Fundamental rights and directive principles of state policy in India

C. C. Aikman*

Part III of the Indian Constitution guaranteed to Indian citizens certain fundamental rights, including the rights to equality, to freedom and to property. The Constitution sought to entrench these rights and provided for their enforcement by the Supreme Court. Part IV of the Constitution set out directive principles of state policy, being a statement of economic rights and policy prescriptions in the social area that were to guide the government. Although these principles were described as "fundamental" they were not to be "enforceable in any Court." Pressure for economic and social reforms led to debate as to whether fundamental rights or directive principles were to take precedence. This debate centred on Supreme Court decisions as to the validity of constitutional amendments affecting property rights. There have also been a series of post-Emergency decisions in which the Supreme Court has construed the right to personal liberty as embracing procedural due process.

I. THE BEGINNING

At a time when the New Zealand public has before it proposals for the adoption of a Bill of Rights[1] we need to be reminded that India, a member of the commonwealth, which continues to be a staunch adherent of the Common Law system, has detailed constitutional provisions dealing with human rights. In their original form, they were drafted by a Constituent Assembly that met for three years from 9 December 1946 until it adopted the Constitution of India on 26 November 1949. The Constitution contains, in parts III and IV respectively, provisions setting out "Fundamental Rights" and "Directive Principles of State Policy". There is now a substantial literature in the form of court decisions and learned commentary relating to these provisions. This material contains lessons for New Zealand as the debate proceeds on whether New Zealand should adopt a Bill of Rights.[2]

* New Zealand High Commissioner to India 1975-1978; former Dean of the Faculty of Law, Victoria University of Wellington.

1 *A Bill of Rights for New Zealand. A White Paper* N.Z. Parliament, House of Representatives, Appendix to the Journals, 1985 A.6.

2 The writer contributed an article to (1978) 9 V.U.W.L.R. 357-383 on "The debate on the amendment of the Indian Constitution". Since this debate centred around the fundamental rights provisions of the Constitution, much of the material in that article is relevant to the present discussion and some of it has to be repeated.

The movement for civil rights in India can be said to have started with the establishment of the Indian National Congress in 1885.[3] It began as an Indian demand for the rights and privileges enjoyed by their British colonial masters and was, therefore, an integral aspect of the independence movement; but, as independence approached, there was increased Indian consciousness that the existence of communal differences and other inequalities within the Indian community meant that civil rights had to be assured amongst the Indians themselves. It became appreciated, too, that the negative civil and political rights could be realised only if positive action was taken to provide the economic and social conditions in which those rights could have a real meaning. Thus the National Congress, at its March 1931 Karachi Session, adopted a Resolution on Fundamental Rights and Economic and Social Change — described by Glanville Austin, in his authoritative account of the making of the Indian Constitution, as both ". . . a declaration of rights and a humanitarian socialist manifesto."[4] The Resolution stated that ". . . in order to end the exploitation of the masses, political freedom must include the real economic freedom of the starving millions." There was also an appreciation that, although the political and economic objectives of the independence movement were in practice inseparable, there were distinctions between the procedures for implementing negative fundamental rights on one hand and positive economic and social objectives on the other that corresponded in a municipal jurisdiction to a distinction between justiciable and non-justiciable rights. This distinction was to be reflected in the Indian Constitution as between part III, establishing fundamental rights, and part IV, establishing directive principles of state policy.

The preamble to the Constitution of India[5] together with parts III and IV, has been described as the core or conscience of a Constitution that is primarily a social document. Under the preamble, the Indian Republic is to secure to all its citizens —[6]

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity . . .

and to promote among them all

FRATERNITY assuring the dignity of the individual and the [unity and integrity of the national] . . .

Parts III and IV concretise and spell out in detail how the objectives stated in the preamble are to be realised.

3 Much of the historical material, including accounts of discussions in the Constituent Assembly, is drawn from Glanville Austin *The Indian Constitution: Cornerstone of a Nation* (Oxford University Press, Bombay, 1966, reprinted 1976). See also V. N. Shukla *The Constitution of India* (6th ed. by D. K. Singh, Lucknow, 1975); H. M. Seervai *Constitutional Law of India* in two volumes (3rd ed. Bombay, 1983 and 1984); S. L. Shakdher (ed.) *The Constitution and the Parliament in India: The 25 Years of the Republic* (Lok Sabha Secretariat, New Delhi, 1976); and Satish Kumar "Human Rights and Economic Development: The Indian Tradition" (1981) 3 *Human Rights Quarterly No. 3 Summer 47-55.*

4 *Supra n.3, 56.*

5 *Constitution of India [as amended up to the Constitution (Forty-fourth Amendment) Act, 1978]* (Eastern Book Company, Lucknow, 1979). It is necessary to refer to different versions of the Constitution to follow the many amendments.

6 Amended by Constitution (Forty-second Amendment) Act, 1976, s.2.

II. FUNDAMENTAL RIGHTS

In 1950, part III of the Indian Constitution guaranteed to Indian citizens seven "Fundamental Rights": the right to equality, the right to freedom, the right against exploitation, the right to freedom of religion, cultural and educational rights, the right to property, and the right to constitutional remedies. Some limitations were placed on the exercise of these rights. Thus there were provisions for legislative intervention in support of social policies, state interests and the general welfare.

Under the heading "Right to Freedom", article 19(1) originally provided:
(1) All citizens shall have the right —

(a) to freedom of speech and expression;
(b) to assemble peaceably and without arms;
(c) to form associations or unions;
(d) to move freely throughout the territory of India;
(e) to reside and settle in any part of the territory of India;
(f) to acquire, hold and dispose of property; and
(g) to practise any profession, or to carry on any occupation, trade or business.

The remaining provisions of article 19 placed limitations on each of these rights. Thus clause (5) of article 19 provided:

> Nothing in sub-clauses (d), (e), and (f) ... shall affect the operation of any existing law in so far as it imposes ... reasonable restrictions on the exercise of any of the rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

Other clauses in article 19 used the expression "reasonable restrictions" and an extensive case law[7] has developed on the reasonableness of restrictions that have been imposed. It is of interest that article 3 of the Draft New Zealand Bill of Rights,[8] which allows "Justified Limitations" on the rights proclaimed, uses the wording "reasonable limits", language that is comparable to that used in article 19.

Article 13 of the Constitution gave the fundamental rights an entrenched status. There is not to be ". . . any law which takes away or abridges the rights conferred by [Part III] and any law made in contravention of this clause shall, to the extent of the contravention, be void." Article 32 made the rights justiciable: "The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed."

