislation, reservation of backward class of citizens if not adequately represented in the state services and prescription of profession a particular religion or belonging to a particular denomination if the office is in connection with the affairs of any religious or denominational institution.

Abolition of Untouchability (Art. 17): *“Untouchability” is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law.*

Article 17 abolishes untouchability and forbids its practice in any form. The enforcement of any disability arising out of untouchability is to be an offence punishable in accordance with law. It does not stop with a mere declaration but announces that this forbidden untouchability is not henceforth be practised in any form. If it is so practised it shall be dealt with as an offence punishable in accordance with the law.

Abolition of Titles (Art 18)

No title, not being a military or academic distinction, shall be conferred by the State.

No citizen of India shall accept any title from any foreign state.

No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the president any title from any foreign State.

No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument or office of any kind from or under any foreign State.

Article 18 prohibits the state to confer titles on any body whether a citizen or a non-citizen. Military and academic distinctions however do not come under the purview of this article. Clause 2 prohibits a citizen of India from accepting any title from any foreign state. Clause 3 provides that a foreigner holding any office of profit or trust under the State cannot accept any title from any foreign state without the consent of the president. This is to ensure the loyalty to the government he serves for the time being and to shut out all foreign influence in Government affairs or administration. Clause 4 provides no persons holding any office of profit under the state shall accept without the consent of the President , any present, emolument or office of any kind from or under foreign State.

However the recent conferment of titles of *Bharat Ratna*, *Padma Vibhushan*, *Padma Sri*, etc., come under the category of academic distinctions and thus given as a recognition on public ceremonies and they do not come in the category of article 18.

The main goal of the right to equality presented in the above articles intend to remove social and economic inequality and make equal opportunities available. In reality the right to social and economic justice envisaged in the preamble and elongated in the fundamental rights and directive principles of the constitution, are to make the equality of the life of the poor, disadvantaged and disabled citizens of the society meaningful.

II

Development of the Concept of Equality in the History of Political Philosophy

Early Origins

The perception that human person as a species possessed with special human nature that is shared alike by all human beings lays the foundation for the concept of natural equality. This common similarity in all humans combined with their specific differences, provides ingredients for two distinct problems in the history of philosophy, viz., the problem of universals and the problem of equality. Both were attacked by the Greek thinkers before 400 B.C.¹²⁷

Plato and Aristotle centered their attention on the problem of universals and of justice to emphasize unity and order rather than multiplicity and equality. As a consequence, their idea of society as an organic whole hierarchically structured on a principle of proportional equality readily admitting class distinctions and essential inequalities. Aristotle therefore found no difficulty in acknowledging the possibility of a class of natural slaves, the natural subjection (complementarity?) of females to males, and the unequal (difference) capacities in different men for ruling both themselves and others.¹²⁸

Although Aristotle was not entirely blind to the fact of equality, his idea of equality arose from the nature of politics, rather than from the nature of human. Politics, being the practical art of organizing and governing a polity, deals specifically not only with the matters that are contingent but more specifically with people who are free. Since the citizens of a free society are all free, they are, in this respect, also all equal not only with respect to those who govern them. Equality is therefore only a corollary derived from the fact that “one is free who exists for one’s own sake and not for another’s”.¹²⁹ Thus

¹²⁷ Wopelfl 1981, 498.

¹²⁸ Wopelfl 1981, 498.

¹²⁹ Aristotle, *Metaphysics*, 982b 25

Aristotle for very sound reasons, could never bring himself to describe political human as better than more or less and more or less equal.¹³⁰

The credit of focusing the importance of equality of individual human person goes to the Stoics. They emphasized the moral independence and social self-sufficiency of the individual, reducing the concept of society to an arithmetical relationship of human to human each remaining in a cosmos of one's own. As a result although the individual concept got its prominence during this time, the social aspect of equality was jeopardized by throwing the individual back upon oneself.

However, first traces of the concept of social equality can only be found in the social administrative principles of Roman Empire. Rome constructed its political order based on the principles of equal rights conferred by civil law, the law of *nations* (*ius gentium*) or natural law. By perfecting the role of social institutions, Rome succeeded in developing a status of citizenship that superceded differences of race, culture and religion and reduced Greek and Gaul, Roman and German to a like condition before the law.

Modern Departures

In the modern world, the credit of initiating a new empirical approach to a science of politics, which shifted the concept of equality from the basis of law to the basis of nationality goes back to *Niccolo Machiavelli*. Machiavelli held that National loyalty or civic virtue only can provide a common base over all political and cultural factions and inequalities, which would be an emotional laden factor for all people that would permeate competing interests in order to obliterate the social, economic and political inequalities. However, *Thomas Hobbes* sees this concept of national equality over individual equality glaringly deficient and takes on himself the task of explaining why "if every human by nature seeketh one's own benefit and promotion," humans nevertheless "will not enter into the conditions of peace but upon equal terms."¹³¹ He is of the opinion that people don't chance peace unless each individual, having consented to become a member of a system of rules, is guaranteed a basic equality with every other member. Once a pattern of equality is established by rule of law, all other inequalities arising from social and economic sources become irrelevant. Thus Hobbes identifies equality with legal fairness, making justice "a certain equality, as consisting in this only; that since we are equal by nature, one should not arrogate more right to oneself than one grants to another, unless one has fairly gotten it by compact."¹³² Thus identifying justice with fairness and equality, Hobbes sets the pattern for 18th century liberalism, with its focus on equal opportunities, fair trade, fair trial, fair wages, and the equal protection of the law. He thus becomes a first to give expression to the modern concept of a classless society, the concept that was reaffirmed by John Lock and Adam Smith.¹³³

¹³⁰ Wopelfl 1981, 498.

¹³¹ Thomas Hobbes, *Leviathan*, 1.15

¹³² Thomas Hobbes, *Philosophical Rudiments Concerning Government and Society*, ch.3

¹³³ Wopelfl 1981, 498 – 499.

Jean Jacques Rousseau: The modern emphasis on social equality may be said to have received its direction from Jean Jacques Rousseau, who regarded the institution of private property as the first and chief cause of human's degeneracy from a state of pure, and hence ideal nature. While admitting that it would not be possible to efface the distinctions that society has attached to birth, wealth, position and education he nevertheless thought that it was possible to free human from the domination of a ruling class of humans if all would form an association that will defend and protect with the whole common force the person and goods of each associate, and in which each, while uniting with oneself with all, may still obey oneself alone and remain free as before.¹³⁴ One's legislator, who ought to feel oneself capable, so to speak, of changing human nature of transforming each individual into part of a greater whole was to be concerned not only with legal fairness but with the vast potentialities of human perfectibility.¹³⁵ Hence the historical significance of Rousseau emerges in his having been the first to engender a new conception of collectivity – a concept later along sociological lines envisaged by Emile Durkheim and Saint Simon for the purpose of harnessing science and industry. This ideology of equality inevitably tend to submerge the individual in the group and thereby, to sublimate the older notion of individualistic rights.¹³⁶

Marxists Views: It has to be accepted at the outset that communism is not particularly dedicated to the concept of equality. Both Marx and Engels, in tracing the modern idea of equality to the economic conditions of bourgeois society, interpreted the proletariat's unrest as nothing more than a demand for the abolition of classes. Engels indeed was insistent that "any demand for equality which goes beyond that, of necessity passes into absurdity."¹³⁷ Marx too acknowledged that even in using labour as an exclusive standard "the right of the producers is proportional to the amount of labour they contribute....The equal right is an unequal right for unequal work. Only in some higher phase of communist society, after the tyrannical subordination of the individuals according to the distribution of labour and thereby also the distinction between manual and intellectual work, have disappeared ...then and then only can the narrow bourgeois horizon of rights be left far behind and society will inscribe on its banner: from each according to one's capacity, to each according to one's need."¹³⁸ Since the rise of socialism the pressure has not been directed toward obtaining legal equality, but toward an improved social condition of the masses who as Saint Simon observed, are not intent on liberty or on a fictional equality, but only on a mitigation of their present social agony. Marxism's intent is basically therefore on the ideal of a more equitable distribution of material goods.

¹³⁴ J. J. Rousseau, *Social Contract*, 1.6

¹³⁵ Rousseau, *Social contract*, 2.7

¹³⁶ Wopelfl 1981, 499.

¹³⁷ F, Engels, *Anti –Duering* trans. By E. Burns, (New York 1939), 18

¹³⁸ Karl Marx, *Critique of the Gotha Program*, edited by C.P. Dutt, (New York, 1938), 9-10.

The concept of Equality in the history of America: The basic desire for equality that has to be found among the people of America can be summarized in the words of Charles Pinckney, “a greater equality, than is to be found among the people of any other country.”¹³⁹ Thus it is not surprising to find the notion that all humans are created equal was asserted as axiomatic in the Declaration of Independence. The then existing pattern of social set up combined with a long arduous, and often traumatic experience has brought America to the desired equality which is much aspired throughout the globe today.¹⁴⁰

In summary the whole concept of the history of equality concentrates more on the individual aspect of equality on the one hand and on the socio – political aspect of Governance of equality on the other. However, the concept of equality is more vital, and broader than what is written in the pages of above history, which has to be seen more in the philosophical perspectives and in its critical intent.

III. A Philosophical Perspective of the Concept of Equality

Politics, Society, and Nature

The political order deals with the set up of the state and its fundamental and basic constitution and, as we have seen, the Indian constitution insists on the maintenance of equality in its political set up. Is this insistence and emphasis justified by natural law?

To the greater part of today’s thinkers it would appear that the political demands of the Indian constitution on Equality is a positive fulfilment of the expectations of natural law. Nature creates every human being equal as a person to every other. As for example, for Plato nature appeared aristocratic in the distribution of her gifts and benefits. That would still appear to be the case today when the endowments of nature are considered from peculiar angles, perspectives and points of view. But there is a more universal and over all approach to the mechanisms of nature as dispositions and arrangements of the universe. Etymologically universe signifies unity in diversity and diversity in unity. As a sector of this universe nature too in all its manifestations gives and presents to our vision some basic unity notwithstanding its vast variety and diversity. The crown of this manifestation of nature is humanity. When the seeker of wisdom, the philosopher, contemplates this extraordinary manifestation of nature that is humanity in all its multidimensional form, activity, geographical pluriformity and technological advancements in a vast variety of specialization, one cannot fail to notice a common denominator running through all the gamut of differences and circumscribing them in a common identity.

¹³⁹ Charles Pinckney, *Records of the Federal convention of 1787*, ed. M. Farand, (New Haven, 1911), 1398.

¹⁴⁰ Wopelfl 1981, 499.

This common identity is the very foundation and basis of equality. Through this universal identity that constitute humanity as humanity nature is signaling to the philosophical observer that it not only intends equality that is *unidimensional* but a very rich *multidimensional* equality. Through a plan for *multidimensional* equality, nature leaving aside simple, one level, mathematics is adopting a complex pattern of multilevelled calculi. In this method of nature the universe is to be reflected as unity in diversity and diversity in unity. Every human being, therefore, – and remember that each human being is a microcosm – is something, some participation in all of humanity. Humanity is considered by nature as a multidimensional, integrated, interconnected, interrelated, interdependent whole. If nature appears to be aristocratic bestowing on Plato the idea of equalities of a noble mind Plato should not forget that before him the Pythagoreans and the Eliatics, though apparently less favoured, can now be used by him as a pedestal standing on which he appears supereminent. This illustration is meant to point out the simple truth that such aristocrats in the histories of civilization and cultures are merely standing on the shoulders of others. Had the others not gone before them, they too would have been nowhere. Natural equality therefore is intertwined with the multiple and multifaceted complementarity. Nature has made certain that her humanitarian equalizations be brought about by a lavish distribution of gifts and benefits in such a way that no individual human being turned out to be humanity. The millions of people from one point of history and Geography to all other points are all but one humanity. In sum and substance, by equality nature understands multidimensional and multifaceted complementarity.

Constitution and Complementarity

One must congratulate the makers of the Indian constitution. Putting their minds and ideas together they seem to have approached quite close to the realistic vision of the nature's project. With the few masterful strokes the equalities intended by nature had been captured and formulated in legal norms, which in a few juridical terms encapsulate a great deal. Thus nature's purposes had been suitably adapted to the political set up and civic organization of our nation. For example in abolishing untouchability the constitution is inviting the people of India to re-think their positions on Indian humanity.

For that matter of fact, the very concept of equality, envisaged in the Indian constitution intends to remove social and economic inequality and make equal opportunities available for all. It is in this direction, the framers of the Indian constitution, did strive to eradicate all existing cultural, religious, and social inequalities, providing a new normative basis for the social well-being of the people of India. They dreamt of a new cultural deconstruction and social liberation while keeping in mind the vast cultural, religious and linguistic traditions of India. Thus, while the articles 15,16,17 give equal opportunity for all its citizens irrespective of religion, race, cast, sex or place of birth, it does give a special provision for women and children. At the same time the above said articles together with schedules 5 and 6 provide a special provision for the scheduled castes and tribes keeping in mind their respective cultural differences. Articles 19 and 30 give special protection for all distinct languages, script, culture or religion, thus accepting pluriformity of the Indian social order. These and other articles (such as article 371)

intend to show that the framers of the Indian constitution were not interested in an arithmetical, social or political equality, rather they were fully aware of the complementarity of the multidimensionality of each group or community formed by nature or social order.

Blocks to Complementarity

How has it come about that the wealth of nature's project has been partly frustrated by human culture, political structure, and social prejudice? It is clear that after our half century as an independent nation much of what was desirable to the makers of our Constitution remains as unfulfilled dream. The papers are reporting everyday about outrages against dalits, women, children, and other elements in society. When one looks for an in-depth solution to this problem one discovers that the roots of the problem are really deep. Political thinkers seem to have been too one sided and narrow and also time bound in their explanations concerning the origin of the State. Modern psychoanalysts have pointed out that deep within the human psyche there are egoistic tendencies such as the pleasure principle (Freud) and the power principle (Adler) that tend to upset the universal benevolence of nature by disregarding the basic rights of the other person. Adler would seem to think that some expressions of feminism are only manifestations of the hidden working of the power principle. Cultural factors too have their role to play. And they can easily combine with one and two mentioned above. Apparently these three sets of causes either in isolation or in combination are responsible for the resistance to the progress in human relationships envisaged by the Constitution.

