

Law and Social Policy in India

From Growth-Based Welfare to Welfare Entitlements

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Introduction

The object of this chapter is to provide some perspectives on law and social policies in India over certain critical historical periods, ie, the British period (nineteenth century to 1947), the period of the drafting of the Indian Constitution (1947–1949), the 1950s and '60s, the 1970s and '80s, and the post-1990s. The overall aim is to examine the political and social context for the emergence of ideas and values underlying constitutional provisions for social welfare, the formulation of social rights, judicial decisions, and pertinent social security laws that shaped social policies in India.

Colonial India: The British Approach to Policies of Social Welfare

The Political and Economic Context

Unlike the 'settlor' imperial Mughal rulers, British rule in India was characterised by an 'extractive/exploitative' impulse. Colonial governance was founded on a theory of indivisible sovereignty with a monopoly of military control and authority over revenue collection. With the transfer of power to the British Crown-in-Parliament after 1857, Queen Victoria's Proclamation of 1858 seemed to point to a new justification for British rule in India, namely to

stimulate the peaceful industry of India, to promote works of public utility and improvement, and to administer the government for the benefit therein. In their prosperity will be our strength, in their contentment our security, and in their gratitude our best reward.¹

Yet, the logic of imperialism and the facilitation of British interests continued to dictate India's administrative and legal systems.

¹ Ramsay Muir, *The Making of British India 1756–1858* (Manchester University Press 1915) 384.

Rule by a Colonising Minority

Political debates in Britain in the nineteenth century on the imperial role in India was characterised by the Evangelical belief in the Gospels on the one hand, and the Radicals' or Utilitarians' belief in reason, the superiority of Western civilisation, and the possibility of indefinite progress on the other. Static and decaying civilisations such as India's could only progress through the introduction of Western enlightenment and rational thinking. Indian social customs were denounced. Governors-General such as Bentinck² engaged in social reform aimed to plant Western ideas and institutions in India, in particular through the promotion of a modern Indian educational system. After the 1857 Mutiny, the Westernising policy took the form of the British playing an 'enabling role', primarily through public works such as roads and railways or irrigation systems to reduce famines. British political attitude was of prolonged trusteeship towards a ward in court in relation to the Indian people. From the nationalist perspective however, British economic and social policies and its administrative and legal structures were the primary causes of the country's backwardness and poverty. For the nationalist movement, the British Government of India was an oppressive government operating an unjust legal system as an instrument for furthering mainly British interests and creating further divisions and social inequalities.

British administration in India remained largely centralised, unrepresentative, and irresponsible. The Government of India Act of 1858 transferred power to the British Crown from the East India Company. Such powers were exercised through the governor-general-in council. The governors-general ruled through their nominated councils. New legislation in 1861 allowed non-official members of a legislative council to be nominated Indian members.³ The Morley-Minto Reforms of 1909 introduced the principle of elected legislative representatives at the centre and provinces through limited franchise.⁴ But the impact of such members on policy making and governance remained marginal. The Government of India Acts of 1919 and 1935 introduced a limited federal structure with limited devolution of authority to the provinces. Control over key areas of administration remained with the governor-general. The limited franchise that was finally extended to Indians by the Morley-Minto Reforms of 1909 and the Montague Chelmsford Reforms of 1919 was divided among several of the communal identities the British had created within Indian society – there were seats reserved for Hindus, Muslims, Sikhs etc. This electoral practice was continued in the provisions of the Government of India Act of 1935.⁵

2 Governor-General of India from 1824 through 1835.

3 The Indian Councils Act of 1892 allowed such councillors to ask questions and criticise the government's budget.

4 Such elected legislative councillors could question the government and debate the annual budget and introduce legislative proposals. Such proposals could be subject to an executive veto.

5 Partha Chatterjee and Gyanendra Pandey (eds), *Subaltern Studies: Writings on South Asian History and Society*, vol 7 (Oxford University Press 1992).

Imperial Policies of Economic Exploitation

Economic historians have examined how early British rule discouraged indigenous manufacturing in order to make India primarily a supplier of raw materials for British industries. There were prohibitive tariffs on Indian goods entering England while English goods were admitted into India with nominal or no duties. In the agricultural sector, the land tax was heavy and uncertain, and the British administration intercepted the incomes and gains of the tillers and added to its land revenue demands at each recurring settlement, leaving the cultivators poor. Proceeds of taxation were withdrawn from India and were not returned to the cultivators in the form of public goods and services. Indian revenues flowed out of the country as 'home charges' or were spent on the British administration.⁶ The unrepresentative nature of British rule was seen as the root cause for such policies – Indian agriculture, landed interests, their trades, and industries – were not represented.⁷

Policies of Social Welfare

In view of overarching imperial imperatives dominating British social and economic policies, a comprehensive system of social insurance did not exist in India until 1945. Traditionally, the family or the home was the only form of social security during periods of sickness, unemployment, or old age, other than charity.⁸ Mendicants were partly made up of disabled or unemployed workers who had lost touch with the countryside. But the introduction of Western civilisation based on individualism and the play of modern economic forces undermined the joint family system and the traditions of charity. Moreover, there was also the rising cost of living, a materialistic attitude, growing pressure of population on the land, and increased fragmentation of the holdings which reduced rural standards of living.

The schemes that emerged during the British period after World War I and the formation of the International Labour Organisation (ILO) were built on a thin notion of state responsibility towards the welfare of the people and were primarily for the purpose of securing political stability and legitimacy for the rule, stimulating productivity, and improving industrial relations. A certain notion of improving the conditions of industrial labour and taking care of vulnerable groups did emerge, but not as a primary duty of the state. Restricted public financial resources, the severity of foreign competition, which made Indian industrialists unwilling to provide social insurance for their workers, and

6 Romesh Dutt, *The Economic History of India Under Early British Rule*, vol 1 (Kegan Paul, Trench, Trübner 1902) v – xxiv.

7 *ibid.*

8 A.N. Agarwala, 'Problems of Social Security for Industrial Workers in India' (1945) 51 *International Labour Review* 1, 2–4.

poverty, illiteracy, and lack of organisation of the workers were contributing factors. Hence, British policies primarily took the form of statutory regulation and protection of Indian industrial labour.⁹ The policies did not involve the establishment of state financed schemes from which benefits were dispensed in cases of emergency according to a determined schedule and on a uniform basis.

Social Policy Instruments

Employment Injuries

The ILO passed a convention on employment injuries in 1921 and asked its members to ratify it. The Government of India did not ratify that convention, but the recommendations of a committee appointed by the Indian Legislative Assembly in 1922 led to the Workmen's Compensation Act of 1923.

The Workmen's Compensation Act was based on the principle of occupational risk where liability resulted not on any act or omission of the employer, but upon the existence of the relationship which the employee bore to the employment because of and in the course of which the employee was injured. Liability for paying compensation rested with the employer irrespective of fault. The loss of earning power consequent upon an industrial accident was deemed a loss arising out of the business and that had to be borne by the employer. However, the act did not provide for effective guarantees for such payments as, for instance, an obligatory insurance at the cost of the employer in case of inability to make payments.

The Workmen's Compensation Act covered employment injuries, that is, injuries arising out of and in the course of employment (including temporary disablement; permanent partial disablement; permanent total disablement and death) and contracted occupational diseases listed in the act. The act imposed on the employer the obligation to provide compensation to the worker.¹⁰ But the protection granted by the act left many gaps: Protection was confined to certain employments based on size; to certain injuries based on duration; and

⁹ Such statutes included the Indian Mines Act 1923; the Indian Boilers' Act 1923; the Indian Trade Union Act 1926; the Payment of Wages Act 1936; and a series of labour laws passed by the Indian provinces.

¹⁰ Under the Workmen's Compensation Act, benefits for permanent total disablement were paid as lump sums according to a schedule in the act. Permanent partial disablement benefits were calculated on the basis of wages and the percentage of the loss of earning capacity resulting from the injury (as specified in the act). N. Hasan, *The Social Security System of India* (S. Chand & Co. Ltd. 1972) 70–74. In cases of temporary total disablement, where the workmen were wholly incapacitated from work he was capable of performing before the injury, the amount of compensation equalled their full wages in the case of the lowest income group and about 20 percent of the wages in case of the highest income group payable in half monthly instalments till the time of recovery. P.C. Srivastava, *Social Security in India* (Lokbharti Publications 1964) 216. In the case of permanent disablement and death, compensation took the form of a lump sum payment.

to certain workers based on the amount of their wages and the nature of their work. The rates of compensation were low. With regard to injuries causing death, lawmakers had opted for lump sum payments to avoid (regular) pension payments. The Workmen's Compensation Act did not make any provision for medical treatment of disabled workers or for their physical/vocational rehabilitation.

Maternity Benefits

The draft Convention concerning employment of women before and after childbirth, adopted by the ILO in 1919, was not ratified by the Government of India. Still, maternity benefit legislation was adopted by some provinces under which the employer was liable to pay maternity benefit to women workers for a specified period. No portion of the cost of the benefits was met by the state, and there was no common fund created out of tripartite contributions. The schemes placed the entire burden of paying benefits and providing medical facilities on the employer alone.

The state legislations provided different benefits and prescribed varying qualifying conditions. Though the legislations did not lay down a maximum salary limit for coverage of the beneficiary, almost all state legislations laid down minimum service conditions for eligibility to benefits under the schemes. The schemes made provision for monetary as well as non-monetary benefits (eg, maternity leave), and for additional benefits such as food concessions during the pre- and post-natal periods, free medical aid during confinement or payment of a medical bonus if no medical care was provided for otherwise. There were no administrative structures to administer the schemes – the administration was largely left to factory inspectorates in all the states.¹¹

Sickness Insurance

TENTATIVE APPROACHES

The ILO's tenth session in 1927 considered the question of compulsory sickness insurance. The International Labour Conference accepted that such schemes provided the best means of 'constantly and systematically applying provident measures to obviate or make good any loss of the workers' productive efficiency'. The Government of India approved the ILO's view in the Indian Legislative Assembly in March 1928 but concluded that any such comprehensive scheme was not practicable under existing conditions. Faced with problems of

11 Hasan (n 10) 100–104. The Mines Maternity Benefits Act 1941 was passed to regulate conditions of work of women employees and to safeguard the health of pregnant employees.

migratory labour, shortage of medical personnel for certification and the costs involved, neither were provincial governments encouraging in their response.¹²

Nonetheless, in the 1930s and early 1940s, committees and labour conferences kept the idea of introducing a sickness insurance in India alive. The Royal Commission on Labour stated in 1931 that there was a need for Indian workers of some form of sickness insurance since the incidence of sickness was substantially higher than in Western countries, the medical facilities were much less adequate, and the wages generally paid make it impossible for most workers to get through more than a very short period of illness without borrowing.¹³ In 1934, the Bombay Textile Labour Inquiry Committee recommended that a compulsory and contributory sickness insurance scheme (including both cash and medical benefits) should be started in the cotton textile centres of the province, in which the employers, workmen, and the state were expected to contribute.¹⁴ In the early 1940s, the first three Labour Ministers' Conferences were in favour of introducing a sickness insurance scheme, and so were the All India Organisation of Industrial Employers' and the Employers' Federation of India.¹⁵ In 1942, the Labour Department of the Government of India came up with a tentative proposal (covering certain industries) that was inspired by developments in Great Britain (Beveridge), the United States, and Canada. The time was ripe for politics to seriously consider establishing a scheme of sickness insurance, and possibly even more comprehensive measures of social security, following the change in the ILO's focus on comprehensive schemes of social security rather than protection against individual contingencies.¹⁶

THE ADARKAR REPORT

Early in 1943 the Government of India appointed a commission under the chairmanship of B.P. Adarkar tasked to frame a scheme of sickness insurance for industrial workers. The commission's report of 1944 conceived of a scheme of social insurance as the nucleus of a comprehensive social insurance scheme including maternity benefits and employment injuries. The scheme was to be compulsory,

12 Hasan (n 10) 41.

13 *ibid* 42.

14 *ibid* 42–43.

15 *ibid* 43.

16 Pursuant to a resolution of the Tripartite Labour Conference of September 1943, a Labour Investigation Committee was appointed by the Government of India in 1944 (Rege Committee) whose report was to be the basis for framing a Beveridge Plan for India. A Health Survey and Development Committee was also appointed to make a comprehensive survey of health conditions to recommend a plan for future development. Hasan (n 10) 44, 88. For the ILO's turn toward 'social security' see International Labour Office, *Approaches to Social Security. An International Survey* (International Labour Office 1942); International Labour Office, *Social Security: Principles, and Problems Arising Out of the War* (International Labour Office 1944); Ulrike Davy, Chapter 6 in this volume, p. 207.

and it had to be contributory – along with employers and workers, the state should also share a definite proportion of the cost of the scheme. Thus, for the first time, there was an emphasis on the need for state subsidy. The ILO experts appointed by the government to review the scheme endorsed Adarkar's views. The Adarkar report and the ILO suggestions emerged as the Employees' State Insurance Act of 1948 initiating the start of social insurance coverage for industrial workers in India.¹⁷

THE EMPLOYEES' STATE INSURANCE ACT OF 1948

The Employees' State Insurance Act of 1948 applied to all factories nationwide. The definition of 'factory', however, narrowed the scope of the act.¹⁸ The scheme covered all employees in the covered establishments whether they were engaged in manual or clerical work but whose monthly wages did not exceed Rs 500. Thus, it was intended to cover all categories of low-income group employees and not just industrial workers.