III. DIRECTIVE PRINCIPLES OF STATE POLICY[9]

The directive principles of state policy took the form of a statement of economic rights that were yet to be realised and policy prescriptions that were to guide the

7 Shukla, supra n.3, 59-61.
8 Supra n.1, 11.
9 In adopting Directive Principles of State Policy, the Constituent Assembly followed the precedent provided by the Irish Constitution; Seervai supra n.3 Vol II, 1577, 1584. See also J. M. Kelly *The Irish Constitution* (Dublin, 1980) 542-546.

Government of India. Article 38 required the state to strive "... to promote the welfare of the people by securing and protecting ... a social order in which justice, social, economic and political, shall inform all the institutions of national life." Three of the policies which, under article 39, the state was to direct its policy towards securing were: —

(a) that the citizens, men and women equally, have the right to an adequate means to livelihood;
(b) that the ownership and control of the material resources of the community are so distributed as best to subserve the common good;
(c) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

Under article 37, the directive principles were not to be justiciable — they "... shall not be enforceable in any court". However, the article went on to say "... the principles [laid down in Part IV are] fundamental to the governance of the country and it shall be the duty of the State to apply these principles in making laws."

IV. AREAS OF CONTROVERSY

The Constituent Assembly had experienced great difficulties in arriving at agreed texts for some of the provisions in parts III and IV of the Constitution. These difficulties, and the actual content of the provisions, suggested that there would be ample scope for controversy as to whether fundamental rights or directive principles were to take precedence, and for confrontation between Parliament and the Supreme Court on issues of interpretation and on the steps that Parliament might take to change the fundamental rights provisions by way of constitutional amendment. This paper will concentrate on developments that took place with regard to two particular rights — the right to property and the right to life and personal liberty. The first raises the problems that have been experienced over the relationship between fundamental rights and directive principles and over the power of constitutional amendment, while the second illustrates the approaches that the Supreme Court has adopted in interpreting the fundamental rights provisions.

The two themes that are to be developed come together in the concept of due process as it appears in the 5th and 14th Amendments to the United States Constitution. As stated in the 5th Amendment:

> No person shall... be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Glanville Austin has examined in detail the Indian Constituent Assembly's treatment of this due process issue.[10] That issue

> ... shows how the members approached the conflict between, on the one hand, the principles of abstract justice and the desire of all good men to be just and fair, and on the other hand, the need to solve the pressing problems of social reform and state security (stability being a prerequisite of reform) as a means to advance the common good.

10 Supra n.3, 85.

Due process raised the two separate problems — the appropriation of property and compensation for it; and preventive detention.

The Constituent Assembly was told by one of its principal advisers, B. N. K. Rau, that it should not adopt a due process provision. Rau had met Justice Felix Frankfurter during a visit he had made to the United States and other Western countries. Frankfurter had explained how due process had been used to attack legislation on substantive as well as on procedural grounds; in particular, there had been cases in which it had been used to invalidate social legislation. Rau reflected Frankfurter's views when he advised the Constituent Assembly:[11]

> The Courts, manned by an irremovable Judiciary not so sensitive to public needs in the social or economic sphere as the representatives of a periodically elected legislature, will, in effect, have a veto on legislation exercisable at any time and at the instance of any litigant.

The Assembly decided not to adopt a due process provision and to deal separately with the two problems raised by due process. It took members of the Assembly three years to decide on draft provisions for the Constitution.

V. THE RIGHT TO PROPERTY

The problem of how to deal with appropriation of property centered around a general desire to eliminate the zamindars — the traditional landlords who had exploited their tenants and were popularly associated with support for the British Raj. On the other hand, the actual tiller of the soil was to be protected. In these circumstances, the question arose as to the level of compensation that would be appropriate; and there were strong views that this question should be kept away from the courts. Also, the union government was concerned to exercise some control over steps taken by state governments to expropriate property.

Article 31, as eventually adopted, was regarded as a middle course between those who supported review power for the courts and those who favoured unfettered powers for the legislature. Under clause (1) No person shall be deprived of his property save by authority of the law. Under clause (2) any law providing for the taking of property had either to name the compensation or the principles on which it was to be paid. The Assembly was advised that the clause meant that Parliament would be the sole judge of the propriety of the principles and that the principles could vary as regards different classes of property. In the words of Prime Minister Jawaharlal Nehru:[12]

> . . . eminent lawyers have told us that on a proper construction of this clause . . . normally speaking, the Judiciary should not and does not come in . . . . no Supreme Court . . . can stand in judgement over the sovereign will of Parliament representing the will of the entire community.

11 Ibid. 86-87, 102-104. See also P.N. Bhagwati "Human Rights as evolved by the jurisprudence of the Supreme Court of India" (1987) 13 *Commonwealth Law Bulletin* January 237, 239-240.

12 Austin, supra n.3, 99.

VI. CONSTITUTIONAL AMENDMENTS

There was not long to wait for the first of a series of constitutional amendments relating to article 31, which were to culminate in the repeal of both sub-clause (f) of article 19(2) and article 31. The Constitution (First Amendment) Act, 1951 introduced two new articles — 31A and 31B — to secure the constitutional validity of zamindari abolition and other agrarian reform legislation. Article 31A dealt with a problem that Nehru had wanted to avoid. The Patna High Court[13] had decided that article 31(2) did not debar the court from deciding that a classification of zamindars for the purpose of determining compensation was discriminatory and offended against article 14 of the Constitution, which read:

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

Article 31A, therefore, provided that no law providing for the acquisition of any estate was to be deemed to be void on the ground that ". . . it is inconsistent with, or takes away or abridges any of the rights conferred by any provision of [Part III]." Article 31B purported to validate acts retrospectively by establishing a ninth schedule and providing that no acts listed in the schedule were to be avoided for inconsistency with a fundamental right, notwithstanding the judgment of any court.

The belief that article 31 had made the issue of compensation non-justiciable was not to be realised. In *State of West Bengal* v. *Mrs Bela Banerjee*[14] the Supreme Court decided that it could examine whether the principles governing the amount of compensation ". . . take into account all the elements which make up the true value of the property appropriated and exclude matters which are to be neglected . . . ." This was one of the decisions that led to the passing of the Constitution (Fourth Amendment) Act, 1955. Under a new article 31(2), no law dealing with compensation ". . . shall be called into question in any Court on the ground that the compensation provided by that law is not adequate." The Amendment also amended article 31A by extending the categories of property legislation that were not to be attacked for inconsistency with other provisions of part III. However, these provisions were now limited to articles 14, 19 and 31, whereas originally all the articles of part III had been involved.

