

COMMUNAL VIOLENCE IN INDIA – A CRITICAL STUDY

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INTRODUCTION

A Constitution means a body of fundamental principles or established precedents according to which a matter or state or of other organization is acknowledged to be governed. Constitution is not to be meant a simple law but as an instrument by which laws are formed. A Constitution is a living' and organic thing which, of all instruments, has the greatest claim to be construed broadly and liberally. The objective of the constitution of India is “let the good (or safety) of the people be the supreme (highest) law. The Indian desire for civil and political rights was very much implicit in the formation of Indian National Congress in the year 1885 in the words of Austin: "Indian wanted the same rights and privileges that Britisher masters enjoyed in India and that Britain's had among them in England ... and wanted to end the discrimination ... of colonial regime. Many of the human rights and freedoms in the *Universal Declaration of Human Rights, 1948* and in the *International Covenant on Civil and Political Rights, 1966*. are guaranteed in Part III of the Indian Constitution as fundamental rights. Part III of the Constitution is characterized as the Magna Carta of India. Part III embodies and sanctifies certain fundamental, individual, justifiable rights which are primarily meant to protect and promote the basic human rights of the people and protect the individual against the state action by imposing negative obligations. They are limitations upon all the powers of the government, legislative as well as executive and they are essential for the preservation of human rights. The declaration of fundamental rights in the Constitution serves as a reminder to the government in power that certain liberties and freedoms essential for by the people and assured to them by the fundamental law of the land are to be respected. The Constitution of India permits the reasonable restrictions to be imposed on an individual's liberty and the interest of the society. Thus, the State can limit the freedom and liberty of the individuals on those grounds which are prescribed in the Constitution. Anything beyond that will be ultra vires of the Constitution. The fundamental rights are guaranteed in Part III of the Indian Constitution consisting of articles

12 to 35. Since these rights are a guarantee against "state action", they have to be distinguished from violation of such rights by the private parties. Fundamental Rights are different from other rights available to us. Whereas ordinary law protects, Regulates and enforces our ordinary legal rights. the constitution of the country guarantees the protection of fundamental rights. The legislature has the right to change the ordinary rights by following the ordinary process of law making but without amendment in the constitution itself a fundamental right cannot be changed in addition to this, no ingredient or any part of state or government act to violate them. This is to responsibility and authority of the judiciary to maintain or protect the fundamental right from violations by the actions of the government. The judiciary has the power to declare the actions illegal taken by legislative as well as executive if found violating the fundamental rights or restricting in an unreasonable manner.

THE INDIAN CONSTITUTION GRANTED THE FOLLOWING POLITICAL RIGHTS

- I. **“Article 14 (Right to Equality)-** The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.
- II. **Article 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.
- III. **Article 15(3) -** Nothing in this article shall prevent the State from making any special provision for women and children.
- IV. **Article 16 (1) -**There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.
- V. **Article 19 (Right to Freedom)**
- VI. **Article 19(1)(a) -** Rights to Freedom of Belief, Speech & Media.
- VII. **Article 21-** No person shall be deprived of his life or personal liberty except according to procedure established by law.
- VIII. **Article 21A-** The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.”

RULE OF LAW

Indian constitution has the “basic feature” in the rule of law instituted in Article 14. Therefore by the amendment in the constitution under Article 368 it can not be destroyed.

MEANING OF RULE OF LAW

Prof. Dicey gave the rule of law that guarantees the equality of everyone before the law. All are same and No one is superior to law. The origin of the rule of law is the Magna Carta and it denotes the law equal for everyone in the same line because nation or state have no religion and everyone is equal and Homogeneity will be applicable to all. The rule of law controls and regulates each organ of state under the constitution of India. Absence of arbitrary power has been held to be the first essential of rule of law. The rule of law requires that the discretion conferred upon executive authorities must be contained within clearly defined limits. The rule of law permeates the entire fabric of the constitution of India and it forms one of its basic features.

EXCEPTIONS TO RULE OF LAW

Despite provisions of equality in our Constitution, there are some exceptions to the Rule of Law in public interests:

- I. The President or the Governor of a State shall not be answerable to any court for the exercise and performance of the powers and duties of his office.
- II. No criminal proceeding whatsoever shall be instituted or continued against the President or a Governor in any Court during his term of office.
- III. No civil proceeding in which relief is claimed against the President or the Governor of a State shall be instituted during his term of office in any court, until the expiration of two months after a notice is served on him. These immunities shall not bar impeachment of the President or suits or other proceedings against the Government of India or State.
- IV. Exception in favour of foreign sovereign and ambassadors.

RULE OF LAW UNDER INDIAN CONSTITUTION

The rule of law has a vital role in flourishing the democracy of India. India had two options while framing the constitution i.e. U.S.A & England. The rule of law from England was adopted and instituted so many arrangements/provisions in Indian Constitution by our constitutional founder. Constitution must be pursued by three organs. If any of the organs acts something in contravention of the constitution, all such acts will be beyond the legal power or authority or person or body etc. Law enforces all fundamental rights and part III to all under the rule of law. Part- III and all fundamental Rights come under the Rule of Law, which are enforceable by Law. If these are violated we can go to the Supreme Court and High court under Article 32 & 226. The term Law includes all orders, rules, regulations, bylaws, notice and customs. It expects that all these will be according to Constitutional provisions if they will be against, under article-13 they will be declared unconstitutional and void. In the Constitution of India guaranteed certain rights which can be enforced by the courts. At this situation we may have the opinion of the position third principal of Dicey's doctrine of rule of law prevailing in India i.e. Predominant of legal spirit. Until this principle was being considered in the context of interpreting the provisions of the Constitutions. In our Constitutional system, the central and most characteristic feature is the concept of the rule of law which means. In current scenario, the authority of law sets all administrative action according to the standard of legality. Any action taken by the administrative or executive that does not match the standard set by law will be set aside if the aggrieved party puts the appropriate action in the competent court. The doctrine of Rule of Law has been adopted in the Constitution of India. The principles of Rule of Law i.e. Justice, equality and liberty are enriched in the Constitution of India. The Constitution of India is above all the laws implemented in Indian Territory and any law made by the central government or by the state government must be in confirmation with the Constitution of India. If any law made by the legislation under the jurisdiction of India, which is against the mandates of the constitution, the law would be void. Article 14 of the constitution of India guarantees equality for every person before the law as an aspect of the rule of law.

