CHAPTER III

SOCIAL CHANGE AND JUDICIAL REVIEW

The primary function of the law is to serve the society by regulating the behaviour of the members of the society. In the absence of regulatory behavioural norms which is provided by law, the society will have to face anarchy, because in the absence of law every member actuated by his interest would act to the detriment of everyone else. It is, therefore, force of law which has helped mankind to maintain peace and order in the society and has saved society from anarchy. This necessity of force of law becomes evident when it is said : "A herd of wolves is quieter and more at one than so many men, unless they all had one reason in them, or have one power over them. Unfortunately, they have not one reason in them, each being moved by his own interests and passions; therefore, the other alternative is the sole resource."[1]

However, it is universally accepted that the society is always in a state of flux and is always changing, sometimes forward and sometimes backward. Law, therefore, has to keep pace with the changing mores of society. Once the society is on the march, law will have to be reformed, modified or amended with a view to bringing it in conformity with the need of the society. However, there exists a controversy as to whether social change

1. G. Williams (ed.), Salmond on Jurisprudence, 1957, p.88.

influences law or law influences social change. The controversy is one of the recurrent themes of the history of legal thoughts.[2] While Savigny holds that it is the law which follows the social change, Bentham holds the opposite view.[3] But in ultimate analysis one must agree that they do influence each other. Sometimes it is the law which brings forth the required and desired social change and sometimes it is the social change that brings in the expected change of law.[3a] For example, it can be said that the law relating to abolition of "Sati" system was enacted primarily to bring about the desired reform of the then Hindu society, whereas the changing trend of the society towards socialism necessitated the change of law which brought about the abolition of "Zamindary" system.

Therefore, change of law is a must either way — that is either to bring about the desired change of society or to reflect the change of society. If law remains static and hinders the march of society, it will be rejected.[4] This holds good both in case of ordinary law and Constitutional Law. Though Constitutional Law is superior to ordinary law of the land and, therefore, should not be lightly tempered with, yet it should not obstruct the will of the future generation and the

2. W. Freidman, Law in a Changing Society, 1970, p. 19.

3. See A.V. Dicey, Lectures on the Relation between Law and Public Opinion in England during the Nineteenth Century, 1948, for detail discussion.

3a. H.R. Khanna, Society and The Law, 1981, p.15.

4. See Justice D.A. Desai, Law Reforms in India, 1990,p.4.

changing social, political and economic values and needs of the people.[5] The only way to ensure long life to a constitution, therefore, is to allow liberal reinterpretation of the constitutional provisions in the context of social aspirations and urges of the time or to subject the constitution to necessary amendments from time to time.[6] A constitution which cannot be amended constitutionally is an act of violence committed on the coming generations and an open invitation to revolution.[7] Already twelve unamendable Constitutions of France have each lasted on an average for less than ten years and have frequently perished by violence.[8]

Social Change and Judicial Interpretation

It is a fact that though the function of changing or amending any provision of the Constitution or a statute is entrusted upon the legislative organ of the state and the legislature formally and conciously discharges this duty, yet no one can deny that judiciary also while interpreting a provision of a constitution or a statute unconsciously contributes to the change or reform of it by giving it a progressive interpretation to meet new developing situations.[9]

5. See S.C. Kashyap, Human Rights and Parliament, 1978, p. 163
6. ibid., p. 134
7. ibid.
8. A.V. Dicey, An Introduction to the Study of the Law of the Constitution, 1961, p.129
9. See Justice D.A. Desai, Law Reforms in India, 1990, p.5

The constitution of a country being a living document must be interpreted in the light of the hopes and aspirations of the people. This interpretative function of the constitution is discharged by the courts through direct as well as indirect judicial review.[10] Through judicial review the courts perform the role of expounding the constitution and exercise power of declaring any law or administrative action, which may be inconsistent with the constitution, as unconstitutional and hence void.[11] This judicial function makes the judiciary the final arbiter of the constitution and enables it to put necessary restraints on governmental organs from exercising powers which may not be sanctioned by the constitution. The courts through the interpretative process contribute to the development of the constitution by putting gloss on the bare text of the constitution. There are times when the courts play a more creative role and even make law while interpreting the constitutional phraseology. Here the role of the courts may not be very different from being "constituent" or "law making". However, as mentioned above the interpretation of the constitution has to be in the light of the prevailing situations. Because with the change of time, the prevailing situations of the society go on changing and so also the

10. See M.P. Jain, Indian Constitutional Law, 1978, p.669.
11. ibid.

life of a nation. The life of a nation is dynamic, living and organic; its political, social and economic conditions change continuously. Social mores and ideals change from time to time creating new problems. It is, therefore, quite possible that a constitution drafted in one era, and in a particular context, may be found inadequate in another era and another context. It thus becomes necessary for the judiciary to make such interpretation of the provisions of the constitution so that they may be adapted from time to time in accordance with contemporary needs of the society to avoid both stagnation and revolution. Through such judicial interpretation the constitution gets amended informally and gradually without any change of the constitutional text.[12] The words in the constitution remain same but their meanings and contents change with time and context. Since right to "life" and "personal liberty" under Article 21 of the Constitution of India are constitutional provisions and these are being judicially interpreted in exercise of its power of judicial review, and the judicial pronouncements made on "life" and "personal liberty" are expected to vary from time to time and case to case with change of social needs, it will not be inappropriate to study something more about judicial review.

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12. See K.C. Wheare, Modern Constitutions, 1964, pp. 146-177.