In the course of the debate on the Fourth Amendment Bill, Prime Minister Nehru reiterated his view that the responsibility for economic and social policy lay with Parliament. How could effect be given to the directive principles of the Constitution if the argument being used by the Supreme Court prevailed? There was then an inherent contradiction between fundamental rights and directive principles. "Therefore", he said, "it is up to this Parliament to remove that contradiction and make the fundamental rights subserve the Directive Principles of State Policy."[15] Glanville Austin says of this approach: "Good sense, fairness, and the commonweal might still be served, but so far as property was concerned, due process was dead."[16]

13 *Kameshwar Singh* v. *State of Bihar* A.I.R. (38) 1951 Pat 91 cited in Shukla supra n.3, 142.

14 A.I.R. (41) 1954 SC 170 cited in Shukla supra n.3, 146.

15 Subhash C. Kashyap *Jawaharlal Nehru and the Constitution* (New Delhi, 1982) 148-149.

16 Supra n.3, 101.

The Supreme Court continued to invalidate some legislative measures adopted by the Indian states to give effect to their agrarian policies. Again, constitutional amendment followed. The Constitution (Seventeenth Amendment) Act, 1964 made further amendments to article 31A and added forty-four acts to the ninth schedule.

VII. CONSTITUTIONAL CHALLENGE

At this point, legislation of the union and state Parliaments began to be challenged in the Supreme Court from two directions:

(i) In *Golak Nath* v. *State of Punjab*[17] the Court considered the validity of the Seventeenth Amendment. A majority of the Court of eleven judges, reversing earlier decisions, decided that Parliament had no power to abridge or amend the fundamental rights. However, this rule was only to be applied prospectively and hence it did not affect the First, Fourth and Seventeenth Amendments. In arriving at these conclusions, Chief Justice Subba Rao, speaking for five of the majority judges, said that fundamental rights were ". . . the primordial rights necessary for the development of human personality." Therefore, ". . . fundamental rights are given a transcendental position under our Constitution and are kept beyond the reach of Parliament."[18] As to the implementation of the directive principles without the infringement of fundamental rights, the Chief Justice argued that parts III and IV of the Constitution ". . . constituted an integrated scheme forming a self-contained code." The scheme was so elastic that all the directive principles could reasonably be enforced without taking away or abridging fundamental rights. There were, too, the provisions in article 19 allowing "reasonable restrictions" in the public interest on the rights set out in the article.[19]

(ii) The Supreme Court, in a series of cases, considered the provisions of article 31(2).[20] The Court took the position that a provision for compensation, or the laying down of principles for determining compensation, was a necessary condition for making an expropriation law. This requirement remained even though the Fourth Amendment had taken away the jurisdiction of the court to examine the adequacy of compensation. Accordingly, the Court held that it could strike down a law as a fraud on the Constitution if the principles for determining compensation were unrelated to the value of the property at or about the time of acquisition, or if the law provided for illusory compensation. The Court referred with approval to the view, taken in the *Bela Banerjee* case, that compensation meant "just equivalent". Decisions to this effect were followed in the *Bank Nationalisation* case[21] in which it was held that Mrs Gandhi's bank nationalisation law was liable to be struck down as it failed to provide for compensation determined according to relevant principles.

The Constitution (Twenty-fourth Amendment) Act, 1971 amended article 13 and article 368, the article dealing with amendment of the Constitution, with the object of

17 A.I.R. (54) 1967 SC 1643.
18 Ibid., 1656.
19 Idem.
20 Shukla supra n.3, 149-150.
21 *R. C. Cooper* v. *Union of India* A.I.R. (57) 1970 SC 564.

ensuring that Parliament could amend the provisions of part III. The Constitution (Twenty-fifth Amendment) Act, 1971 then proceeded to replace the word "compensation" in article 31(2) by the word "amount" in order to avoid judicial interpretation of compensation as "just equivalent". The Twenty-fifth Amendment also introduced a new article — 31C. This provided that, notwithstanding anything contained in article 13, no law giving effect to the policy of the state towards securing the principles specified in clauses (b) and (c) of article 39 was to be deemed to be void on the ground that it was inconsistent with, or took away or abridged any of the rights conferred by articles 14, 19 or 31. Article 31C continued, in its second part: ". . . and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy . . . ."

VIII. THE FUNDAMENTAL RIGHTS *(KESAVANANDA)* CASE

The validity of the Twenty-fourth and Twenty-fifth Amendments came before a special bench of thirteen judges of the Supreme Court in 1973 in *Kesavananda Bharati* v. *State of Kerala.*[22] Chief Justice Sikri, along with another five of the judges, decided

(i) There was an inherent or implied limitation to article 368, which provided for the amendment of the Constitution, in that the article did not empower Parliament to alter or destroy the essential features or basic structure of the Constitution.

(ii) The fundamental rights were among the essential features of the Constitution.

Another judge (Khanna J.), while accepting that the basic structure or framework of the Constitution could not be amended, differed from Chief Justice Sikri and his five colleagues in that he did not regard the right to property as forming part of the basic structure. It followed that, although there was a majority of judges who accepted the essential features approach, there was not a majority who regarded the right to property as an essential feature. As a result, the Amendments under attack were not invalidated. Nevertheless, there was a majority of judges who regarded the second part of article 31C (quoted above) as invalid on the view of Khanna J. that it gave carte blanche to Parliament to make any law violating articles 14, 19 and 31 and, by inserting the requisite declaration, to make that law immune from attack in the courts, even if it was not for the objective prescribed in article 31C.

IX. THE INDIAN EMERGENCY

On 12 June 1975, the Allahabad High Court upheld an election petition by Raj Narain in which he contested the election of the Prime Minister, Mrs Indira Gandhi, at a parliamentary election held on 7 March 1971.[23] Found guilty of two corrupt practice charges of a technical character, Mrs Gandhi was disqualified from holding any public office for a period of six years. This judgment was a factor contributing to Mrs Gandhi's announcement, on 26 June 1975, that the President had the previous day declared an

22 A.I.R. (60 1973 SC 1461. For a more detailed discussion of this case, see (1978) 8 V.U.W.L.R. 371.
23 Prashant Bhushan *The case that shook India* (New Delhi, 1978) passim.

emergency under the Constitution. A supine Parliament proceeded to deal with Mrs Gandhi's disqualification by two measures. The Election Laws (Amendment) Act, 1975 purported to eliminate retrospectively the corrupt practices on which her election had been challenged; while the Constitution (Thirty-ninth Amendment) Act, 1975 sought by amendment to the Constitution to validate the original election. The Thirty-ninth Amendment also included the Election Laws (Amendment) Act, 1975 among thirty-eight new entries in the ninth schedule to the Constitution. Others of the new entries were Acts affecting fundamental rights which did not fall under the right to property. They included the Maintenance of Internal Security Act, 1971, known as MISA, which became notorious as the authority under which many detentions without trial were made during the emergency.