Remedy: Complementarity and Dialogue

Due to the radical nature of the obstacles to complementarity, no easy solution can be guaranteed to the present ailment of Indian society. Education is lacking and many of our Parliamentarians are scarcely aware of the powerful forces and the strong undercurrents that are tossing the Indian political and social scenario. Many of our political leaders seem to be motivated more by the power principle than by the welfare of the nation. And if that is the case with the leadership we must not be surprised at the injustice and wholesale neglect of human rights and especially right to equality at all levels.

The way to solve these problems appears to be long and demanding. Future politicians should be given an adequate knowledge of their roles and their missions and also some understanding of their internal mechanisms. Moreover, the universal purposes of nature and the beneficial effect of equality understood as complementarity should be explained to them. The common people need liberation from old cultural prejudices – some of which are rooted in their psychological drives. Once a certain level of education has been attained – education of the politicians, education of people, and police – the atmosphere will be clear for a more healthy, holistic and universal approach through dialogue.

This dialogue would further clarify the concrete manifestations of the factors that we have mentioned as obstacles to the implementation of the Constitution. Moreover, the dialogue would promote mutual understanding between representatives of the various public sectors that constitute our society. The results of the dialogue would in the long

run contribute to understanding and implementing the goals of the Constitution and towards preventing any amendments against the spirit of universality and equality embodied in it.

WOMEN IN THE INDIAN CONSTITUTION

Mrs. Nancy Rita D'Souza

The Constitution is the supreme law of the land. It is a document that highlights the past experiences of the nation and provides guidelines for the future. Our constitution which, is considered to be the best in the world, also deals with fundamentals of governance and reflects the dreams of the Founding Fathers of our Republic, namely – setting up of an egalitarian society based on Justice, Liberty, Equality and Fraternity.

Realizing the miserable conditions of women in Indian society and the role the Indian women had played in the freedom struggle the framers of our constitution wanted to take special care of women in the constitution of the new Republic. Pundit Nehru wanted women to be involved in the task of framing the constitution so as to enable them to get a place of equality and honor similar to that of men. Mahatma Gandhi had the similar opinion. Accordingly in the constituent Assembly that met for the first time in December 1946, there were 14 women members. These women representatives like Sarojini Naidu, Hansa Mehta, Vijayalakshmi Pundit, Lila Roy participated actively in the drafting of the clauses guaranteeing gender equality in the constitution.

So we find the acceptance of women's equality in the constitution that came into force on January 26th, 1950. While women in the west had to fight for over a century to get some of their basic rights, like the right to vote, our constitution gave women equal rights with men right from the beginning of the new constitution. The universal adult franchise granted under Art 326 brought women on equal footing with men. It enabled every adult female to function as a responsible citizen and as an individual partner in the task of building the nation.

The concern for equality and justice is very well reflected in the preamble to the constitution which categorically promises - “..... to secure to *all its citizens*

Justice – social, economic and political;

Liberty – of thought, expression, belief, faith and worship;
Equality – of status and of opportunity; and to promote among them all
Fraternity – assuring the dignity of the individual and unity and integrity of
the Nation.”

In the historic speech made by Dr. Ambedkar in the last stage of the constituent Assembly, he tried to explain the significance of liberty, equality and fraternity in the realization of social democracy. According to him liberty, equality and fraternity are not to be treated as separate items in a trinity – for they form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy. The constitutional philosophy, as contained in the preamble is given expression through various provisions of the constitution particularly in part III, dealing with the Fundamental Rights and part IV, dealing with Directive Principles of State policy.

Besides the preamble, Article 14, 15, 21 and 23 under Fundamental Rights, Article 39, 42, 44 under Directive Principles of State policy and Article 51-A (e) dealing with Fundamental Duties guarantee equality of sexes and grant special favors to women.

Art 14 states: “The state shall not deny to any person equality before the law or the equal Protection of the laws within the territory of India.” This Article upholds equality before law. But equality before law does not mean absolute equality in a mathematical sense. What the constitution means is that “among equals the law should be equal and should be equally administered and that like should be treated alike.” A woman, therefore, cannot be denied a job merely because she is a woman. But if she is rejected because of her poor performance in the written test or interview, she has no right to claim the job.

Air India Vs Nergesh Meerza case can be regarded as the most important and interesting case that was decided by the Supreme Court illustrating women’s right to equality. In this case, the airhostesses had challenged their service rules as male chauvinist and discriminatory. Regulation 46 provided that an airhostess could retire from the service upon attaining the age of 35 years or on marriage, if it takes place within 4 years of service or on first pregnancy, whichever occurs earlier. Under Regulation 47 the Managing Director had the discretion to extend the age of retirement by one year at a time beyond the age of 45 years if an airhostess is found medically fit.

The S.C. upheld the restriction on marriage in the first four years of service as there was no unreasonableness in the provision. The S.C., however, felt the condition that the services of airhostesses could be terminated on first pregnancy as the most unreasonable and arbitrary provision and hence liable to be struck down. The regulation did not prohibit marriage after 4 years and if an airhostess after having fulfilled the first condition becomes pregnant, there is no reason why pregnancy should stand in the way of her continuing in service. The court held that the termination of service on pregnancy was not only unreasonable and arbitrary but contain the quality of unfairness and exhibit naked despotism and was, therefore, clearly violative of Article 14 of the Constitution. Such a despotic condition may compel the poor airhostess not to have any children and thus

interfere with the ordinary human nature. The S.C. considered this regulation as very cruel and an open insult to Indian womanhood – the most sacrosanct and cherished institution.

The provision for extension or service of airhostess “at the option” of the Managing Director was also considered to be unconstitutional for the extension of the retirement was entirely at the mercy and sweet will of the Managing Director. It is discriminatory for he may favour one airhostess and not favour another. So the conferment of such uncontrolled power on the Managing Director was violative of Art 14 and hence liable to be struck down.

In Art.15, the Constitution refers to a woman as an equal citizen and prohibits any form of discrimination on ground of religion, race, caste, sex or place of birth. Article 15 (1) states that “The state shall not discriminate against any citizen on ground only of religion, race, caste, sex, place of birth or any of them.” The Article 15 (2) states that “No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition, with regard to – (a) access to shops, public restaurants, hotels and places of Public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resorts maintained wholly or partly out of state funds or dedicated to those of the general public.

So Article 15(1) and 15(2) further reiterate the right to equality granted under Art, 14 of an Constitution. However an exception to the above general principle is offered by Art.15(3) which authorizes the State to make ‘special provision for women and children’. Through this Art.15(3), the Constitution empowers the state to adopt measures of positive discrimination in favor of women so as to neutralize the socio-economic, educational, political disadvantages faced by them. Since this is a special provision, it has to prevail if there is any conflict between it and the general provision in Art.14. So if under Art.42, women workers to this effect is passed, it will not infringe Art 15(1). Again it would not be violation of Art15 if educational institutions are established by the State exclusively for women. The reservation of seats for women in colleges do not go against Art 15(1) and so also 33% reservation of seats for women in local bodies. Similarly the provision of separate accommodation, entrance etc for women and children at places of public resorts will not be a violation of Art 15(2) of the Constitution.

The following case involving adultery (Abdul Aziz V. State of Bombay) can illustrate how the laws favouring women will be valid, though it may be discriminatory against men. Abdul Aziz was charged with adultery under section 497 of Indian Penal Code, which only punishes man for adultery and exempts the women from punishment even though she may be equally guilty as an abettor.

Abdul Aziz argued that this was discrimination on the ground only of sex and thus violative of Art 15(1). The Supreme Court rejected the argument, pointing out that under Art 15(3) the government could make special provision for women. It also stated that the discrimination in favour of women was deliberative in view of the social position of

women in our society. Thus, special provisions of law favouring women can be passed by the government but it cannot discriminate against women.

Article 16 relates to equality of opportunity in matters of public employment. Art. 16(1) and 16(2) lay down the general rule that no citizen can be discriminated against or be ineligible for any employment or office under State on ground only of religion, race, caste, sex, descent, place of birth or any of them. But this Article does not prevent the State from prescribing the necessary qualifications and selective tests for government services.

C.B.Muthamma V. Union of India was a clear case of discrimination against women in government employment. C.B. Muthamma challenged the provision in service rules requiring a female employee to obtain the permission of government in writing before her marriage is solemnized and denying right to be appointed on the ground that the candidate is a married woman. Muthamma was denied promotion to grade I of the Indian Foreign Service only on this ground. The Supreme Court in its judgment called upon the government to overhaul the service rules to remove the stain of sex discrimination and added that in these days of nuclear families, marriages affected the efficiency of males and females alike and hence the rule was nothing but a hangover of masculine culture of handcuffing the weaker sex. However the court also stressed another important point – namely men and women cannot be treated equally in all occupations and situations. A particular job may require a particular sex and hence the rule of equality cannot be enforced blindly.

Article 21 deals with protection of Life and Personal Liberty. The Art 21 states that “No person shall be deprived of life or personal liberty except according to procedure established by law.”

In a landmark judgment in a rape sex Bodhisatwa Gautama V. Subrachakraborty, Justice Sagher Ahrnad refers to the pitiable condition of women in our society who inspite of her “equal status” under the constitution becomes the victim of tyranny at the hands of men. He further remarks that women also have the right to life and liberty. Their honor and dignity cannot be touched. They also have the right to lead a honorable and peaceful life. Rape therefore is a crime against basic human right and is also violative of the victim’s most cherished right, namely, the right to life contained in Article 21.

In Vishaka (a non-governmental organization working for gender equality) V. State of Rajasthan, the Supreme Court laid down exhaustive guidelines to prevent sexual harassment of working women in places of their work until legislation is enacted for the purpose.

In Apparel Export Promotion Council V. A.K.Chopra, the Supreme Court of the first time applied the above laws and upheld the dismissal from service of a superior officer, who was found guilty of sexual harassment of a subordinate female employee at the place of work.

Article 23 of the Con. deals with right against exploitation. Article 2(1) states that “Traffic in human beings and beggar and other similar forms of forced labor are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.” This Article prohibits buying and selling of men and women as goods and also use of women and children for immoral purpose.

Part IV of Indian Constitution deals with “Directive principles of State policy”. These Directive principles guide the path which will lead the people of India to achieve the noble ideals which the preamble of the Constitution proclaims. They also set out the aims and objectives to be taken by the State in the governance of the country for realizing the goals of a welfare state. Some of these Directive principles deal with women.

The first such Article is Article 39 which states that the State shall, in particular, direct its policy towards securing –

that the citizen, men and women equally, have the right to an adequate means of livelihood

that there is equal pay for equal work for both men and women

that the health and strength of workers, men and women, and the tender age of children are not abused and the citizen are not forced by economic necessity to enter vocations unsuited to their age and strength.

According to Article 42, the State shall make provision for securing just and human condition for work and for maternity relief.

Article 44 deals with the uniform civil code for the citizen. It says “The State shall endeavour to secure for the citizen a uniform civil code throughout the territory of India.” The primary aim of this Article is to introduce uniform personal law for the purpose of national consolidation. It was felt that in a civilized society there is no need to connect religion with personal law. Yet the fear of losing Muslim votes or of violence, the Directive to frame a uniform civil code for the whole of India has not yet borne fruit. The absence of a uniform civil code continues to be the great hurdle in improving the status of women in our society.

The 42nd Amendment added part IV(A) to our Constitution . It dealt with Fundamental duties. This part has only one Article namely 51(A). One of the subclasses 51(A) (e) says, “It shall be the duty of every citizen of India to promote harmony and spirit of common brotherhood amongst all the people of India transcending religions linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women.”

Thus, an analysis of the relevant Article under our Constitution makes it clear that women in India have Equal rights with men. As women have been considered ‘deprived’, certain special provisions have also been made to provide protection to them. Various legislative measures have been taken by the state to ensure equal rights and to counter social discrimination and various forms of violence especially to working women. Amendments have been periodically carried out to keep pace with the changing demands. But the very Constitution that provides equality for women through various Article of the

Constitution also has Articles that deprive women of her right to equality. For instance, part III and IV dealing with Fundamental Rights and Directive Principles do consider women as equal citizen and go out of the way to provide 'special Rights' to them. Yet these very parts also contain Articles dealing with other categories of Rights such as Right to Freedom of Religion as embodied in Article 25 to 28. These rights have been interpreted by the State and Legislature in the form of personal laws and these personal laws fundamentally deny equality to women in almost all basic aspects of her life. In all personal laws there are certain common features which perpetuate inequality between women and men. For instance,

Under all personal laws it is the man who is the head of the family in all circumstances.

The line of succession is through the male line

The woman, normally, has to live wherever the man decides after marriage

The right to divorce is far more lenient with man than with woman, e.g.: Christian men have to establish one ground, i.e., adultery to secure a divorce but a Christian woman has to establish two grounds namely adultery plus cruelty or desertion

The natural guardian of the children under all personal law is the father even though the mother gives birth to the child and looks after the infant.

Women do not get equal right to property.

These instances show how women face discrimination and oppression in these personal laws based on religion. No religion tolerates any modification in the personal laws. When Supreme Court in 1985 ruled out that even the Muslim women, if divorced, will be entitled to maintenance from her previous husband until she remarries. The Mullahs and political exploiters of religion raised a storm that the judgment poses danger to Islam and amounts to interference in Muslim's cultural way of life. When Hindu code Bill was presented in the parliament in the mid fifties, the interpreters of Hindu scriptures raised hue and cry that if passed it would endanger the Hindu cultural and religious system. So also was the response of Christians in Kerala, when the bill for giving equal property rights to Christian daughters with sons, was introduced.

So the only way to overcome this type of inequality between sexes is through the passage of uniform civil code. In 1954, when there was pressure on Pundit Nehru, the then Prime Minister of India, to move the uniform civil code, he tried to avoid that saying 'I do not think that at the present moment the time is ripe in India for me to try to push it through.' Looking at the present situation there is a fear "that time may never come at all" and the sorry state of women may continue for ever.

Similarly the economic assumption embodied in the Constitution, as formulated in Article 23 dealing with Right Against Exploitation, does not consider the day today immense surplus labour of women witnessed in every family as exploitation. Ironically the ever toiling Indian woman has been described as 'dependent' and her work at home is considered 'unproductive' and 'value-less'. So if there is genuine concern for women, then, the woman's labour in house and her role in sustaining the family will have to be recognized. She should be given equal property right so as to make her economically independent. Otherwise Right Against Exploitation may remain idle, only on paper.

Even with regard to Article 39 dealing with equal pay for equal work, no serious laws have been made to put this Right in force. May be in organized labour, which is around 6%, we find equal pay for equal work. What about the remaining 94% that belong to unorganized sector? Can we think of equal pay for equal work even in these private sectors? Then what is the use of this right for a lay woman?