Judicial Review : Bulwark of Fundamental Rights and Liberties

The power of judicial review is the weapon in the hand of the judiciary to protect the individual's right to life and liberty from the legislative and executive encroachments. Because judicial review implies a comprehensive judicial enquiry into, and examination of, the actions of the legislative, executive and administrative branches of the government, with specific purpose of ensuring their conformity to the specified constitutional provisions.[13] That is to say, the judicial review is applied not only to scrutinize the legislative acts of the legislatures but also to examine the executive actions.[14] The importance of judicial review under written federal constitution with a set of Bill of Rights is undeniable.[15] Judicial review is also recognized as corollary to limited government and constitutional supremacy, and it is because of this that any action on the part of legislative organ or executive organ which contravenes the provisions of the constitution must be void and the courts must invalidate them.[16]

Constitutional guarantee of the Fundamental Rights and Liberties of man has generally been regarded as the

13. S.A. de Smith, Judicial Review of Administrative Action 1980, p. 16.
14. E.S. Corwin, Encyclopaedia of Social Sciences, Vol. VIII, p. 457.
15. A.V. Dicey, Introduction to the Study of the Law of the Constitution, 1961, p. 111.
16. D.D.Basu, Commentary on the Constitution of India, Vol.I, 1965, p. 165.

indispensable basic condition of ordered human progress and political stability in a community governed by the doctrine of "rule of law" and ideal constitutionalism.[17] The Fundamental Rights and Liberties are so embeded in the constitution of a country governed by democratic means that they acquire a status of inviolability by the powers of the government. These rights and liberties limit the power of the government and if the government by going beyond the limits violates these rights and liberties of the people, the actions of the government are held to be unconstitutional and void. Since it is the power of judicial review which enables the courts to scrutinize the legislative and executive acts of the state and protect the Fundamental Rights and Liberties from the legislative and executive encroachments, the judicial review is called the bulwark of Fundamental Rights and Liberties.

Judicial Review under the Indian Constitution

Under the scheme of the Constitution of India though the political structure is federal, the judicial one is unitary. The Constitution provides for a pyramid of courts, at the bottom of which are the subordinate courts which are under the control of the High Courts of different States. The judges of the High Courts are not

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17. C.G. Haines, The American Doctrine of Judicial Supremacy, 1932, p. 512

under any authority except that of the Constitution, but their judgements can be modified or reversed by the Supreme Court which stands at the apex of the judicial system. The courts are independent of the executive and the legislature, and the freedom of judges are constitutionally guaranteed.

Articles 129 to 145 of the Constitution confer extensive powers on the Supreme Court to interpret the law and adjudicate on disputes, the verdict being binding on all institutions in the Country.[18] Articles 32 and 226 empower the Supreme Court and the High Courts respectively to protect the Fundamental Rights guaranteed under Part III of the Constitution, against legislative enactments and executive orders. Article 13(2) declares that State shall not make any law which contravenes the Fundamental Rights and any law made in contravention of Fundamental Rights shall be void. Under Article 13(3) the term "law" has been described to include even any ordinance, order, bye law, rule, regulation, notification, custom or usage having in the territory of India the force of law. From here it becomes clear that the Constitution has vested the judiciary with power of judicial review.[19] The Supreme Court under Article 32 and the High Courts under Article 226 are empowered to issue directions or orders or writs

18. Article 141 vests the Court with plenary power in this regard.

19. The Constitution of India explicitly establishes the doctrine of judicial review in several Articles, such as 13,32,131-136,143,226 & 246. See M.P.Jain, Indian Constitutional Law, 1978, p. 670

in the nature of *habeas corpus, mandamus,* prohibition, *quowarranto* and *certiorari,* which ever may be appropriate, for the enforcement of any of the Fundamental Rights. The difference between Articles 32 and 226 being that while the Supreme Court exercises the power conferred by Article 32, only in case of violation of Fundamental Rights, the High Courts can exercise the powers conferred by the Article 226, not only for enforcement of the Fundamental Rights but also for any other purpose.[20] It is by virtue of this power of judicial review, provided specifically under the Constitution, that the judiciary has been capable to protect the Fundamental Rights from the legislative and executive encroachments. Since judiciary through its power of judicial review has been able to protect the Fundamental Rights enshrined in the Constitution, the judiciary has been termed as the extension of these rights.[21] The power of judicial review under the constitution has never been questioned since the commencement of the Constitution.[22] The presence of this power of judicial review also makes it clear that the Constitution has discarded the doctrine of sovereignty of Parliament and in Part III it accepted the American view

20. However, the power of the Supreme Court to issue "writs" for other purposes also can be enlarged by Parliament under Article 139 of the Constitution.

21. Granvile Austin, The Indian Constitution : Cornerstone of a Nation, 1966, p. 164.

22. For Indian experience of the doctrine of judicial review, see V.S. Deshpande, "Judicial Review of Legislation" 16, J.I.L.I., 1974, p.727.

of Fundamental Rights.[23] The view that the Indian Constitution is a work of synthesis, compromise and accommodation of the borrowed principles of other countries, notably the U.K. and the U.S.A., evidently becomes clear when we find the presence of power of judicial review in the Constitution of India which is the combination of British parliamentary system with a written constitution of the American model, including a set of Bill of Rights and a division of powers between the Centre and the constituent units.[24]

Judicial Review and Right to Life and Personal Liberty in the Constitution

It is to be admitted that in case of life and personal liberty under Article 21 of the Constitution, the framers of the Indian Constitution restricted the scope and place of judicial review when the phrase "without due process of law" in the corresponding Draft Article was replaced by the expression "except according to procedure established by law". Had the clause "without due process of law" been retained in this Article the judiciary could have exercised judicial review both against the legislative and executive organ of the State with respect to protection of life and personal liberty of the individuals.