When Mrs Gandhi appealed the Allahabad High Court decision — *Indira Gandhi* v. *Raj Narain,*[24] Raj Narain challenged the validity of the two Acts that had been passed. A five-judge bench of the Supreme Court held the Thirty-ninth Amendment to be invalid and the Election Laws Amendment Act to be valid. The latter finding meant that Mrs Gandhi succeeded in her appeal. From the point of view of the present paper, the interest in the decision lies in the discussion of the essential features principle. Four of the five judges (Khanna J. being the fifth) had been in the minority in *Kesavananda* that had not accepted the principle. However, all five judges accepted that the essential features principle was binding on the Court. Three of the judges proceeded to find the relevant clause of the Thirty-ninth Amendment invalid on one or other limb of the essential features limitation. However, a different three judges held that the limitation did not apply in respect of "an ordinary law" and, therefore, the attack on the Election Laws (Amendment) Act could not succeed.

During the course of the emergency, Mrs Gandhi's Congress Government passed the Constitution (Forty-second Amendment) Act, 1976. The amendments made were wide-ranging, involving an increase in the authority of the union executive, a strengthening of the position of the centre vis-a-vis the states, and restrictions on the courts. Included in the latter were amendments to article 368 designed to frustrate the essential features principle. There were two new clauses:

> (4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article . . . shall be called in question in any court on any ground.
>
> (5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article.

The Forty-second amendment also made a significant amendment to article 31C. The reference to the directive principles specified in clauses (b) and (c) of article 39 was omitted and replaced by the words "all or any of the principles laid down in Part IV". In other words, all the directive principles of state policy were to prevail over the

24 A.I.R. (62) 1975 SC 2299.

fundamental rights set out in articles 14 (equality before the law) and 19.[25]

The Janata Government, which came into power after the emergency, was committed to the repeal of the Forty-second Amendment. The (Forty-fourth Amendment) Bill, 1978 provided for the inclusion in article 368 of a referendum procedure, requiring the approval of the Indian people to certain specific proposals for change to the Constitution. The procedure would apply, inter alia, to any change ". . . abridging or taking away the rights of citizens under Part III". This, and the other specified changes, could be seen as changes to the basic features of the Constitution. However, this particular proposal was not accepted by the Rajya Sabha, or Upper House, with its Congress (Indira) Party majority. The Constitution (Forty-fourth Amendment) Act, 1978, therefore, became law without the inclusion of an amendment to article 368.

Among the amendments actually made by the Forty-fourth Amendment was the deletion from article 19(1) of sub-clause (f), which confers the right to acquire, hold and dispose of property, and the omission from the Constitution of the whole of controversial article 31, dealing with the compulsory acquisition of property.[26] This meant that the right to property ceases to be fundamental. It now appears as article 300A in part XII of the Constitution in the following form:

> No person shall be deprived of his property save by authority of law.

The rejection of the Janata Government's referendum proposal appeared to leave Parliament with an uninhibited power to amend the Constitution. However, in *Minerva Mills Ltd* v. *Union of India*[27] a Supreme Court bench of five judges held unanimously that clauses (4) and (5) of article 368, as added by the Forty-second Amendment, were void. These clauses, the Court said, infringed the basic features limitations on the amending power enunciated in *Kesavananda* and confirmed in *Indira Gandhi*. In a further case, *Waman Rao* v. *Union of India,*[28] another bench of five judges proceeded on the basis that clauses (4) and (5) were void, as held in *Minerva*.

X. FUNDAMENTAL RIGHTS VIS-A-VIS DIRECTIVE PRINCIPLES

The confirmation of the essential features principle in *Minerva* stimulated the controversy as to the relationship between fundamental rights and directive principles of state policy.[29] There are broadly three possible approaches to the relationship. These range through assertions of the supremacy of fundamental rights, emphasis on the equal

25 When the Constitution (Forty-fourth Amendment) Act, 1978 omitted article 31 from the Constitution, a reference to article 31 was deleted from article 31C.

26 Seervai is of the view that the conclusion that the right to property is not a fundamental right is too wide. It may not apply to property other than land, and to all land irrespective of the use to which it is being put. Thus compulsory acquisiton of land on which a morgue, temple or church is situated could affect the right to freedom of religion; supra n.3 Vol II, 1654.

27 A.I.R. (67) 1980 SC 1789.

28 A.I.R. (68) 1981 SC 271.

29 See series of articles in (1981) 8 Journal of the Bar Council of India 385-422; S. Sundara Rami Reddy "Fundamentalness of Fundamental Rights and Directive Principles in the Indian Constitution" (1980) 22 Journal of the Indian Law Institute 399; Jagat Narain "Judical Law Making and the Place of Directive Principles in Indian Constitution" (1985) 27 Journal of the Indian Law Institute 198; Justice Mahavir Singh "Directive Principles and Fundamental Rights — A Correlation" (1981) 3 SCC 28.

status of fundamental rights and directive principles and the need to harmonise the two, in cases of conflict, to claims that directive principles must be given priority. The issues involved are those that face all democratic politics that are committed to the active pursuit of economic and social policies in the interests of the community at large — and in what country are the problems that arise more acute than in India? Are civil and political rights such as the right to life and liberty and freedom of speech and assembly to be subordinated to the attainment of economic and social objectives? The experience of the Indian Emergency provides an emphatic answer to this question. And yet there will be many situations in which the rights of individuals must be conditioned by social responsibility and reconciled with wider community interests. In India, this is well illustrated by the fact that the constitutional amendments that the Supreme Court has been called upon to consider have, in the main, been concerned with attempts by Parliament to circumscribe the right to property — a right that has now been formally removed from the fundamental rights protected in part III of the Constitution.

The *Minerva* and *Waman Rao* cases, and others about to be considered, suggest that, in the Indian situation, dialogue on the relationship between the supremacy of the Constitution and the sovereignty of Parliament, on an accommodation between freedom and socio-economic development, and on the role of the judiciary in constitutional issues, will be a continuing one. Indeed, there are suggestions that the present government is awaiting an opportunity to have the essential features principle reconsidered by the Supreme Court and even that the government has this objective in mind in the making of appointments to the Supreme Court bench.[30]

The relationship between fundamental rights and directive principles arose in *A.B.S.K. Sangh (Rly.)* v. *Union of India,*[31] in which the competence of the railway administration to reserve posts for members of the scheduled castes and scheduled tribes was considered. Chinnappa Reddy J. rejected as obsolete thinking that fundamental rights held a superior position under the Constitution than the directive principles:[32]

> It is now universally recognised that the difference between the Fundamental Rights and Directive Principles lies in this that Fundamental Rights are primarily aimed at assuring political freedom to the citizens by protecting them against excessive State action while the Directive Principles are directed at securing social and economic freedoms by appropriate State action . . . . it becomes the duty of the Court to apply the Directive Principles in interpreting the Constitution and the laws . . . . Fundamental Rights should thus be interpreted in the light of the Directive Principles and the latter should, whenever and wherever possible, be read into the former.