In addition to right to vote, through 73rd and 74th Amendment of the Constitution, women have got 33% reservation in Panchayats and municipalities. But due to illiteracy and social back-ground, women have not been very effective and vocal. Women sarpanchas are mere dummies or rubber stamps of their husbands or sons who go with them to attend official meetings.

There are very few courageous women who have fought against the atrocities committed against them. Ms. Bajaj, an I.A.S. officer had the courage to pull Mr. K.P.S. Gill, former Director General of Punjab Police, to the court who misbehaved with her at a dinner party and got justice. But for majority of Indian women, Article 21 dealing with personal liberty is of no use. They have neither 'social' nor 'moral' courage to fight for justice even if they become the victims of worst atrocities like rape.

The conclusion is that despite a number of constitutional guarantees and enactment of various laws, the status of woman in India still remains unequal. Her role as a house-keeper and rearer of children and that of playing the second fiddle to man has remained unchanged. There may be women here and there fully empowered. But as late Prime Minister, Smt. Indira Gandhi has said 'If a handful of women go forward, become ministers or judges, you should not think that women's status has gone up.' Many of the rights and privileges have benefited only those women who have knowledge and means to get the remedy. It has, instead of bringing about equality of sexes, brought about inequality among women themselves.

Thus the constitutional provisions and laws alone may not be able to bring the social change. What we need is total transformation of man's mind and drastic change in the outlook of society towards women. Only then emancipation of women is possible. The judiciary as well the law-enforcing machinery should be more vigilant. Above all education, especially at the grass root level, is the surer means of obtaining the desired results. Men must be made to see that this world is not their exclusive possession – it belongs to both sexes. So for better society, men and women must come to a compromise. Equal rights can be ensured only when men and women have attained the same level of consciousness and only then the constitutional goal of equal society as envisaged by the Preamble can be fully realized.

FREEDOM OF THE MEDIA: A FAIR BALANCE?

Ms. Shashikala Gurpur-Murphy

“The media in many countries have ceased to be a market place of ideas, they do not reflect diversity and plurality, and ultimately undermine democracy.” Presenting the interface of the media and empire in these words, Kunda Dixit¹⁴¹ further notes that the resistance to global television’s secular valuelessness, unbridled consumerism or moral ambiguity has emerged from conservative guardians of society’s morals. Those who act as watch dogs, such as the policy makers or the court or the civil society groups in their attempt to encourage the media as the forum for debate in public sphere, battle against the ‘state and the United States’¹⁴². Against this, one could locate the media in the wired global community, in the technocratic information age and with the demanding reality of a pluralistic society. To start with, a conceptualisation of the terms ‘freedom’ and ‘the media’ is required: ‘Freedom’ means absence of control where ‘control’ is internal and external. The former is in the realm of ethics and the latter could solely be from legal mechanisms or the regulatory mechanisms combining the two ideas of interference and restriction. Here the freedom suggests the right to print, publish or broadcast without any interference from the state or any public authority except as authorised by the Constitution.¹⁴³ ‘The Media’ in today’s world have moved beyond the press to include print media such as pamphlet, newspapers as well as the electronic media comprising the broadcast media of television and radio, new media of internet.

Freedom of the Media as a Right

Freedom as a fundamental right is in keeping with individual liberty, socio-economic equality and social justice. Freedom of the media does not suggest a license to publish whatever one wants. As an institution, the media has no constitutional or legal privilege. Its freedom is nothing more than the freedom of expression of every citizen guaranteed by the Constitution.¹⁴⁴ As a fundamental right, it is the entitlement of the individual and is justiciable against the state. One can question its violation through writs, and enforce. The Supreme Court has placed the citizen’s right to get information and right to know, above the access monopoly by the media.¹⁴⁵ It implied and included in ‘expression’ not explicit. The perimeters of its operation are the restrictions.

¹⁴¹. Kunda Dixit, *Global Media and Empire, 2 Development Dialogue* (1998), 39-48.

¹⁴². Op.cit. 44.

¹⁴³. Sita Bhatia, *Freedom of Press: Politico-legal Aspects of Press Legislations in India* (1997), 21-22.

¹⁴⁴. Sharma V.Srikrishna, AIR 1959 SC 395 para 13.

¹⁴⁵. Director J&B V.CAB, 1995, *Infra*.

It is needed and significant as the record of ideas in a permanent form, circulation and publication, potential of reaching masses, expression and its ability to render endurance to democracy, act as watchdog-agenda-setter and gate-keeper, strengthen articulation and guidance of public opinion. Further, it provides for free debate, free exchange of ideas, leading emergence of truth and facilitating the unhampered flow of and interplay of competing ideas. Furthermore, as great interpreters between the government and people, the media are far more powerful than one can imagine. Freedom of access to information, publication, and circulation are the essential elements in the media. The diverse information is essential to welfare of public, foundation of free government, and its purpose is to guarantee that public authorities are prevented from assuming 'the guardianship of the public mind.'

Freedom of the media is saddled with accountability and responsibility. For it is not absolute right, but is restricted for social benefit. Yet it is not fully restricted but reasonably restricted. The reasonableness is a temporal issue to be determined by the courts of the times when the challenge is posed. This envisages media as 'free but not independent,' also highlights the constraints internal to the press.

If it is true that human progress is impossible without freedom, then it is no less true that ordinary human progress is impossible without a measure of regulation or discipline. Indeed one might say that restrictions are essential to the preservation of freedom itself, and what makes freedom usable as a factor of progress is the existence of essential compensatory limitations¹⁴⁶. The value of one's freedom is connected to that of others and determined by the ends it serves, i.e., the common good, and the social good. It has to be harmonised with duties and responsibilities towards society, thus arbitrary and excessive restrictions, mocking at freedom are prohibited.

Constitutional Guarantee

In India, freedom of the press is not distinctly or specifically provided for in the Constitution¹⁴⁷. Our Constitution as such is a successful synthesis of freedom and social justice. The freedom of the press received the constitutional status of fundamental right by judicial interpretation. Art.19¹⁴⁸ provides for the freedom of speech and expression as one of the six fundamental freedoms. The others are of assembly, to form associations, of movement, to reside and settle, freedom of profession, occupation, trade or business. The freedom of expression connotes free propagation of ideas, which is secured by freedom of circulation. It does not limit itself to propagation of one's views only but also the right to propagate or publish the views of other people. Judicial interpretation of this freedom

¹⁴⁶ Mons Lopez Report, ECOSOC, UN, the First Press Commission Report, Part I, 358(6).

¹⁴⁷ Soli J. Sorabjee, *Press Freedom in India: Problems, Perils and Paradoxes* (2000), Vol.27, NO.3, 144-149.

¹⁴⁸ Art. 19.(1): All citizens shall have the right (a) to freedom of speech and expression,.... (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the Exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality in relation to contempt of court, defamation or incitement to an offence.

is commendable as it reflects the temperament of tolerance. Media professionals have a lesson, to abstain from claiming the monopoly of truth, to uphold the moral and legal obligation to desist from incitement to communal or caste violence or hate speech dissemination. This could subvert democracy.

Further, absence of dissenting views (in Eduard Said's View, 'an intellectual as a constant dissident'), non-conformity could reflect intellectual malaise. So the acceptance of the dissenter and such tolerance of dissent is very important which could weaken a bias against receiving new ideas, to break the status quo, to strengthen a large and complex societies having people with diverse beliefs and interest than to facilitate an overly homogenised society. In a fine judgement, the Supreme Court upheld the claim made by three students of Jehovah's Witness faith¹⁴⁹ that they were forbidden by their religious beliefs to sing the national anthem of any country. They were expelled by the educational authorities although they respectfully stood up in silence. The court held that the expulsion was violative of their fundamental right of freedom of expression which also includes the freedom of silence. Further the principle was reiterated while lifting the ban on the screening of a Tamil movie *Ore oru Gramatile* on the basis that it might stir up anti-reservation violence. It was stated, 'freedom of expression cannot be suppressed on account of threats of demonstration and processions or threats of violence... it cannot be held to ransom by an intolerant group of people'¹⁵⁰.

The purposes of the freedom of the media as watchdogs and agenda setters have been identified as attainment of self-fulfilment, discovery of truth, participation in decision-making, and as a mechanism to strike a reasonable balance between stability and social change. For this purpose, the freedom of the media has been hailed as the cornerstone of democracy. The right to know and right to privacy is not specifically provided for in the Constitution. The right to know or the right to information was elaborated in the SP Gupta case in 1981, whereby the access of the press to information was recognised as part of its constitutionally guaranteed freedom. Here, the justification was to enable citizens to make intelligent and informed decisions and choice to participate in the government to enforce accountability on the part of the power holders.

However, as the attempt to control human's limitable desires and to reconcile it with those of other individuals in a civil society, the state is given the power to impose reasonable restrictions¹⁵¹. These restrictions should be imposed by law and in the larger interest of community. The restrictions should not be arbitrary or excessive than required. Intelligent care and deliberation dictated by reason must dictate such move. Thus a fair balance is expected to be struck between the right and restriction, social control for public interests. It is the court which determines if the restrictions is reasonable or not. Further,

¹⁴⁹. Bijoe Emmanuel v. State of Kerala (1989).

¹⁵⁰. Soli Sorabji, supra; recall the Shiv Sena led demonstrations against the screening of 'Fire' and filming of 'Water' by Deepa Mehta. It is timely to register that freedom of expression of this kind meant to document the gender-biased atrocities of tradition should not be sacrificed at the altar of tranquility. Such intolerance should firmly be dealt with as the law and order problem.

¹⁵¹. As under Art.19 (2), these qualifiers include security of the state, friendly relations with foreign states, public order, decency or morality, contempt of court, defamation, incitement to an offence, sovereignty and integrity of India.

there is no definite test to adjust such cases, so each case requires to be judged on its own merit. Criteria such as the nature of the right, the purpose of restriction, the extent and urgency of the evil sought to be suppressed, the proportion of imposition are to be considered. Judges are expected to be free of bias, social philosophy and values and to exercise self reflection and sense of responsibility. Thus it is ensured to be objective¹⁵². Therefore, curtailment of circulation¹⁵³ by levy of taxes¹⁵⁴ or singling out press for penalisation¹⁵⁵ or requiring them to reduce pages or raise prices¹⁵⁶ or to demolish building with an intention to stop the business of a newspaper¹⁵⁷ are held unconstitutional. Thus, freedom of the media, is based on and inclusive of peoples' right to know and it is not above or different from citizen's freedom of speech and expression.

In *Prabhu Dutt's* case of 1986, it was held that the right to know news and information regarding administration of the government is contained in the freedom of press although it is not absolute. The court directed the Superintendent of Tihar jail to let the Hindustan Times' reporter to interview Billa and Ranga, the two convicts on a death row. However, the clarity came in 1990 in *Charita's* case, where the court granted permission subject to relevant rules and Regulations as in the Jain Manual.

The *Manubhai D. Shah* case (1992), representing the CERC, Ahmedabad, combines two demands of directing the LIC magazine to publish the rejoinder in its issue of Yogakshema and the Doordarshan to telecast the award-winning documentary film of Bhopal gas disaster titled 'beyond Genocide.' The court held that in both cases, the prior restraints did not fit with either any grounds under art. 19(2) or the cinematograph Act, 1952. Further, prior-restraint is adjudged justified only for protection of the society from ill effects and not otherwise.

Another dimension to the freedom of speech and expression was added by the Supreme Court in 1995 with the judgement in *Ministry of I&B vs. Cricket Association of West Bengal*. The Supreme Court held that the government has no monopoly of electronic media. As air ways are public property, they must be used for public good and be under the control and regulate it. Thus the right of the viewer or consumer was considered as pivotal.

An obvious clash of interest between the media and the state or the citizens is seen in the area of defamation and obscenity. A host of cases exist which show how freedom to express is no license¹⁵⁸. However, the conceptual overlapping of defamation and right to

¹⁵². See D.D. Basu, *Constitutional Law of India*, 7th Edition (Prentice –Hall, 1998), 39-52, for exclusive reflections on the freedom of the press; also see J.N. Pandey, *Constitutional Law of India* (Allahabad: Central Law Agency, 2001), 154-176, for a mix of cases relating to electronic media and communications.

¹⁵³. Sakal papers case, 1962.

¹⁵⁴. Express Newspapers, 1958.

¹⁵⁵. Benett Coleman, 1973.

¹⁵⁶. Ibid.

¹⁵⁷. Express Newspapers, 1986.

¹⁵⁸. Film censorship is upheld in K. A. Abas case in 1971, justifying the censorship as reasonable restriction and the categorisation of A and U certificates. Further, the powers and verdict of Censor Board

privacy of the people holding public office has resulted in confusion¹⁵⁹. Another such area is the contempt of court which thwarts even genuine critical comments on the judiciary, particularly in view of the recent engagement of some its members in corruption, politicisation, and even with the underworld.

Such delicate nature of the freedom of the media was revealed during emergency, India's mini-dictatorship. During that period, press-censorship was imposed and appeal to court of law was denied. Yet the history showed the gross price that was extracted for riding on such a valuable freedom.

On the moral realm, the media professionals are reminded by the norm to avoid the 'seven deadly sins' identified by the Editor's Guild of India in 1986. Among others, these include yellow journalism, scandalising or character assassination, invasion of privacy, sensationalism, lack of objectivity, selectivity and arrogance of power, failure to follow-up stories, falling into stereotypes of labeling groups or communities in offensive manner, denial of legitimate correction or reply and so on.¹⁶⁰ Every consumer of the current media would see the paucity of rural stories, development-related or human rights-connected material. The Urban middle class is appeased and so is the bias of the personnel. There is near total absence of advocacy for social change or good governance.

Conclusion: Freedom as Necessity and Responsibility

The freedom with restrictions looks inconsistent and contradictory with the value of freedom as positive restriction as negative. Still this cannot be rejected as societies need them to govern themselves, so they use them. Such freedom is vital to develop free conscience and self-fulfilment, academic inquiry and artistic expression and required to ensure people's participation in democratic decision making.¹⁶¹

As noted, 'it is the eternal problem of striking the right balance...of how competing interests can be accommodated in ways that afford some measure of protection to each¹⁶².' Given the over-dependence on advertising and the state as the major contributor to it, it is difficult for the media to solely crusade for the public interest. This freedom, however, is basic to democracy and is based on the rule of law. Yet it is not just

Tribunal granting the 'A' certificate were validated in the recent 'Bandit Queen' (Bobby Art International V.Ompal Singh Hoon) case (1996).