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23. See A.K. Gopalan V. State of Madras, AIR, 1950, S.C. 27 at 74 as per Justice Shastri

24. S.N.Ray, Judicial Review and Fundamental Rights, 1974, p. 66.

The makers of the Constitution were aware of the "judicial vagaries" which the phrase "due process"[25] had led to in U.S.A., and so the phrase "procedure established by law" was incorporated in Article 21 to give power of judicial review in case of rights to "life" and "personal liberty" only against the executive organ of the State. The partition of the Country and its aftermath on law and order situation made the framers of the Constitution extra-mindful of social interest and security, and they put certain fetters on the powers of the judiciary with respect to life and personal liberty by incorporating the phrase "procedure established by law" in place of "due process" in Article 21 of the Constitution. The makers of the Constitution seem to have been convinced that under the circumstances that was prevailing at that time, the security of the Country was more important than the right to life and personal liberty of private individuals, and thought that elected representatives in the legislatures were more well suited and well placed to prescribe the limits of enjoyment of right to life and personal liberty than few professional lawyers who adorned the benches of the courts as judges. However, with the introduction of procedural due process in the guise of doctrine of fair, just and reasonable procedure, by the Menaka Gandhi case[26], the Supreme Court has assumed extensive power of

25. See 2 C.A.D., p. 209.

26. A.I.R., 1978, S.C. 597.

judicial review, making it effective even against the legislative encroachments on the right to life and personal liberty. This expansion of the power of judicial review with respect to life and personal liberty is certainly a praiseworthy judicial innovation which will go a long way to protect the most cherished Fundamental Rights of "life" and "personal liberty".

However, it is to be borne in mind that the power of judicial review has not given the supremacy to the judiciary over the legislative or the executive organ in all matters.[27] The judiciary has been assigned a superior position in relation to the legislature and executive, in respect of certain matters only. In respect of matters in which operation of judicial review is excluded, the legislature and executive organs are supreme in their respecive jurisdictions.

Judicial Review and Constitutional Objectives

Under a constitutional government, the judiciary bears the formidable responsibility of ensuring that a balance is maintained between individual freedom and social control, and that is why it is said that judiciary "functions as the balancing wheel" of the Constitution.[28]

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27. Prof. D.N. Banerjee, Our Fundamental Rights : their Nature and Extent (As Judicially Determined), 1960, p.22.

28. K.S. Hegde, Crisis in Indian Judiciary, 1973, p. 20.

The judiciary while fulfilling through its power of judicial review the great task of preserving and protecting the cherished Fundamental Rights and Freedom of the people in a country based on ideal of constitutionalism must bear in mind the social welfare objectives also. It is sometimes found that the rigid, conservative and doctrinaire attitude in preserving the Fundamental Rights and Liberties gives rise to conflict with regard to effective implementation of social welfare objectives. Here the judiciary should resolve these conflicts, through its judicial review power, by giving constructive and harmonizing interpretation of the relevant provisions. The task of exercise of judicial review power should not be confined just only to the annulment of legislative or executive discretions whenever there is an apparent conflict between the Fundamental Liberties in one hand and the welfare objectives on the other. That could in the long run become negative and destructive function, as the history of U.S. Supreme Court during the New Deal era of 1930's evidently shows us. The judiciary should also be aware along with its duty to protect and preserve the Fundamental Freedoms of the citizens, about the objectives enshrined in the Constitution. It should strive as one of the organs of the State to facilitate the achievements of these objectives also. The basic tenets of the faith are embodied in the Constitution to which we all owe allegiance. The Constitution in its Preamble contains the

hopes and aspirations of the people of India. The Directive Principles of State Policy show the path to realize these hopes and aspirations, with due respect to Fundamental Rights. The over all scheme of the Constitution shows that the three main pillars of our parliamentary democracy, viz. legislature, executive and judiciary, have to function co-operatively to achieve the desired objectives of securing to all people social, economic and political justice.[29] The judiciary must share and not shun the responsibility of achieving the goal of social revolution through the path shown by Part IV of the Constitution which deals with the Directive Principles of State Policy. It must safeguard the Human Rights and clear the way for socio-economic revolution by upholding legislative measures and executive projects designed to secure socio-economic justice to the poor millions of India. The courts can perform this task only if it adopts a pragmatic and sociological approach without making much ado about rights and liberties in interpreting socio-economic legislations, which contemplate change in social structure or attempt to remake material conditions of the society.[30]

29. See P.B.Mukherjee, The Critical Problems of Indian Constitution,1967, pp.94-127 and B.R.Sharma, Judiciary on Trial: Appointment, Transfer and Accountability,1989, for critical appraisal of the Indian Judicial system.

30. See V.R.Krishna Iyer, Justice and Beyond, 1980, pp.55-74; B.R.Sharma, Socio-Economic Justice Under Indian Constitution,1984, pp.303-307 and S.M.N.Raina, Law, Judges and Justice,1979, pp.131-145 for elaborate discussion on the aspect of judicial function and social justice.