The scheme provided protection of income as well as medical services in case of 'sickness' – a condition which required medical treatment and necessitated abstention from work. The act also covered maternity/confinement, and employment injuries covering both industrial accidents (which could result in total or partial disablement or death) and occupational diseases arising in the course of the worker's employment.¹⁹ Accordingly, the act introduced sickness benefits, maternity benefits, disablement benefits (including benefits for dependents), and medical services.

Both employers and employees were required to make cash contributions towards the cost of benefits. Employers would pay at double the rates of the contributions made on behalf of the employees. The employer liability principle was at the basis of employer contributions; the act held employers liable to compensate the loss of earnings of the employees up to a certain extent. The central or state governments made no contributions, but they subsidised the scheme by meeting a part of the cost of the administration and the medical services respectively.²⁰ Availability of medical services was not conditional on contributions. The provision of medical services was the responsibility of the state governments, which determined the scale of the benefits. The Employees' State Insurance Corporation (ESI Corporation) had to defray an agreed share of expenses

17 Srivastava (n 10) 89–91. For a more detailed analysis of the Adarkar Report see Hasan (n 10) 45–58.

18 According to the act, factory meant those premises in which a manufacturing process was being carried on with the aid of power with not less than twenty workers during the preceding 12 months. Seasonal factories, perennial factories employing less than twenty workers, and establishments which did not use power were excluded.

19 Hasan (n 10) 156–158.

20 Srivastava (n 10) 101–103.

incurred by the state government.²¹ The administration of the fund (consisting of contributions and grants by the governments) was vested in the Employees' State Insurance Corporation which was set up by the central government in 1948.²²

Unemployment Insurance

Against the background of workers' unrest, the Bombay Strike Enquiry Committee, appointed in 1928, proposed that millowners be made responsible for alleviating the distress caused by unemployment arising from schemes aimed to improve industrial efficiency. This was to be done through a voluntary gratuity scheme, namely the establishment of a 'Out-of-Work Donation Fund' from which gratuities amounting to four to six weeks' wages would be granted to discharged workers to enable them to maintain themselves during the time that they were looking for other employment. No action was taken on that proposal.²³

In 1931, the Royal Commission on Labour also went into the problem of unemployment insurance. Similar to the Bombay Strike Enquiry Committee the commission held that 'where any comprehensive scheme of reduction [of employment] is contemplated in an industry, the introduction of a joint scheme [based on contributions from employers and workers] . . . should be considered'.²⁴ But the commission's report stated that it could not regard any national system of insurance with which it was familiar as feasible at that time in India and that in the present situation the village home afforded the industrial worker his best available security in times of unemployment or sickness. The report concluded, 'The fullest insurance against unemployment . . . would be provided by the growth of Indian industry'.²⁵

Unemployment Relief

The Industrial Disputes Act of 1947 (as amended in 1953) made provision for a form of unemployment relief. Under the 1953 amendment, employers of certain categories of establishments were liable to pay compensation to workers

21 The state's share was one quarter of the cost of such services to the insured persons. The ESI Corporation with the approval of the state government could establish hospitals, dispensaries, and other medical and surgical services as the ESI Corporation thought necessary.

22 The ESI Corporation was an autonomous body and functioned under the control of the central government. The ESI Corporation was composed of representatives of various interests such as the central and state governments, the medical profession, employers, and employees.

23 Agarwala (n 8) 5.

24 Royal Commission on Labour in India, *Report of the Royal Commission on Labour in India* (Government of India 1931) 35.

25 *ibid* 34. Two Indian members of the Commission pointed out that industrial life tended to break down the family system and in the absence of provident funds for industrial workers, the government ought to encourage employers by financial grants or otherwise, to start such schemes for their employees. Agarwala (n 8) 7.

(with some exclusions) who were laid off or retrenched (lump sum). Such payment was conditional on the length of service. The workers concerned were not required to pay any contributions nor was any state authority. The sole responsibility for contributions was of the employers, though conditions of unemployment often arose on account of factors beyond the control of individual employers and were caused by governmental labour policies. The scheme was essentially about improving industrial relations. No machinery was set up to secure re-employment.

Inadequacies of British Social Welfare

Though the schemes established in the 1920s and 1930s were created through central legislation, there were almost no provisions for financial contributions by the state nor were benefits tax based. Contributions were primarily by the employers and employees and intended to meet certain contingencies such as sickness, unemployment, or maternity. A comprehensive framework for a national social insurance structure did not emerge. The schemes primarily targeted industrial workers, and not peasants, the informal sector, lower castes, or poor migrant labour. Entitlement to benefits was conditional on minimum service conditions, scale of wages, and rate of contributions. Inadequate statistical data and unwillingness on the part of the central and provincial governments to bear an additional financial burden often caused schemes to fail. Lack of economic progress and increase of national dividend and per capita income made it difficult for the state to accumulate tax revenues in order to finance social insurance plans. Trained personnel were scarce, and the workers' ignorance and illiteracy made it difficult for them to know of their rights and procedures for paying contributions and drawing benefits under existing statutory provisions.²⁶

The Nationalist Debate: The Indian Approach to Social Welfare

Ideational Background

Synergistic links both in form and substance between the nationalist discourse against British rule and drafting the constitution are evident in the Constituent Assembly serving as a symbol of the sovereign body of the Indian people, a culmination of prior forms of popular political mobilisation and assertion of their sovereignty against British authority.²⁷ Substantively, the task before the Constituent

26 Agarwala (n 8) 13–16.

27 Sarbani Sen, *The Constitution of India. Popular Sovereignty and Democratic Transformations* (Oxford University Press 2007) Part Two.

Assembly was a complex one. There were shifts of emphasis in Congress ideology as it progressed from early Moderate thought to the Gandhian and Nehruvian periods.²⁸ Alternate or radical views also emerged that challenged accepted viewpoints and opted for different forms of political organisation and processes of social transformation.²⁹ However, the predominant focus that emerged during the working of the Constituent Assembly was building a modern nation state, with representative and responsible forms of governance, and to secure the liberties of the people against arbitrary government. There were also references to state responsibility for promoting economic progress and social transformation to create a more just and equitable society.

Nationalist thinking during the colonial period included two parallel strands of thought, the political and the social. Nationalist demands for political reforms and civil liberties from the British government also included the idea that the state had a positive obligation to provide its people with certain economic and social conditions.³⁰ For instance, the Commonwealth of India Bill of 1925 contained a provision that all persons were to have free elementary education. The Nehru Report of 1928 contained provisions for a living wage for industrial workers, and protection against the economic consequences of old age, sickness, and unemployment. Labour was to be freed from conditions of serfdom. There was to be protection for women workers such as maternity leave.³¹

28 For understanding the formation, structure, and processes of decision making in the Constituent Assembly see Granville Austin, *The Indian Constitution: Cornerstone of a Nation* (Clarendon Press 1966) 8–25.

29 For instance, while the Constituent Assembly was in session, in March 1948, tensions emerged between the Socialist Party of India and the Indian National Congress. The Socialist Party argued that the Draft Constitution ‘fell short of economic and equalitarian ideas’ that were integral to the freedom movement. The Socialist Party’s own 1948 draft included an ‘Economic Rights’ section: Private property and private enterprise would be subject to ‘general interest of the republic and its toiling masses’. There was also a section on ‘Directive Principles of State Policy’ to establish a socialist order. However, Ambedkar made it clear that the Directive Principles were not meant to create a socialistic economy – the decision was left for future parliaments to take. See the Socialist Party’s Draft Constitution of the Indian Republic, <www.constitutionofindia.net/historical_constitutions/draft_constitution_of_the_republic_of_india__socialist_party__1948__1st%20January%201948> accessed 28 February 2022. See also the Gandhian alternative to nation building, <www.constitutionofindia.net/historical_constitutions/gandhian_constitution_for_free_india__shrman_narayan_agarwal__1946__2nd%20April%201945> accessed 28 February 2022; the drafts presented by M.N. Roy incorporating radical socialist ideas, <www.constitutionofindia.net/historical_constitutions/constitution_of_free_india__a_draft_m_n_roy__1944__1st%20January%201944>; and Ambedkar’s draft on ‘States and Minorities’ <www.constitutionofindia.net/historical_constitutions/states_and_minorities__dr_b_r_ambedkar__1945__1st%20January%201945> accessed 28 February 2022. This draft was presented to the Fundamental Rights Sub-Committee based on an earlier draft called ‘Political demands of the Scheduled Castes’, <see www.constitutionofindia.net/historical_constitutions/political_demands_of_scheduled_castes__scheduled_castes_federation_1944__23rd%20September%201944> accessed 28 February 2022.

30 Austin (n 28) chap 2.

31 *ibid* 54–55.

The Congress session held in Karachi in March 1931 adopted the Resolution on Fundamental Rights and Duties and Economic Programme, which was a declaration of rights and also a socialist manifesto.³² The Resolution was based on ideas influenced by Nehru such as the provisions concerning the welfare of the workers and of the people generally and the placing of the primary responsibility for social welfare on the state.³³ The provisions – which became a precedent of the Directive Principles – stated that ‘[in] order to end the exploitation of the masses, political freedom must include the real economic freedom of the starving millions’. The state was to safeguard ‘the interests of industrial workers’ with ‘suitable legislation’ for a living wage, healthy conditions of work, limited hours of work, and protection from ‘the economic consequences of old age, sickness, and unemployment’. Women and children were also to be granted protection through special benefits. The state was to ‘own or control key industries and services’.³⁴

Nehru influenced the Assembly’s thinking that economic progress could only be achieved through planning by a centralised state authority to introduce modern agricultural methods, transport, power generation, and industrial development. By 1947, the idea of state responsibility for social welfare was an accepted principle. Nehru and other socialists were influenced by the ideas of Karl Marx, T.H. Green, Harold Laski, and Sidney and Beatrice Webb. It was widely assumed that ‘political equality . . . is never real unless it is accompanied by . . . economic equality’³⁵ and that ‘true individual freedom cannot exist without economic security . . . necessitous men are not free’.³⁶ Assembly members understood that ‘the utility of a state has to be judged from its effect on the common man’s welfare’.³⁷ That consensus notwithstanding, the nationalist discourse faced vexing questions about whether to prioritise the political or social revolution; if the state should be committed to socialist objectives in the constitution; and whether to hold the government judicially accountable for realising certain social and economic rights. During the drafting, the approach that prevailed was that while political independence had to be prioritised, this was not an end in itself but a ‘means to an end’ which was the ‘raising of the people . . . to higher levels and hence the general advancement of humanity’.³⁸

32 Indian National Congress, *Resolutions on Economic Policy and Programme, 1924–54* (All India Congress Committee 1954) 6.

33 Austin (n 28) 57.

34 *ibid.*

35 Harold J. Laski, *Grammar of Politics* (George Allen & Unwin Ltd 1925) 162.

36 A quote attributed to Franklin Roosevelt by K.T. Shah in a letter to Prasad dated 15 February 1947. Prasad papers, File 4-C/47, quoted in Austin (n 28) 60.

37 H.V. Kamath in the Constituent Assembly, Constituent Assembly Debates, vol 7, 5 November 1948, 7.49.69; also quoted in Austin (n 28) 60.