¹⁵⁹. PUCL v UOI (1997), where the incidents of telephone tapping were declared to be invasion of right to privacy and violation of Art .19(1) (a). Further in R.Rajagopal v. State of T.N, it was held that the government cannot impose a prior restraint upon the publication of defamatory material against its officials. The case involved Nakeeran magazine which was stopped from publishing the biography of auto Shanker, a noted serial murderer and rapist exposing his links with several bureaucrats.

¹⁶⁰. B.G.Verghese, "Freedom of Expression" in Asad Latif, ed. (1998), 31-49; see also "Walking the Tightrope: Press Freedom and Professional Standards in Asia," 38; pointing to lack of gender equity, he asks if pornography be considered as part of the freedom of expression. He shows how mega gatekeepers have emerged with the new technology and how war on terrorism or environmental security or conflict resolution require the media to play a most important role in promoting understanding and peace.

¹⁶¹. Monroe E.Price & Stefaan G.Verhulst (eds), Broadcasting Reform in India: Media Law from a Global Perspective (Oxford: 1998), 63.

¹⁶². Soli Sorabji, 146.

about knowledge as inquisitiveness, it is rather about efficient and transparent, accountable governance and utmost protection to human rights of the marginalized. It is a fine balance between watchfulness and rapidity.

Self-discipline as the need to look inward through a code of ethics is urged taking care of the needs such as protecting identity of source, objectivity, non-judgmental approach, freebies to be avoided, fair space to all points of view, avoidance of any bias – communal racial, sexual or regional in stories, need to legalise ombudsman to look into complaints or ethical misconduct, such as a retired judge or senior media person. Audio-visual media need greater scrutiny, programmes with sex or violence to be categorised, warning to be beamed, programme affecting child's healthy growth to be pushed later at night, separate channel if possible and advanced TV sets with channel locks. In a wired society it would continue to influence behaviour. There is dire need to study and monitor influence and raise ethical barrier, as liberalisation, nuclear families working couple, increase in permissiveness cannot be contained solely through media regulation although the media could help readjust the balance. Vigilant society and sensitive media need to work hand in hand. It should indeed be a fair balance of competing interests and claims.

CONVERSION AND THE CONSTITUTION OF INDIA

Dr. Antony Mookenthottam

In the context of the attacks on Christians, Christian Institutions and missionaries – under the pretext that they were converting tribals and Hindus to Christianity – the Prime Minister Atal Behari Vajpayee called for a national debate on conversions. In this context it is good that we understand what conversion means. This article seeks to present the meaning of conversion, the religious background of conversions, the religious background of the Indian constitution, the text of the constitution and its meaning from a philosophical perspective.

1. Meaning of Conversion

The noun ‘conversion’ is derived from the Latin verb *convertere* meaning to turn round. The noun form: *conversio*, *conversionem* means the action of turning round or revolving, rotation. From this original sense, it came to mean the action of turning to a particular direction, of directing one’s mind, actions etc. to the same object. Bringing anyone over to a specified faith, profession or party is also called conversion.¹⁶³

Conversion in a very general sense means simply a change or transformation of a person’s manner of thinking or acting in reference to any given person, place or thing. Thus one can be converted to any ideology or system like Marxism, conservatism or any other areas of human interest like modern art. It may imply a prior attitude of opposition, hostility, or indifference. According to Christian theology, conversion means a spiritual transformation in reference to God.¹⁶⁴

Conversion from one belief to another form, one system to another is not a recent phenomenon. It is as ancient as humanity itself. The religious teachers of Greece initiated movements of conversions from polytheism to monotheism. It had its saints and martyrs. Graeco-Roman philosophy had become evangelical, and sent out number of preachers to make people converted to a nobler and purer ideal.¹⁶⁵ Such movements of conversions were not restricted to Greece or Rome.

2. Indian Religious Background

¹⁶³ See *The Oxford English Dictionary*, Vol. II (Oxford: Clarendon Press, 1978).

¹⁶⁴ *New Catholic Encyclopaedia*, Vol. IV (Washington: The Catholic University of America, 1981).

¹⁶⁵ *Encyclopaedia of Religion and Ethics*, Ed., James Hastings, Vol. IV (Edinburg: T. & T. Clark, 1974).

All Indian religions too practised conversions. For instance, Jainism is a non-brahmanic religion older than Buddhism.¹⁶⁶ It may be considered as a non-Aryan proto-Indian religion even though the known historical founder is a Kshatriya because its tenets are quite different from brahmanic religions. It promotes ahimsa, non-violence. Jainism bears witness to the number of conversions it had made. Jaina tradition proudly holds that the king Chandragupta was a convert to Jainism, left the throne, came to Sravanabelagola, lived as an ascetic and finally embraced death by starvation.¹⁶⁷ King Samprati, the grand son of Asoka, became a Jaina, induced his vassals to embrace Jainism and sent Jaina missionaries to the south.¹⁶⁸ These are only few instances among many.¹⁶⁹ Other Indian religions were no exception.

Buddhism is a professedly missionary religion. It is non-violent. It sent out missionaries not only to various parts of India but also to Tibet, China, Sri Lanka and many other countries and converted entire nations to Buddhism.¹⁷⁰ Even today, genuine Buddhists are earnest in propagating their religion.¹⁷¹ Buddhism in no way pretends that it does not make converts.

Hinduism, on the contrary, pretends that it does not make converts. In practice, it denies what it preaches. Hinduism began sending missionaries to the East Asian countries, even to the Far East probably from the 5th B.C. or even earlier. It continues to send missionaries all over the world, though not in a very organized way, since the last century. Radhakrishnan and Vivekananda have made very subtle intellectual onslaught on all the religious traditions of the world.¹⁷² Though there were instances of intolerance, on the whole, the Vedic religion and Hinduism fostered religious freedom and tolerance:

The ancient Indian polity never needed this confrontational experience with the philosophies of 'secularism' and "liberty for fostering religious freedom. Absence in the Vedas of a proper noun for religion (in the sense of the religion) is not a case of imperfection but an indication of the singularity and universality of religion, conceptually and factually. Religious and cultural rights were just inextricably inter- woven in the very fabric of the civil life of the ancient Indians. Religious freedom was an integral item of social life of man, the most important part..."¹⁷³

¹⁶⁶ Antony Mookenthottam, *Towards a Theology in the Indian context* (Bangalore: ATC, 1980), 69-70.

¹⁶⁷ Mohan Lal Mehta, *Jaina Culture* (Varanasi: P.V. Research Institute, Jainashram, 1969), 16-20.

¹⁶⁸ Ibid.

¹⁶⁹ Chimanlal J. Shah, *Jainism in North India, 800 B.C. – A.D. 526* (New Delhi: A Sagar Book House, 1989).

¹⁷⁰ Kenneth J. Saunders, *Epochs in Buddhist History* (Buddhism in India, Nepal, Tibet, Ceylon, Burma, Siam, China, Japan and Korea, New Delhi, Aryan Book International, 1996).

¹⁷¹ In the early 1970 's while doing research in the British Museum library, one of the workers in the library, a Buddhist himself, tried to persuade me to become a Buddhist. I appreciated his earnestness and faith in Buddhism.

¹⁷² For more details see Antony Mookenthottam, "Hindu Missionary History and Methods", in *Jeevadhara*, Vol. XXVI, No.155, Sept. 1996, 392-403; "Hindu Missionaries and Conversion", in *Jnanadeepa*, Vol. 3, No.1 (January 2000), 65-73.

¹⁷³ V.P. Bharatiya, *Religion State Relationship and Constitutional Rights in India* (New Delhi: Deep & Deep Publications, 1987), 11.

What Bharathiya says about the Indianization of conquerors and settlers like the Greeks, the Parthians and others are worth noting.¹⁷⁴ It gives us also an insight into why Christianity and Islam appear as foreign to some Indians. There is no doubt that Hinduism also converts while accepting the notion of religious freedom. That is also one reason why there are no Greeks or Parthians in India today. Both Christianity and Islam acknowledge that they are missionary religions; they do evangelize.

Certain conclusions seem to be evident. All major religious traditions of the world preach and convert. If they pretend that they do not, it is either due to ignorance of the nature of the human person and religion or due to hypocrisy. The same is true of philosophies, ideologies and even of political parties. So it is good to probe into the fundamental reasons for conversion.

3. The Why of Conversions

It seems to me that the basic reason for conversion is a desire or a tendency for growth, truth and personal development inherent in human nature. Here my concern is only with genuine conversions, no matter, to whichever religious tradition the convert may belong to. Conversion from one political party to another for ulterior motives and political games are not our concern. They might deserve outright condemnation, as they are defections, a sign of perversion and corruption.

The convert belonged to one religious tradition or the other. He or she is struck by some religious ideal, experience or truth propagated by another religion. The person is struck and seized by it and turns to that religion which propagates it. Sometimes it is the witness and life of a person following a particular religious faith that strikes the convert. The life witness of Gandhiji, Hindu mystics like Ramana Maharshi, Islamic and Christian saints made very deep impression on both the educated and uneducated masses. Life and example have a powerful influence on every person. So conversion as a result of the innate human tendency for growth, truth and progress may be gathered from what Swami Agnivesh writes:

A long time after the sensational element in this event [the massacre of Dr. Graham Staines and his two little sons in Monoharpur] subside, we shall continue to be challenged by Mrs. Gladys Staines spiritual stature as revealed through her response. Though wounded in her soul by the barbarity inflicted on her dear husband and darling children, she refused to allow her mind to be tainted by hate. She was quick to forgive her husbands' killers. Her prayer was that the love of God which inspired her husband may touch their hearts also. She had the spiritual magnanimity to recognize that those who become mad with hate are also children of God, and that they too deserve forgiveness. Her 13-year-old daughter, Esther, thanked God for her father's love for the people he treated – people afflicted with leprosy – and for finding him worthy to die for Christ. Can responses such as these fail to melt even the most hardened hearts.¹⁷⁵

¹⁷⁴ Ibid., 12.

¹⁷⁵ Swami Agnivesh, "Hailing the Spirit of Gladys Staines", in *The Times of India* (Bangalore: February 4, 1999), 12.

Conversions are the results of hearts melted by the example of love and forgiveness. It need not necessarily mean change of religion.

We have seen the religious background of conversions. Now we shall turn our attention to the political situations that led to the formation of the Indian constitution.

4. Political Background

The Constitution of the Republic of India is the result of a process of historical evolution.¹⁷⁶ The government of India Act of 1858 brought India under the direct rule of the British government assuming the sovereignty of India from the East India Company. It was an absolute imperial control without the participation of the people. The administration of the country was unitary and rigidly centralized. There was no separation between civil and military, executive and legislative in the Governor General's Council. The Governor General was all in all in India responsible only to the Secretary of state of the British Government.

The Indian Council's Act of 1861, introduced a few non-official members in the Governor General's Executive council so far composed exclusively of officials while transacting legislative affairs as a legislative council.

The Indian National Congress was founded in 1885. It was fully loyal to the British throne. It became an annual assembly of English speaking protestors. Finally by the turn of the century, it became a nationalist organization. It may be recalled here that the English education promoted by the missionaries and the Government contributed to this development. Moreover, through this education, the educated Indians came into contact with Christians and liberal values which certainly influenced the freedom struggle as well as the formation of the Constitution of India. Rarely is attention paid to this aspect.¹⁷⁷ The Indian Councils' Act of 1892 gave greater participation.

The guaranteed constitutional rights became a vision and programme of the Indian National Congress. The home rule bill of Annie Beasant (1895), the first 'constitution of India Bill,' had envisaged for India a constitution guaranteeing to every citizen the right to free speech, equality, liberty and property.¹⁷⁸ The trend of introducing popular representation was continued by Morely-Minto Reforms and the Indian Councils Act of 1909, Montague-Chelmsford Report and the Government of India Act of 1919, Sir John Simon Report of 1930 and the Government of India Act of 1935.¹⁷⁹ This last mentioned

¹⁷⁶ . For this section, I am dependent on Durga Das Basu, *Introduction to the Constitution of India* (New Delhi: Prentice-Hall of India, 1998), 3-30, as it is a brief exposition.

¹⁷⁷ . For various aspects of Education in India refer, John Desrochers, *Education for Social Change* (Bangalore: Center For Social Action, 1985); Lourenco C. Torcate, *Education Its History And Philosophy* (Bangalore: Jack Printers, 1970), 169-194.

¹⁷⁸ Bharatiya, 65.

¹⁷⁹ Basu, 8-9

Act awarded separate representation for the Sikhs, the Europeans, Indian Christians and Anglo-Indians creating an obstacle to national unity.¹⁸⁰

In 1935, the National Congress made a demand for a Constitution of India. In 1938, Pandit Nehru demanded the establishment of a constituent assembly. In 1942, the Cripps mission proposed the establishment of a Constituent Assembly. Both the congress and the Muslim league participated in the elections in 1946 for a Constituent Assembly. But the Muslim League members refused to attend when the Constituent Assembly met on December 9, 1946. Lord Mountbatten was sent as Governor General. The Mountbatten plan of 3rd June 1947 resulted in the division of the country into India and Pakistan. A separate Constitutional Assembly was set up for Pakistan on July 26th, 1947.¹⁸¹

The Constitution Assembly of India, which first met on December 9, 1946, reassembled on August 14, 1947 as the sovereign Constituent Assembly for the dominion of India. The Constituent Assembly drafted the constitution, completed the third reading on November 26, 1949, on which date the Constitution received the signature of the President of the Assembly and was declared passed. Certain provisions regarding citizenship, election etc, were given immediate effect, while the rest of the Constitution came into force on January 26, 1950, referred to as the date of the commencement.¹⁸²

The evolution towards a Constitution of India was a progressive one. At first, the Indian nationalists including Mahatma Gandhi did not think of total independence from the British. The only exemption might have been Brahmabandhab Upadhyaya, a Catholic sannyasin who called for it in 1907.¹⁸³ The division of the country into India and Pakistan inflamed communal hatred and passions of the Muslims and Hindus. A certain sense of insecurity crept into the minds of the minorities. The theocratic state of Pakistan became the model for a theocratic Hindu state for the fanatical elements of the Hindu community. Communalism and fundamentalism began to take deep roots among a section of people of both communities on both sides of the divide. The liberal politicians and religious leaders of India perceived this as a threat to the integrity of the nation. They sought to reassure the minorities through a Constitution, which respected the rights of all. These aspects underlie the evolution of the Constitution of India. These are to be taken into consideration when the question of conversion is discussed.