Thus, the Indian constitution effectively applies the rule of law. The Supreme Court in the case of *Indira Nehru Gandhi vs. Raj Narain*¹ It was held that the rule of law embodied in Article 14 is the 'basic structure' of the Indian constitution and hence it cannot be destroyed even by an amendment of the constitution under Article 368 of the constitution.

POLITICAL RIGHT UNDER PART – III OF THE CONSTITUTION

Article 14 (Right to Equality)- The State shall not deny any person equality before the law or the equal protection of the laws within the territory of India.ⁱⁱ

Article 14 states that state shall not deny to any person equality before the law or equal protection of law within the territory of law. Thus, Article 14 embodies the general principles of equality before the law and prohibits unreasonable discrimination between persons. Article 14 says every person is equal before law and deserve equal treatment in equal circumstances without distinction of caste, sex, religion, social status etc. however this rule is not absolute and has few exception.

Article 14 provide two expressions:-

- i. Equality Before Law.
- ii. Equal Protection Of Law.

EQUALITY BEFORE LAW

The concept of “equality before the law” is from English common law. The principle of equality is outstanding and growing concept equality before law denotes that No one is superior to the law of the land. Thus it has a little bit of a negative indication. On the basis of gender, birth, position or other personal attributes law does not discriminate. Thus everyone of any criteria is equal before the law.

EQUAL PROTECTION OF LAW

Article 14 of Indian Constitution gives the “Equal protection of law” that has been incorporated from section 1 of the 14th Amendment of the Constitution of the United states. It is a conclusive approach as it denotes the equal treatment into both entitlement or advantages provided or liabilities compelled equal protection of law clarifies that every person is supposed to get equal safeguard of laws within the territory of India. In *Stephen college Vs Delhi University*ⁱⁱⁱ under the court held that the term “Equal protection of law” is a conclusive accountability on the state

to assure equal safeguards of laws by fetching essential social and economic changes so that no one is refused such safeguards and everyone may enjoy equal protection of laws. If the state leaves the existing inequalities untouched laws d by its laws, it fails in its duty of providing equal protection of its laws to all persons. Every person of India will be conferred equal protection of law by state and it should also ensure equal protection to non-citizens of India.

LIMITATION OF THE DOCTRINE OF EQUAL PROTECTION:

- i. Every law cannot be made universally applicable. There are different classes of persons who require special treatment.
- ii. The state has the power to classify persons for legitimate purposes only. Every classification is likely to produce some inequality and mere production of equality is not enough.

In the case of *Indra Sawhney*^{iv} The right to equality is also recognized as one of the basic features of the Indian constitution. Article 14 applies to all people and is not limited to citizens. A corporation, which is a juristic person, is also entailed to the benefit of this article. This concept implied equality for equals and aims at striking down hostile discrimination or oppression of inequality.

In the case of *Ramesh Prasad v. State of Bihar*,^v It is to be noted that the aim of both the concept, 'Equality before law' and 'Equal protection of the law' is equal Justice.

This 'all-embracing scope' and 'activist magnitude' of article 14 was reaffirmed in the celebrated *Maneka Gandhi* case^{vi} where Bhagwati J concurring with the majority in a 6:1 decision observed: "Article 14 strikes, at arbitrariness in State action and ensures fairness and equality of treatment."

THE TWO TESTS OF CLASSIFICATION ARE AS FOLLOWS:

1. **INELIGIBLE DIFFERENTIA:** The classification must be founded on an intelligible differentiate which distinguishes those that are grouped together from others, and
2. **RATIONAL RELATION:** That differentiate must have a rational relation to the object sought to be achieved by the Act.^{vii}

REASONABLENESS and FAIRNESS is the Heart and Soul of Article 14.^{viii}

Article 15^{ix}

Article 15 of constitution of India deals with prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

Article 15(1) It prohibits the state from discriminating against a citizen on grounds of religion, race, caste, sex, place of birth.

Article 15 (2)-Article 15(2) elaborates that no Indian citizen can be discriminated against on basis of religion, race, caste, sex, place of birth. It states that no citizen shall be denied access to shops, public restaurants, hotels and palaces of public entertainment. It also includes that no citizen shall be accountable to any disablements burden, prohibition or circumstances with the use of wells, bathing ghats, tanks, ponds, streets, roads and plans of public resort maintained wholly/partly out of State funds or dedicated to the use of general public

Article 15 (3) and (4)- The Article also states that the article cannot be used as an argument to make special provisions for women, children or any other backward classes. “Nothing in this article or in clause (2) of 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 Scheduled Tribes,” the article states.

Article 15 (5)- An amendment was made in the article in 2018 after the government announced a 10% reservation in colleges and universities for economically weaker sections. It states, State makes any specific provision by law for the upliftment or advancement of any socially and educationally backward classes of citizens or for SC or ST and shall not be prevented by this article or sub clause (g) of clause (I) of Article 19. Such specific provisions are related to their admission to educational organizations whether aided or unaided by the state other than the Minority educational institution referred to in clause (1) of Article 30.

ARTICLE 16- EQUALITY OF OPPORTUNITY IN MATTERS OF PUBLIC EMPLOYMENT^x

Article 16 Equal opportunity in public employment is dealt with Article 16. There are different definitions over the subject of equal opportunity and has no consensus as to the precise meaning. This article has been widely defined by the constitution of India. Equal Employment Opportunity (EEO) principles apply to:-

1. Access to jobs
2. Conditions of employment
3. Relationships in the workplace
4. The evaluation of performance and
5. The opportunity for training and career development.