38 Jawaharlal Nehru, *The Unity of India. Collected Writings 1837–1940* (Lindsay Drummond 1948) 11.

K. Santhanam, a prominent member of the Constituent Assembly, spoke of three revolutions – the political revolution would end with independence; the social revolution was to ‘to get (India) out of the medievalism based on birth, religion, custom, and community and reconstruct her social structure on modern foundations of law, individual merit and secular education’. The third revolution was an economic one: ‘The transition from primitive rural economy to scientific and planned agriculture and industry’.³⁹ Nehru anticipated that the three revolutions were interrelated: A modern nation state that could provide for social welfare required certain preconditions, namely, a stable and united political community based on popular consent, economic development, and social restructuring. In his Objectives Resolution, Nehru stated, ‘I stand for Socialism and, I hope, India will stand for Socialism. . . . What form of Socialism . . . is another matter for your consideration’.⁴⁰ However, Nehru was clear that such a state would seek to secure to ‘all the people of India justice, social, economic and political; equality of status, of opportunity, and before the law’. Nehru’s pragmatic approach prevailed in the Assembly and a democratic constitution with a socialist bias was crafted, so as to allow for such social welfare measures as the citizens desired or their needs demanded, to be enacted through their elected representatives in government.⁴¹

Drafting the Constitution

The core of the constitution’s commitment to social welfare lies in some Fundamental Rights provisions of Part III and in the Directive Principles of Part IV.⁴² Although the Fundamental Rights primarily protect individuals and minority groups from arbitrary state action, three of the Fundamental Rights are also designed to protect individuals against social discrimination and prejudice. Article 17 abolishes untouchability. The anti-discrimination provisions – Article 15(1) and (2), Article 16(2) – protect citizens from being discriminated against on certain grounds (religion, race, caste, sex, place of birth) in the use of commercial and other public spaces and employment in state services. Article 23 prohibits forced labour. However, the Directive Principles in Part IV are the clearest illustrations of the Constituent Assembly’s thinking on social welfare, containing ideas of social security and the welfare state, of justice, modernisation, development, and socio-economic reform.⁴³ The Directive Principles

39 K. Santhanam, in the Magazine section of *The Hindustan Times*, New Delhi, 8 September 1946.

40 Resolution on Aims and Objects, moved by Jawaharlal Nehru in the first session of the Constituent Assembly, *Constituent Assembly Debates*, vol 1, 13 December 1946, 1.5.1.

41 Socialist ideologies in the Constituent Assembly ranged from Marxism to Gandhian Socialism.

42 Item 23 of the Concurrent List in the Seventh Schedule contains the words ‘social security and social insurance’ on which both the central and state governments can legislate.

43 For details on the drafting of these provisions in the Constituent Assembly, see B. Shiva Rao, *The Framing of India’s Constitution: A Study* (Indian Institute of Public Administration 1968) chaps 7 and 8; Austin (n 28) chaps 3 and 4.

refer to ideas of making the state responsible for the welfare of its citizens, to the rights adopted by the All Parties Conference of 1928, and the Karachi Resolution of 1931.⁴⁴

The constitution-makers agreed that the values in Part IV were to be 'fundamental in the governance of the country' and 'in making laws'. The overarching ideology of the Principles appears to be the creation of a just social order. The principle of justice – social, economic, and political – was to inform all institutions of national life, as stated in Article 38(1) of the constitution. The title of Article 38 affirmed that the welfare of the people could only be promoted within such a social order. The concept of 'welfare' that emerges from the Principles includes the state directing its policies to securing adequate means of livelihood; the right to work; a living wage; decent conditions of work; maternity relief; and securing the health of workers, women, and children. There are references to measures to be taken by the state to provide free education to children up to the age of fourteen years,⁴⁵ and public assistance in cases of unemployment, old age, sickness, disablement, and in other cases of undeserved want. The state is also to secure adequate nutrition and improvement of public health and promote with special care the educational and economic interests of the lower castes and of weaker sections of the people (Article 39).

The Principles addressed India's historic legacy of multiple and mutually reinforcing inequalities:⁴⁶ Social 'inequalities' (gender and caste) and economic inequalities (of income, ownership, and control of material resources and means of production), which often produced inequalities of access to education, to adequate nutrition, to health services. The Principles also categorised vulnerable sections based on specific characteristics such as old age, disability, and sickness. The role of the state – as envisioned by the Principles – was to 'enable' rather than 'provide', though in certain cases the state was directed to undertake suitable policies or economic organisation to reach specific goals such as adequate means of livelihood for citizens; a living wage for workers, both industrial and agricultural; equal pay for men and women; to secure the health of all workers; education; public assistance in certain cases; decent conditions of work; and to ameliorate the educational and economic interests of the Scheduled Castes and Tribes. However, Article 41 of the constitution established that state responsibilities had to be undertaken 'within the limits of its [the state's] economic capacity and development'.

44 See p. 88, 95 in this chapter.

45 Ambedkar explained that the clause that every child shall be kept in an educational institution until 14 years was because child labour in factories, mines, or hazardous occupations under 14 years was abolished under Article 24 of the constitution.

46 See Jean Drèze and Amartya Sen, *An Uncertain Glory. India and its Contradictions* (Princeton University Press 2013) chap 8.

Justiciability of the Directive Principles

The issue of whether the Directive Principles should be made justiciable, ie enforceable in a court of law, was contested ground. Constituent Assembly members such as Munshi, Ambedkar, and Shah would have made the Directives justiciable. Shah, a doctrinaire socialist, believed that there must be a time period within which the Directives had to be made justiciable; otherwise, they would be mere 'pious wishes'.⁴⁷ B.N. Rau, however, preferred 'to set out the positive rights merely as moral precepts for the authorities concerned'.⁴⁸ Rau included in his 'Constitutional Precedents' the Irish example of distinguishing between justiciable and non-justiciable rights. His defence was that '[m]any modern constitutions do contain moral precepts of this kind', and 'nor can it be denied that they may have an educative value'.⁴⁹ Rau believed that it may occasionally be necessary for the state to invade private rights (justiciable and thus protected) in the discharge of one of its fundamental duties. That is why Rau suggested in his Draft Constitution that no law made by the state in pursuance of its policies under the Directive Principles could be invalidated for contravening the Fundamental Rights.⁵⁰ However, the Drafting Committee did not include this suggestion in their draft provisions.

At the first meeting of the Fundamental Rights Sub-Committee in 1947, Alladi Krishnaswami Ayyar saw no use in laying down unenforceable precepts in the constitution. Ambedkar and Masani had similar views. Munshi's and Ambedkar's drafts of Fundamental Rights included the right to work and for every citizen to have free primary education (Munshi).⁵¹ But while drafting the negative rights provisions, the Fundamental Rights Sub-Committee realised that some were more susceptible to court enforcement than others and that there was a need for non-justiciable rights.⁵² Anticipating further criticism that these Principles should be viewed as fundamental to the ordered progress of the state, the Sub-Committee in finalising its report redrafted the opening clause: 'While these principles shall not be cognisable by any court they are nevertheless fundamental

47 Shah's minute, dated 20th April, 1947, quoted in Austin (n 28) 79 footnote 19.

48 Rau, *Constitutional Precedents*, Third Series (Government of India Press 1946), 10–24, quoted in Austin (n 28) 77 footnote 10. Justiciable rights meant that the rights could be judicially enforced. The Directive Principles cannot be enforced by any court, see Article 37.

49 B.N. Rau, *India's Constitution in the Making* (Orient Longman 1960) 364–365, quoted in Austin (n 28) 77 footnote 12. See also B. Shiva Rao, *The Framing of India's Constitution. Select Documents*, vol 1 (The Indian Institute of Public Administration 1966) 165.

50 B. Shiva Rao, *The Framing of India's Constitution. Select Documents*, vol 3 (The Indian Institute of Public Administration 1967) 222, 226–227.

51 Rao B. Shiva Rao, *The Framing of India's Constitution. Select Documents*, vol 2 (The Indian Institute of Public Administration 1967) 69; Ambedkar's draft, article II (II) (4) and explanatory notes thereon, *ibid* 89–90, 99.

52 Alladi Krishnaswami Ayyar supported this position in a note submitted on 14 March 1947 in which he stressed the distinction between justiciable rights and rights which were 'merely intended as a guide and directing objectives to state policy'. Rao (n 51) 67.

in the governance of the country and their application in the making of laws shall be the duty of the state’.

As foreseen, there were Constituent Assembly demands for greater enforceability of Part IV. One member said,

I think it is the primary duty of government to remove hunger and render social justice to every citizen and to secure social security. . . . The teeming millions do not find any hope that the Union Constitution . . . will ensure them a minimum standard of living and a minimum standard of public health.⁵³

But majority opinion was that the Principles should be kept general, leaving ‘enough room for people of different ways of thinking’ towards social change.⁵⁴ Introducing the draft constitution in the Assembly in November 1948, Ambedkar said that though the Directive Principles had no legal force behind them, he was not prepared to conclude that they were ‘useless’. Synthesising democratic values with those of social transformation, he said,

The draft constitution as framed only provides a machinery for the government of the country. It is not a contrivance to install any particular party in power. . . . Who should be in power is left to be determined by the people. . . . But whoever captures power will not be free to do what he likes with it. In the exercise of it, he will have to respect these Instruments of Instructions which are called the Directive Principles. . . . He may not have to answer for their breach in a court of law. But he will certainly have to answer for them before the electorate at election time.⁵⁵

Equality

Members such as Alladi Krishnaswami Ayyar discussed the problem of the concept of equality being an obstacle to social welfare laws classifying men and women employees or laws demanding differential treatment of vulnerable groups such as backward classes, or Scheduled Castes and Tribes. Ayyar preferred using the phrase that ‘no person should be denied the equal protection of the law’. But ‘equality before the law’ and ‘equal protection of the laws’ were both added to Article 14 of the constitution.

The principle of equality under Article 14 does not require identical treatment by the state but allows for ‘reasonable classifications’ where

53 B. Das in the Constituent Assembly, Constituent Assembly Debates, vol 5, 30 August 1947, 5.46.29.

54 Austin (n 28) 83.

55 Constituent Assembly Debates, vol 7, 4 November 1948, 7.48.243.

unequal categories can be treated differently.⁵⁶ The initial constitutional draft permitted the state to make ‘special provisions’ for groups such as women and children. These categories are only illustrative. The state can also make special provisions for those not specifically mentioned, where there is ‘reasonable classification’ under Article 14. The original text also explicitly contained further principles of positive discrimination. For instance, under Article 16(4) the state was explicitly allowed to make reservation of appointments or posts in state services in favour of ‘any backward class of citizens’ not adequately represented in services under the state.⁵⁷ Subsequent amendments created further categories of Scheduled Castes and Tribes and socially and educationally backward communities for admission to state sponsored educational institutions.⁵⁸ Subsequent case law has expounded on these categories.⁵⁹

The Supreme Court of India has interpreted the idea of equality under the constitution to mean ‘substantive equality’.⁶⁰ The underlying premise is that social justice is not constitutionally limited by values of formal equality or efficiency but is a ‘seamless web’ of harmonious values. This premise influenced later judicial interpretation that Article 16(4) is merely an ‘illustration’ of

56 The principles of ‘reasonable classification’ embedded in Article 14 was expressed in early Supreme Court. See *State of West Bengal v Anwar Ali Sarkar*, AIR 1952 SC 75; *Kathi Raniing Rawat v State of Saurashtra*, AIR 1952 SC 123.

57 During constitution-making, the Sapru Committee Report of 1945 tabled the question of marginalised groups such as the Scheduled Castes and suggested that discriminatory social customs should be eliminated. All citizens were to have the right to education, regardless of caste distinctions in any educational institution maintained or aided by the state. There could be no discrimination on grounds of religion, caste, or creed in public employment or for access to public spaces and facilities. There would be no form of forced labour. The Sapru Committee Report suggested further that the Constituent Assembly should consider schemes for the uplift of lower castes and make special provisions for their education and protection. For the Sapru Committee Report of 1945, see <www.constitutionofindia.net/historical_constitutions/sapru_committee_report__sir_tej_bahadur_sapru__1945__1st%20December%201945> accessed 28 February 2022. Article 16(4) is one of the outcomes of the considerations taking place in the Constituent Assembly.

58 The Constitution (First Amendment) Act, 1951 and the Constitution (93rd Amendment) Act, 2005.

59 Later cases, such as *Indra Sawhney v Union of India*, AIR 1993 SC 477; *Ashoka Kumar Thakur v Union of India* (2008) 6 SCC 1; *M. Nagaraj v Union of India* (2006) 8 SCC 212, have laid down the principles for determining ‘socially and educationally backward’, and ‘other backward’ classes as well as the ‘extent’ of reservations that is constitutionally valid. For a detailed analysis of ‘reservations’ see Vinay Sitapati, ‘Reservations’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *Oxford Handbook of the Indian Constitution* (Oxford University Press 2016) 720.

60 In *State of Kerala & Anr v N.M. Thomas*, Ray CJ’s majority opinion states that the ‘question of unequal treatment does not really arise between persons governed by different conditions and different sets of circumstances’. *State of Kerala & Anr v N.M. Thomas*, AIR 1976 SC 490. This perspective has been upheld in later cases. See also Gautam Bhatia, ‘Equality under the Indian Constitution’ in Ulrike Davy and Antje Flüchter (eds), *Imagining Unequals, Imagining Equals. Concepts of Equality in History and Law* (Bielefeld University Press 2022) 231.