5. Conversion in the Indian Constitution

There is no direct reference to conversion in the Indian Constitution. Yet there were many heated discussions in the Constituent Assembly regarding conversions. Freedom of thought, freedom of speech, freedom of religion and freedom of conscience were at the background of the discussion on conversion. We shall come to the reasons behind the

¹⁸⁰ Ibid., 9

¹⁸¹ Ibid., 16-17

¹⁸² Ibid., 18-19

¹⁸³ Antony Mookenthottam, *Indian Theological Tendencies* (Berne: Peter Lang, 1978), 35

discussions referring to the articles that have a direct or indirect bearing on religion. The first indirect reference comes in the Preamble of the Constitution:

*We the people of India, having solemnly resolved to constitute India into a Sovereign Socialist Secular Democratic Republic and to secure to all its citizens:
Justice, social, economic and political;
Liberty of thought, expression, belief, faith and worship;
Equality of status and of opportunity; and to promote among them all
Fraternity assuring the dignity of the individual and the unity and integrity of the nation;
In our Constituent Assembly this twenty-sixth day of November 1949, do hereby adopt,
Enact and give to us this Constitution.*

The preamble expresses the object and policy of the legislation, the evils or the inconveniences it seeks to remedy, the goal of our political society, the ambit of fundamental rights and the Directives which are to be interpreted in accordance with the ideals of socialism, secularism and democracy. Justice: social, economic and political; liberty: of thought, expression, belief, faith and worship; equality: of status and opportunity, and to promote among all fraternity assuring the dignity of the individual and the unity and integrity of the nation are what Indian secularism, democracy and republicanism stand for.¹⁸⁴

It may be pointed out that some of these values like justice, freedom, equality and fraternity are common to religious traditions, socialism, secularism and democracy.

The Vedic religious tradition (that of the *Samhitas*) upheld the dignity and equality of human persons deriving their dignity from the divinity (RV. 10.90, 10.129). Later Hindu tradition denied justice, equality and fraternity to vast sections of the people of India by classifying and oppressing them as untouchables. The preamble is a conversion from this Hindu aberration to the original Vedic spirit and thought. It would be a great mistake to think that it expresses a change of mind in Hindus only. No. It is the whole nation, "We the people of India": Hindus, Muslims, Sikhs, Christians, Jains, believers and non-believers who accept these values which are common to humanism and to all religious traditions of the world unless vitiated by various forms of fundamentalism. So the very preamble of the Constitution expresses a genuine conversion to the values indicated.

The unconditional affirmation of these values has a clear aim of ensuring the dignity of the individual and the unity and the integrity of the nation. In the context of the division of the country into India and Pakistan this preamble assumes enormous importance. The very purpose of the liberty of thought, expression, belief, faith and worship is to protect the dignity of the individual, the unity and integrity of the nation. The Gujarat carnage was a great blow to these ideals. The Indian Mass-media used the liberty of thought and expression to defend the dignity of the individual and the unity of the nation. It also showed how many in India need a genuine conversion to the essential values upheld by the constitution beginning from the Prime Minister to the common man on the street. This is evident from the vacillation of the Prime Minister and his government to take the

¹⁸⁴ Durga Das Basu, *Shorter Constitution of India* (New Delhi: Prentice – Hall of India, 1989), 1

Gujarat Chief Minister Narendra Modi to task and the common man indulging in carnage¹⁸⁵.

Liberty of thought, expression, belief, faith and worship imply also conversion. Often there is a tendency to ascribe “converting” to Christians alone due to prejudices. I have already shown that from time immemorial religious traditions in India have been involved in converting. Hinduism also excels in the work of conversions. The freedom of thought, speech, belief etc, is not a concession granted to any minorities but an expression of natural justice, human right and freedom of conscience equally applicable to all the followers of any faith and religious tradition whatsoever.

5.1. Fundamental Rights

Part III of the Constitution is dedicated to fundamental rights. The Government of India and the Parliament of India and the Government and the Legislature of each of the states and all local and other authorities within the territory of India cannot go against the rights guaranteed by the Constitution.¹⁸⁶ Here, we are concerned only with those articles which have a direct or indirect bearing on conversion.

Protection against discrimination is assured by the Article 15.1. The rights granted to all the citizens of India in the Article 19.1 have indirect reference to conversion:

All citizens shall have the right—
to freedom of speech and expression;
to assemble peaceably and without arms
to form associations or unions;
to move freely throughout the territory of India;
to reside and settle in any part of the territory of India.¹⁸⁷

In fact some members of the Constituent Assembly argued that “freedom of speech and expression” contain the freedom to propagate religion. So there is no need to add the word propagate.”¹⁸⁸ The article gives the right to the missionaries to move freely throughout the territory of India. No state can prevent an Indian citizen, a missionary, from settling anywhere in the country.

A more explicit reference came under the right to “freedom of religion”. The article reads: Subject to public order, morality and health and to other provisions of this part, all persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion. Nothing in this article shall effect the operation of any existing law or prevent the state from making any law –

a) Regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

¹⁸⁵. See also Basu, *Introduction*, 20-30.

¹⁸⁶. Articles 12, 13. See Basu, *Shorter*, 15-28.

¹⁸⁷ Basu, *Shorter*, 87

¹⁸⁸ Julian Saldanha, *Conversion and Indian Civil Law* (Bangalore: TPI, 1981), 147-151.

b) Providing for social welfare and reform or the throwing open of Hindu religious institution of public character to all classes and sections of Hindus.¹⁸⁹

Here it is useful to pay attention to the discussion that took place in the Constituent Assembly to understand this article. The main debate centred on the right “to propagate religion.” I shall mention certain aspects here:

5.2. To Practice and Propagate

It was presumed by many that practicing religion refers to rituals and cult: So practice of religion and propagation can be separated. In Hinduism, practice and propagation may be separated in theory. But genuine practice of any religion will attract adherents or followers as seen earlier. Thus, propagation is an essential dimension of the practice of religion in Christianity and Islam. In Buddhism, the professedly missionary religion began its activities since the time of Ashoka. Hinduism, especially modern Hinduism, may separate it in theory but does the opposite as it is evident from the preaching and practice of holy persons like Satya Sai Baba, Amrtananda Mai and others.¹⁹⁰ The Constituent Assembly was aware of what practice and propagation meant for Christians and Muslims but was not clear about Hinduism.

There have been fears expressed in the Constituent Assembly concerning the word propagate:

The word “propagate” may be used for forced conversions; religion is a private affair between oneself and the Creator. It has nothing to do with others.¹⁹¹ Propagation of religion becomes a nuisance; the propagation of Islam brought about the partition of India. The spread of other religions will annihilate Hindu culture and way of life and manners. No other constitution in the world has such a provision. The Christian community show excessive zeal in proselytising. Missionaries used abusive language against Krishna and religious practices.¹⁹² Conversions break up the social cohesion of Hindus. Conversion is an attempt to increase one’s fold....¹⁹³

More than 50 years of independence has shown the fallacy of these arguments, The Hindu fold has increased by millions. No one has so far clamoured for a further division of India [except some of the Hindu fundamentalists who have set a very dangerous trend these days by advocating the division of Jammu and Kashmir]. The objections mentioned above show only one side of the picture. The other side: There were a number of unbiased eminent Hindus in the Constituent Assembly who supported the provision. Here I refer to a few significant interventions as quoted by Saldanha: L. Krishnaswami Bharati

¹⁸⁹ Basu, *Shorter*, 198.

¹⁹⁰ People from all over the world flock to Satya Sai Baba and Amrtananda Mai. A great majority of them are Europeans.

¹⁹¹ Saldanha, 151

¹⁹² *Ibid.*, 152

¹⁹³ *Ibid.*, 156-157

(Madras) corrected the general misconception, that ‘propagate’ refers to the Christian religion alone. At any rate, to hold that some people should not propagate their religious views, would amount to intolerance. He referred to the “thoroughly nationalist” decision of the Christian community to forgo reservation of seats in order to be more integrated with the nation, and added: “Therefore, in good grace, the majority community should allow this privilege (of propagating religion) for the minority communities and have it for themselves as well.” K. Santhanam (Madras) viewed Art.25 as an article on religious tolerance; at the same time it rightly circumscribed freedom within certain limits.¹⁹⁴

T.T. Krishnamachari (Madras), later cabinet Minister for several years, asserted that though he studied for about 14 years in Christian institutions, no attempt had been made to convert him to Christianity. He was of the opinion that people coming under a new Government should not feel that it is a change for the worse. Therefore, the Constitution must provide for the continuance of things as they are, in religious matters, unless the *status quo* has something which offends all ideas of decency, equity and justice. The Arya Samajists are as free to carry on their Shuddhi propaganda, as are Christians and others to propagate their own religion. He concluded:

“I feel that if the followers of any religion want to subtract from the concessions given herein in any way, they are not only doing injustice to the possibility of integration of all communities into one nation in the future but also doing injustice to their own religion and to their own community.”¹⁹⁵

K.M. Munshi told the Assembly: “I know it was on this word that the Indian Christian community laid the greatest emphasis, not because they wanted to convert people aggressively, but because the word ‘propagate’ was a fundamental part of their tenet.... So long as religion is religion, conversion by free exercise of the conscience has to be recognized.”¹⁹⁶

It is evident from the interventions of these eminent persons that the fear of including the word ‘propagate’ and that of forced conversions is unfounded, based on ignorance and prejudices. Even after 50 years of the Constituent Assembly’s acceptance and approval of the Constitution, the fundamentalists continue to remain in a melting pot of ignorance, prejudice and violence. They spread hate and persuade others to do the same.

6. The Basic Reason

The fundamental reason, as many have recently pointed out is not conversion. Swami Agnivesh writes: The ascendancy of hate and the corresponding atrophy of compassion betray the weakness rather than strength of a religion. The killers of Swami Dayananda were caste Hindus, not Muslims or Christians, even though Swamiji was as outspoken about their religions as he was of the aberrations within the Hindu fold. Bapuji too was consumed by the fire of high caste hate. What a pity that we fight missionaries and put up

¹⁹⁴ Ibid., 152

¹⁹⁵ Ibid., 153

¹⁹⁶ Ibid. 153

with armies of caste atrocities like the Ranvir Sena, despite repeated massacre amounting to genocide.¹⁹⁷ The real problem is not conversion but the hidden Agenda of a section of the upper castes, to perpetuate their age-old domination, oppression, enslavement and racism. They have found conversion a convenient stick to incite passions and hatred.

7. Conversion a Convenient Bogey

A.J. Philip wrote in *The Indian Express*: The missionaries have become the whipping boys of the VHP and their alleged crime is conversion. Statistics disprove all the VHP's claims. Hinduism is the most flourishing religion in the country. In fact, the largest conversion that ever took place was when the tribals of the country were declared as Hindus in one fell swoop. It gets more new adherents than any other religion. In fact every now and then the VHP makes claim that it has converted so many people. Even in the West where Christian churches fail to attract enough worshippers, Hindu temples come up by the dozen (in Munich's imposing Cathedral Church that can accommodate over a thousand people, I was one of the dozen who had attended the English service on Sunday). Turn to any corner in India and one finds a temple. Yet, conversion is a convenient bogey used against the Christians even when the freedom to propagate religion is enshrined in the constitution.¹⁹⁸

Conclusion

Often, those who debate on conversion have no clear idea of what conversion means. There are various types of conversions, from one system of philosophy to another, one thought pattern to another, one religion to another, and, in a deviated sense, even defection from one political party to another is a conversion of the sort, of course, for ulterior motives. Conversion, in fact is a natural process; human nature demands it. Physical, psychological and spiritual conversion takes place daily in an unperceived manner. No one pays attention to it. The food we eat is converted into flesh and blood. The books we read change our ideas. The reflections we make convert our attitudes. The persons we meet may even change our convictions. Thus, conversion is a growth process.

Genuine conversion is a spiritual transformation in reference to God. It begins in the innermost depths of the human heart and brings about radical changes. Underlying conversion is the natural human tendency for personal growth, possession of truth and development. As such, conversion is an inalienable human right which one ought to possess and cherish.

Every religion converts. Indian religions are no exception to it. If any Indian religion claims that it does not convert, it is only due to pathetic ignorance of history and the nature of religion. Every religion should undergo conversion and foster mutual conversion, I mean willingness to acknowledge and accept what is good in other religions. Judaism and Islam must cherish a spirit of reconciliation and forgiveness which

¹⁹⁷ Swami Agnivesh, *Hailing*, 12

¹⁹⁸ A.J. Philip, "Hate as a Unifying Force, VHP Finds a New target," in *The Indian Express* (Friday, October 2, 1998), 8.

Christianity promotes. A section of Hindus need a re-conversion to its original spirit of tolerance and openness. Since Vatican II, Christianity underwent a re-conversion and regained its original tolerance and openness. A conversion means only that a person has discovered something new, a new religious experience, a new truth that she or he appreciates and wants to make it her or his own. Any new experience or discovery leads to sharing. So the Constitution is simply acknowledging the freedom to know, to experience what is good, to share and to grow and live exercising the freedom of conscience. Thus, the right to undergo conversion is also a fundamental right of religious traditions.

Of course, the word 'conversion' does not appear in the Constitution. It is implied in the freedom granted to propagate religion and one's convictions. Any opposition to conversion goes against a fundamental human right. The makers of the Indian constitution had a liberal outlook. They respected freedom of conscience, freedom of speech and expression. They were concerned about fundamental human rights. They appreciated the minorities' openness in forgoing minority representation and concern for national integration. In fully affirming fundamental rights and granting freedom of speech and freedom of religion and worship, the unity and integrity of the nation were uppermost in their minds. The constitution is admirable in its openness. It fosters freedom and human development. The people of India should resist every attempt to curtail human freedom, human right and freedom of conscience. They should promote the age-old tradition of tolerance enshrined in the Constitution.