Article 16 a paradigm of the application of common rule provides specific reference to the opportunity of appointments under the state. It implies the equal opportunity for every citizen of the country in matters related to the appointment of employment to any organization under the state.

If it stood alone all the backward communities would go to the wall in a society of uneven basic social structure; the said rule of equality would remain only a utopian conception unless a practical content was given to it... that is why the makers of the Constitution introduced clause (4) in Art. 16.

The term Nothing in this article is a legislative instrument to define its purpose in a most solidly or emphatic way that the authority or power provided there under is not limited in a what by the main provision but falls outside. It has infected not earned an exception but has preserved a power untouched or free from the other provisions of according to the article.

According to Article 16, every citizen of India shall get the equal opportunity for employment or appointments according to his qualification or capability to any office or organizational working under the state.

In *K.C. Vasanth Kumar v. State of Karnataka*,^{xi} the Supreme Court has suggested that the reservations in favor of backward classes must be based on the mean test. It has been further

suggested that the policy of reservations should be reviewed every five years or so and if a class has reached up to that level where it does not need the reservation. Its name should be deleted from the list of backward classes.

ARTICLE 19 – PROTECTION OF CERTAIN RIGHTS REGARDING FREEDOM OF SPEECH etc^{xii}

The aspect of free speech is the competence to think and speak candidly and to get information from others through advertisements, publications, and public communication without fear of vengeance, oppression, prohibition or restriction by the government. Free speech gives opportunity to people to come together and broaden and strengthen their social and moral position achieve political influence and become socially and morally enhancement persons. Freedom of speech is considered as the first state or position of liberty. It has an imperative or vital position in the pecking order or ranking of the liberty freedom of speech is regarded the mother of all liberties to define freedom of speech and turn explains the obligation one's own views and sentiment without fear in various mode i.e. in writing, printing, pictures, by words of mouth etc. the obligation to freedom of speech in modern time is widely accepted as an aspect of free society and it must be protected at all time. The utmost principle of free society is the unhampered continuity of words in an open stage freedom to express views, opinions and ideas without impediment and without scare or dismay of suffering plays important role in the advancement of that particular society and finally for that state. Not only the constitution or statutes of various states but also various international councils like universal declaration of Human Rights, European connection Human Rights and fundamental freedom, international council on Civil and Political Rights guarantees the freedom of speech. These announcements completely talk about the safeguard of freedom of speech and expression.

Article 19(1)(a)- to freedom of speech and expression;

Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties". -John Milton

The right to freedom of speech and expression to every citizen of India is guaranteed by Article 19 (I) (a) of the constitution of India. The law asserts that every citizen shall have the requisite

to freedom of speech and expression. “Acceptable restraints may be imposed on the operation of this right for certain aims. Any bound on the operation of the right under article 19 (1) (a) not falling within the four corners of Article 19 (2) cannot be valid.

Article 19 (1) (A) comprises the right to represent one’s ideas and views at any topic through any mode i.e. writing, Printing, by word of mouth, advertisement, Movie, Picture etc. it thus also combines the freedom of public discourse and the right to spread or publish views. But this right is liable to acceptable restraints being imposed under article 19 (2). Free expression will not be related or disoriented with a lice to make deceptive and capricious accusation against judiciary.^{xiii}

It is noted that the restraint on the freedom of speech of any person may be imposed by an action of the state by its inaction thus if the state fails to guarantee the right of freedom of speech and expression to all its citizens then it would violate the provision of Article 19 (1) (A).

It is imperative for a healthy democracy to provide the fundamentals right to freedom of speech and expression to all its citizens as it is considered the most prominent part of it and permits its citizens to take part with full sufficiency in social, moral and political process of the Nation.

This right applies to only Indian citizens and not foreign Nationals. This right is, however, not absolute and it permits the Government to form laws to impose reasonable restrictions in the interest of sovereignty and integrity of India Security of the state. Friendly relations with foreign states, public order, decency and morality and contempt of court, defamation and incitement to an offence.

In the prelude to the Indian constitution, the people of India announced then solemn firmness to defend all its citizens’ freedom of speech expressions the constitution asserts the right to freedom of expression combines the right to voice one's idea, the right to obtain data or message, the right to get information and the right to pass on or transmit information there is accountability over Indian state to maintain the situation in which all citizens may enjoy the mentioned rights with full sufficiency.

In *Romesh Thappar v State of Madras*^{xiv}, the Supreme Court of India held that the freedom of speech and expression includes freedom to propagate ideas which is ensured by the freedom of

circulation of a publication, as publication is of little value without circulation. Patanjali Sastri, J., rightly observed that-

'Freedom of Speech and Press lat at the foundation of all democratic organizations, for without free political discussion no public education, so essential for the proper functioning of the process of Government, is possible'

However, Article 19(2) of the Constitution provides that this right is not absolute and 'reasonable restrictions' may be imposed on the exercise of this right for certain purposes. The right to freedom of expression includes the right to express one's views and opinions on any issue and through any medium whether it be in writing or by word of mouth.

The phrase "speech and expression" used in Article 19(1) (a) has a broad connotation. This right includes the right to communicate, print and advertise the information. In India, freedom of the press is implied from the freedom of speech and expression guaranteed by Article 19(1)(a). The freedom of the press is regarded as a "species of which freedom of expression is a genus"^{xv}. On the issue of whether 'advertising' would fall under the scope of the Article, the Supreme Court pointed out that the right of a citizen to exhibit films is a part of the fundamental right of speech and expression guaranteed by Article 19(1)(a) of the Constitution.^{xvi}

Indian law does not expressly refer to commercial and artistic speech. However, Indian Law is developing and the Supreme Court has ruled that 'commercial speech' cannot be denied the protection of Article 19(1)(a) of the Constitution. The Court has held that 'commercial speech' is a part of the 'right of freedom of speech and expression' as guaranteed by our Constitution.