30 Krishan Mahajan "When judges weep . . ." *The Hindustan Times* 7 October 1987. The Law Commission of India has been asked to study and recommend judicial reforms. The Commission's One Hundred and Twenty First Report on *A New Forum for Judicial Appointments* was not available at the time of writing. A summary, provided by the Commission, indicates that the report will be critical of the present method of appointing judges. It will be said that the giving of primacy to the executive in the making of appointments results in the corrosion of the independence of the judiciary. The appointment of a National Judicial Service Commission, with a strong judicial representation, will be recommended.

31 A.I.R. (68) 1981 SC 298.

32 Ibid., 335.

It follows that in those instances in which the Constitution has authorised restrictions on the exercise of a fundamental right the court should have regard to the directive principles in determining the validity of a particular restriction; for instance, in determining the reasonableness of a restriction on the right to move freely throughout India as permitted under clause (5) of article 19.[33]

A.B.S.K. Sangh (Rly.) did not call for a consideration of the impact of article 31C on the relationship between parts III and IV of the Constitution. Parliament had earlier adopted that amendment to counter the position taken by the Supreme Court in property cases. The re-affirmation of the essential features principle in *Minerva* led to questions as to the validity of article 31C and other constitutional amendments, whether or not they had followed the date of the *Kesavananda* judgments. In *Minerva* itself, the amendment made to article 31C by the Forty-second amendment came under attack. The amendment to article 31C was to the effect that all directive principles, and not only those specified in article 39(a) and (c), were to prevail over the fundamental rights set out in articles 14 and 19. Four of the five judges in *Minverva* held that the amendment was invalid as it had the effect of permitting the abrogation of articles 14 and 19 and, therefore, the destruction of a basic feature of the Constitution. As Chief Justice Chandrachud said, in delivering the majority judgment:[34]

> ... Parts III and IV are like two wheels of a chariot, one no less important than the other. You snap one and the other will lose its efficacy .... the Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance ... is an essential feature of the basic structure of the Constitution.

Bhagwati J. delivered a strongly worded dissenting opinion:[35]

> It is the Directive Principles which nourish the roots of our democracy .... [Their] dynamic provisions fertilise the static provisions of the Fundamental Rights .... The amendment to Article 31C far from damaging the basic structure of the Constitution strengthens and re-inforces it by giving fundamental importance to the rights of the members of the community as against the rights of a few individuals and furthering the objective of the Constitution to build an egalitarian social order where there will be social and economic justice for all ....

The validity of constitutional amendments to the fundamental rights provisions came up again in *Waman Rao*. It was there held that articles 31A and the unamended version of article 31C (excluding the conclusive declaration provision, rejected in *Kesavananda*) were valid as not damaging or destroying basic or essential features of the Constitution. Article 31B was also valid, but legislation included on or after 24 April 1973 (the date of the *Kesavananda* judgments) in the ninth schedule, established by the article, was open

33 *Pathumma* v. *State of Kerala* A.I.R. (65) SC 771 cited by Bhagwati J. in *Minerva Mills Ltd.* v. *Union of India* A.I.R. (67) 1980 SC 1789, 1849-50. See also *Olga Tellis* v. *Bombay Municipal Corporation* A.I.R. (73) 1986 SC 180, 194.

34 A.I.R. (67) 1980 SC 1789, 1806.

35 Ibid., 1847 and 1853.

to challenge under the essential features principle. In upholding the unamended version of article 31C, Chandrachud C.J. (for himself and three of his colleagues) said:[36]

> It is impossible to conceive that any law passed [for the purpose of giving effect to clauses (b) and (c) of Article 39] can at all violate Article 14 or Article 19 . . . . In fact, far from damaging the basic structure of the Constitution, laws passed truly and bona fide for giving effect to [those clauses] will fortify the structure.

The status of article 31C and its amendment was complicated by the decision of another five member bench of the Supreme Court, presided over by Bhagwati J., as he still was, in *Sanjeev Coke Manufacturing Company* v. *Bharat Coaking Coal Ltd.*[37] In one of the two judgments, Chinnappa Reddy J. Adopted the dissenting judgment of Bhagwati J. in *Minerva* and found the amended version of article 31C valid. Referring to *Kesavananda,* he said:[38]

> The dialectics, the logic and the rationale involved in upholding the validity of Art. 31-C when it confined its protection to laws enacted to further Article 39(b) or Article 39(c) should, uncompromisingly lead to the same resolute conclusion that Article 31-C with its extended protection is also constitutionally valid.

It is clear, however, that this view was not necessary for the decision in *Sanjeev Coke* which could have rested on the unamended version of article 31C.

The decisions in *Minerva, Waman Rao,* and *Sanjeev Coke* have been subjected to searching criticism by H. M. Seervai, a leading Indian constitutional authority.[39] He has said of *Sanjeev Coke:* "[It] is both an amazing and a distressing judgment to all who would keep the judicial process free from reproach."[40] He argues that article 31A and the unamended article 31C would permit infringements of the essential features principle. The merits of this position are complicated by the issue of stare decisis as it arises from the *Kesavananda* decision. If this issue is left aside, Seervai's argument as it affects article 31C is persuasive. On the other hand, if the unamended article 31C is to be regarded as valid, Chinnappa Reddy's reasoning in *Sanjeev Coke* in favour of the amended 31C is more convincing than the apparent inconsistency of the positions taken by Chandrachud C.J. in *Minerva* and *Waman Rao* respectively.

The status of the unamended article 31C has been confirmed in a series of cases in which the article has been used as a protective umbrella against challenges that legislation violates provisions of articles 14 and 19 of the Constitution. In *State of Tamil Nadu* v. *L. Abu Kavur Bai,*[41] Fazal Ali J., delivering the judgment of five judges of the Supreme Court, followed *Kesavananda* and *Minerva* and found that ". . . Art. 31C, as introduced by the 25th amendment, is constitutionally valid in all respects . . . ."[42]

36 A.I.R. (68) 1981 SC 271, 292.

37 A.I.R. (70) 1983 SC 239.

38 Ibid., 248.

39 Supra n.3 Vol II, 1621-1694, 2703-2705. Seervai at 1667-1670 makes the point that 6 of the 13 judges in *Kesavananda* did not accept the majority view on the validity of article 31C, 5 of them holding the article void.