The judiciary through its interpretative role of the constitutional provisions instead of suppressing the ideals and objectives of the Constitution should highlight them and expedite the realization of those ideals and objectives. The judiciary while interpreting the rights and liberties should be conscious of the fact that the rights and liberties are only some means by which the nation wants to achieve some objectives. The rights and liberties should be interpreted in the light of those objectives. Judiciary should exercise its judicial review power such a way that it awakens the social consciousness about the goals and objectives of the Constitution and activates the other organs of the Governments so as to accelerate and quicken the march towards the achievements of those goals and objectives.[31] The judiciary, therefore, can play a very important role in bringing about the change of socio-economic policies of the government in tune with the hopes and aspirations of the people of the day, while interpreting the provisions of the rights and liberties in creative, innovative and hormonizing manner in conformity with the goals and objectives of the Constitution. This aspect of constructive exercise of judicial review power of the court, through which it has not only been able to protect the basic rights and liberties of the people, but also has set forth the desired social change

31. G.N.Joshi, Aspects of Indian Constitutional Law, 1967, p. 31. See also P.B.Gajendragadkar, The Indian Parliament and the Fundamental Rights, 1972, pp.35-67.

in proper direction, is being highly appriciated in all countries having written constitution with a set of Bill of Rights. Today, therefore, the main question is not whether there should be judicial review in a constitution having a set of Bill of Rights, but to what extent and how it should be exercised in the given context of socio-economic development of a country. The success of a scheme of judicial review will highly depend on how and to what extent it is attuned to the lofty ideal of constitutionalism as well as to the spirit and temper of a dynamic society.[32]

It is to be noted that the Supreme Court of India in the initial stage exercised the power of judicial review under a wrong notion when it opined in State of Madras V. Champakam Dorairanjan[33] that the Directive Principles of State Policy have to conform to and run as subsidiary to the Chapter on Fundamental Rights. This view of the Supreme Court was wholly uncalled for and unwarranted.[34] Prof. P.K. Tripathi and Prof. G.S. Sharma also have criticized the above view of the Supreme Court by which it wanted to confer superiority to Fundamental Rights over the Directive Principles in total disregard to

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32. See S.N.Ray, Judicial Review and Fundamental Rights, 1974, p.2.

33. A.I.R., 1951, S.C. 226.

34. See K.S. Hedge, Directive Principles of State Policy in the Constitution of India, 1971, p. 74.

the original intention of the makers of the Indian Constitution.[35] The Court by granting one set of provisions of the Constitution superiority over the other, made a damaging exercise of its judicial review power. When the judiciary in view of the above opinion of superiority of Fundamental Rights, went on to nullify the agrarian legislations which the legislatures brought in with the intention of improving the lot of tillers of the soil under the mandate of the Directive Principles of State Policy of the Constitution, a confrontation between the judiciary and the legislature came into being. The Parliament felt that if the tendency of the judiciary to frustrate the legislative attempts to bring forth socio-economic development was not curbed in time, the original intention of the framers of the Constitution would be blurred beyond recognition and, therefore, to expedite the agrarian reforms and clarify the intentions of framers of the Constitution enacted the Constitution (First Amendment) Act, 1951.

It is submitted that the Supreme Court really committed mistake in providing the Fundamental Rights

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35. See P.K.Tripathi, "Directive Principles of State Policy : the Lawyer's Approach to them hitherto Parochial, Injurious and Unconstitutional", XVII, S.C.J.(1954), p.7; Spotlights on Constitutional Interpretation, 1972, pp.291-322 and G.S. Sharma, "Concept of Leadership Implicit in the Directive Principles of State Policy in the Indian Constitution",7,J.I.L.I., 1965, p. 183.

superiority over the Directive Principles of State Policy. The Constitution nowhere states that the Directive Principles shall be subsidiary to Fundamental Rights and that judiciary should give more weight to Fundamental Rights over the Directives. It seems, in the initial stage the Court was very much influenced by the first half of the Article 37 of the Constitution which provides for non-justiciable character of the Directive Principles as compared to the Fundamental Rights which have been specifically made justiciable by the courts. But while reading Article 37, the Court should have given due importance to second half also of this Article which has expressely laid down that the Directive Principles shall be fundamental in the governance of the Country and that it shall be the duty of the State to apply these principles in making laws. It has been rightly observed that if the courts give lesser importance and weight to aspirations of the people embodied in Part IV of the Constitution, the attempt to achieve the set goal of new social order will get stifled and the very purpose of providing the Directive Principles of State Policy by the framers of the Constitution will get defeated.[36]

However, we find that the constitutional First Amendment did not bring to an end the conflict between the

36. See K.P.Krishna Shetty, Fundamental Rights and Socio-Economic Justice in the Indian Constitution, 1969,p.88 See also A.R. Blockshield, "Fundamental Rights and Economic Viability of the Indian Nation", 10,J.I.L.I, 1968, pp.84-85.

judiciary and the Parliament with respect to interpretation of Fundamental Rights vis-a-vis the Directive Principles of State Policy. The judiciary went on exercising its judicial review power such a way that by giving undue importance to the right to property it failed to respond to the constitutional objective of socio-economic upliftment of the people.[37] As a result the Parliament brought forth several amendments of the Constitution to overcome the judicial verdicts and give due recognition to the constitutional objective with respect to upliftment of socio-economic conditions of the people. The judicial hyper-activism and positivism with respect to right to property gave rise to many criticism[38] and led the Parliament to restrict and curtail to a great extent, by the 42nd Constitutional Amendment, the judicial review power of the judiciary. However, after the end of the internal emergency, by subsequent amendment the original power of judicial review of the Supreme Court and High Courts was