The citizens of India have the right to receive 'commercial speech' and they also have the right to read and listen to the same. This protection is available to the speaker as well as the recipient.[iv] Freedom of Speech and Expression also includes artistic speech as it includes the right to paint, sign, dance, write poetry, literature and is covered by Article 19(1)(a) because the common basic characteristic of all these activities is freedom of speech and expression.^{xvii}

Under the provisions of the Constitution of India, an individual as well as a corporation can invoke freedom of speech arguments and other fundamental rights against the State by way of a Writ Petition under Articles 32 and 226 of the Constitution of India subject to the State imposing some permissible restrictions in the interests of social control.

The Grounds on Which This Freedom Could Be Restricted

Clause (2) of Article 19 of the Indian constitution imposes certain restrictions on free speech under following heads:

- I. security of the State,
- II. friendly relations with foreign States
- III. public order
- IV. decency and morality
- V. contempt of court
- VI. defamation
- VII. incitement to an offence,
- VIII. sovereignty and integrity of India

In case of *Nandini Satpathy v. P.L. Dhani*,^{xviii} No one can forcibly extract statements from the accused who has the right to keep silent during the course of interrogation.

In *Selvi and Others v. State of Karnataka*^{xix} In 2010, the Supreme Court used the same constitutional provision to find that narco analysis techniques were illegal.

ARTICLE 21: “No person shall be deprived of his life or personal liberty except according to a procedure established by law”.^{xx}

Article 21 provides constitutional right to life and personal freedom to all its citizens. It is a crucial human right and recognizes the purity or faith of human life. This article is liable on the base of measure formed by law for many years this article has withstood a sea change and has been crucial and fundamental right The Supreme Court through a humanistic clarification of the Article has determined a number of conglomerate or inevitable rights now the article denotes not only for the right of life and individual liberty but also the right to decency or honor and all other characteristics of human personality those are mandatory for the full advancement of a person.

All citizens have the right to life, liberty and protection of person the right to life is the most elemental of all rights every other rights combine quality to life in question and rely on the pre-

eminence of life itself for their operation. As human rights may only be adhered to living beings one might hope the right to life itself to be in some sense constitutional, since none of the other rights will have any value or adequacy without it.

If Article 21 had been classified in its origin in original primary sense, there would have been no fundamental rights worth mentioning this section will inspect the right to life as classified and applied by the supreme court of India.

According to Article 21 of constitution of India 1950 every person has the right to life or individual liberty and shall never be deprived of unless according to measure formed by law. “Life” in Article 21 of the constitution has a wide meaning it does not denote only the physical act of breathing like mere animal existence but also combines the right or measure to line with dignity, right to livelihood etc.

Right to life is elemental or Intrinsic to our reality or presence as it combines those aspects which make a person life senseful, absolute and worth living. This article in constitution has met with the widest possible classification or analysis. A number of rights under the proper guidance of article 21 has got evolution, growth progress, shelter and nourishment. The basic needs essential for a person is the main concept of the right to life.

In the case of ***Kharak Singh v. State of Uttar Pradesh***^{xxi}, the Supreme Court quoted and held that:

By the term “life” as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by amputation of an armored leg or pulling out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world.

In ***Sunil Batra v. Delhi Administration***^{xxii}, the Supreme Court reiterated with the approval the above observations and held that the “right to life” included the right to lead a healthy life so as to enjoy all faculties of the human body in their prime conditions. It would even include the right to protection of a person’s tradition, culture, heritage and all that gives meaning to a man’s life. It includes the right to live in peace, to sleep in peace and the right to repose and health.

Article 21A “The State shall provide free and compulsory education to all children of 6 to 14 years in such manner as the State may by law determine.”^{xxiii}

“Article 21 A” asserts the free and compulsory education to all children aged 6 to 14 years in such a manner as the state may by law from determine.

Education is a basic crucial human right and amendatory for the operation of all other rights. It encourages personal liberty and advancement and provides important advantages. Due to poverty, marry children and adults remain deprived of educational opportunities. These machinery encourage and evolve the right of all citizens to enjoy access to education and good quality without any differences or extension. This is the government's accountability to fulfill their duty both legally and politically in order to deliver education to all of better quality and implement and measure sufficiently education strategy. The right to education is a universal entitlement to education. This is recognized in the international covenant on economic, social and cultural rights as a human right that includes the right to free, compulsory primary education for all, an obligation to develop secondary education accessible to all, in particular by the progressive introduction of free secondary education, as well as an obligation to develop equitable access to higher education, ideally by the progressive introduction of free higher education.

The right to education merely also adds an accountability to give basis education for persons who have not done primary education besides these access to education arrangements, the right to education includes the liability to rule out all discrimination at every level of the educational system to fix minimum standard and to improve the education quality.

RIGHT TO EDUCATION ACT

The Right of children to Free and Compulsory Education Act came into force from April 1, 2010. This was a historic day for the people of India as from this day the right to education will be accorded the same legal status as the right to life as provided by Article 21A of the Indian Constitution. Every child in the age group of 6-14 years will be provided 8 years of elementary education in an age appropriate classroom in the vicinity of his/her neighbourhood.