40 Ibid., 1680.

41 A.I.R. (71) 1984 SC 326.

42 Ibid., 333.

Therefore, the Tamil Nadu Stage Carriages and Contract Carriages Act, which nationalised the entire transport service for the purpose of providing a general and expeditious service at reasonable rates to the public, fell[43]

> . . . squarely . . . within the protective umbrella of the said Article inasmuch as in pith and substance, the Act seeks to subserve and secure the objects contained in clauses (b) and (c) of Art. 39 and is, therefore, fully protected from the onslaught of Arts 14, 19 and 31.

In applying the article, a close nexus had to be established between the statute concerned and the twin objects mentioned in clauses (b) and (c) of article 39, that is, there had to be a reasonable connection between the provisions of the statute and those objects. If the nexus was present the protection became complete and irrevocable. The fact that the statute contained a declaration that it was intended to secure the objects of article 39 (b) and (c) might be evidence that the nexus existed. In *State of Maharashtra* v. *Basantibai,*[44] it was decided that such a declaration was not necessary to attract the protection of article 31C. In *Bapuji Educational Association* v. *State,*[45] the Karnataka High Court refused to accept a submission that the immunity against attack engrafted in article 31C extended to laws enacted to give effect to articles 41 and 46 as well as to article 39 (b). The operative portion of the judgment in *Minerva,* in which the amendment to article 31C had been struck down, had not, Rama Jois J. said, been recalled by the Supreme Court. It was, therefore, still in operation.

XI. DUE PROCESS AND INDIVIDUAL LIBERTY

The status given to individual liberty in the Indian Constitution was bound up with the issue of preventive detention. As Glanville Austin has cynically observed: ". . . the British had practised preventive detention in India for many years . . . . It would appear that, along with representative government, preventive detention was also a legacy of the empire of which Britain was so proud."[46]

The Constituent Assembly, having taken B. N. Rau's advice not to adopt a due process clause, centred its discussion on two issues. There was the concern of some that the union and state governments should have the authority and resources to deal with the unsettled conditions that existed in India, and of others that there could be abuse, particularly by state governments, of powers of preventive detention. Article 21, as finally adopted, was not seen as imposing any restraint on legislative action. It read:

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

Article 22 provided for a degree of control over arrest and detention procedures. In particular, preventive detention laws were not to provide for detention for a longer

43 Ibid., 335.

44 A.I.R. (73) 1986 1466.

45 A.I.R. (73) 1986 Kant. 119. See also *Madhusudan Singh* v. *Union of India* A.I.R. (71) 1984 SC 374; and *Minerva Mills Ltd.* v. *Union of India* A.I.R. (73) 1986 SC 2030.

46 Supra n.3, 102.

period than three months unless certain procedures, including reference to an advisory board, were followed.

Austin comments on articles 21 and 22 that "[t]his particular aspect of personal freedom had been whittled down until on paper, at least, it was nearly non-existent."[47] This was the effect of the decision of the Supreme Court in the leading case of *A. K. Gopalan* v. *State of Madras*.[48] A majority of a six-judge court, in rejecting the challenge that the Preventive Detention Act, 1950 (Madras) was void as violating articles 19 and 21 of the Constitution, held that the rights protected by article 19, including the provisions allowing reasonable restrictions on the exercise of those rights, did not apply to a law relating to preventive detention. As to article 21, a "procedure established by law", as required by the article, meant "a law made by the Union Parliament or by Legislatures of the States". It was not used in the sense of law embodying the principles of natural justice and it was not proper to consider it in the light of the expression due process of law as interpreted by the United States Supreme Court. F. S. Nariman has said: "The decision in *Gopalan's Case* considerably inhibited the Justices who sat on the Bench in the 1950s and 1960s. It took more than twentyfive years to lay the ghost of Gopalan."[49] This was done in the case of *Maneka Gandhi,* but reference must first be made to the *Habeas Corpus* case, decided during the Indian emergency.

The Proclamation of Emergency, made on 25 June 1975, was accompanied by an Order under article 359 of the Constitution suspending the right to move to enforce fundamental rights under articles 14, 19, 21 and 22. Many cases of preventive detention followed. In proceedings taken by detainees, nine state High Courts held that writs of habeas corpus were maintainable in respect of the detentions. The approach taken was that the petitioners, although they could not move to enforce their fundamental right under article 21, were entitled to show that the order of detention was not made under or in compliance with law or was mala fide. This view was not accepted by the Supreme Court in *A. D. M. Jabalpur* v. *Shivkant Shukla (the Habeas Corpus* case).[50] A bench consisting of Ray C. J. and Beg, Chandrachud and Bhagwati JJ., with Khanna J. dissenting, held, in effect, that all laws in India protecting life and personal liberty were abrogated during the emergency. In particular, article 21 was the sole repository of the right conferred and, since article 21 was under suspension, the orders of preventive detention could not be challenged. In a later case, *Union of India* v. *Bhanudas,*[51] the Supreme Court held that, during the suspension of articles 21 and 22, detainees — most of them political — could not complain of prison conditions or prison rules. The Chief Justice at the time said of these two judgments "[l]iberty itself is the gift of the law and may by law be forfeited or abridged."[52]

47 Ibid., 112.

48 A.I.R. (37) 1950 SC 27 cited in Seervai supra n.3 Vol I.

49 F. S. Nariman "Human Rights in India — Recent Trends" *Lawasia Human Rights Standing Committee: Recent Trends in Human Rights* (The Law Association for Asia and the Western Pacific, Sydney, 1982) 6.

50 A.I.R. (63) 1976 SC 1207. For an account of preventive detention during the Emergency see Thomas M. Franck *Human Rights in the World Perspective* (Vol II, Oceana Publications, London, 1982) 227-234.

51 A.I.R. (64) 1977 SC 1027.

52 International Commission of Jurists, *States of Emergency: Their Impact on Human Rights* (Geneva, 1983) 169, 186-187.

The publication of Khanna J's dissenting judgment in the *Habeas Corpus* case was banned by the censor, but it earned him a reputation for courage and judicial independence. The majority judgment, on the other hand, has been subjected to scathing criticism by legal commentators.[53] One point that has been made is that article 32, which guarantees the right of approach to the Supreme Court and empowers the Court to issue the writ of habeas corpus, was not suspended by the order made under article 359 — therefore, the power to scrutinise orders of detention remained.