Article 16(1), or that Article 15(3) only reiterates the principles of Article 15(1) of the constitution.⁶¹

Social Policy in the 1950s and 1960s

The Political and Social Context

The constitution-makers envisioned a Westminster-style parliamentary democracy where executive and legislative acts were subject to the constitution and judicial review.⁶² Granville Austin states: ‘Thus began the enterprise of nation building, economic development and social change to which the Congress party had so long been dedicated’.⁶³

However, soon conflicts emerged between the demands of the social revolution (achieving social justice and an equitable society based on the state undertaking primary responsibility for meeting the basic needs of vulnerable groups) on the one hand and the Fundamental Rights and democratic values in the constitution on the other. As the government enacted measures to address problems of traditional social hierarchies (the local caste hierarchy closely paralleled the distribution of land ownership in the village economy and was reflected in the allocation of political authority),⁶⁴ a largely agricultural economy, and widespread poverty tensions arose in balancing individual rights and collective interests. The tensions were mirrored in institutional struggles between the executive’s role in social reform and the legitimacy of judicial intervention in ‘ordering the life of a progressive people’.⁶⁵ The First Amendment to the Constitution of 1951, for instance, was a response to the need to balance the individual right to equality against group rights of ‘backward’ communities to gain access to state sponsored education.⁶⁶

In the 1950s and 1960s, constitutional references to the state’s duties to secure social welfare in the Directive Principles and other constitutional provisions did

61 Article 15 of the constitution is the ‘non-discrimination’ provision of the Indian Constitution and prevents the state from discriminating against citizens on the prohibited grounds specified in clause (1), such as religion, race, caste, sex, place of birth. Article 16(1) and (2) of the constitution embody the principle of ‘equality of opportunity’ for all citizens in matters relating to employment or appointment to any office under the state and lists the prohibited grounds of discrimination (religion, race, caste, sex, descent, place of birth, residence).

62 In the Indian model, the president is a constitutional head, with the prime minister as the leader of the majority party in Parliament heading the government through the Cabinet of Ministers. There is a federal devolution of authority between the central and state governments.

63 Granville Austin, *Working a Democratic Constitution. The Indian Experience* (Oxford University Press 1999) 13.

64 Francine R. Frankel, *India’s Political Economy, 1947–1977. The Gradual Revolution* (Princeton University Press 1978) 8.

65 Attorney General M.C. Setalvad on 26 January 1950, quoted in Austin (n 63) 123.

66 See p. 90, 92, 103 in this chapter.

not result in the emergence of a comprehensive framework of social insurance or social assistance schemes. Economic planning dominated politics.

Economic Planning

The nationalist critique of India's economic decline under colonialism resulted in a post-independence focus on 'nation building' and on increasing economic growth. Economic development was considered an essential prerequisite for the state to engage in social welfare measures.⁶⁷ Policies for growth and development were characterised in broadly reformist and socialist terms during the Nehru years. These policies also reflected Gandhi's teachings that had influenced the 1931 Karachi resolution. The resolution contained the first reference to the need to 'end . . . the exploitation of the masses . . . and real economic freedom for the starving millions'.⁶⁸ Gandhi's approach to political organisation and social planning was based on his critical analysis of modern industrial society.⁶⁹ For Gandhi, only village reconstruction would eliminate the problems of untouchability, illiteracy, and disease. Therefore, Gandhi deemed it necessary to revive traditional handicrafts, cooperative ownership and cultivation of land, and the concept of trusteeship. Congress workers were to engage in a 'Constructive Programme' for 'village uplift', meaning better health, increasing rural income through the revival of village industries, and providing basic education.

Gandhian thinking created an interest in the normative aspects of economic modernisation. In his 'Discovery of India', Nehru stated that modern industrial society was based largely on the absence of social values.⁷⁰ Moreover, Nehru wanted to approach the multiple goals of India's development through an incremental and non-violent approach from within India's democratic system. The Gandhian critique also caused an interest in exploring alternative approaches to economic growth than a purely Western capitalist approach. The interest in a Soviet pattern of economic planning as a 'scientific' approach to

67 Agarwala (n 8) 14–15.

68 Indian National Congress (n 32) 6.

69 Gandhi characterised modern industrial society as one based on class violence, a state-centred political culture, and militarism, though his critique of modern industrial society was distinct from the typical Marxian analysis of the capitalist mode of production based on the labour theory of value and exploitation. M.K. Gandhi, *Panchayati Raj* (compiled by R.K. Prabhu, Navajivan Publishing House 1959); M.K. Gandhi, *Sarvodaya* (edited by Bharatan Kumarappa, Navajivan Publishing House 1954).

70 Jawaharlal Nehru, *The Discovery of India* (The Signet Press 1946) 678, deploring the excessive individualism of the West and finding that 'the competitive and acquisitive characteristics of modern capitalist society, and enthronement of wealth, and the continuous strain and lack of security for many' had afflicted entire populations with neurotic anxieties even in the midst of great material abundance.

problems of resource allocation and investment, for instance, has been viewed as a consequence of Gandhian thinking.⁷¹

The policies of the 1950s and 1960s also embodied values of state responsibility for nation building, for social transformation through legal means, and 'for modernisation' to increase productivity and build a new nation. State responsibility required state ownership and regulation of land and other means of production. The 1947 Jaipur meeting of the All India Congress Committee reiterated that the state would be responsible for starting new enterprises in all key industries; existing industries in the field would be transferred from private to public ownership after a period of five years.⁷² This strategy was expected to lay the foundations of a self-reliant economy and solve the problem of unemployment. Economic planning was to be spearheaded by a Planning Commission.⁷³ According to a 1955 Congress resolution, state control and interventions in economic planning would mean 'the establishment of a socialistic pattern of society where the means of production are under social ownership and control, . . . and there is equitable distribution of the national wealth'.⁷⁴

Social and economic policies of the Planning Commission and the Congress party largely conformed to long-standing values of equality and social justice which became the means and the goal of [India's] development and the entire planning effort.⁷⁵ The Directive Principles also influenced state social policy.⁷⁶ The Cabinet resolution establishing the Planning Commission in March 1950 specified three principles of economic planning: For one, all citizens would equally have a right to an adequate means of livelihood. For another, the operation of the economic system would not result in a concentration of wealth and means of production. Finally, the ownership and

71 In 1953, Shriman Narayan, as the general secretary of the All India Congress Committee, claimed that there was 'no fundamental difference between the ideologies of the Congress, Socialism and Sarvodaya'. Quoted in Francine R. Frankel, *India's Political Economy, 1947–2004*, 2nd edn (Oxford University Press 2005) 106. However, Jean Drèze and Amartya Sen have written that India's economic planning in the Nehru years was not Soviet-style planning with extensive nationalisation of industries. According to Drèze and Sen, India was attempting a sort of state-led development strategy where most of the economy (with the exception of what were seen as 'essential services') were in the hands of the private sector. Drèze and Sen (n 46) 25.

72 This was decided by the Committee on Objectives and Economic Program. See Indian National Congress (n 32) 32; Frankel (n 64) 77. See also the Resolution on Industrial Policy, 6 April 1948, quoted in Frankel (n 71) 77.

73 In January 1950, the Working Committee of the Congress agreed to a resolution calling for the creation of a Planning Commission. Frankel (n 71) 84–85.

74 Jawaharlal Nehru, 'Planning and Development', speech delivered to the National Development Council, 9 November 1954, quoted in Frankel (n 71) 117.

75 Planning Commission, Government of India, *The New India: Progress through Democracy* (Macmillan Company 1958) 34.

76 Tarlok Singh, *India: Towards an Integrated Society: Reflections on Planning, Social Policy, and Rural Institutions* (Orient Longmans 1969) 253–254.

control of the material resources of the country would be distributed so as to subserve the common good.⁷⁷ The First Five Year Plan, December 1952, also reiterated,

[the socio economic] framework has itself to be remoulded so as to enable it to accommodate progressively . . . the demands for the right to work, the right to adequate income, the right to education and to a measure of insurance against old age, sickness and other disabilities. The Directive Principles of State Policy . . . make it clear that for the attainment of these ends, ownership and control of the material resources of the country should be so distributed as best to subserve the common good.⁷⁸

While the Plans did not outline comprehensive government schemes of social assistance or social insurance, they did make financial outlays to improve infrastructure for health, education, and nutrition; to improve the conditions of backward classes; for social welfare schemes for women and children, and physically and mentally disabled groups. Under the First Five Year Plan, the Central Government set up a Central Social Welfare Board with the object of assisting voluntary agencies for organising welfare programmes for women, children, and handicapped groups.⁷⁹

Social Policy Instruments

During the Nehru years, it would appear that state action to formulate social schemes which were tax-financed and means-tested became secondary to the predominant urge to build a political nation state and to achieve economic growth. State action to achieve social goals took the form of giving effect to constitutional provisions for special care for vulnerable groups. Certain statutory provisions were also formulated for the benefit of employed women. Additionally, a legal framework was enacted for provident funds schemes for employees or their beneficiaries on retirement, superannuation, and disability, along with pension and life insurance schemes. However, there was no state financing of such schemes.

77 Resolution (Planning) published by the Cabinet Secretariat in the Gazette of India Extraordinary, 15 March 1950.

78 For the First Five Year Plan, see <<https://niti.gov.in/planningcommission.gov.in/docs/plans/planrel/fiveyr/1st/1planch1.html>> accessed 28 February 2022.

79 The Second Plan also provided for funding to the 'people's sector', to assist voluntary social welfare organisations at the instance of a social welfare board. For the Second Five Year Plan see < <https://niti.gov.in/planningcommission.gov.in/docs/plans/planrel/fiveyr/welcome.html>> accessed 28 February 2022.

Special Care for Vulnerable Groups

The original text of the Constitution of India contained various provisions for compensatory treatment of disadvantaged citizens, based on categories such as caste, sex, or age.⁸⁰ There are also general anti-discrimination clauses under the 'Fundamental Rights' in Part III of the constitution: Articles 15 and 16 prohibit discrimination on certain grounds, such as religion, race, caste, sex, and place of birth, among others. Article 29(2) says that no citizen shall be denied admission into any government-supported educational institution on similar grounds.

The seeming contradiction between the 'special care' provisions allowing for preferential treatment and the general non-discrimination provisions was first raised before the Supreme Court of India in *State of Madras v Srimathi Champakam Dorairajan*.⁸¹ In that case, the Madras Communal General Order which reserved seats in medical colleges for backward communities in accordance with Article 46 of the constitution, contained in Part IV (Directive Principles), was found by the Madras High Court (upheld in the Supreme Court) to be in violation of Article 29(2) of the constitution. The Supreme Court held that the Directive Principles could not override the Fundamental Rights which were sacrosanct and not liable to be overturned by legislation or an executive act.⁸²

The potential danger presented by decisions such as *State of Madras v Srimathi Champakam Dorairajan* to the constitution's 'special care' provisions led to the First Amendment to the Constitution of 1951 which added clause 4 to Article 15. The newly inserted clause stated that nothing in Article 15 or in Article 29(2) of Part III of the constitution would prevent the state from making special provisions for the advancement of any socially and educationally backward classes of citizens or Scheduled Castes and Tribes listed by presidential notification under Articles 341 and 342 of the constitution. The term 'Scheduled Castes' referred to lower castes and 'untouchables' in the Indian social hierarchy with a historical legacy of discrimination.⁸³ The term 'Scheduled Tribes' referred to 'adivasi' (original inhabitants) or tribal communities who faced loss of lands and changes to their traditional ways of life from modernisation and

80 Part XVI of the original text of the Constitution of India contained thirteen articles providing for reservation of seats in legislatures for Scheduled Castes and Tribes. Article 15(3) allowed (and allows) the state to make special provisions for women and children. Article 16(4) empowered (and empowers) the state to reserve posts (in state services) in favour of 'any backward class of citizens' not adequately represented in such services.

81 AIR 1951 SC 226.

82 *ibid.* The Supreme Court also struck down other communal quotas – for example, in *Venkataramana v State of Tamil Nadu*, AIR 1966 SC 1089, quotas for government posts.

83 The caste system is generally considered to be *sui generis* to the Hindu social structure and characterised by restrictions on marriages outside the caste, exchanging food, and pursuing certain occupations.

economic development. Subsequent case law has created identifying criteria for determining 'social and educational' backwardness.⁸⁴

Benefits for Women

The Maternity Benefits Fund Act of 1961 was passed by the Indian parliament to regulate the employment of women in certain establishments before and after childbirth and to provide for maternity and other benefits. The Act applied to every factory, mine, or plantation not covered by the Employees' State Insurance Act of 1948.⁸⁵

Under the act, every woman was entitled to, and her employer was liable for, the payment of maternity benefit at the rate of the average daily wage for the period of her actual absence.⁸⁶ The maximum period for such benefit was (originally) twelve weeks of which not more than six weeks was to precede the date of her expected delivery. Such employees were also entitled to receive from her employer a medical bonus of (originally) Rs 25, if no pre-natal confinement and post-natal care was provided by the employer free of charge. The appropriate government was authorised to appoint inspectors to secure the enforcement of the act.