The Constitution (Eighty-sixth Amendment) Act, 2002 inserted Article 21-A in the Constitution of India to provide free and compulsory education of all children in the age group of six to fourteen years as a Fundamental Right in such a manner as the State may, by law, determine. The Right of Children to Free and Compulsory Education (RTE) Act, 2009, which represents the consequential legislation envisaged under Article 21-A, means that every child has a right to full time elementary education of satisfactory and equitable quality in a formal school which satisfies

certain essential norms and standards. Article 21-A and the RTE Act came into effect on 1 April 2010. The title of the RTE Act incorporates the words ‘free and compulsory’. ‘Free education’ means that no child, other than a child who has been admitted by his or her parents to a school which is not supported by the appropriate Government, shall be liable to pay any kind of fee or charges or expenses which may prevent him or her from pursuing and completing elementary education. ‘Compulsory education’ casts an obligation on the appropriate Government and local authorities to provide and ensure admission, attendance and completion of elementary education by all children in the 6-14 age group. With this, India has moved forward to a rights based framework that casts a legal obligation on the Central and State Governments to implement this fundamental child right as enshrined in Article 21A of the Constitution, in accordance with the provisions of the RTE Act.

STATE OF TAMIL NADU & Ors vs K SHYAM SUNDER & Ors^{xxiv}

“Court held that “right of a child should not be restricted only to free and compulsory education, but should be extended to have quality education without any discrimination on the ground of their economic, social and cultural background.”

INTERNATIONAL COVENANT

Article 2^{xxv}

“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^{xxvi}

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

Article 26^{xxvii}

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Article 6^{xxviii}

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

Article 7^{xxix}

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 26^{xxx}

(1) 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.

(2) 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.

(3) Parents have a prior right to choose the kind of education that shall be given to their children.

LANDMARK CASES

State Of West Bengal V. Anwar Ali Sarkar^{xxxi}

ISSUES

The issue raised by the petitioner was constitutional validity of West Bengal Special Courts Act (X of 1950) which was entitled “An Act to provide for the speedier trial of certain offences”. The applicant challenged it on the grounds of Article 14. Also section 5(1) of the act was constitutionally challenged as it was submitted that the said section gives arbitrary power and authority to the state government to refer any ‘case’ or ‘class of cases’ to Special Courts without a reasonable classification. The issue also included inclusion of any individual ‘case’ besides the ‘class of cases’.

HELD

The Supreme Court held that Section 5 (1) of the West Bengal special court violated Article 14 and was unconstitutional since it provided unfound power on the government to frame offences or cases at its pleasure and the act did not establish any policy or guideline for the operation of sensibility to classify cases or offences. The measure established by the Act for the trial by the special courts varied to a large extent from the measure established for the trial of offences commonly by the criminal procedure court. The differentia which is the basis of classification and the object of the Act are two distinct things. What is necessary is that there must be a nexus between the basis of classification and the object of the Act which makes the classification. It is only when there is no reasonable basis for a classification that legislation making such classification may be declared discriminatory. Thus, the legislature may fix the age at which persons shall be deemed contempt to contract between themselves but no one will claim that competency. No contract can be made to depend upon the stature or colour of the

hair. Such a classification will be arbitrary. Law doesn't include administrative directions or instructions issued by the government for the guidance of its officers.

There can be no discrimination both in substantive as well as procedural law.

State Of Madras V. Smt. Champakam Doriaranjan.^{xxxii}

ISSUE

The important question is where there is a conflict between the fundamental rights and directive principles, which should prevail?

HELD

A historical decision or judgment of the supreme court of India led to the first amendment of the constitution of India. Other republics it was the first crucial judgment of India regarding reservations. In its ruling the Supreme Court upheld the Madras High Court judgment, which in turn had struck down the Government Order (G.O) passed in 1927 in the Madras Presidency. The G.O had provided caste based reservation in government jobs and college seats. The Supreme Court's verdict held that providing such reservations was in violation of Article 16 (2) of the Indian Constitution.

IMPLEMENTATION

1st constitutional amendment (Art. 15 (4)) introduced to make judgment invalid.

M. R. Balaji And Others V. State Of Mysore^{xxxiii}

ISSUE

Whether the criteria used by the state for the purpose are relevant or not ?

HELD

The five-judge bench of the Supreme Court struck down this classification for several reasons – the chief of which is the Court's interpretation of the words in Article 15(4) as being "classes of citizens", not as "castes of citizens". The test of caste was rejected for some other reasons as well – *first*, caste is inapplicable in many sections of Indian society which do not recognise the caste system such as Muslims or Christians; and *second*, the use of caste may be inappropriate if the end-goal is to eradicate caste itself.

“Thus, there is no doubt that Article 15(4) has to be read as a proviso or an exception to Articles 15(1) and Article 29(2).”

Indra Sawhney Etc. Etc Vs Union Of India And Others.^{xxxiv}

ISSUE

1. Whether Article 16(4) is an exception to Article 16(1) and would be exhaustive of the right to reservation of posts in the services under the State?
2. What would be the content of the phrase "Backward Class" in Article 16(4) of the Constitution and whether caste by itself could constitute a class and whether economic criterion by itself could identify a class for Article 16(4) and whether "Backward Classes" in Article 16(4) would include the "weaker sections" mentioned in Article 46 as well?
3. If economic criterion by itself could not constitute a Backward Class under Article 16(4), whether reservation of posts in the services under the State, based exclusively on economic criterion would be covered by Article 16(1) of the Constitution?
4. Can the extent of reservation of posts in the services under the State under Article 16(4) or, if permitted under Article 16(1) and 16(4) together, exceed 50 % of the posts in a cadre or Service under the State or exceed 50% of appointments in a cadre or service in any particular year and can such extent of reservation be determined without determining the inadequacy of representation of each class in the different categories and grades of services under the state?

5. Does Article 16(4) permit the classification of 'Backward Classes' into Backward Classes and Most Backward Classes or permit classification among them based on economic or Other considerations ?
6. Would make "any provision" under Article 16(4) for reservation "by the State" necessarily have to be by law made by the legislatures of the State or by-law made by Parliament? Or could such provisions be made by an executive order?
7. Will the extent of judicial review be limited or restricted in regard to the identification of Backward Classes and the percentage of reservations made for such classes, to a demonstrably perverse identification or a demonstrably unreasonable percentage?
8. Would reservation of appointments or posts "in favour of any Backward Class" be restricted to the initial appointment to the post or would it extend to promotions as well?
9. Whether the matter should be sent back to the Five-Judge Bench?