MINORITIES IN THE INDIAN CONSTITUTION

1. Who Are the Minorities?

‘Minority’ means ‘the smaller in number.’ There is a definition that is found in *the Encyclopedia Britannica*, which says, minorities are “groups held together by ties of common descent, language or religious faith and feeling themselves different in these respects from the majority of the inhabitants of a given political entity.”¹⁹⁹ J.A.Laponce in his book, *The Protection of Minorities*, has given two definitions. The first is: “A minority is a group whose race, language or religion is different from that of the majority.” The second: “A minority is a group that thinks of itself as a minority.”²⁰⁰ In the *Year Book on Human Rights*, the United Nations’ Sub-commission on Prevention of Discrimination and Protection of Minorities defined the minorities thus: “(i) the term minority includes only those non-dominant groups in a population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population; (ii) such minorities should properly include a number of persons sufficient by themselves to preserve such traditions or characteristics; and (iii) such minorities must be loyal to the state of which they are nationals.”²⁰¹ Assessing the two definitions given above, we can say *the Encyclopedia Britannica* lays stress on the expression ‘feeling’. What, if the minority does not have such a feeling? Further such a definition²⁰² makes the definition a ‘subjective definition.’ But, in the definition in the *Year Book on Human Rights*, the main point is that those groups have been defined as minority, ‘who want to preserve their separate identities.’ Hence, there can be two types of minority groups: one which is anxious to maintain its separate identity and is hostile to assimilation with dominant groups; the second type can be that which intends to dissolve its identity in the dominant group, but due to social or economic forces they are prevented from doing so by the majority group. These can be called ‘forced minority’. The best example of such minorities is Negroes in the U.S. or scheduled tribes in India.²⁰³

The International Covenant on Civil and Political Rights of the UN has so far been able to confirm that emphasis was placed on individual, since it refers to “persons” belonging to minorities and not to minorities as groups.²⁰⁴ Though the problem of the minorities figured prominently in the Constituent Assembly, the framers of the Constitution not only did not make any effort to define the expression “Minority” but were also reluctant in using the expression often. During the discussion of the draft of the Constitution in the Constituent Assembly on November 16, 1949, T.T. Krishnamachari moved the following Amendment:

¹⁹⁹ William Benton, *Encyclopedia Britannica*, Vol. 15 (Chicago: 1969), 542.

²⁰⁰ J.A. Laponce, *The Protection of Minorities* (California: University of California Press, 1969), 3-4.

²⁰¹ *Year Book on Human Rights* (U.N. Publications, 1950), 490.

²⁰² Arun Kumar, *Cultural and Educational Rights of the Minorities under Indian Constitution* (New Delhi: 1985), 41.

²⁰³ *Ibid.*, 42.

²⁰⁴ *Ibid.*

*‘That in Part XVI of the Constitution, for the words ‘Minorities’ where it occurs, the words ‘certain classes’ be substituted.’*²⁰⁵

It was very interesting that this Amendment was adopted unanimously and even without any discussion. It is also to be noted that the term minority’ occurs only in four places in the Constitution. First in the ‘head note’ to Article 29 of the Constitution, second in the ‘head note’ to Article 30 of the Constitution, third in Clause (1) of Article 30 and lastly in Clause (2) of Article 30. However, it may be said that though the expression ‘minority’ has been rarely used in the Constitution, several Articles of the Constitution adequately protect and provide safeguards to the minorities.²⁰⁶

2. Kinds of Minorities

The distinguishable characteristics are either religion or language or both as found in Article 30(1) of the Constitution. This is a precondition to invoke the protection guaranteed by the constitution. From the above Article, minority can be classified as technical minorities and non-technical minorities. Technical minorities can be identified with religious minorities who sought reservation for themselves in legislatures and services during the British rule in India. Muslims and Sikhs, for instance, were such a minority. Non-technical minorities can be identified with linguistic minorities. It can be ruled out that a part of the majority community, that is, the Hindus could become a linguistic minority when people from one linguistic area were to migrate to another.²⁰⁷

The classification made above can be better understood in the context of history. It cannot be disputed that the problem of minorities prior to the Constitution only related to those minorities which claimed to be separate from the majority, that is, the Hindus. It is also a fact that no section of Hindus was treated as a minority. The fast unto death of Mahatma Gandhi defeated the attempt of the British rulers to separate scheduled castes from Hindu fold in 1932. The expression minorities ‘based on religion,’ which appears in Clause (1) of Article 30 of the Constitution, refers to those technical minorities whose religion became the basis of their separate identity. The expression means the principal basis of a minority must be their adherence to one of the religions and not a sect or a part of it. For instance, Hinduism is a religion and Arya Samaj is only a sect of it. Islam is a religion, and Shia and Sunnies are only sects of it. Christianity is a religion, and the Catholics and the Protestants are only sects of it. The expression ‘minority’ in the technical sense was never applied to Hindus or a part or a section of it. In Article 30(1) the word ‘minority’ cannot be applied to a class or a section of Hindus.²⁰⁸

It is also to be noted that Hindu religion can be understood in two different contexts: One is the context of doctrine and the other is that of the application of the Hindu personal

²⁰⁵ Quoted by Arun Kumar, op. cit., 42.

²⁰⁶ Ibid., 42.

²⁰⁷ D.A.V. College Jullundur, V. State of Punjab, AIR 1971.

²⁰⁸ Arun Kumar, 43.

laws. Hindu religion in its former context is different from Jain, Buddhist or Sikh religions. In the context of application of personal laws, the Hindu religion is the same for Jains, Buddhists or Sikhs. It may be because the above divisions have emerged out of the Hindus and the personal law of the Hindu continues to apply to them even after they have separated from the fold of Hinduism.²⁰⁹

There is another kind Minorities as per the Article 30(1), and they are those who are less than 50% of the population of the state or of the country. Though there may be a difference between the understanding of minorities as found in Article 29 & 30, it is to be noted that they can claim the protection of Article (29)(1) as they are also a part of “any section of the citizens” of India. But the minorities of Article 29(1) cannot claim the protection of Article 36(1) unless they are religious or linguistic minorities and also satisfy the numerical test.²¹⁰

3. Backward Classes: Are They Minorities ?

Let it be noted that the backward classes can be classified into ‘backward class in a minority community’, and ‘backward class in a majority community’.

The first one will be a minority for the purpose of the protection of Clause (1) of Article 30 of the Constitution, whereas the backward classes in a majority community are depressed segment of Hindu community.²¹¹

There may be a controversy in this, and it leads to conclude that religious or linguistic minorities, for the reasons of their religious and linguistic character, do not change, whereas the backward classes are not to remain in perpetuity. The minorities want to retain their separate identity whereas the backward classes have been kept out of the majority by force. Minority is a reference to the quantity, whereas backward class is a reference to the quality.²¹²

This means that backward classes and minorities differ in nature and scope and it would be inappropriate to identify backward classes as minorities. As stated earlier, backward classes are a depressed segment of Hindu community and their struggle for special treatment and concession is in order to come on par with other privileged classes. The Constitution has dealt with the problem of backward classes with a feeling of justice, equity and good conscience.²¹³ The guarantee of equality as per Article 14 coupled with the special case of the backward classes taken by the Constitution assures a favoured treatment and provides opportunity to them to come at par with others in India.²¹⁴

4. Linguistic Minorities

²⁰⁹ Ibid., 44.

²¹⁰ Ibid., 44-45

²¹¹ Ibid., 45.

²¹² Ibid., 46.

²¹³ Ibid., 46.

²¹⁴ Ibid., 47.

Language groups are there, and it is no use trying to deny them. They will be there. Any attempt to suppress a language will, in fact, create a violent revulsion and may be a cause for fissiparous tendencies.”²¹⁵ The framers of the Constitution were aware that this issue of language is a delicate matter. Dr. Rajendra Prasad, the First President of India, had this to say: “There is no other item in the whole Constitution of the country which will be required to be implemented from day to day, from hour to hour, I might even say, from minute to minute, in actual practice. Whatever has to be said in moderate language so that it might appeal to reason and there should be no appeal to feelings or passion in a matter like this.”²¹⁶

Linguistic minorities can be described as those minorities residing in the territory of India, or any part thereof, which have a distinct language or script of their own. A group will be declared a linguistic minority if its mother-tongue is different from the principal language of the Country and at the State level different from the principal language of the state. “A linguistic minority for the purpose of Article 30(1) is one which must at least have a separate spoken language.”²¹⁷

5. Religious Minority

Religion is a sensitive matter. It has worked as a unifying force and has also caused severe divisions between human and human, group and group, nation and nation.²¹⁸ “The religious conceptions in this country are so vast that they cover every aspect of life, from birth to death. There is nothing which is not religion.”²¹⁹ In India, Hinduism is the religion of the majority. Muslims, Christians and Sikhs are major religious minorities in India. It is not to deny that Jains, Buddhists, Parsees and Jews are also minority groups here. Their number is much smaller than the three major minority groups. They do not represent nearly as broad a range of problems as the major religious minorities. The concentration of study as far as statistical position of ‘Religious Minorities’ in India is concerned is on major minority groups, i.e., Muslims, Christians and Sikhs.²²⁰

6. Test to Determine Minority

In order to claim the protection of Clause (1) of Article 30 of the Constitution, there must exist a minority community, and that the Institution is established by one or more members of it.

The first one takes us to the question: who is a minority?. The second one leads to the problem whether an institution has been established by a minority community or a person

²¹⁵ Prof. Humayun Kabir, *Minorities in a Democracy* (Calcutta, 1968), 16.

²¹⁶ Quoted by Arun Kumar, op.cit., 48

²¹⁷ Quoted by Arun Kumar, op.cit., 48.

²¹⁸ Ibid., 51.

²¹⁹ Ibid., 51.

²²⁰ Ibid., 51

belonging to the minority. It is easy to say that a minority community means a community which is numerically less than 50%, but then the question is not fully answered, for part of the question has yet to be answered, namely 50% of what? Is it 50% of the entire population of India or 50% of the population of a state forming part of the Union.²²¹ This question was answered by the Supreme Court as follows: “ When a Bill is passed by a State Legislature, which extends to the whole of the State, the minority must be determined by reference to the entire population of the State.” ²²² Hence, if there is a question to determine as to who is a minority, it will have to be determined by reference to the entire population of the Country.²²³ This numerical test has been followed in more instances than one. The second is borne by experience in India for the past 50 years of Independence. The minorities have established Institutions, both educational and other, so that they could manifest that they are entitled to have their own institutions with due regard to the laws and regulations of the state and Country.

Conclusion

Having given the bare minimum on the Minorities in Indian Constitution, I would like to pose a few questions or throw some challenges for further reflection. Is the notion of minority a tool in the hands of majority to be used for their purpose? Are the minorities being taken for granted by the Government/s and others? Do the minorities have the satisfaction of being in a country, where they feel protected or exploited? Do the minorities keep themselves aloof from public life? Is there a sort of inferiority complex connected/attached/imposed on the minorities? Are they looked down upon by the majority? Does the majority use just the facilities, like educational, medical, social, and the minorities are left in the lurch when they are to be defended? Do the minorities really enjoy an identity of their own, or are they lost in the crowd? There was a time when the minorities did have a lot of space in public life, may be due to the influence of the British or because they had better opportunities for education. But now, especially Christians are not found in that measure in public life. What would be the reason? Do we shy away from entering the public life or are we simply pushed back and even neglected or denied our rightful place? That is why all talk of equality as enshrined in the Constitution seems to be just a façade or cover for the benefit and advantage of the majority.

What is our task, as philosophers, and much more as Christian philosophers, to reawaken in the minorities a sense of dignity and confidence? There should be a way to abolish this discrimination between the majority and minority. It is one NATION that we should talk about and work for and thus achieve the purpose for what the Constitution was framed. The preamble of the Constitution should stand as a beacon of hope to all peoples, irrespective of majority and minority. That the Constitution did not define the term, ‘minority’ is itself an indication that the framers of these directives did not want to divide the population on these lines. Will the purpose of the Founding Fathers and Framers of the Constitution ever be fulfilled! Time alone is the answer!

²²¹ Ibid., 54.

²²² Ibid., 55.

²²³ Ibid.

RIGHTS OF THE MINORITIES AND WEAKER SECTIONS: A PHILOSOPHICAL PERSPECTIVE

Dr. Thomas Kadankavil

1. The right of less gifted and unfortunate humans for special protection to find their personal worth on the basis of the principle of human equality cannot be denied even though the Indian Constitution Article 14 articulates the most basic principle of jurisprudence as follows: “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” The intent of the article is that any arbitrary or unreasonable action of an authority under Article 12 would be held violative of Article 14. Law requires that all persons subjected to any legislation should be treated alike under like circumstances and conditions. The law does not forbid classification of people for the purpose of implementing the right to equality guaranteed by it if the circumstances and conditions are not alike. Equals have to be treated equally and unequals ought not to be treated equally.

2. On the basis of the creation account of the Hindu Scriptures (RV X, 90,11, 12) the whole society was divided into four *varnas*, which at the end of the *Vedic* period was modified into the caste system. When the entire society was divided into various endogamous groups, individuals who were born in one group were never permitted to

become a member of any other group. The *sudras* (the lowly serf) were not given any instruction in the Veda and they were kept as ignorant despised slaves to do the meanest works of the upper classes. The *avarnas* who were outside the *charurvarnya* system, the people, which constitutes 15.7 % of the total population, now belong to the scheduled caste, and they were regarded as highly untouchables. The source of their suffering was mainly from the division of the society into pure castes and impure castes on the basis of pure and impure occupations. The main cause of the practice of untouchability in Hinduism was said to be the obsession of the high caste Hindus to maintain purity and avoid pollution. By and large the untouchables had a subhuman social existence and even today a large section of them lies in abject poverty, economic exploitation, sub-culture of submission and political powerlessness. Ambedkar argued that the untouchables are not Hindus, but a separate religious minority.²²⁴ Article 30 has given special rights for religious and linguistic minorities to establish and administer educational institutions. Our concern, however, is not to define which are the sections of the population that are granted special privileges, but on what rational basis such provisions can be justified or such provisions are to be there because of the very given social reality.

3. Article 16 # 4 and 46 refers to a section of people as backward classes and weaker sections, in particular as the scheduled castes and scheduled tribes. Due to the caste system vast sections of the population from time immemorial were kept backward socially, educationally and economically. They were subjected to untold suffering and discrimination. The claims of the sword of social justice lie in the never-ending need to wage war against the cult of inhumanity, asserting the right for personhood for millions of Indians. The social reality of the so-called weaker sections and the minorities confronted was human indignity, and the spiritual humiliation they experienced was that they were untouchable to human and unapproachable to God. The constitutional provisions to achieve the full human right for every citizen in our country are the reification of a long process of interaction with the politico-cultural movement, which held liberty, equality and fraternity as its rallying point.

4. The essence of the social evil of caste system is the subversion of the spiritual commandment that dignity and divinity and inborn creativity are non-negotiable presence, which blossoms in every person when liberative opportunity comes in one's way. Only when we accept the philosophical foundation of the slogan 'one human, one value,' as a sound social principle the declaration of the fundamental rights in the Preamble of our Constitution becomes meaningful and makes sense for the least in our country. The rights are individual and personal over against the collective right of the community. The extreme limit of the minority is a single person and one's rights can never get dissolved in the overriding claims of the majority.