Provident Funds

The need for old age provisions for industrial workers was referred to in the 1931 report of the Royal Commission on Labour and in 1946 by the Rege Committee (established in 1944); both reports pointed out that a worker who had toiled for a long period in a factory could become destitute in his old age.⁸⁷ In 1947, the question was reviewed at the Asian Regional Conference of the International Labour Organisation and its recommendations were discussed at the tenth session of the Indian Labour Conference in 1948.⁸⁸ The enactment

84 See p. 103 in this chapter.

85 The Maternity Benefits Fund Act of 1961 has been amended a number of times, also to extend the scope of the act. In the 2017 amendment, maternity benefit was increased from twelve weeks to twenty-six weeks for two surviving children (of which not more than eight weeks shall precede the date of expected delivery and eighteen weeks after delivery) and remained twelve weeks for more than two children. The amendment also facilitated 'work from home' and made the provision of crèche facilities mandatory in establishments having fifty or more employees.

86 Section 5 of the Maternity Benefits Fund Act of 1961 defined average daily wage to mean the average of the woman's wages payable to her for the days on which she worked during the period of three calendar months immediately preceding the date from which she absented herself on account of maternity, or ten rupees, whichever was the highest.

87 Royal Commission on Labour in India (n 24) 269; Labour Investigation Committee, *Report on An Enquiry into Conditions of Labour in the Principal Municipalities in India* (Government of India 1946) 29; Srivastata (n 10) 69.

88 Preparatory Asian Regional Conference of the International Labour Organisation. *Record of Proceedings* (International Labour Office 1948) 275; Srivastata (n 10) 304.

of the Employees' State Insurance Act of 1948⁸⁹ made the need to address this issue even more pressing.

The Employees' Provident Funds Act of 1952 provided for retirement benefits in the form of provident funds for employees in factories and other establishments.⁹⁰ Originally, the Employees' Provident Funds Act was applicable to every establishment or factory which employed fifty or more persons.⁹¹ Under the Employees' Provident Fund Scheme authorised by the act, a provident fund was (and is) instituted for each employee covered by the act. Contributions to the (individual) fund account were (and are) mandatory, for employees as well as for employers. The total amount of the contributions made by the employee and the employer plus interest constituted the maximum benefit an employee could receive under the scheme, once the qualifying conditions for entitlement were fulfilled (entitlement to the full amount required a period of membership of more than twenty years and retirement from services after reaching the retirement age). Shorter periods of membership led to a reduction of the contributions made by the employer, according to a defined scale.⁹² The administration of the Employees' Provident Fund Scheme was (and is) in the hands of a Central Board of Trustees, a tripartite body consisting of representatives of the central government, the state governments and all-India employers' and employees' organisations.

The Employees' Provident Funds Act did make provision for old age, at least to some extent, and for certain categories of employees. But the benefit took the form of a lump sum, ie a one-time payment, and that lump sum remained meagre in case of short periods of membership, or – for dependents – in case of premature death.

Social policy in India in the 1970s and 1980s

The Political and Social Context

After Nehru, the government's economic policies initially retreated from socialist values and goals.⁹³ Subsequently, ideological factionalism developed between those with a vested interest in the status quo and those committed to

89 See p. 84 in this chapter.

90 The Employees' Provident Fund Act of 1952 was amended a number of times to increase its coverage and to put its provisions on a sounder footing.

91 Today, the act applies to factories/establishments employing twenty or more persons. Hence, smaller factories/establishments were and are excluded from the act.

92 Srivastata (n 10) 314.

93 Lal Bahadur Shastri, Nehru's successor, faced opposition to social reforms from the states. The World Bank argued that India's public sector programmes were too ambitious; and that Indian private enterprise and foreign private capital should have a larger role in industrial development. The Annual Plans between 1966–1969 relied more on the private sector, and there were a series of measures to relax controls under the Industrial (Development and Regulation) Act of 1951.

more radical socialist values. Promises given by the Congress to provide basic individual needs such as food, clothing, housing, education, and health could not be met. The democratic political framework failed to provide effective organisational devices for removing the problems of poverty or achieving the values of a just and equitable society.

Against the background of economic failures and the decline of Congress' popularity in the 1967 elections, the Congress party split, and Indira Gandhi won the 1971 elections with her new Congress party. But despite the formation of Congress majority governments at the centre and in the states, constitutional amendments that tried to prevent any legal obstruction to reform, and despite popular endorsement of 'Garibi Hatao' (remove poverty), the national leadership was unable to carry out social change through peaceful and parliamentary means. The political consensus that provided the foundation of a stable democratic government was destroyed. Following the adverse Allahabad High Court ruling against her election,⁹⁴ Indira Gandhi declared an emergency in June 1975 ostensibly in view of '[a]ttacks . . . intended to subvert the government's progressive programmes and to dislodge it'.⁹⁵ But the declaration of emergency resulted in a resurgence of the values of basic civil liberties and a turn to law and constitutionalism to grant the judiciary a 'new historical basis of legitimacy'.⁹⁶ The Supreme Court's jurisprudence around Public Interest Litigation and new legislation to expand social welfare was prompted by the emergence of new social groups, such as civil rights activists, women's organisations, and non-party organisations, who created new political coalitions and social alliances.⁹⁷

Social Goals and Political Conflicts

In 1967, the radical wing of the Congress drafted a Ten Point Programme to accelerate the attainment of a socialist society.⁹⁸ But contestations continued with those who favoured an incremental approach towards social justice. The

94 *The State of Uttar Pradesh v Raj Narain*, 1975 AIR 865. The Supreme Court ultimately upheld Indira Gandhi's election.

95 Austin (n 63) 307.

96 Sanjay Ruparelia, 'Contesting the Right to Law – Courts and Constitutionalism in India and China' in Prasenjit Duara and Elizabeth J. Perry (eds), *Beyond Regimes. China and India Compared* (Harvard University Asia Center 2018) 99, 109.

97 *ibid* 108.

98 The Ten Point Programme included a national policy of public distribution of food grains particularly to vulnerable sections of the population; the development of consumer cooperatives for supply of essential commodities at fair prices; and steps towards provision of minimum needs to the entire community. These goals required greater state regulation of key sectors of the economy and restricting concentration of economic power. See Austin (n 63) 175. The ideas of the programme were reiterated in 1969 in the economic regulation passed by the Bangalore session of the Congress Parliamentary party and the 'Note on Economic Policies' prepared by the Congress Forum for Socialist Action. *ibid* 177.

Planning Commission's 'Towards self-reliance, Approach to the Fifth Five Year Plan', released in 1972, reiterated that the basic premise of the Five Year Plans was 'development along socialist lines to secure rapid economic growth and expansion of employment, . . . and creation of the values of a free and equal society'.⁹⁹

Proponents of social change also perceived a conflict between the values in the Directive Principles in Part IV and the Fundamental Rights in Part III of the constitution, which culminated in the 24th and 25th amendments to the Constitution of India. The Congress Forum suggested ending judicial review of laws that were 'in consonance' with the Directive Principles.¹⁰⁰ The Attorney General told a seminar organised by the Congress Forum and the Congress Parliamentary party in 1971 that the constitution should be amended to ensure Indians' economic liberties, which were 'more fundamental than the Fundamental Rights'. The report of the seminar stated that the Fundamental Rights in Articles 14, 19 and 31 'must be withdrawn . . . Without these changes our commitment to establish a socialist society shall remain a dead letter'.¹⁰¹ Against these political conflicts, the 24th and the 25th amendments were meant to curb the range of judicial review, in particular the powers of the Supreme Court of India.

Social Policy Instruments

Key Constitutional Amendments

The 1971 electoral win for the Congress party took place based on slogans of a renewed commitment to economic and social reforms, of a programme of 'Garibi Hatao' (remove poverty), and of references to socialism along with democracy. The 24th and 25th amendments were introduced in Parliament in 1971.

The 24th Amendment modified Articles 13 and 368 of the constitution to authorise parliament to freely amend the Fundamental Rights.¹⁰² Hence, constitutional amendments purporting to achieve social goals could no longer be judicially challenged for violating Fundamental Rights. Among other provisions, the 25th Amendment inserted Article 31C into the constitution, holding

99 Planning Commission, *Towards Self-Reliance, Approach to the Fifth Five Year Plan* (Government of India 1972).

100 Socialist India, 8 May 1971, 20.

101 Austin (n 63) 241–242.

102 The 24th Amendment asserted the constituent power of parliament under Article 368 of the Constitution, ie the power to change the constitution, and added: 'Nothing in Article 13 [declaring that all laws must conform with the Fundamental Rights] shall apply to any amendment made under [Article 368]'. The amendment overturned the Supreme Court decision in *I.C. Golaknath v State of Punjab*, AIR 1967 SC 1643.

that laws securing certain Directive Principles under Article 39 would not be deemed to be void on the ground that they violated certain Fundamental Rights (such as equality or property). The amendment clearly intended that laws purporting to give effect to certain social values expressed in the Directive Principles could not be invalidated by courts because of a violation of Fundamental Rights. The amendments expressed the political intention to ‘subordinate the rights of individuals [as expressed in the Fundamental Rights under Articles 14, 19 and 31] to the urgent needs of society’ as expressed in the Directive Principles.¹⁰³ Thus, an entire category of legislation was placed beyond the reach of judicial review.¹⁰⁴

The 42nd Amendment Act of 1976 also aimed to protect social reform legislation from judicial scrutiny. The amendment added the word ‘socialist’ to the Preamble of the constitution and – in order to give primacy to the Directive Principles over the Fundamental Rights – extended the number of Directive Principles that lawmakers could allude to in order to make a law exempt from judicial review under Article 31C of the constitution.¹⁰⁵ The government argued that it was necessary ‘to make the directive principles more comprehensive and give them precedence over those fundamental rights which have been allowed to be relied upon to frustrate socio-economic reforms for implementing the directive principles’.¹⁰⁶ Eventually, certain sections of the 42nd Amendment were declared unconstitutional by the Supreme Court in *Minerva Mills Ltd v Union of India*.¹⁰⁷

Reformulation of the Reservations Policy

The First Amendment of 1951 empowered the state under Article 15(4) of the constitution to formulate special measures for socially and educationally backward classes of citizens. Such measures included, *inter alia*, reserving quotas in educational institutions for pupils or students belonging to such categories. Article 16(4) of the constitution allows (and allowed so from the beginning) the state to reserve posts in state services for backward classes of citizens who, in the opinion of the state, were not adequately represented in such services.

103 Austin (n 63) 254.

104 The 25th Amendment was, in principle, upheld by the Supreme Court in *Kesavananda Bharati Sripadagalvaru v State of Kerala* (1973) 4 SCC 225. However, the Supreme Court struck down a part of Article 31C which read ‘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’.

105 Under the 42nd Amendment, lawmakers could allude to ‘all or any of the principles laid down in Part IV [of the constitution]’, not just a limited number of principles mentioned in Article 39 of the constitution.

106 Statement of Objects and Reasons, the Constitution (42nd Amendment) Act of 1976, <legislative.gov.in/constitution-forty-second-amendment-act-1976> accessed 28 February 2022.

107 *Minerva Mills Ltd v Union of India*, 1981 SCR (1) 206, 263. Section 4 (Justice Bhagwati dissenting) and Section 55 of the 42nd Amendment Act were declared unconstitutional by the majority decision.

Judicial decisions have varied in determining the beneficiaries of these clauses and also in determining the extent of reservations in educational institutions and state employment permissible under these clauses. The constitution helps in identifying Scheduled Castes and Scheduled Tribes. For both such groups, Article 366 refers to enumerations made by public notification under Articles 341 and 342 respectively. However, there is no constitutional definition of what constitutes 'backward classes'. Article 340 leaves the task of investigating the conditions of socially and educationally backward classes to commissions appointed by the president. The president has exercised his power under Article 340 only twice, once – in 1953 – to appoint the Kaka Kalelkar Commission, and again – in 1978 – to appoint the Mandal Commission. Both commissions presented a report suggesting criteria for defining the 'socially and educationally backward classes' and recommendations with a view to the advancement of these classes.¹⁰⁸ The commissions took caste as the dominant factor in determining backwardness, but no universally agreed formula was found. Thus, these issues became subject to review by the Supreme Court, most famously in *Indra Sawhney v Union of India*. The case of *Indra Sawhney v Union of India* challenged a Government Order implementing the 1980 Mandal Commission report.¹⁰⁹ The judgement of the Supreme Court in the case laid down important determining principles on some of the contested issues regarding reservation clauses.¹¹⁰

So far, affirmative action has primarily taken the form of numerical quotas for admission to state-sponsored educational institutions and to posts in the

108 *Report of the Backward Classes Commission* (Government of India 1955); *Report of the Backward Classes Commission, Parts 1 and 2* (Government of India 1980). The Mandal Commission evolved eleven 'indicators' or 'criteria' for determining social and educational backwardness. These eleven 'indicators' were grouped under three broad heads, ie social, educational, and economic.