FINDINGS OF THE COURT:

In Connection Of This Case Following Findings Were Made By The Court:-

- I. Clause (4) of Article 16 is not an exception to Clause (1) thereof. It only carves out a section of the society, viz. the backward class of citizens for whom the reservations in services may be kept. The said clause is exhaustive of the reservations of posts in the services so far as the backward class of citizens is concerned. It is not exhaustive of all the reservations in the services that may be kept. The reservations of posts in the services for the other sections of the society can be kept under clause (1) of that Article.
- II. Article 16 (4) refers to those backward class of citizens whose educational and economic lack of development is due to their social backwardness. A caste by itself may constitute a class. However, in order to constitute a backward class the caste concerned must be socially backward and its educational and economic backwardness must be on account of its social backwardness. The economic criterion by itself cannot identify a class as backward unless the economic backwardness of the class is on account of its social backwardness. The weaker sections mentioned in Article 46 are a genus of which backward class of citizens mentioned in Article 16(4) constitute a species. Article 16(4) refers to backward

classes which are a part of the weaker sections of the society and it is only for the backward classes who are not adequately represented in the services, and not for all the weaker Sections that the reservation in services are provided under Article 16(4).

- III. No reservations of posts can be kept in services under the State based exclusively on economic criterion either under Article 16(4) or under Article 16(1).
- IV. Ordinarily, the reservations kept both under Article 16(1) and 16(4) together should not exceed 50 per cent of the appointments in a grade, cadre or service in any particular year. It is only for extraordinary reasons that this percentage may be exceeded. However, every excess over 50 per cent will have to be justified on valid grounds which grounds will have to be specifically made out. The adequacy of representation is not to be determined merely on the basis of the overall numerical strength of the backward classes in the services. For determining the adequacy, their representation at different levels of administration and in different grades has to be taken into consideration. It is the effective voice in the administration and not the total number which determines the adequacy of representation.
- V. Article 16(4) permits classification of backward classes into backward and more or most backward classes. However, this classification is permitted only on the basis of the degrees of social backwardness and not on the basis of the economic consideration alone. If backward classes are classified into backward and more or most backward classes, separate quotas of reservations will have to be kept for each of such classes. In the absence of such separate quotas, reservations will be illegal. It is not permissible to classify backward classes or a backward class social group into an advanced section and a backward section either on economic or any other considerations. The test of advancement lies in the capacity to compete with the forward classes. If the advanced section in a backward class is so advanced as to be able to compete with the forward classes, the advanced section from the backward class no longer belongs to the backward class and should cease to be considered so and denied the benefit of reservations under Article 16(4).
- VI. The provisions for reservations in the services under Article 16(4) can be made by an Executive order.

- VII. There is no special law of judicial review when the reservations under Article 16(4) are under scrutiny. The judicial review will be available only in the cases of demonstrably perverse identification of the backward classes and in the cases of unreasonable percentage of reservations Made for them.
- VIII. It is not necessary to answer the question since it does not arise in the present case. However, if it has to be answered, the answer is as follows: The reservations in promotions in the services are unconstitutional as they are inconsistent with the maintenance of efficiency of administration. However, the backward classes may be provided with relaxations, exemptions, concessions and facilities etc. to enable them to compete for the promotional posts with others wherever the promotions are based on selection or merit-cum-seniority basis. Further, the committee or body entrusted with the task of selection must be representative and manned by suitable persons including those from the backward classes to make an impartial assessment of the merits. To ensure adequate representation of the backward classes which means representation at all levels and in all grades in the service, the rules of recruitment must ensure that there is direct recruitment at all levels and in all grades in the services.
- IX. The matter should not be referred back to the Five-Judge Bench since almost all the relevant questions have been answered by this Bench. The grievance about the excessive and about the wrong inclusion and exclusion of social groups in and from the list of backward classes can be examined by a new Commission which may be set up for the purpose.

Observation Of The Court

Following observations were made by the court in connection of this case:-

- i. The court particularly in this case observed that after the issue of Office of Memorandum (O.M.) by the GOVERNMENT OF INDIA regarding implementation of the recommendation made in the MONDAL COMMISSION report a widespread violence occurred throughout the INDIA by which large number of public & properties were get affected by it. So Court considering the social scenario appealed to the people to keep peace & maintain social order.

- ii. Court also observed & also admitted that this type of problem which mainly occurred from the caste system & which we are now facing is nothing but a consequence of our own fault as we created in our ancient day & till we have been following. It is really a peril for our society. But we being judges can't overlook it because otherwise the basic object of the Constitution will be defeated. Our duty is to interpret this provision i.e., Art. 16(4) in such a way so that the true Object of the framer of the Constitution can easily be found out.
- iii. Court also pointed out that the Part-III of the Constitution (mainly deals with FUNDAMENTAL RIGHTS)&- Part III of the Constitution (mainly deals with FUNDAMENTAL DUTIES)are the core sections the constitution which was enacted for removal of historic injustice and inequalities either inherited or artificially created in the Indian society.
- iv. The court also observed the idiotic practise our society where the moment a child comes out of the mother's womb in a Hindu family and takes its first breath and even before its umbilical cord is cut off, the innocent child is branded, stigmatized and put in a separate slot according to the caste of its parents despite the fact that the birth of the child in the particular slot is not by Choice but by chance.
- v. The concept of inequality is unknown in the kingdom of God who creates all beings equally, but some people have created artificial inequality in the name of casteism with selfish motive and vested interest. In this respect the court also pointed out the view of SWAMI VIVEKANANDA where he one of his letter referred "Caste or no caste, creed or no creed, or class, or caste, or nation, or institution which bars the power of free thought and action of an individual - even so long as that power does not injure others - is devilish and must go down".