37. State of Bihar V.Kameshwar Singh, A.I.R. 1952 S.C. 252 State of West Bengal V.Mrs. Bela Banerjee, A.I.R. 1954 S.C. 170; Shankari Prasad V. Union of India, A.I.R. 1951 S.C. 458; Sajjan Singh V. State of Rajasthan A.I.R. 1965 S.C. 845; Golak Nath V. State of Punjab A.I.R. 1967 S.C. 1643; R.C. Cooper V. Union of India A.I.R. 1970 S.C. 564; Madhav Rao Scindia V. Union of India A.I.R. 1971 S.C. 530; Keshavananda Bharati V. State of Kerala A.I.R. 1973 S.C. 1461 and Minerva Mills Ltd. V. Union of India A.I.R. 1980 S.C. 1780 are some of the notable cases where we find the conflict between the judiciary and the Parliament with respect to status of Fundamental Rights vis-a-vis the socio-economic objectives of the Constitution laid down in the Directive Principles.

38. See S. Dayal, "Judicial Review and the Constitution (44th Amendment) Bill", XXVIII P.U.L.R., 1976, p.101.

restored and the relentless battle fought between the judiciary and the Parliament over the right to property was brought to an end by abolishing the right to property as Fundamental Right through the 44th Constitutional Amendment.[39]

It appears that in Kesavananda Bharati case[40] the Supreme Court exercised its judicial review power most harmoniously and correctly so as to facilitate the achievement of the constitutional objectives laid down in the Preamble and the Directive Principles of State Policy. Justice Mathew attributing a significant place to the Directive Principles of State Policy under the Constitution held the view that Directive Principles are fundamental in the governance of the Country and all organs of the State, including judiciary, are bound to enforce them.[41] He held further that economic goals have uncontestable claim for priority over ideological ones on

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39. However, see P.K. Tripathi, "Right to Property After Forty-fourth Amendment-Better protected than Ever Before" A.I.R.(Journal) pp.49-52, 1980; S.P. Sathe, "Right to Property After 44th Amendment : Some Reflections on P.K. Tripathi's Observations," A.I.R.(Journal) 1980, pp.97-100, where the two authors have given opposite views about right to property under the Indian Constitution after the 44th Amendment. Further see Justice A.M. Bhattacharjee, "Right to Property after Forty-fourth Amendment", A.I.R.(Journal) 1982, pp.52-55, where it has been opined that right to property falls within the ambit of article 21 dealing with right to life and personal liberty.

40. Kesavananda Bharati V. State of Kerala, A.I.R. 1973 S.C. 1461.

41. ibid. at 1952

the ground that excellence comes only after existence. It is only if men exist that there can be Fundamental Rights. He, therefore, expressed the opinion that in building up a just social order it may sometimes be imperative to make Fundamental Rights subordinate to Directive Principles.[42] Justice Hegde and Justice Mukherjee observed : "Part IV of the Constitution is designed to bring about the social and economic revolution that remained to be fulfilled after independence. The aim of the Constitution is not to guarantee certain liberties only to a few of the citizens but for all. The Constitution visualizes our society as a whole and contemplates that every member of the society should participate in the freedom guaranteed. Without faithfully implementing the Directive Principles, it is not possible to achieve the objectives of the welfare state contemplated by the Constitution and create the atmosphere for enjoying the guaranteed liberties by all the members of the society.... A government which fails to fulfil the pledge taken under the Constitution cannot be said to have been faithful to the Constitution and to its commitment."[43] Justice Beg observed that Fundamental Rights are like the banks of the flowing river , which could be mended or amended by displacements, replacements or curtailments or enlargements of any part according to the needs of those who had to use the path as laid down by the

42. ibid. at 1966
43. ibid. at 1641

Directive Principles.[44] According to Justice A.N. Ray the principles of social justice are placed above individual rights and whenever or wherever it is considered necessary individual rights have to be subordinated or cut-down to give effect to the principles of social justice as embodied in Part IV of the Constitution.[45] Justice Chandrachud also expressed opinion in favour of social objectives and held that if the State fails to create conditions in which Fundamental Freedoms could be enjoyed by all, the freedom of the few will be at the mercy of the many and all freedom will vanish. In order, therefore, to preserve their freedoms, the previleged few must part with a portion of it.[46] In short in the Kesavananda Bharati case there was a change of judicial attitude from the "right based thinking to goal oriented thinking".

Judicial Independence and Protection of Life and Liberty

To enable the judiciary to carry out with outmost effectiveness its responsibility of protecting the rights and liberties of the people from the legislative and executive encroachments and at the same time to bring a balance of these rights and liberties with social control measures for attainment of the objectives laid down in the Constitution, the independence of judiciary is inevitable.