109 AIR 1993 SC 477. The National Front government of V.P. Singh tried to implement the Mandal Commission recommendations by passing an Office Memorandum of August 1990 to reserve 27 percent of vacancies in civil posts and services under the government of India for socially and educationally backward communities.

110 In *Indra Sawhney v Union of India*, the Supreme Court held that caste represented an existing, identifiable social group and could be a starting point for identifying vulnerable groups. The economic criterion alone could not be the basis of backwardness. Within socially and educationally backward groups, further classification between the 'backward' and 'more backward' was deemed permissible, and the so-called 'creamy layer' had to be excluded. While in Article 16(4) the emphasis was on social backwardness, in Article 15(4) it was on both social and educational backwardness. The court further ruled that once a caste satisfied the criteria of backwardness, it would become a backward class for the purpose of Article 16(4), if, additionally, it was underrepresented in state services. Later, in *Ashoka Kumar Thakur v Union of India* (2008) 6 SCC 1, the Supreme Court said that 'backwardness' could be identified on caste and occupation/income/property holdings for the next ten years, after which only economic criteria should prevail. The removal of the 'creamy layer' to determine the existence of a 'backward class' under Article 16(4) as per *Indra Sawhney*, will apply equally well with regard to identifying a socially and educationally backward class in Article 15(5) of the constitution.

service of the state, both entry-level positions as well as promotions.¹¹¹ In the context of access to state employment, the state also used to set lower evaluation standards or relax qualifying marks in examinations. In *Indra Sawhney v Union of India*, the Supreme Court rejected the practice of relaxing entry criteria for the context of promotion to higher positions, arguing that such relaxation would compromise the efficiency of administration.¹¹² In *Indra Sawhney v Union of India*, the Supreme Court further held that the extent of reservations to posts in state employment must not exceed 50 percent of the posts in a cadre or service barring extraordinary situations. The mandated 50 percent quota obviously incorporates the idea of balancing equality rights of the general community and administrative efficiency with the need for achieving social justice.¹¹³

The reservations policy in India has raised various definitional and conceptual issues. First, with reference to the question of more affluent sections within each caste disproportionately monopolising benefits, judicial decisions and scholarly debate have suggested excluding wealthy individuals within these groups ('creamy layer') from benefits, and to create sub-quotas for especially disadvantaged groups within the quota.¹¹⁴ There are also questions about additional 'reasonable classifications' that the state can make for granting such benefits.¹¹⁵

Second, the question of whether the state can require the private sector to adopt such policies has eventually been addressed by the Constitution (93rd Amendment) Act of 2005 which added Article 15(5), enabling the state to

111 Article 16(4A) of the constitution, inserted by Constitution (77th Amendment) Act of 1995, states that there can be reservation to posts in state services 'in matters of promotion' for Scheduled Castes and Scheduled Tribes only. *M. Nagaraj v Union of India* (2006) 8 SCC 212 validated the amendment.

112 The Constitution (82nd Amendment) Act of 2000 inserted a proviso to Article 335 (overriding the Supreme Court's decision in *Indra Sawhney v Union of India*) that the state may make provision for relaxation in qualifying marks or lowering the standards of evaluation for reservation in matters of promotion to state services or posts. The amendment was upheld in *M. Nagaraj v Union of India* (2006) 8 SCC 212.

113 The Constitution (103rd Amendment) Act of 2019 has overridden two principles laid down in *Indra Sawhney v Union of India*, namely, for one, that economic backwardness could not be the sole criterion for reservation, since reservation only provided a right of access to resources for backward and underrepresented classes and was not an anti-poverty programme; and for another, that there should be a 50 percent cap for reservations to posts in state services. The Amendment introduced Article 15(6) and Article 16(6) into the constitution. Article 15(6) allows for reservations for 'economically weaker sections of citizens' other than the classes mentioned in Articles 15(4) and 15(5) (that is, other than the Scheduled Castes and Tribes and socially and educationally backward classes). Article 16(6) does the same for public employment. The quantum of reservation is fixed at 10 percent over and above the existing reservation for scheduled castes and tribes and backward classes. An Explanation inserted in Article 15 states that 'economic weakness' shall be decided on the basis of 'family income' and other 'indicators of economic disadvantage'.

114 Sitapati (n 59) 724.

115 Reservations for women are constitutionally permitted. Reservations for religious groups, such as Muslims, remain constitutionally contested.

mandate reservations in private educational institutions, effectively overriding the judgement in *P.A. Inamdar v State of Maharashtra*.¹¹⁶ The Right of Children to Free and Compulsory Education Act of 2009 also mandates 25 percent reservations for disadvantaged groups in private schools unaided by the state.¹¹⁷

Third, the reservations clauses are often regarded as expressions of the value of 'substantive equality' in Article 14 of the constitution (right to equality). According to that interpretation, differential treatment is permitted, if differential treatment meets the test of 'reasonable classification'. The differential treatment implicit in the provisions allowing for reservations does not burden the groups addressed in those provisions. Differential treatment is meant to advance their interests. A deeper value underlying such tests is based on the Dworkinian distinction between the right to equal treatment and the right to treatment as an equal, that is, a right to equal respect and concern. The clauses allowing for preferential treatment also promote the Directive Principles in Articles 46 and 38.¹¹⁸ The clauses also harmonise the competing constitutional values of equality (Articles 14, 15[1], and 16[1]), of social justice (Articles 15[4], 16[4], and 46), and efficiency in governance (Article 335).¹¹⁹ The differential treatment that is implied in reservation schemes has been validated by the constitution itself.

Gratuity Payments

A gratuity is a one-time payment to the employee, made by the employer as a *quid pro quo* for a certain period of services. Initially, as a practice, the making of such payments evolved in the 1950s and 1960s on a voluntary basis. Soon, however, labour tribunals and the Supreme Court assumed that employees were entitled to receive such a payment in case of retirement or incapacity.¹²⁰ Bolstered by that judicial approach, gratuities became a form of retirement benefit received as of right, either in place of or in addition to provident fund

116 *P.A. Inamdar v State of Maharashtra* (2005) 6 SCC 537. However, Article 15(5) of the constitution (as amended) does not apply to minority educational institutions, which are protected by Article 30(1) of the constitution. Article 15(5) was validated by the Supreme Court in *Pramati Educational and Cultural Trust v Union of India* (2014) 8 SCC 1. The enabling Article 21A of the constitution – especially its application to private unaided educational institutions – was also upheld in this decision.

117 The validity of the mandate was upheld in *Society for Unaided Private Schools of Rajasthan v Union of India* (2012) 6 SCC 102. However, the court excluded unaided minority schools from the mandate imposed by the Right to Education Act. In *Pramati Educational and Cultural Trust v Union of India* (2014) 8 SCC 1 both aided as well as unaided minority institutions were exempted from providing reservations.

118 M.P. Singh, 'Are articles 15(4) and 16(4) Fundamental Rights?' (1994) 3 Supreme Court Cases (Journal Section) 34–41.

119 Sitapati (n 59) 746.

120 Suresh C. Srivastata, 'Gratuity: The Approaches of Indian Judiciary' (1972) 7 Indian Journal of Industrial Relations 331.

payments. Gratuities bridged the gap in coverage left open by the Employees' Provident Fund Act or supplemented inadequate payments made from the provident funds.

In 1972, gratuities became mandatory by statutory law. The Payment of Gratuity Act of 1972 covered (and still covers) every factory, mine, oilfield, plantation, port, and railway company as well as every shop or establishment, in which ten or more persons are employed, which is quite a comprehensive range of applicability.¹²¹ The act continues to provide for a scheme for payment of gratuity to employees upon their superannuation, retirement, resignation, and death or disablement due to accident or disease. Gratuity was payable to an employee on the termination of the employment after the employee had rendered continuous service for not less than five years, except in case of death or disablement. As a principle, the amount of payment equalled fifteen days' wages at the rate of wages last drawn by the employee. An amendment to the act made in 1987 obliged all employers in the private sector to obtain an insurance for the liability for making a gratuity payment from the Life Insurance Corporation or another prescribed insurer. By way of compulsory insurance, gratuities became a more reliable form of payment which employees could expect at the end of their employment.

Supreme Court's Jurisprudence

The Supreme Court's Involvement in Social Policies

The idea of a necessary dissonance between the Directive Principles (Part IV of the constitution) and the Fundamental Rights (Part III of the constitution) that had been propagated by the government¹²² was judicially resolved when the Supreme Court in *Minerva Mills Ltd v Union of India* drew upon the basic structure doctrine of *Kesavananda Bharati Sripadagalvaru v State of Kerala* to declare Section 4 of the 42nd Amendment to the constitution invalid and beyond the amending power of parliament 'since it [damaged] the basic or essential features of the constitution . . . by the total exclusion of challenge to any law' meant to implement the Directive Principles at the expense of the Fundamental Rights in Articles 14 and 19 of the constitution. The court affirmed that the balance between Parts III and IV could not be destroyed.¹²³

121 The Payment of Gratuity Act of 1972 sought to achieve two major objectives – establish uniformity in payment of gratuity to employees nationally, and to avoid differential treatment of employees in different branches of a single establishment.

122 See p. 102 in this chapter.

123 *Minerva Mills Ltd v Union of India*, 1981 SCR (1) 206, 263. The court held that the implication of the basic structure doctrine was that the clauses of Article 368 of the constitution that gave unconstrained amending power to Parliament were unconstitutional.

From the early 1980s onward, the Supreme Court's jurisprudence developed substantive norms to conceptualise poverty and hunger as a denial or violation of an expanded fundamental 'right to life' under Article 21.¹²⁴ *Maneka Gandhi v Union of India* was the breakthrough judgement for an open textured and expansive concept of 'life' and 'personal liberty' under Article 21 of the constitution.¹²⁵ Since Part IV of the constitution was deemed aspirational and non-justiciable, locating and explicating social and economic rights was done at a more implicit and interpretative level under Article 21. In developing a new rights-based constitutionalism for advancing social welfare, the court defined the right to life as 'the right to live with human dignity and all that goes with it, namely, the bare necessities of life such as adequate nutrition'.¹²⁶ Under the umbrella of the 'bare necessities of life' the Supreme Court assembled a variety of rights such as the right to food, the right to education, and the right to health in Article 21.¹²⁷

The development of the Supreme Court's jurisdiction to hear 'public interest litigation' created procedural innovations so that disadvantaged groups could access the legal/political process, mobilise, and voice their needs. Justice Bhagwati said that

Anglo Saxon law . . . was developed and has evolved . . . essentially . . . to deal with situations involving the private right/duty pattern. It cannot possibly meet the challenge raised by . . . new concerns for the social rights and collective claims of the underprivileged.¹²⁸

Enforcing orders by the Supreme Court required the cooperation of state agencies, since the orders were not self-executing and could not create new law. Relief in such cases merely ensured that the government carried out its obligations under the law.¹²⁹

124 Illustrative cases are *Olga Tellis v Bombay Municipal Corporation*, AIR 1986 SC 180 (right to livelihood); *Bandhua Mukti Morcha v Union of India* (1997) 10 SCC 549 (right to minimum wages and abolition of forced labour); *Unni Krishnan v State of Andhra Pradesh*, AIR 1993 SC 217 (right to education); *Kishen Pattnayak v State of Orissa*, AIR 1989 SC 677, and *Peoples' Union for Civil Liberties v Union of India*, AIR 1982 SC 1473 (right to food).

125 *Maneka Gandhi v Union of India*, AIR 1978 SC 597.

126 *Francis Coralie Mullin v Administrator, Union Territory of Delhi*, 1981 AIR 746.

127 See also Varun Gauri and Daniel M. Brinks (eds), *Courting Social Justice. Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2008) exploring the judiciary's enforcement of health and education rights in developing countries.

128 P.N. Bhagwati, 'Judicial Activism and Public Interest Litigation' (1985) 23 *Columbia Journal of Transnational Law* 561, 570. The expansion of the rule of locus standi; epistolary jurisdiction; appointment of commissions for data gathering and monitoring enforcement of court orders; and crafting innovative remedial measures drawing on its powers under Article 32 of the constitution are instances of such innovations.

129 Demands for welfare rights and socio-economic entitlements through law, constitutionalism, and democracy have led to issues of transparency and accountability in government and identification numbers for citizens as beneficiaries to enable targeted cash transfers to the deserving poor. Ruparelia (n 96) 119.

The Right to Livelihood

The case underlying the judgement of the Supreme Court in *Olga Tellis v Bombay Municipal Corporation* related to the measures taken by the Bombay government to evict pavement dwellers who lived on pavements and slums in the city of Bombay and to deport them to their places of origin or to places outside the city. The court found that the main reason for the emergence and growth of squatter-settlements in cities like Bombay was the availability of job opportunities which were lacking in the rural sector. Such settlements allowed easier access to places of work.