Judgment

The 9 judge Constitution Bench of the Supreme Court by 6-3 majority gave the following judgments:-

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

- ii. Article 16(4) is not an exception to Article 16(1). It is an instance of the classification. Reservation can be made under article 16(1).
- iii. Backward classes in Article 16(4) were not similar to as socially & educationally backward in article 15(4).
- iv. Creamy layer must be excluded from the backward classes.
- v. Article 16(4) permits classification of backward classes into backward & more backward classes.
- vi. A backward class of citizens cannot be identified only & exclusively with reference to economic criteria.
- vii. Reservation shall not exceed 50%.
- viii. Reservation can be made by the 'EXECUTIVE ORDER'.
- ix. No reservation in promotion.
- x. Permanent Statutory body to examine complaints of over – inclusion / under – inclusion.
- xi. Majority held that there is no need to express any opinion on the correctness or adequacy of the exercise done by the MONDAL COMMISSION.
- xii. Disputes regarding new criteria can be raised only in the Supreme Court.

Ashok Kumar Thakur V. Union Of India.^{xxxv}

ISSUE

The fundamental constitutional issues to be discussed may be classified as follows:

- I. What is the basic structure of the constitution?
- II. Can caste be the basis for reservations?
- III. What is the basis for exclusion of the creamy layer from the ambit of reservations?
- IV. Can legislation in India be challenged only on the grounds that it is unreasonable?

JUDGMENT

1. The Constitution (Ninety-Third Amendment) Act, 2005 does not violate the "basic structure" of the Constitution so far as it relates to the state maintained institutions and aided educational

institutions. Question whether the Constitution (Ninety-Third Amendment) Act, 2005 would be constitutionally valid or not so far as "private unaided" educational institutions are concerned, is left open to be decided in an appropriate case.

2. "Creamy layer" principle is one of the parameters to identify backward classes. Therefore, principally, the "Creamy layer" principle cannot be applied to STs and SCs, as SCs and STs are separate classes by themselves.

3. Preferably there should be a review after ten years to take note of the change of circumstances.

4. A mere graduation (not technical graduation) or professional deemed to be educationally forward.

5. Principle of exclusion of Creamy layer applicable to OBC's.

6. The Central Government shall examine as to the desirability of fixing a cut off marks in respect of the candidates belonging to the Other Backward Classes (OBCs) to balance reservation with other societal interests and to maintain standards of excellence. This would ensure quality and merit would not suffer. If any seats remain vacant after adopting such norms they shall be filled up by candidates from general categories.

7. So far as determination of backward classes is concerned, a Notification should be issued by the Union of India. This can be done only after exclusion of the Creamy layer for which necessary data must be obtained by the Central Government from the State Governments and Union Territories. Such Notification is open to challenge on the ground of wrongful exclusion or inclusion. Norms must be fixed keeping in view the peculiar features in different States and Union Territories. There has to be proper identification of Other Backward Classes (OBCs.). For identifying backward classes, the Commission set up pursuant to the directions of this Court in *Indra Sawhney* has to work more effectively and not merely decide applications for inclusion or exclusion of castes.

8. The Parliament should fix a deadline by which time free and compulsory education will have reached every child. This must be done within six months, as the right to free and compulsory education is perhaps the most important of all the fundamental rights (Art.21 A). Without education, it becomes extremely difficult to exercise other fundamental rights.

9. If material is shown to the Central Government that the Institution deserves to be included in the Schedule (institutes which are excluded from reservations) of The Central Educational Institutions (Reservation in Admission) Act, 2006 (No. 5 of 2007), the Central Government must take an appropriate decision on the basis of materials placed and on examining the concerned issues as to whether Institution deserves to be included in the Schedule of the said act as provided in Sec 4 of the said act.

10. Held that the determination of SEBCs is done not solely based on caste and hence, the identification of SEBCs is not violative of Article 15(1) of the Constitution.

E.P.Royappa V.State Of Tamil Nadu^{xxvi}

ISSUES

He filed a petition under Article 32 of the Constitution challenging the validity of his transfer from the post of Chief Secretary, on the following grounds:

- i. It was contrary to the proviso of Indian Administrative Services (Cadre) Rules, 1954 and Indian Administrative Services Pay Rules, 1954.
- ii. It was violative of Articles 14 and 16 of the Constitution as the posts of Deputy Chairman, Special Planning Commission and Officer on Special Duty were inferior in rank and status to that of Chief Secretary.
- iii. It was made in mala fide exercise of power.

JUDGMENT

The Supreme Court held that the two posts were created for discharging functions requiring very high caliber and specialized experience and were not to be counted as any less responsible than the topmost cadre posts for which the petitioner was selected. The wide experience of the petitioner in the field of commercial taxes made the Government post him as Officer on Special Duty. The posts of Deputy Chairman, Planning Commission and officer on Special Duty are equal in status and responsibility. There was also no ground for attributing bad faith or

improper motive by the Government against the petitioner. The affidavit evidence indicated that the petitioner carried out normal duties and exercised care and caution at the time of the election and gave advice in the course of duty. The Government in all cases accepted the advice of the petitioner.

There also did not appear any instance of acrimony or disagreement between the Government and the petitioner and there were no records to suggest that the petitioner advised one way and the Government acted in an opposite manner.

Kihoto Hollohan Vs Zachillhu And Others^{xxvii}

ISSUE

Whether the changes made by the 52nd amendment are constitutionally valid or not?