44. ibid. at 1970
45. ibid. at 1717
46. ibid. at 2050

It is only an independent and impartial judiciary that would be able to raise its voice effectively without fear and favour against the powerful executive and legislature, and protect the rights and liberties of the people. In absence of strong and independent judiciary there is always the risk and fear that the over-zealous executive and legislature in a democratic country in the guise of bringing about the social security and socio-economic development may take executive and legislative measures trampling the very basic rights and liberties of the people. A judiciary not independent from the executive and legislative wing of the government will not be able to protect the weak, the helpless and the oppressed from the tyranny of the government and will fail to uphold the basic human dignity of the people. It is a strong and independent judiciary that can through its power of judicial review maintain the supremacy of the Constitution and rule of law.[47] To resist the arrogance of power of the executive and the legislature and to make judicious assessment of their activities vis-a-vis the Fundamental Rights and Liberties of the people, the makers of the Indian Constitution had emphasized on the independence of judiciary. The makers of the Constitution were well aware that on independence of judiciary depended the protection of individual's rights, survival of democracy and the

47. Jawaharlal Nehru's speeches, September 1957-April 1963, 1964, p. 426.

supremacy of the Constitution. Once the supremacy of the Constitution is undermined by making the judiciary weak and subservient to outside pressure, it would be open to any branch of the State to go against any provision of the Constitution with the full confidence that the judiciary will not be in a position to prevent it the violation of the Constitution.[48] To maintain the independence of the judiciary in the constitutional scheme of India the courts have been so constituted that unlike the legislature and the executive, they are least amenable to pressure of any kind. Since the judges are not elected by popular vote and their tenure as well as the salary is fixed by the Constitution, the independence of judiciary has been assured. Through this independence, the judiciary has been made the sole arbiter of the Constitution, authoritative interpreter of the will of the people and protector of life and liberties.

However, we find that inspite of the Constitutional safeguards, the indepencence of judiciary has been tried to be undermined in recent past by appointing judges on political consideration.[48a] In 1973 the Government for the first time came out with the idea that the judges should be committed not only to the social

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48. H.R. Khanna, "Independence of the Judiciary" 3 S.C.C. (Jrn.), 1981, p. 17.

48a. See B.R. Sharma, "Independence of the judiciary : Appointments and Transfers," C.M.L.J., Vol.17, 1981, pp.229-248.

philosophy of the Constitution but also to that of the Government and appointed Justice A.N. Ray as Chief Justice of India, superseding three senior judges, namely Justice Shelat, Justice Hegde and Justice Grover. The three judges were passed over only because their rulings displeased the Government. There can be no two opinions regarding the calibre and total suitability of each of the three superseded judges, two of them had already served with distinction as Chief Justices of the High Courts.[49] In January 1977 the second supersession took place. This time Justice M.H. Beg was appointed as Chief Justice of India, superseding a senior judge, Justice H.R. Khanna. This time the Government did not talk about the "Social Philosophy of Judges". It was explaind that the senior-most judge would have served a very short term as Chief Justice. This explanation was not at all convincing because there was no constitutional bar to appoint Chief Justices for a shorter or longer term and as we find Justice J.C. Shah had already served only for 35 days as Chief Justice of India.[50] The main reason of his supersession was that Justice H.R. Khanna delivered a bold dissenting opinion against the Government in the Habeas Corpus case[51] when Government through Presendential Order

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49. See N.A. Palkkivala (ed.), Judiciary Made to Measure, 1973, p. 36.

50. See Rajeev Dhavan, Justice on Trial : The Supreme Court Today, 1980, p. 70.

51. A.D.M. Jabalpur V.S.K. Shukla, A.I.R. 1976 S.C. 1207.

under Article 359 deprived the people of the right to life and personal liberty during the period of internal emergency. During the period of internal emergency as many as 16 judges of different High Courts were transferred without their consent to punish and terrorize them for demonstrating their independence and courage in giving judgements relating to emergency which were unfavourable for the Government.

It is submitted that since India is a democratic country, a judiciary committed to the philosophy of ruling party has no place in the constitutional set-up. Under dictatorship only the judiciary becomes committed to the ideology of the ruling party. But under democracy the judiciary keeps the party in power within the constitutional bounds. The judiciary has to be committed to the Constitution, the rule of law and democratic ideals and not to the philosophy of the party in power. The judges should be faithful to the Constitution and administer justice without fear and favour.[52] To avoid any future controversies in judicial appointments the Government should not resort to appointing judges on the basis of committed judiciary and must leave a larger say to the Chief Justice of India. Similarly to safeguard the

52. For further reading as to how judiciary can play effective role see V.R. Krishna Iyer, "Justice and Beyond," 1980 and Upendra Baxi, The Indian Supreme Court and Politics, 1980.

independence of judiciary effective checks and balance should be provided on the power of executive in transferring judges of different High Courts.[53] Another deplorable mode by which the independence of judiciary is being undermined is to appoint additional judges for a year or two and keep a watch on their conduct as judges, not to ensure honesty, integrity or the depth of knowledge, but to see that they do not become too independent, and play the tune set by the Government. By this mode the judges who are politically not dependable as far as the ruling party is concerned are thrown out. This practice also of the Government should be curbed to enable the judiciary to become independent and discharge its responsibility most effectively in protecting the citizens from the executive and legislative encroachment of their rights and liberties.

However, it is to be noted that a perfect set of laws and an ideal judicial system by themselves are not enough to ensure protection of rights and liberties.[54] The organized political forces and vigilant public opinion are vital for their preservation. To keep the executive and the legislative wing of the Government within the prescribed constitutional limit, whereby they can be

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53. See V.R. Krishna Iyer, "Three Decades of Constitutional Experience", C.M.L.J., Vol.17, 1981, p. 20.