The Supreme Court held that the right to life included the right to livelihood. The actual deprivation of life (through imposition of the death penalty, for instance) was but one aspect of the right. According to the court, no person could live without the means of living, that is, the means of livelihood. Depriving a person of the means of livelihood would not only denude 'life' of its effective content and meaningfulness but it would make life impossible to live. Article 39(a) and Article 41 of the constitution, so the court further held, required the state to secure to the citizens an adequate means of livelihood and the right to work. The court conceded that the state may not by affirmative action be compelled to provide adequate means of livelihood or work to the citizens. However, the court asserted that any person who was deprived of his right to livelihood, except according to just and fair procedure established by law, could challenge the deprivation as offending the right to life under Article 21. In this case, it was apparent that the dwellers' eviction from pavements and slums would lead to a deprivation of their means of livelihood. However, the court found that the right was not an absolute right and could be restricted in accordance with reasonable legal procedure.

The Right to Food

A petition brought in July 2001 on behalf of the poor in Rajasthan who had not been receiving the required employment and food relief mandated by the Rajasthan Famine Code of 1962 prompted the Supreme Court's judgement in *People's Union for Civil Liberties (PUCL) v Union of India*.¹³⁰ The petition was in response to the failure of the central and state governments to address acute hunger and starvation deaths at a time when India was producing a grain surplus. The petition wanted a constitutional right to food to be enforced under Article 21 of the constitution.

The Supreme Court stated that there was a state obligation to ensure 'that the poor and destitute and the weaker sections of society [did] not suffer from hunger or starvation'. The court passed a series of interim orders for public distribution of food grains to families and persons falling below the

130 Writ Petition (Civil) No 196 of 2001.

government-designated poverty line. The orders ranged from converting food security schemes into entitlements to increasing their coverage and putting in place mechanisms for effective monitoring and implementation. The order of 28 November 2001 especially, critically and expansively transformed the *PUCL* case by identifying which food schemes were to be considered legal entitlements under the constitutional right to food and determining in detail how those government schemes were to be implemented. Such orders have sought to define gradually, but in increasing detail, India's constitutional right to food and to hold the state accountable for instances of its violation.¹³¹

The Right to Education

In *Unni Krishnan v State of Andhra Pradesh*, the question before the Supreme Court was whether a citizen had the right to education for a medical, engineering, or other professional degree.¹³² Referring to an earlier case, *Mohini Jain v State of Karnataka*,¹³³ the Supreme Court held that 'the right to education flows directly from the right to life'. According to the court, education – generally – had a fundamental significance in the life of an individual and the nation. Education brought enlightenment and dignity to an individual and transfigured human personality through a synthetic process of development of the body and enrichment of the mind. However, the question was about the content of such a right and how much and what level of education was necessary to make life meaningful. Answering that question, the Supreme Court contended that the right had to be construed in the light of the Directive Principles and the state had to provide for free education for every child up to 14 years. For children older than 14 years, the right to education was circumscribed by the limits of the economic capacity of the state and its development.

The state obligation encapsulated in the right to education could, so the Supreme Court held, be discharged by either establishing state institutions or by aiding, recognising and/or granting affiliation to private educational institutions. Higher education weighed heavily on national economic resources, so the state's obligation was not absolute and immediate, but relative and progressive. The state had to take steps to the maximum of its available resources to progressively achieve the full realisation of the right.¹³⁴

131 The *PUCL* order of 28 November 2001 acted as a catalyst for the Right to Food and Work Campaign for Dignity and Survival and led to the National Food Security Act of 2013.

132 *Unni Krishnan v State of Andhra Pradesh*, AIR 1993 SC 217.

133 *Mohini Jain v State of Karnataka* (1992) 3 SCC 666.

134 The Right to Education Act of 2009 emerged from the Supreme Court judgement in *Unni Krishnan v State of Andhra Pradesh*. A constitutional amendment secured the right to education as a Fundamental Right in Article 21A. The Constitution (86th Amendment) Act of 2002. In *Society for Unaided Private Schools of Rajasthan v Union of India*, Kapadia CJ upheld the constitutional validity of the act so far as it applied to private non-minority schools and minority schools aided by the state.

Right to Adequate Medical Services

In *Paschim Banga Khet Mazdoor Samity v State of West Bengal*, a petitioner who had suffered serious head injuries and brain haemorrhage in an accident complained against medical authorities at various state-run hospitals in Calcutta who refused to admit him for emergency treatment.¹³⁵ The Supreme Court held that the constitution embodied the idea of a welfare state at the federal and state levels, with a primary government duty to secure general welfare by providing adequate medical facilities for its citizens. According to the court, Article 21 of the constitution imposed an obligation on the state to preserve and safeguard the right to life of every person. The court added that the state could not avoid its constitutional obligation to provide adequate medical services on account of financial constraints. The court insisted that a time-bound plan for providing these services had to be chalked out for ensuring availability of proper medical services. In particular, government hospitals and its medical officers had a duty to extend medical assistance for preserving human life. Failure on the part of a government hospital to provide timely medical treatment to a person in need of such treatment would result in violation of the right to life guaranteed under Article 21.

Politics of Public Interest Litigation

Public Interest Litigation interventions are seen as creating opportunities for Indian citizens to demand more social programs from the state, since many citizens may either not be aware of their rights or may be denied redressal through the political process. The Supreme Court's orders can create and enforce justiciable entitlements against the state by triggering legislative reform, and ensuring that existing state welfare programs are properly implemented. The Right to Education Act of 2009 and the National Food Security Act of 2013, for instance, are illustrations of the involvement of the Supreme Court in India's social policies.¹³⁶

India since the 1990s

The Political and Social Context

The dominant role of the public sector in industrial development characterised Nehru's legacy and was associated with the goals of a self-reliant economy and a socialist pattern of society. But this vision was achieved at significant economic

135 *Paschim Banga Khet Mazdoor Samity v State of West Bengal* (1996) 4 SCC 37.

136 For a critique of the Public Interest Litigation movement see Madhav Khosla, 'Making Social Rights Conditional: Lessons from India' (2010) 8 *International Journal of Constitutional Law* 739; Arun K. Thiruvengadam, 'Revisiting *The Role of the Judiciary in Plural Societies (1987)*. A Quarter-Century Retrospective on Public Interest Litigation in India and the Global South' in Sunil Khilnani, Vikram Raghavan and Arun Thiruvengadam (eds), *Comparative Constitutionalism in South Asia* (Oxford University Press 2012) 341; Ruparelia (n 96) 115.

costs.¹³⁷ To address the problems of the Indian economy significant economic reforms occurred in the 1990s, which marked a departure from the approach to economic planning and development that had characterised the Nehru and Indira Gandhi periods. These reforms in the 1990s were the culmination of a prior period of contestations within the Congress party between the left wing and older congressmen who wished to continue Nehru's policy of self-reliance and Indira Gandhi's pro poor programme and those who wished to reform such policies. These contestations continued during the Janata party regime (1977–1980) and when the Congress won an electoral victory in 1980. Rajiv Gandhi (1985–1989) resorted to piecemeal changes, but still insisted that his government would continue the traditional approach of a mixed economy in which the public sector would control the 'commanding heights'. In 1985, the All India Congress Committee resolution also restated the Congress' commitment to the goal of achieving socialism.¹³⁸

However, in May 1987, the Planning Commission circulated the text of a 'new industrial policy', proposing a package of incentives to the private sector for modernising certain basic industries.¹³⁹ This new policy constituted a break with past state policies favouring the public sector and the goal of economic self-reliance. The V.P. Singh government (1989–1990) which came to power after the Congress electoral defeat in 1989, attempted to adopt economic reforms (though without success) and the interim budget for 1991/1992 of Prime Minister Chandra Shekar's government (1990–1991) stated that in view of accumulated internal and external debt, only a comprehensive package of macro-economic adjustment would be a sustainable solution to the fiscal crisis in the next budget planned for May 1991.¹⁴⁰

It was the economic reforms of the early 1990s led by Manmohan Singh, the finance minister under the Narasimha Rao government (1991–1996) and later prime minister of a Congress-led multi-party coalition government, the United Progressive Alliance (UPA 2004–2014), that finally led to increased economic progress. It has been noted: 'The robustness of high growth in India is undoubtedly connected with the economic reforms of the 1990s, which have built a solid foundation for continuing economic growth'.¹⁴¹

When the UPA won power in 2004, it not only prioritised rapid economic growth led by private investment, but also developed a narrative of 'inclusive development' that was for the common man. This approach, coupled with the left parties' alliance at the centre, influenced government policies that focussed

137 Public sector undertakings were characterised by a chronic shortfall of profits and inefficiencies. When Rajiv Gandhi became prime minister in 1984, both internal and external financial shortages showed signs of worsening.

138 Frankel (n 71) 586.

139 *ibid* 587.

140 *ibid* 589.

141 Drèze and Sen (n 46) 19.

on greater investments in providing social services, and enactment of legislation for a right to work, education, and the right to food during its two terms (2004–2009 and 2009–2014). It was under the UPA regime that a new welfare framework emerged based on rights legislation, though the foundation for the new ‘entitlements’ regime was the Supreme Court’s jurisprudence in the 1980s and 1990s, expanding the interpretation of the right to life mentioned in Article 21 of the constitution.¹⁴² Yet, the failures with respect to implementation that characterised the UPA’s ‘entitlements’ regime encouraged parties such as the Bharatiya Janata Party (BJP) to express an alternative path to welfare when it came to power in 2014. The BJP’s approach focussed on technology and direct cash transfers to redress failures in state capacity and to minimise its role. ‘Aadhaar’ and financial inclusion (through Aadhaar) were the key components.¹⁴³

Economic Liberalisation and Rights-Based Welfare

The economic reforms of the early 1990s stimulated rapid growth, diversification, and technological change. But while aggregate economic prosperity increased public revenues, old social and sectoral inequalities were exacerbated. New vulnerabilities were created in the informal sector because of failings in the pattern of growth, distribution, and reform.¹⁴⁴ The political process in India, until the early 2000s, was relatively unresponsive to popular demands for improved social and economic welfare and accountability for improved delivery. Citizens were not empowered to place claims on the state and demand accountability for their implementation.¹⁴⁵

The interaction between civil society activism and judicial interventions which evolved due to the state’s failure to provide adequate social services to citizens, led to the emergence of enforceable social and economic rights through judicial interpretation that read Parts III and IV of the constitution together.¹⁴⁶ This development laid the foundation for legalisation of basic social ‘entitlements’ through rights-based legislation. Existing schemes from the pre-1990s period offered minimal protection, thus leaving room for an ‘informal security regime’ in which most citizens had to rely on supplemental informal

142 See p. 108 in this chapter.

143 Aadhaar enrolment occurred through the triple agenda of ‘Jan-Dhan, Aadhaar, Mobile’. Direct transfer of benefits through technology was aimed at addressing issues of administrative failures in implementing welfare policies. See Yamini Aiyar, ‘Maximum Schemes, Minimum Welfare’ in Niraja Gopal Jayal (ed), *Re-forming India the Nation Today* (Viking 2019) 157, 160. For more details on ‘Direct Cash Transfers’ see p. 121 in this chapter.

144 Amongst others, see Atul Kohli, *Poverty Amid Plenty in the New India* (Cambridge University Press 2012).

145 Yamini Aiyar and Michael Walton, *Rights, Accountability and Citizenship: Examining India’s Emerging Welfare State* (Centre for Policy Research 2014).

146 See p. 107 in this chapter.

networks. The new rights-based welfare state changed the legal status of many people, providing formal social security for the first time.

The new rights-based welfare state has been viewed by some as part of a broader project of 'state building', in response to inefficiencies and corruption in social provisioning.¹⁴⁷ For others, the 'entitlements' regime embodied both the aspiration of delivering substantive social services and a deepening sense of 'citizenship'. It has been argued that if inclusion – civic, political, social, economic, and cultural – was the condition of full citizenship, then the public provision of welfare – whether through social and economic rights or through redistributive policies adopted by such regimes – can be a plausible way of creating such inclusivity and the emergence of the concept of 'social citizenship'.¹⁴⁸

One important feature of the new rights-based welfare regime was the issue of institutional transparency and accountability. Mechanisms embedded in the legislated rights, such as social audits, grievance redressal systems, participatory planning, and the right to information, were the tools for building state capacity and accountability, since critics pointed out that a weak state infrastructure could impede implementation of such rights. Arguably, these mechanisms can also be viewed as creating opportunities for greater direct interactions between citizens and the state and could also reduce power asymmetries between them.