XII. AFTER THE EMERGENCY

Once the emergency was over, the Supreme Court, in the words of one commentator, set out to redeem itself. This was done in *Maneka Gandhi* v. *Union of India.*[54] During the Janata regime, the passport of Mrs Maneka Gandhi, the daughter-in-law of Mrs Indira Gandhi, was impounded as she was about to travel abroad. In a petition to the Supreme Court challenging the order impounding the passport, the Court held that the right to go abroad was comprehended within personal liberty and, therefore, was protected by article 21. No-one could be deprived of this liberty except by a procedure established by law. The Court was not prepared to follow the precedents which suggested that this right was not violated if an established procedure was actually followed. As former Chief Justice Bhagwati, who delivered the main judgment, has since said:[55]

> ... in this case ... the Supreme Court for the first time took the view that Article 21 affords protection not only against executive action but also against legislation and no law can deprive a person of his personal liberty unless it prescribes a procedure which is *reasonable,* fair and *just.* And it would be for the court to determine whether the procedure is reasonable, fair and just and if it is not, the Court will strike down the law as invalid. Thus Article 21 assumed a new dimension and the Court introduced procedural due process in the Constitutional law of India by a process of judicial construction.

The Supreme Court decided that, in the context of the *Maneka Gandhi* case, a reasonable, fair and just procedure called for the observance of the audi alteram partem rule. The Court had an answer to the argument that in cases such as the present prior notice and hearing might frustrate the exercise of the power. It directed that the authority concerned should give a post-decisional hearing so that the party affected had an opportunity to be heard and to argue that the order should be rescinded. The Court would import such a procedure into the statute by judicial interpretation.

Nariman has said of the *Maneka Gandhi* case: "[t]he fresh look at article 21 has helped the once stunted growth of India's tree of liberty."[56] Recognition of due process has meant that the courts have construed very strictly constitutional safeguards for persons under preventive detention. The scrutiny of detention orders and of the grounds of detention have been meticulous.[57] Also, article 21 has continued to be given a wide

53 Idem; Nariman supra n.49, 5; H. M. Seervai *The Emergency, Future Safeguards and the Habeas Corpus Case: A Criticism* (Bombay, 1978) passim.

54 A.I.R. (65) 1978 SC 597.

55 Supra n.11, 239.

56 Supra n.49, 6.

57 See International Commission of Jurists, supra n.52, 188; Nariman supra n.49, 14-18.

interpretation. The Supreme Court has ordered that a prisoner in bar-fetters should have the fetters removed,[58] and has used one of its judgments to formulate guidelines for the protection of prisoners.[59] It has been held that a reasonable, fair and just procedure requires the grant of legal aid, calls for the release on personal bond of indigent accused who have roots in a community, demands a speedy trial for the accused and is incompatable with a plea bargaining procedure.[60] Article 21 has also been cited in civil proceedings. In a case[61] involving arrest for non-payment of a debt, the Supreme Court referred to article 11 of the International Covenant on Civil and Political Rights —"No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation." Invoking the reasonable, just and fair procedure implicit in article 21, the Court directed that the defendant could not be imprisoned unless he had dishonestly evaded or postponed payment and committed acts of bad faith in respect of his assets.[62]

A recent case coupled article 21 and the directive principles of state policy. In *Olga Tellis* v. *Bombay Municipal Corporation*[63] the Supreme Court held that an important facet of the right to life under article 21 is the right to a livelihood. The easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Moreover, under the directive principles, everyone has the right to an adequate means of livelihood (article 39(a)) and the right to work and to public assistance in case of unemployment and of undeserved want (article 41). The Court decided that these principles were equally fundamental in the understanding of the meaning and content of fundamental rights:[64]

> . . . it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Art. 21.

The Constitution (Forty-fourth Amendment) Act, 1978 tightened the procedures set out in the Constitution relating to Proclamations of Emergency. It also provided that article 359, enabling the executive to suspend fundamental rights during an emergency, is not to apply to article 20 (protection against ex post facto laws and against double jeopardy) and to article 21. The Forty-fourth Amendment also included provisions that would strengthen the protection given by the provisions of article 22 as to procedures to be followed in cases of detention for more than two months (previously three months). However, as at 1983, the union government had taken advantage of a provision in the

58 *Sunil Batra* v. *Delhi Administration* A.I.R. (65) 1978 SC 1514; A.I.R. (65) SC 1675.

59 *Sunil Batra* v. *Delhi Administration* A.I.R. (67) 1980 SC 1579, 1601-1603. See also Nariman supra n. 49, 7-8.

60 *Hussainara Khatoon* v. *Home Secretary, State of Bihar* A.I.R. (66) 1979 SC 1360; *Kadra Pahadiya* v. *State of Bihar* A.I.R. (69) 1982 SC 1167.

61 *Jolly George Varghese* v. *The Bank of Cochin* A.I.R. (67) 1980 SC 470.

62 The Supreme Court will uphold the death penalty where it is not arbitary and unreasonable and serves a legitimate social purpose: *Bachan Singh* v. *State of Punjab* A.I.R. (69) 1982 SC 1325.

63 A.I.R. (73) 1986 SC 180.

64 Ibid., 194.

Forty-fourth Amendment enabling it to bring different provisions in the Amendment into force at different times, and had not brought the amendments to article 22 into force. In *A. K. Roy* v. *Union of India,*[65] the petitioner contended that the union government was under an obligation to bring the amendments to article 22 into force within a reasonable time and sought an order of mandamus to direct the government to bring them into force. The decision of a majority of the Supreme Court, delivered by Bhagwati C.J., was that the court could not interfere with the government's discretion.

The decision in *A. K. Roy* has been described as a serious setback for the law of preventive detention in India and this view has considerable support from the legal profession in that country.[66] That this view should be widely held is a commentary on the expectations held of a Supreme Court which Mr Justice Bhagwati himself describes as activist.

XIII. AN ACTIVIST SUPREME COURT

Nariman has given credit to former Chief Justice P.N. Bhagwati for the Supreme Court's new role as keeper of human rights. The Judge, in his address to the Institute of International and Comparative Law, spoke of an activist Court:[67]

> . . . the Court's view was that fundamental rights merely imposed negative obligations on the State. The State cannot do this or that. If it took any action in violation of a fundamental right, such action would be invalid and would be liable to be struck down. But, for the first time, the Supreme Court started reading the fundamental rights as imposing affirmative obligations on the State. It marked the beginning of a new era of judicial activism.