54. See Justice Frankfurter in Dennis V. United States, 341 U.S. 494, 517 (1951).

prevented from violating the rights and liberties of the people, the role of the enlightened public opinion and the organized political forces in a democratically ruled country is of great importance. In a parliamentary form of government the executive which may manage to have complete control over the legislature, can, in absence of vigilant public opinion and strong organized political forces, become tyrannical threatening the rights and liberties of the people. And it is because of this, it has been said that "liberty lies in the hearts of the men and women; when it dies there, no constitution, no law, no court can save it".[55] But it must be admitted that though the judiciary by itself is not sufficient to preserve and protect the Fundamental Rights and Liberties, the rights and liberties are not likely to prevail in the absence of support from an ideal judiciary.[56]

It is sometimes opined that in a matured democratic country the legislature can be as much the guardian of rights and liberties of the people as the courts. But, Roscoe Pound does not agree with it and points out that the legislature is subject to constant pressure from the majority or powerful minorities and so it often fails to fulfil its sacred task by being

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55. Learned Hand, The Spirit of Liberty : Papers and Addresses, 1954, p. 190.

56. See Upendra Baxi, (ed.), Introduction to K.K. Mathew on Democracy, Equality and Freedom, 1978, pp. 118-119.

influenced through passion, prejudice or political consideration.[57] Moreover, legislative protection of rights and liberties calls for a high level of political consciousness and is not very effective in a country like India where this consciousness is still backward. India being a poor and largely illiterate country, its citizens are not adequately conscioius of their basic rights and liberties. As a result, the public opinion which is another instrument for safeguarding the rights and liberties is not effectively forth coming from the people. In the absence of the effective public opinion in India, it would have been very risky to leave the protection of Fundamental Rights and Liberties to the discretion of legislative majority.

Judicial Activism and Social Change

After the end of the dark period of internal emergency, during which total deprivation of right to life and personal liberty received the judicial approval from the highest court of the land,[58] the Supreme Court in recent years has been making major pronouncements with respect to right to life and personal liberty under

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57. Roscoe Pound, Jurisprudence, Vol.II, 1959, pp.397-402.

58. See A.D.M. Jabalpur V.S. Shukla, A.I.R. 1976 S.C. 1276 where the majority held that during the emergency under Presidential Order under Article 359 no person had any right to life or personal liberty.

Article 21 of the Constitution, which are not only raising the status of Fundamental Rights but are also bringing about a significant change in India's jurisprudence.

The Supreme Court in the post-internal emergency era, particularly from Maneka Gandhi's Case [59] onward, has adopted innovative and activist role while interpreting the right to life and personal liberty. The Court has taken to interpret these rights in the light of the Directive Principles of State Policy as incorporated in Part IV of the Constitution as well as the values underlying the U.N.O.'s Universal Declaration of Human Rights, 1948 and other international covenents. As a result of this judicial activism, the concepts of "life" and "personal liberty" embodied in Article 21 of the constitution have gradually broadened. Instead of playing the traditional role of mechanical interpreter and applier of laws, the Court has assumed the role of policy maker, both for Government and public institutions. Because of this changed role of judicial activism, the Supreme Court has raised many controversies, the most important being its encroachment upon the legitimate spheres of the other two branches of the State.

The Supreme Court after the initial phase of non-activist judicial review started in Gopalan, assumed

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59. A.I.R 1978 S.C. 597.

from Maneka onward the posture of activist judicial review and this has resulted in laying down of new laws by the judges with respect to right to life and personal liberty. This phenomenon involves the personality of the judges as they have to choose from several alternative approaches to solve the given problem under changed social circumstances and in picking one of them they are influenced by their own predispositions, values, policies and these may not necessarily be the same as those of the Constitution makers.[60] The activist judges believe that their function of interpretation of law involves to a certain degree the function of law making also. In the hands of the activist judges the Article 21 has received a very liberal interpretation in the post internal emergency era and many social, economic and political aspects have been infused into the concepts of life and personal liberty. The liberal interpretation of Article 21 has considerably widened its reach and amplitude, and presently the jurisdiction of the Supreme Court of India is comparable with the due process jurisdiction of the Supreme Court of the U.S.A. Through the judicial activism the right to personal liberty has been placed in due process model instead of crime control model of the pre-Maneka period.

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60. See M.P. Jain, Indian Constitutional Law, 1978, p.671.

Until the decision of Maneka Gandhi's Case,[61] the orbit of personal liberty included individual's right to be let alone,[62] freedom to go abroad[63] and certain rights of the detenus etc.[64]; but the doctrine of reasonable, just and fair procedure laid down in the Maneka Gandhi's case enabled the Court to incorporate many more rights such as the right to live with dignity, right to speedy trial, right to legal aid, right to liberal bail, human treatment and facilities to prisoners , impermissibility of the use of bar-fetters and handcuffs in normal cases, right against solitary confinement etc. Unlike Gopalan, Maneka allowed Articles 14 and 19 to assist Article 21 in widening the horizones of judicial review. The consequence is that the Article 21 has acquired immense potentialities. Displaying the activist role, the court has gone to the extent of issuing numerous directions requiring affirmative actions on the part of the State authorities and laying down new principles. The judicial activism has even led to the dilution of the traditional rule of *"locus standi"* as a result of encouragement given to public interest litigations.

The activist judiciary has expanded the concept of "life" also and has held that right to life enshrined in

61. See Supra foot note 59.
62. See Kharak Singh V. State of U.P.,A.I.R.,1963 S.C.1295
63. See Satwant Singh V.A.P.O., New Delhi, A.I.R.,1967, S.C. 1836.
64. State of Maharastra V. Prabhakar Pandurang Sanzgiri, A.I.R., 1966 S.C. 424.