HELD

It was held by the minority judges held that the basic feature of the Constitution has been violated as the Constitutional scheme for decisions on questions on disqualification of members after being duly elected, contemplates adjudication of such disputes by an independent authority outside the House, namely President or Governor in accordance with the opinion of the Election Commission, all of which who high Constitutional functionaries are. The Election Commission had a similar opinion as that of the minority judges in the present case. In the year 1977, it made recommendations and suggested that the disqualification on grounds of defection could also be referred to the Election Commission for tendering opinion to the President or the Governor, as the case may be, and the President or the Governor shall act on such opinion tendered by the Election Commission, as it was in the case of other disqualifications referred to in articles 102 and 191 of the constitution.

It was thus held that the Para 6 of the Tenth Schedule does not introduce a non-justifiable area. The power to resolve the disputes of the Speaker/Chairman is a judicial power. The important construction is that of the 'finality clause' which paved a way for the majority to reach the judgment.

Unni Krishnan, J.P. And Others. Etc. Vs State Of Andhra Pradesh And Others^{xxxviii}

ISSUES

- i. Whether a citizen has a fundamental right to education for a medical, engineering or other professional degree?
- ii. Whether the Constitution of India guarantees a fundamental right to education to its citizens?
- iii. Whether there is a fundamental right to establish an educational institution under Article 19(1)(g)?
- iv. Does recognition or affiliation make the educational institution an instrumentality?

HELD

All citizens of this country have constitutional or elemental right to education. The above article 21 constitutes this right this right is however not a complete or infinite right. Article 45 and 41 needs to determine its content and measure every person of this country till the age of 14 yrs has a right to free education. Later on his right to education depends on the economic capacity and advancement of the state.

The obligations created by Articles 41, 45 and 46 of the Constitution can be discharged by the State either by establishing institutions of its own or by aiding, recognising and/or granting affiliation to private educational institutions. Where private educational institutions are not granted Aid, only granted Affiliation or recognitions cannot be insisted on charging a fee according to the standard of similar courses in government institutions.

The private educational institutions have to and are entitled to charge a higher fee, not exceeding the ceiling fixed on that behalf. The admission of students and the charging of fees in these private educational institutions shall be governed by the scheme evolved herein – set out in Part-III of this Judgment.

A citizen of this country may have a right to establish an educational institution but no citizen, person or institution has a right, much less a fundamental right, to affiliation or recognition or to grant-in-aid from the State. The recognition and/or affiliation shall be given by the State

subject only to the conditions set out in, and only in accordance with the scheme continued in Part-III of this Judgment. No Government/University or authority shall be competent to grant recognition or affiliation except in accordance with the said scheme. The said scheme shall constitute a condition of such recognition or affiliation, as the case may be, in addition to such other conditions and terms which such Government, University or other authority may choose to impose. Those receiving aid shall, however, be subject to all such terms and conditions, as the aid giving authority may impose in the interest of the general public.

Section 3-A of the Andhra Pradesh Educational Institutions (Regulation Of Admission And Prohibition of Capitation Fee) Act, 1983 is violative of the equality Clause enshrined in Article 14 and is accordingly declared void. The declaration of the Andhra Pradesh High Court in this behalf is affirmed.

CONCLUSION

Rightly the constitution makers had decided to incorporate Fundamental Rights in the Constitution because of several reasons, such as, consciousness of the massive minority problem in India, memories of the protracted struggle against the despotic British Rule, acknowledgement of the Gandhian ideals, the climate of international opinion and the American experience. The preamble of the constitution of India assures to every citizen in the very first class, social, economic and political justice, liberty of thought, expression, belief and faith, equality of opportunity and equal status assuring the dignity of Individual to all citizens for fraternity, integration and unity of the Nation. These assured rights have been charted out in part III fundamental rights. The object of providing Social Economic and political Justice, liberty, equality of status, opportunity etc. to all her citizens. Due to the failure of successive governments the socio-economic goals enshrined in the preamble have not been achieved even after 70 years of home rule. The relevant provisions of Social Justice in part III fundamental rights of the citizen. The bill of rights incorporated in part III of our constitution is named fundamental rights. Article 14 to 18 which relates to equality causes comprehending protective discrimination in Article 15(4) and 16(4) article 17 by which untouchability is abolished. Article 19 which conference the six fundamental freedoms. Freedom of speech and expression, assembly, association movement, residence and profession. Article 21, right to life and

personal liberty, right to live with human dignity. Thus briefly we say that Social Justice Means there shall no social, economic and political inequalities. There shall be unjust enrichment; citizen shall not suffer discrimination on grounds of religion, race, caste, class and the like. There shall be positive or protective discrimination in favour of the oppressed depressed and the under privileged. There shall not be wage discrimination between sexes who are employed on the same job, so that the directive principles of state policy shall not mock at the aggrieved as teasing illusions.

Solution to social injustice lies within us only we should be aware of the expression, the poor, and backwards. Social Justice which are being used to undermine standards, to flout norms and to put institutions to work. We should subject every claim whether it is made in the name of the poor, backwards, whosoever to rational examination. We must bear in mind that if the majority disregards smaller sections in the community, it drives them rebellion. We would try to refashion the policies of state on Truly Secular and liberal principles. The individual and not the group should be the unit of state policy. There is no conflict between fundamental rights and directive principles of state policy as both are aimed at ushering an egalitarian society for the welfare of the nation as a whole. As article 14 ensures equality before the law and equal protection of laws. Article 15 assures that there would be no discrimination against any citizen on the ground of religion, race, caste, sex, and place of birth. There would be no restriction or condition with regard to access to shops, public restaurants hotels, and public's entertainment or to use of wells tanks, bathing Ghats and places of public resort maintained by the state. There is also no discrimination in appointment and employment on services. With the promulgation of Indian constitution untouchability has been abolished and its practice in any form is forbidden. Further citizens have other rights like freedom of speech and expression, formation of association, right to acquire hold or dispose of property etc. Traffic in human beings beggary and all forms of forced labour are prohibited. All laws in force just before the commencement of the constitution is declared void to the extent of their being inconsistent with the provisions of part III of the constitution.

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