Minority Rights in Education: Supreme Court Judgements²²⁵

²²⁴ B.R.Ambedkar, *What Congress and Gandhi have done for the Untouchables* (Bombay: Thacker Co. 1945), 175-177.

²²⁵ Ninan Koshy, "Minority Rights in Education," *The Hindu* (November 14, 2002).

5. The rights of linguistic and religious minorities guaranteed in the Constitution 'to establish and administer educational institutions of their choice' (30 (1) has received the considered attention of the Supreme Court in Kerala Education Bill (1959), the nine-judge Bench Xavier case verdict (1974), and over a fifty other cases and finally in the 11-judges Bench judgment of October 31, 2002. The original reference of this issue in 1993 was to a Bench of seven judges.²²⁶ Since the judges wanted a comprehensive examination of all the issues and to re-examine Xavier's case verdict the reference was enlarged between 1993-2000 with 11 judges Bench. The recent judgment of the Court is impregnable and a 13-judges or a larger Bench can only overrule it. Though the judgment relieved the minorities from some of the adverse effects of the Unnikrishnan case (1993), there is criticism in the legal circles that several cognate issues were arbitrarily left out from consideration to meet a particular timeframe of the Chief Justice. Though the 11-judges Bench judgment has apparently settled some of the contentious and sensitive issues which have been for long under legal scrutiny it also raises some fresh questions along with a few old ones in new forms. The irony of the judgment is that after 11 judges have ruled even a temporary relief from many complex issues it has raised could not be easily resolved by any authoritative source. The story of the long legal battle to decide the true nature of the right of minority education and related issues has made it appear that the outcome of this battle is mere guesswork and not at all prescient wisdom.

6. When the recent judgment attempted a redefinition of Article 30 (1) in the Constitutional scheme, of course, there appears to have a semblance of philosophical reflection in linking it to the Constitutional ideals of secularism and equality. But here the overriding right of the minorities and weaker sections to have special and preferential treatment over against the rights of the majority is ignored. If equality and secularism were 'the essence of Article 30 (1)' which are already guaranteed in Articles 14,15, 16, 25, 26 an additional guarantee there would have no special significance. The clarification that the Article under scrutiny is also based on the above 'two basic features of the Constitution' is certainly welcome. But the Article in question is not concerning 'equal treatment between the majority and minorities institutions' but about the special rights and privileges of the minorities. The judgment seems to have missed the wood for the trees. Important concerns related to equality and social justice are conveniently ignored in the judgment.

7. The judgment has given unfettered freedom to unaided minority educational institutions, but it is certainly not a special right or privilege to the minorities alone. The judgment comes up with a brand new doctrine that education can be an occupation with the fundamental right to create a 'reasonable surplus to meet (the) cost of expansion.' This aspect of the minorities case (2002) is a charter for private enterprise taking over all levels of education under limited 'criteria setting regulations' to preserve standards. Since the principle that everyone's right to make education an occupation has been accepted, no serious effort is made in the judgment to refine the protection afforded to minority educational institutions. Even the broad view of the Constitution that minorities (Sikhs, Christians, and Muslims) were to be determined on a national basis has now been altered by the majority judgment. Minorities are now to be determined on a state-wise basis and

²²⁶ Rajeev Dhavan, "The Minorities Case," *The Hindu* (November 15, 2002).

allowed the state authorities to fix a proportionate percentage of admission to minorities in their own institutions. This certainly kills the autonomy of the minority institutions over admission of students.

8. It is to be admitted that there are a few favourable provisions in the judgment, though on the whole it has considerably restricted the privileges granted to the linguistic and religious minorities. The concept of minorities itself is neither clearly defined, nor clear guidelines are given for these institutions for seeking affiliation. The right to determine the percentage of the students to be admitted to their institutions is reserved to the state governments, which usually have no sympathy to these institutions. Another gray area is that the judgment does not clarify whether a minority educational institution in a state can admit students belonging to their community from other states, if required number of students could not be found from the home state of the institution. Minorities' institutions, which admit students from non-minority community on the basis of merit are only eligible for government aid. Even in the appointment of the staff and their service conditions the court allows the intervention of the government in such a way that in future either they would have to be closed down or would have to be taken up by the government for their survival. On the basis of the philosophy of reservation and social justice the judgment should have given a fixed minimum percentage of reservation in all private and governmental educational institutions to the religious and linguistic minorities. In a welfare state where education up to 14th year of age is declared as a fundamental right what is appropriate is that the government gives aid to all recognized educational institutions, including those of the minorities. In effect the judgment withdraws with one hand what it gives by the other, offending the principle of social justice and imposing equality on unequals.

9. In 1959 the Supreme Court recognized that aid was essential to sustain many minority institutions. Earlier judgments of the Supreme Court recognized the speciality of the rights given to linguistic and religious minorities so that religious and cultural rights were not whittled away. This settled law has now been discreetly undermined. Even the autonomous working of these institutions are very much impaired by the majority judgment requiring special tribunals be set up for grievance redress of employees punished or dismissed by minority educational institutions. The stricture of the Court decision of 2002 on aided institutions by allowing the state authorities to fix a proportionate percentage of admissions permissible to the minority institutions, in effect, nullifies the philosophy behind the granting of special privileges to certain classes of the population and the recognition of the great human and social diversity extant in the Indian polity. This splendid diversity can only be sustained if maximum leeway with necessary and reasonable grant is given to minority institutions. The unfettered freedom given to run unaided institution to minorities is neither a special privilege to them nor in any way a generous gesture from the part of the republic to preserve their identity and to ameliorate their backwardness. With preoccupation and vested interest the Constitution is being read in bits and pieces and *ad hoc* solutions have been offered. In this erudite exercise of the Supreme Court the first principles for minority protection have been overlooked.

Privileges of the Special Classes of People

10. The problem of the minorities prior to the adoption of the Constitution was practically that of all those sought reservation of seats for themselves in legislatures and services during the British rule in India. The norm to determine the minority status of a community was their claim to be separate from the Hindus, the majority community. The depressed class, which was renamed as scheduled caste in 1936, under the leadership of Ambedkar fought in the beginning for the status of religious minority to claim for special political privileges. When the British government decided to give untouchables separate electorate giving them the status of a religious minority Gandhi resorted to a fast unto death at Yervads, in 1932 opposing the proposed communal award and so under pressure from everywhere Ambedkar had to agree to have joint electorates with reservation of seats for the untouchables (depressed class/ Harijans). It was Ambedkar's belief that Gandhi and the Congress would never accept the ideal of equality and the political method of socialist revolution. It was his conviction that rights are protected not by laws, but by the social and moral conscience of society and by a democratic form of government based on a democratic form of society. As long as caste system stands socialism and democracy are unworkable in a political society.

11. Ambedkar had an earnest desire to include the programme of socialism among the fundamental rights. It implied a condemnation of existing social, political, economic and religious order as unjust and discriminative and an advocacy of a new order based on the principle of universal adult franchise. In his concluding speech in the constituent assembly on November 25, 1949, he declared:

Social democracy means a way of life which recognizes liberty, equality and fraternity as the principles of life. These principles of liberty, equality and fraternity are not to be treated as separate items of a trinity. They form a union of trinity in the sense that to divorce one from the other is to defeat the very purpose of democracy...without equality liberty would kill individual initiative; without fraternity, liberty and equality would not become a natural course of things.²²⁷

The basic concept of Ambedkar's political thought was the reality of equality of all men, which is to be achieved by a state socialism of a constitutional and parliamentary democracy.

12. A society of unequals, according to Mathew Arnold, "materializes our upper class, vulgarizes our middle class, brutalizes our lower." Therefore the task before a social reformer is to create upheaval changes by bringing an end of exploitation of untouchables and outcasts, creating in them a sense of self-respect, dignity of individual and the consciousness of equality of status. This has to be protected foolproof by constitutional guarantee.

13. In a democracy people rule themselves by the majority decision of their representatives. Citizens in a democracy should be entitled to equal protection of their

²²⁷ G.S.Lokhande, "Ambedkar and Socialism," *Political Thinkers of Modern India* (Delhi: Verinder Grover, Deep and Deep Publications, 1990), 653.

persons, possessions and rights. They should be free within the framework of law to believe, behave and express them as they wish. In the name of equal rights and to make material conditions equal for everyone some political ideologists are eager to increase the role of the government in the areas of welfare, education, employment, health and housing reducing the freedom and free enterprising of the people to the minimum. It is true that applying democratic principles in every day life is really challenging. It is in view of guarding the rights and freedom of the people written democratic constitutions guarantee that certain rights can never be taken away from the people even by extremely large majority of the elected representatives. These rights include the basic freedom of speech, press, assembly and religious worship. In the electoral context majority is a fluid concept. The present majority also must recognize the right of the minority to try to become the majority from the point of view of governance of the nation. This is, however, not workable in the case of majority and minority religions. Here each has to accept and respect their separate identity from each other and right to maintain their identity in all reasonable ways. Minority right in fact means the right to be a free, unique and different individual or community in a larger community. This is an essential dimension of being free. In human's search for fuller understanding of one's life in a political society, the minority view often becomes the thesis for the future synthesis in the social evolution.

Legal Equality through Special Privileges

14. A social audit and performance sheet vis- a vis the extent of the dynamic equality our nation has achieved only can tell whether the three classed, namely (1) Schedule Castes, (2) Scheduled tribes, (3) Other Backward classes, has come up in life through the action plan in favour of the former untouchables or the least and last in the society. Justice V.R.Krishna Iyer writes: "Skin-deep equality and cultural cosmetics may appear to meet legal needs, but soul-deep social justice is a therapeutic operation, where marginalized groups suffer discriminatory leprosy, demanding effective action. We must establish a new *dharma* fine-tuned to a dynamic nationalism where egalitarian values catalyse new community solidarity, sans caste, sans disabilities, sans social suppression."²²⁸

15. The Constitution responding to the political summons of distributive justice and equal sharing has justified protective discrimination in the form of minority rights and special privileges to certain classes. The declared goal of these special provisions was to fuse the high and low castes into a large national bloc and that they may be integrated into a casteless egalitarian society. Since linguistic and religious minorities may remain as such for a long time to come their need for preserving their own identity and the removal of disabilities arising from their being minorities can not be adequately realized within any definite timeframe. But that is not the case with the backwardness arising from lower caste privations. V.R.Krishna Iyer again writes: "Our Constitutional imperative is that castes shall perish as a source of ancient advantages or current disadvantages. Our country and culture have suffered enough through upper caste privileges and lower caste privations. To eradicate this communal disadvantage and to establish a people's solidarity is the Constitutional essence of fraternity."²²⁹

²²⁸ V.R.Krishna Iyer, *Dr Ambedkar and the Dalit Future* (Delhi: B.R. Publication Corporation, 1990), 55.

²²⁹ Ibid., 62

16. After a time, however, all remedy for under-privileged inequality may turn out to be a malady of privileged-inequality. To quote V.R.Krishna Iyer: "...the very policy of annihilation of caste disabilities is not to be perverted into a fallacy of perpetual plea for prolongation of reverse discrimination by a section of the population which has substantially wiped out its base-born attributes and leveled itself up, thereby converting a remedy for under-privileged inequality into a malady of privileged inequality."²³⁰ The success of our strategies for salvaging the depressed sector of the society must be judged by progressive pruning of socio-economic inequalities among communities and eventual evolution of a broadly egalitarian fraternity. In such a context equality and excellence will blend and open non-discriminatory avenues of access to developmental opportunity for every member of the polity.

17. Reservations and other hoisting devices have relevance only to the extent they advance the larger cause of social democracy. To achieve this end a general diffusion of literacy, a pervasive awareness of rights, a broad economic development and better ability to use the democracy of opportunities is necessary. A few judges, a few high officers or some ministers, a handful of professionals from the backward classes would not make any substantial change in the plight of the immense backward mass. Instituting reasonable restrictions on the rights of this creamy layer to receive privileges earmarked for backward classes, these benefits are to be ploughed back to the really deserving members of the community. That the egalitarian command of the Constitution may not be defeated, particularization of all aspect of this complex issue, into which we cannot enter at this juncture, is absolutely necessary.

18. When the majority community resent against the Constitutional ideal of secularism and the rights given to the religious minorities and even the reservation given to the weaker sections these rights could not be easily established. As is evident the articles which guarantee the privileges to the special classes of people are included in the section on fundamental rights (Part 111, Art. 12-35) which are unlike the 'Directive principles' (Part IV, Art. 36-51) judicable. Though the courts have rendered valuable services to solve the problems with regard to the rights of the educational institutions of the religious minorities and the demand of Christian converts from the Scheduled Caste for reservation benefits they remain yet as vexing social problems because of the lack of clear sighted political will of those who keep the keys of power as of right through their might. The law itself despite its profession of equal protection many a times lends learned support for its distortion. Critics of our social and legal system say that justice itself is means by which established injustice is sanctioned.

19. With clear foresight on the sinister forces working in the society to frustrate the social justice promised in the Preamble of our Constitution, Art. 38 has stipulated the following: (1) 'The State shall strive to promote the welfare of the people by securing and protecting as effectively as it may 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,

²³⁰ Ibid.

facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.’ This destination in our social and political life cannot be achieved by bare declarations and subtle analysis of the demands of social justice but it summons all our national determination and collective energies because the forces working against it are none other than different sections of the elite of our society.

EPILOGUE

The Constitution has always maintained a sense of national identity shared by a billion people, despite all their diversities and disparities, thanks to the remarkable philosophical vision of *unity-in-diversity*, or *one-in-many*, of its founding fathers. The significance of this philosophical vision for us today is much more than in the early decades of independence when there was a widely shared agreement on the essentials of public life and the laws and institutions required to sustain them. This, for example, is evident with regard to the freedom promised in the Constitution. That promised freedom is the *basis* that enables one to grow, and the *goal* towards which one grows. That promised freedom, nevertheless, obliges one to be convinced of it as a collective responsibility to the freedom of everyone and to the common good of all through a strict adherence to human and fundamental rights. What is being questioned in many circles today is the entire process of nation-building and economic development without respecting these rights, which has already marginalized the dalits, tribals, the religious and linguistic minorities and the regional identities on the periphery. The need of the hour is a sustained combat against prejudices of these particular identities through a process of dialogue aimed at the establishment of a more egalitarian society.