S. P. Gupta v. *Union of India,*[68] in which the independence of the judiciary was described as a basic feature of the Indian Constitution, provided Bhagwati J., as he then was, with an opportunity to give his views on ". . . what the true function of the judiciary should be in a country like India which is marching along the road to social justice with the banner of democracy and the rule of law . . . ." These views call for quotation at length:[69]

> . . . our Constitution is not a non-aligned rational charter. It is a document of social revolution which casts an obligation on every instrumentality including the judiciary . . . to transform the status quo ante into a new human order in which justice, social, economic and political will inform all institutions of national life and there will be equality of status and opportunity for all. The judiciary has therefore a socio-economic destination and a creative function . . . . The British concept of justicing, which to quote Justice Krishna Iyer, is still "hugged by the heirs of our colonial legal culture and shared by many on the Bench" is that "the business of a Judge is to hold his tongue until the last possible moment and to try to be as wise as he is paid to look" . . . .

65 A.I.R. (69) 1982 SC 710.

66 Nariman supra n.49, 18; International Commission of Jurists, supra n.52, 190.

67 Supra n.11, 243.

68 A.I.R. (69) 1982 SC 149.

69 Ibid. 196-197. See also Chief Justice P.N. Bhagwati, "Rule of Law and Role of Law: perspectives in the mid-eighties" *9th Lawasia Conference: Looking Back,* Record of the Proceedings of the Conference held at the Taj Palace Hotel from 7th to 12th October 1985 (New Delhi) 121-129; and Bhagwati "Public Interest Litigation" (1986) 2 The Commonwealth Lawyer December 61.

> Now this approach to the judicial function may be all right for a stable and static society but not for a society pulsating with urges of gender justice, worker justice, minorities justice, dalit justice and equal justice between chronic unequals. Where the contest is between those who are socially or economically unequal, the judicial process may prove disastrous from the point of view of social justice, if the Judge adopts a merely passive or negative role and does not adopt a positive and creative approach. The judiciary cannot remain a mere bystander or spectator but must become an active participant in the judicial process ready to use law in the service of social justice through a pro-active goal oriented approach.

Chief Justic Bhagwati has been succeeded as Chief Justice by Justice R. S. Pathak who would see himself as more attuned to the "British concept of justicing" than did his predecessor. Pathak J. was not a member of the Supreme Court bench in any of the constitutional cases considered in this paper.[70] In view of the responsibility of the Chief Justice for determining the composition of the bench, it will be interesting to watch the stance adopted by the Supreme Court on constitutional issues over the next few years.

XIV. RELEVANCE FOR NEW ZEALAND?

The New Zealand reader of this paper may be disposed to reject the relevance of Indian experience to the New Zealand situation. After all, the cases that have raised the status of the directive principles of state policy and those concerned with infringements of individual liberty are peculiar to India, a developing country that has its own range of problems. And surely New Zealand judges would not adopt the activist approach espoused by Mr Justice Bhagwati and other judges of the Indian Supreme Court? On the other hand, there is the point made at the outset that there is debate in New Zealand over the adoption of a New Zealand Bill of Rights and in this context the experience of another country should be of interest. Moreover, this paper has been written against the background of the questions that are being asked about the impact on social services of the deregulatory policies of a Labour Government; of the decision of the New Zealand Court of Appeal in the case brought by the New Zealand Maori Council against the Crown in respect of the transfer to state-owned enterprises of lands subject to Maori claims; and of two military coups in Fiji.

The New Zealand Labour Government has been following free-market economic policies which have raised questions as to the future of the welfare state. Labour policies have traditionally emphasised the social responsibility of the state for the under-privileged and for the provision of social welfare, health and education. At the recent election, Labour party spokespersons took the position that, if given another term, the government would give greater attention to social issues. Questions are still being asked as to the extent to which the government envisages that these issues will continue to be a state responsibility. It may not be without significance that the New Zealand Government's White Paper on *A Bill of Rights for New Zealand*[71] concentrates on relations between the individual and the state. It includes only a cursory reference to economic, social, and cultural rights[72] and makes the questionable claim that

70 See, however, the views of Pathak J. on public interest litigation in *Bandhua Mukti Morcha* v. *Union of India* A.I.R. (71) 1984 SC 802, 837.

71 Supra n.1.

72 Ibid., 23.

fundamental procedural rights in the political and social spheres ". . . in a substantive sense can — in terms of social and economic policy — be seen as value free."[73] The Indian experience does not support this view. Also, the White Paper places a great deal of reliance on the International Covenant on Civil and Political Rights. Indeed, the text of the Covenant is provided. Apart from a reference to the "International Covenants", the White Paper does not recognise the existence of the International Covenant on Economic, Social and Cultural Rights, ratified by New Zealand at the same time as the Covenant on Civil and Political Rights.[74] Under this second Covenant, states which are parties accept responsibility for the realisation of a wide range of economic, social and cultural rights.

Many of the problems that arise in relation to the status of New Zealand's minority Maori people have their Indian parallels. And this is an area in which the New Zealand Court of Appeal has shown its willingness to adopt a liberal approach to the ambit of judicial review. In his judgment in *The New Zealand Maori Council and Latimer* v. *Attorney-General and Others.*[75] the President of the Court of Appeal, Sir Robin Cooke, said that the interpretation of the State-Owned Enterprises Act 1986, as it affected the status of Maori land claims, should not be approached ". . . with the austerity of tabulated legalism. A broad, unquibbling and practical interpretation is demanded."[76] Later in his judgment, the President recognised that in the instant case the judiciary had been able to play ". . . a role to some extent creative . . . ."[77] — an admission of judicial activism. It is also of interest that the orders of the Court embodying directions to the Crown to prepare a scheme of safeguards for Maori land and waters claims have their parallels in the directions that the Indian Supreme Court has been issuing to state agencies in the exercise of its expanding public interest jurisdiction.[78]

The two military coups in Fiji and the establishment of an authoritarian military government are a reminder of past events in India and particularly of the Indian Emergency. In a country much closer to New Zealand, there has been an attack on the democratic rights of a large section of the community, arbitrary arrests and imprisonment without trial, restraints on the freedom of the press and other blatant infringements of fundamental rights. Fiji will be fortunate if its present leaders accept the restoration of a democratic regime and constitutional government as willingly as did the Indian Prime Minister, Mrs Gandhi.

73 Ibid., 28.

74 N.Z. Parliament, House of Representatives, Appendix to the Journals, 1979 A.68.

75 (1987) 6 N.Z.A.R. 353.

76 Ibid., 360.

77 Ibid., 374.

78 See addresses by former Chief Justice Bhagwati cited supra nn. 11 and 69 and judgments of Bhagwati and Pathak JJ. in *Bandhua Mukti Morcha* v. *Union of India* A.I.R. (71) 1984 SC 802, 805, 837.