Article 21 could not be restricted to mere animal existence nor it could be limited to protection of limbs or faculties only, through which life is enjoyed. Justice Bhagwati has observed in Francis Carolie Mullin V. Administrator, U.T. of Delhi[65] in the following way : "The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head, and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing with follow human beings. Ofcourse, the magnitude and content or components of this right would depend upon the extent of economic development of the country, but it must, in any view of the matter include the right to basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of human self."[66] The activist judiciary has held that not to pay minimum wages to a worker would amount to violation of his human dignity and consequently his right to life.[67] The Court by infusing the aspect of economic liberty in the concept of life has held that exploitation of bonded labourers[68] and the

65. A.I.R. 1981 S.C 746

66. ibid. at 753.

67. People's Union of Democratic Rights V. Union of India, A.I.R. 1982 S.C. 1473.

68. Bandhua Mukti Marcha V. Union of India, A.I.R. 1984, S.C. 802.

children[69] amount to deprivation of their right to live with human dignity. It has also held that right to life includes the right to livelihood[70] and right to healthy environment.[71]

What could be the reason of this perceptible change of attitude of judiciary from its non-activist role in pre-Maneka period to activist role in Maneka and post Maneka period? Social change can be attributed as one of the main reasons of such change of judicial attitude. The situation at the time of Gopalan, which set in the traditional non-activist attitude of the judiciary, was different from the situation when Maneka came in for decision. When Gopalan was decided in 1950, i.e., in the very year the Constitution came into force, it was very fresh in the memory of the judges as to how the new-born Nation had to pass through the critical law and order situation during the time of its birth, due to partition related communal riots. The existing law and order situation demanded strict interpretation of the personal liberty clause under Article 21 instead of liberal interpretation. At that time it was the security of the new-born Nation that was at stake. Therefore, a crime-

69. Labourers Working on Salal Hydro Project v. State of J.K. A.I.R. 1984 S.C. 177 and Peoples' Union of Democratic Rights V.Union of India, A.I.R. 1982 S.C. 1473.

70. Olga Tellis V. Bombay Municipal Corporation, A.I.R.1986 S.C. 180.

71. Ratlam Municipality V. Vardhichand, A.I.R. 1980 S.C. 1622.

control model, which helps the State authority to keep the security of the Nation, was the need of the day, instead of the due process model, which favours the liberty of the private individuals. Besides the post-partition communal riots, the invasion of Kashmir by Pakistan, the Razakar Movement in Hyderabad, the Communists' upsurge in some parts of the Country, assasination of Gandhiji and the demonstrations for demand of Hindu Rashtra had created very serious problems of law and order at the time of Gopalan's decision. Moreover, the Constituent Assembly also rejected the due process model due to prevailing law and order situation. Therefore, it was not possible for the Supreme Court to take a view, within a few months of the commencement of the Constitution, which was in complete disregard to the intention of the Constitution makers. Whereas, the situation at the time of Maneka was completely different. Maneka was preceded by the period of internal emergency which represents the darkest period of the Constitutional history of the independent India with respect to right to life and personel liberty. The judiciary was at its lowest ebb during the period of internal emergency and it made the darkness complete after the Habeas Corpus case[72], which had the effect of abrogating right to life and personal liberty in the practical sense. The people of India, whose right to life and personal liberty were wiped out during the internal

72. See Supra foot note 58.

emergency by the Government and could not get the protection from the judiciary as well, reacted vehemently against the Government and for the first time in the political history of independent India removed the ruling party from the power by giving its positive mandate to the newly formed Janata Party. The change led to revolutionary juristic thinking and the judiciary through its new role of judicial activism and dynamism wanted to secure the faith of the people of India. In order to undo the image of the emergency period and regain the credibility which it had lost during the emergency period it started giving pro-life and pro-liberty interpretation and widened the scope of Article 21. Probably, in the absence of internal emergency experience, today the right to life and personal liberty under Article 21 would not have received the expansive and liberal interpretation through the judicial activism and dynamism. This is a healthy trend as interpretation of law must change with the changing needs of the society. Because, as we have mentioned earlier towards the beginning of this chapter, if the law fails to respond to the needs of the changing society, then either it will stifle the growth of the society and choke its progress, or if the society is vigorous enough, it will cast away the law which stands in the way of its growth. The law must, through judicial interpretation, constantly be on the move adapting itself to the fast changing

society.[73] Conversely, law can be used also to bring in desired social order and change. That is why the constitution puts an obligation on every organ of the State including the judiciary, to usher in a new social order in which justice-social, economic and political-and equality of status and opportunity pervail.[74] The law courts and the entire judicial process are, therefore, obliged to contribute to social change and be responsive to the changing needs of the society. That is to say that the judiciary must use its judicial creativity as the most suitable instrument of introducing continual changes in the society.[75]

We will find in the subsequent chapters that while social change on one hand has changed the meaning and contents of the right to life and personal liberty, it has been tried, on the other hand, to bring in the desired change in the society by giving wide and liberal interpretation of the right to life and personal liberty.

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73. National Textile Workers Union V.P.R. Ramakrishnan, A.I.R. 1983 S.C. 75 at 87.

74. See the Preamble of the Indian Constitution.

75. Benjamin N. Cardozo, The Nature of Judicial Process, 1955, p. 73.