APPENDICES

APPENDIX -1

A Note on the Report of the National Commission to Review the Working of the Constitution

The Commission's report was submitted to the Government of India on March 31, 2002, by its Chairman, Justice M. N. Venkatachaliah – on the last day of the panel's two-year term. The report came in 1,976 pages, containing 249 recommendations. Altogether, the Commission made 58 recommendations involving amendments to the Constitution, 86 involving legislative measures and 105 others which could be accomplished through executive action. The following are some of the key recommendations:

- Extend prohibition against discrimination to issues of ethnic or social origin.
- Include freedom of the press in freedom of speech and expression under Art. 19.
- Allow acquisition of individual property by state only for a public purpose.
- Constitute a National Judicial Commission to appoint judges of the Supreme Court.
- Bar people charged with any offence punishable by imprisonment of five or more years from contesting parliamentary or assembly elections.
- Disallow a candidate from contesting elections in more than one constituency.

- Amend the Tenth Schedule (the anti-defection law) to ban even the splitting of parties now deemed legal.
- Limit size of cabinet to 10 per cent of the Lower House's strength.
- Allow constructive no-confidence vote, meaning alternative leader should be named before voting takes place.
- Discontinue the MP Local Area Development scheme.
- Allow lateral entry into government jobs above joint secretary level.
- Keep the Prime Minister out of purview of the Lok Pal.
- Raise retirement age of High Court judges to 65 years from current 62 and Supreme Court judges to 68 from 65 now.
- Constitute a statutory panel – consisting of the Prime Minister, the Leader of the Opposition in the Lok Sabha, the Speaker, the Deputy Chairperson of the Rajya Sabha and the Leader of the Opposition in the Rajya Sabha – to appoint the Chief Election Commissioner and other Commissioners.

Besides Mr Justice Venkatachaliah, other members of the panel were Justice B. P. Jeevan Reddy, Justice R. S. Sarkaria, Justice K. Punnayya, Soli Sorabjee, K. Parasaran, Subash Kashyap, C. R. Irani, Abid Hussain, Sumitra Kulkarni and P.A. Sangma (who resigned from the panel three months before its submission of the report).

APPENDIX -2

Universal Declaration of Human Rights²³¹

Preamble

Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation, justice and peace in the world,

Whereas disregard and contempt of human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspiration of the common people,

²³¹. On December 10, 1948, the General Assembly of the United Nations adopted and proclaimed the Universal Declaration of Human Rights, the full text of which appears in the following pages. Following this historic act, the Assembly called upon all Member countries to publicize the text of the Declaration and “to cause it to be disseminated, displayed, read and expounded principally in schools and other educational institutions, without distinction based on the political status of countries or territories.”

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law,

Whereas it is essential to promote the development of friendly relations between nations,

Whereas the peoples of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom,

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observance of human rights and fundamental freedoms,

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now, Therefore, the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction.

Article 1

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

Article 2

Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.

Article 3

Everyone has the right to life, liberty and security of person.

Article 4

No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.

Article 5

No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.

Article 6

Everyone has the right to recognition everywhere as a person before the law.

Article 7

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

Article 8

Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.

Article 9

No one shall be subjected to arbitrary arrest, detention or exile.

Article 10

Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him.

Article 11

Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

No one shall be held guilty of any penal offence on account of any act or omission, which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.

Article 12

No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks.

Article 13

Everyone has the right to freedom of movement and residence within the borders of each State. Everyone has the right to leave any country, including his own, and to return to his country.

Article 14

Everyone has the right to seek and to enjoy in other countries asylum from persecution.

This right may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.

Article 15

Everyone has the right to a nationality.

No one shall be arbitrarily deprived of his nationality nor denied the right to change his nationality.

Article 16

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

Marriage shall be entered into only with the free and full consent of the intending spouses.

The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

Article 17

Everyone has the right to own property alone as well as in association with others.

No one shall be arbitrarily deprived of his property.

Article 18

Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

Article 19

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

Article 20

Everyone has the right to freedom of peaceful assembly and association.

No one may be compelled to belong to an association.

Article 21

Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

Everyone has the right of equal access to public service in his country.

The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

Article 23

Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.

Everyone, without any discrimination, has the right to equal pay for equal work.

Everyone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.

Everyone has the right to form and to join trade unions for the protection of his interests.

Article 24

Everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay.

Article 25

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control. Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection.

Article 26

Everyone has the right to education. Education shall be free, at least in the elementary and fundamental stages. Elementary education shall be compulsory. Technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. Education shall be directed to the full development of the human personality and to the strengthening of respect for human rights and fundamental freedoms. It shall promote understanding, tolerance and friendship among all nations, racial or religious groups, and shall further the activities of the United Nations for the maintenance of peace. Parents have a prior right to choose the kind of education that shall be given to their children.

Article 27

Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits. Everyone has the right to the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author.

Article 28

Everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized.

Article 29

Everyone has duties to the community in which alone the free and full development of his personality is possible. In the exercise of his rights and freedoms, everyone shall be subjected only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and meeting the just requirements of morality, public order and the general welfare in a democratic society. These rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

Article 30

Nothing in this Declaration may be interpreted as implying for any State, groups or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

APPENDIX-3**Fundamental Rights in the Indian Constitution****PART III****General Definition**

12. In this part, unless the context otherwise requires, “the State” includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

Laws Inconsistent with or in Derogation of the Fundamental Rights

13. All laws in force in the territory of India immediately before the commencement of this Constitution, insofar as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

The State shall not make any law, which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

In this article, unless the context otherwise requires –

“law” includes any ordinance, order, byelaw, rule, regulation, notification, custom or usage having in the territory of India the force of law;

“Laws in force” includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

Nothing in this article shall apply to any amendment of this Constitution made under Article 368.

Right to Equality

Equality Before Law

14. The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

Prohibition of Discrimination on Grounds of Religion, Race, Caste, Sex or Place of Birth

15. (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to (a) the access to shops, public restaurants, hotels and place of public entertainment; or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

Nothing in this article shall prevent the State from making any special provision for women and children.

Equality of Opportunity in Matters of Public Employment

16. (1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to class or classes of employment or appointment to an office prior to such employment or appointment.

(4) Nothing in this article shall prevent State from making any provision for the reservation of appointment or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

Abolition of Untouchability

17. "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "Untouchability," shall be an offence punishable in accordance with law.

Abolition of Titles

18. (1) No title, not being a military or academic distinction, shall be conferred by the State.

(2) No citizen of India shall accept any title from any foreign State.

No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President, any title from any foreign State.

No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

Right to Freedom

Protection of Certain Rights Regarding Freedom of Speech etc.

19. (1) All citizens shall have the right –

to freedom of speech and expression;

to assemble peaceably and without arms;

to form associations or unions;

to move freely throughout the territory of India;

to reside and settle in any part of the territory of India;

to practise any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of (the sovereignty and integrity of India), the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing in the interests of (the sovereignty and integrity of India or) public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, in the interest (of the sovereignty and integrity of India or) public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub-clause.

Nothing in [sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interest of the general public or for the public or for the protection of the interests of any Scheduled Tribe.

Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law insofar as it imposes, or prevent the State from making any law imposing, in the interests of the general public, a reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law insofar as it relates to, or prevent the State from making any law relating to:

the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to exclusion, complete or partial, of citizens or otherwise.

Protection in Respect of Conviction for Offences

20. No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

No person shall be prosecuted and punished for the same offence more than once.

No person accused of any offence shall be compelled to be a witness against himself.

Protection of Life and Personal Liberty

21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

Protection Against Arrest and Detention in Certain Cases

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

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

Nothing in clauses (1), (2) shall apply to any person who for the time being is an enemy alien; or to any person who is arrested or detained under any law providing for preventive detention.

No law providing for preventive detention shall authorise the detention of a person for a longer period than two months unless –

an Advisory Board constituted in accordance with recommendations of the Chief Justice of the appropriate High Court has reported before the expiration of the said period of two months that there is in its opinion sufficient case for such detention:

Provided that an Advisory Board shall consist of a Chairman and not less than two other members, and the Chairman shall be a serving judge of the appropriate High Court and the other members shall be serving or retired Judge of any High Court: provided further that nothing in this clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (a) of clause (7).

Explanation – In this clause “appropriate High Court” means:

in the case of the detention of a person in pursuance of an order of detention made by the Government of India or an officer or authority subordinate to that Government, the High Court for the Union territory of Delhi;

in the case of detention of a person in pursuance of an order of detention made by the Government of any State (other than a Union territory), the High Court of the Union territory of Delhi;

in the case of the detention of a person in pursuance of an order of detention made by the administrator of a Union territory or an officer or authority subordinate to such

administrator, such High Court as may be specified by or under any law made by Parliament in this behalf.

When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts, which such authority considers to be against the public interest to disclose.

Parliament may by law prescribe-

the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

Right against Exploitation

Prohibition of Traffic in Human Beings and Forced Labour

23. Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

Nothing in this article shall prevent the State from imposing compulsory service for public purpose, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

Prohibition of Employment of Children in Factories, etc.

24. No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Freedom of Conscience and Free Profession, Practice and Propagation of Religion

25. Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

Nothing in this article shall affect the operation of any existing law or prevent the State from making any law-

regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

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.

Explanation 1 – The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II – In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Freedom to Manage Religious Affairs

26. Subject to public order, morality and health, every religious denomination or any section thereof shall have the right-
to establish and maintain institutions for religious and charitable purposes;
to manage its own affairs in matters of religion;
to own and acquire movable and immovable property;
to administer such property in accordance with law.

Freedom as to payment of taxes for promotion of any particular religion

27. No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

Freedom as to attendance at religious instruction or religious worship in certain educational institutions

28. No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

Nothing in clause (1) shall apply to an educational institution, which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

Cultural and Educational Rights

Protection of interests of minorities

29. (1) any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.

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

Right of minorities to establish and administer educational institutions

30. (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.

31. Compulsory Acquisition of Property. [Omitted by the Constitution (44th Amendment) Act, 1978, together with the preceding subject – heading ‘Right to Property’.]

Saving of Certain Laws

31A. Saving of Law providing for acquisition of estates, etc.

Notwithstanding anything contained in article 13, no law providing for: the acquisition by the State of any estate or of any rights therein or the extinguishments or modification of any such rights, or the taking over of the management of any property by the State for limited period either in the public interest or in order to secure the proper management of the property, or the amalgamation of two or more corporations either in the public interest or in order to secure management of any of the corporations, or the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of share-holders thereof, or the extinguishment or modification of any rights accruing by virtue of any agreement, lease of licence for the purpose of searching for, or winning, any mineral or mineral oil the premature termination or cancellation of any such agreement, lease or licence, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by (article 14 or article 19):

Provided that where such law is a law made by the legislature of a State, the provisions of the article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent:

Provided further that where any law makes any provision for the acquisition by the State of any estate and where any and comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.

In this article, the expression “estate” shall in relation to any local area, have the same meaning as that expression or local equivalent has in the existing law relating to land tenures in force in that area and shall also include:

any Jagir, inam or muafi or other similar grant and in the States of Tamil Nadu and Kerala, may any Janmam right; any land held under ryotwari settlement; any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of building and other structures occupied by cultivators of land, agricultural labourers and village artisans;

the expression ‘rights,’ in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under proprietor, tenure-holder, raiyat, under-raiyat or other intermediary and any rights or privileges in respect of land revenue.

31B. Validation of Certain Acts and Regulations

Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof

shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.

31c. Saving of Laws Giving Effect to Certain Directive Principles

Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing (all or any of the principles laid down in Part IV) shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by (article 14 or article 19); and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:

Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

31D (saving of laws in respect of anti-national activities)

Right to Constitutional Remedies

32. Remedies for enforcement of rights conferred by this part

The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

32A. (Constitutional validity of State laws not to be Considered in proceeding under article 32)

[Rep. By the Constitution (Forty-third Amendment) Act, 1977, s. 3 (w.e.f. 13-4-1978).]

33. Power of Parliament to modify the rights conferred by this Part in their application etc.

Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to: the members of the Armed Forces; or the members of the Forces charged with the maintenance of public order; or persons employed in any bureau

or other organisation established by the State for purposes of intelligence or counter intelligence; or persons employed in, or in connection with telecommunication system set up for the purposes of any Force, bureau or organisation referred to in clauses (a) to (c), be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.

34. Restriction rights conferred by this Part while martial law is in force in any area:

Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law is in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.

35. Legislation to give effect to the provisions of this Part:

Notwithstanding anything in this Constitution: (a) Parliament shall have, and the Legislature of a State shall not have, power to make laws: (i) with respect to any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33 and article 34 may be provided for by law made by Parliament; and for prescribing punishment for those acts which are declared to be offences under this Part; and parliament shall, as soon as may be after the commencement of Constitution make laws for prescribing punishment for the acts referred to in sub-clause (ii); (b) any law, in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (i) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under article 372, continue in force until altered or repealed or amended by Parliament.

Explanation – In this article, the expression “law in force” has the same meaning as in article 372.

APPENDIX -4

STATEMENT of the 26th Annual Meeting of ACPI *Shanti Kiran, Mangalore, October 24-26, 2001*

We, the members of the Association of Christian Philosophers of India (ACPI), gathered for our annual meeting at Shanthi Kiran, Mangalore, 24-26 October 2001, with the topic “The Social Reality of India: Philosophical Reflections Based on the Indian Constitution,” do appreciate and reaffirm the basic tenets and ideals of justice, equality, liberty, fraternity, democracy, secularism and socialism enshrined in the Indian Constitution.

We have become keenly aware of the way our Constitution balances the principle of equality and the rights of difference.

We favour the strengthening of these basic principles, especially in favour of the disadvantaged groups such as the scheduled castes, the scheduled tribes, women and children.

We would like that freedom be taken also as a responsibility by the people as well as by our leaders, and that human rights be respected in all walks of life.

We affirm the unity and integrity of our country, and we denounce those fundamentalist and divisive forces that threaten the unity and secular fabric of our nation.

Taking into account the multi-religious character of India, we feel that secularism should go beyond mere tolerance to a positive acceptance and appreciation of all religions and of their contribution to nation building.

We recommend that a study of our Constitution and of the United Nation’s Charter of Human Rights be included in the syllabus of all educational institutions.

Finally, we strongly urge that the right to education upheld in the Constitution be fully implemented at the earliest.

OUR CONTRIBUTORS

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Dr. Varghese Manimala, OFM Cap. graduated from Karnatak University, Dharwad, and holds an M.A. in English Literature from Calicut University and a Ph.D. from the Madras University. Presently he teaches Philosophy at Vijnananilayam, Eluru, A.P. He has to his credit several scholarly works.

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