The basis, level, and scope of welfare entitlements varied. Different legislative acts recognised the rights of individuals as well as communities such as poor rural households. There was also a push towards 'universalism'. For instance, social policy instruments targeted not just industrial workers in the formal sector but the informal labour force in general. Additionally, instead of creating specific categories of beneficiaries as was done earlier (women, children, the elderly, mothers, people with disabilities, all living in poverty),¹⁴⁹

147 The Right to Information Act of 2005 mandated all government agencies to release information regarding their activities to individual citizens upon request in a timely manner. The purpose of the 'Aadhaar' card was to give every resident of the country a Unique Identification Number (UID), to make sure entitlements reached their intended beneficiaries through direct cash transfers, beginning with pensions, scholarships, and maternity benefits. But critics feel that rights campaigns left untouched issues of inequalities of resources, of restructuring existing power structures, and of unequal social relations. See Neera Chandhoke, 'Democracy and wellbeing in India' in Yusuf Bangura (ed), *Democracy and Social Policy* (Palgrave Macmillan 2007) 164. For an analysis of the efficacy of rights legislation to provide for effective delivery of social services and for state transformation, see Aiyar and Walton (n 145).

148 Niraja Gopal Jayal, *Citizenship and its Discontents: An Indian History* (Harvard University Press 2013) chap 6. Jayal also posits a tension between the normative sense of substantive citizenship, in terms of which social provision can be seen as a moral imperative because substantive citizenship is incomplete in the presence of deep social inequality, and the policy sense, where redistributive taxation necessary for enforcing social rights can be viewed as diminishing the sense of a united civic community.

149 See p. 97 in this chapter.

new legislation created a universal right to primary education for all children between the ages of 6 and 14; insurance cover for rural and urban poor people was introduced, independent of employment status; and schemes such as the Rural Health Mission launched in 2005 envisaged creating universal access to equitable, affordable, and quality health care services.

Another important feature of the social policies is the focus on need: The state-funded social assistance schemes introduced in the 1990s were not based on principles of 'reciprocity' like the insurance schemes of the 1950s through the 1970s, but on covering basic needs. Benefits were not conditional on an individual's employment status and sector of work, but on status based on indicators such as poverty, geographical location, or familial relationship. Characteristic values underlying the new regime were social equity and human dignity; enlargement and enforcement of state responsibility for social welfare; state building; and creating legitimacy and modernisation.

After their 2014 electoral victory, the National Democratic Alliance (NDA) government under Narendra Modi adopted a narrative of welfare that it used to distinguish their welfare programs from the earlier UPA-led welfare schemes.¹⁵⁰ Though initially it was thought that the NDA would have a pro-market approach that would prioritise economic growth and roll back UPA-initiated welfare schemes, the NDA has actually adopted their own welfare agenda. The NDA government has done so by emphasising ideas such as 'maximum governance, minimum government' to reduce 'mindless populism' in favour of 'fiscal prudence',¹⁵¹ and a political rhetoric of 'empowerment' as opposed to 'entitlement'. For example, in May 2015, while launching new social insurance schemes, Prime Minister Modi stated: 'Poor people don't need help. We have to change our thinking, . . . [and] way of functioning, the poor people need to be empowered . . . if they are empowered then they would be all geared up to fight poverty on their own strength'.¹⁵²

However, the idea of 'empowerment' was never fully articulated. The NDA approach has also been criticised for its inner contradictions because despite the NDA's attempt to distinguish its approach from the UPA's welfare schemes, this approach has remained close to the earlier 'entitlements' vision. For instance, the BJP manifesto promised to expand education expenditure and ensure universal health coverage and to better implement the UPA's rights legislation. Moreover, on coming to power, the NDA's focus was not on dismantling the UPA 'entitlements' welfare system. Allocations in centrally sponsored schemes were only changed marginally. Under the NDA, the focus has been on improving existing delivery systems.¹⁵³

150 Aiyar (n 143) 158.

151 This was stated by former Finance Minister Arun Jaitley during the preparation of his first budget, tabled in July 2014, quoted in Aiyar (n 143) 158.

152 Quoted *ibid* 160.

153 Aiyar (n 143).

Social Policy Instruments

Food Subsidies

Food subsidies help cope with the risks of hunger and malnutrition and historically, one of the key government responses was the distribution of food grains through the government controlled Public Distribution System. Established after World War II, it aimed to increase domestic agricultural production and improve food security.¹⁵⁴ Most of the food subsidy in India is now channelled to beneficiaries through the Targeted Public Distribution System to better target lower socio-economic groups. In December 2000 (expanded in 2003–2006), the Antyodaya Anna Yojana ('grain scheme for the downtrodden') further broadened the public distribution system. This expansion also included provision of food and goods to senior citizens and pensioners over 60 years, widows, the diseased, and infirm.

These measures to strengthen the Public Distribution System were reinforced through the introduction of the National Food Security Act of 2013, which provides subsidised food grains to 50 percent of the urban and 75 percent of the rural population. Monetary and nutritional support is mandated to pregnant and lactating women, and through the Integrated Child Development Services and Mid-Day Meal Schemes, malnourished children and those aged 6 months to 14 years were also covered. The National Food Security Act gave a legal standing to India's food safety network in accordance with the right to health and food under Article 21 of the constitution.¹⁵⁵ The act contains measures to prevent corruption, diversion, and leakages through better partnerships between the central and state governments.

Guarantee of Work

The National Rural Employment Guarantee Act of 2005 aims at enhancing the livelihood security of the rural population by guaranteeing 100 days of wage employment in a financial year to a rural household whose members volunteer to do unskilled manual work on community and infrastructure development projects. The act combines income transfers with initiatives intended to build capabilities of those below the poverty line by creating durable assets and

154 To facilitate distribution, the Food Corporation of India acts as a central nodal agency responsible for the procurement of food grains from farmers at a price that is often higher than market price. The individual state governments then procure the food grains at a subsidised price from the Food Corporation. These goods are then distributed to consumers via fair price or ration shops.

155 Neetu Abey George and Fiona H. McKay, 'The Public Distribution System and Food Security in India' (2019) 16(17) *International Journal of Environmental Research and Public Health* 3221. Under the National Food Security Act, 75 percent of the rural and 50 percent of the urban population are entitled to 5 kg food grains per month. Antyodaya Anna Yojana households are entitled to more.

strengthening the livelihood resource base of the rural poor. The act can be seen as a conditional cash transfer programme (cash for work). Adult members of a rural household may apply for such employment.¹⁵⁶ If employment is not provided within fifteen days, a daily unemployment allowance in cash has to be paid. At least one-third of persons to whom work is allotted have to be women. Wages are to be paid according to minimum wages for agricultural labourers in the state as prescribed under the Minimum Wages Act of 1948. Funding is shared between the central and state governments.

Social Assistance

The National Social Assistance Programme (NSAP) of 1995 was the first major social security programme begun in the post-liberalization era.¹⁵⁷ The general eligibility criterion is people living below the poverty line (BPL) though each component has further specific criteria. The programme provides immediate relief to the poor in case of vulnerabilities such as old age and widowhood, chronic need arising from conditions of disability, and contingencies such as death of the family's breadwinner. The types of benefits offered are cash and food. As there is no *quid pro quo*, this is an unconditional cash transfer program.

The National Social Assistance Programme seeks to comply with Article 41 of the Directive Principles and item 23 ('social security') in the Concurrent List. The programme is a fully funded centrally sponsored scheme. The NSAP schemes are mainly implemented by the Social Welfare departments of states and Union Territories in accordance with the general conditions applicable to all components of the National Social Assistance Programme as well as specific conditions applicable to each component.

Conditional Cash Transfers

The Janani Suraksha Yojana (JSY) targets reducing maternal and infant mortality by offering women cash rewards for delivering in public health centres, in accredited private health facilities, or at home with medical care. Sponsored by the central government, it integrates cash assistance with delivery and post-delivery care. Additionally, Accredited Social Health Activists (ASHAs) – women trained to liaise between pregnant females and public health facilities – are also given cash for encouraging women to deliver in hospitals.¹⁵⁸ The Indira Gandhi Matritva Sahyog Yojana (IGMSY) and the National Maternity Benefit

156 Such a household has to apply for registration to the local Gram Panchayat. After registration, a Job Card is issued to the household as a whole.

157 Government of India, Ministry of Rural Development, *National Social Assistance Programme (NSAP)*, <www.nsap.nic.in/nsap/NSAP-%20About%20us.pdf> accessed 28 February 2022.

158 Government of India, Ministry of Health & Family Welfare, <<https://nhm.gov.in/index1.php?lang=1&level=3&lid=309&sublinkid=841>> accessed 28 February 2022.

Scheme (NMBS) serve similar goals. The schemes provide cash benefits to pregnant women and women who have given birth if the women comply with health-related requirements.

Social Insurance for the Poor

Aam Aadmi Bima Yojana (AABY), launched in 2007, provides life insurance cover to the (rural and urban) poor, identified as those living below or marginally above the poverty line. The purpose of AABY is to prepare families in advance for the death or disability of the head of the family or another earning member of the household, between 18 and 59 years of age. The central government pays half of the insurance premium on behalf of beneficiaries and the other half is paid by the state government concerned, by a nodal agency, or by the member himself. Sums are paid to the nominees on their claims being presented to the relevant administrative agency.¹⁵⁹

The Rashtriya Swasthya Bima Yojana (RSBY), launched in 2008, is a health insurance scheme covering unorganised sector workers in the below-the-poverty-line category and their family members (a family unit of five). The scheme provides health insurance cover of up to Rs 30,000 in hospitalization costs for five members of such families in public or private facilities. Beneficiaries are asked to pay only a nominal registration fee and the cost of the annual premium is shared by central and state governments while states are responsible for administrative costs.¹⁶⁰

The NDA government under Narendra Modi added further schemes coined 'government sponsored socially oriented insurance schemes'. One important scheme is the Pradhan Mantri Jeevan Jyoti Bima Yojana (PMJJBY), available to all people between 18 and 50 years having a bank account and giving their consent to join, not just poor people in urban or rural areas. The risk covered by the insurance is death of the insured, due to any reason, at a relatively low premium (Rs 330 per annum). The scheme is primarily offered by the Life Insurance Corporation. Another important scheme is the Pradhan Mantri Suraksha Bima Yojana (PMSBY), available to people between 18 and 70 years, covering accidental death and full or partial disability at a premium of Rs 12 per annum. The scheme is primarily offered by the Public Sector General Insurance Companies.

159 Government of India, Life Insurance Corporation of India, *Annual Report 2012–13*, 60.

160 State governments engage in a competitive public bidding and select a public/private insurance company to provide health insurance in the state. The selected insurance company and district level officials are responsible for enrolment of such families and issuance of smart cards. A central list of enrolled households is the basis of financial transfers from the central to the state governments. Government of India, Ministry of Labour and Employment, *Annual Report 2012–13*, 3.

National Health Policy

India's national health policy comprises two important strands, which evolved over the last fifteen years. Earlier schemes envisioned delivery of medical services primarily through public providers. More recent schemes promote state-financed delivery of medical services through private providers. In that case, financing is based on state-purchased social insurance schemes.

A first significant step in promoting centrally sponsored national health services was the National Rural Health Mission (NRHM), launched in 2005 under the Congress-led UPA central government and intended to give financial support to schemes run by the states, who are – under the constitution – exclusively tasked with regulating and providing 'health care'. The (temporary) programme envisaged creating universal access to equitable, affordable, and quality health care services, since it was found that the rural public health care system in many states imposed an unfair financial burden on women, scheduled castes and tribes, and poor households. The key features included making the public health delivery system fully functional and accountable to the community, de-centralisation, rigorous monitoring and evaluation of standards, and flexible financing. Within broad national parameters and priorities, states had the flexibility to plan and implement state specific action plans, though the fund flow to the states was centrally prescribed. In 2013, the central government launched the National Urban Health Mission (NUHM) and created the National Health Mission as an umbrella for both the NRHM and NUHM.

In 2018, the NDA government launched a new programme called National Health Protection Scheme (NHPS) or the Ayushman Bharat Yojana (also known as Modi-care).¹⁶¹ The aim was again to improve access, quality, and affordability of medical services, in particular for the poor. The programme created Health & Wellness Centres (HWCs) to deliver comprehensive primary health care, universal and free to users, with a focus on wellness and the delivery of an expanded range of services closer to the community. The services extend beyond maternal and child health care services and include care-giving for non-communicable diseases, palliative and rehabilitative care, mental health care, free essential drugs, and diagnostic services. In order to finance secondary and tertiary care by way of hospitalisation, the government relied on the mechanism of a state-financed (social) insurance, such as RSBY, providing coverage of up to Rs 5 lakh (about 7,800 US\$, compared to Rs 30,000 under the RSBY) to roughly 100 million poor families or 500 million beneficiaries, identified through a socio-economic caste census (about 40 percent of India's

161 Government of India, *Ministry of Health and Family Welfare, National Health Policy 2017* (Government of India 2017); Shalendra D. Sharma, 'Health Care for India's 500 Million: The Promise of the National Health Protection Scheme' (2018) 18 *Harvard Public Health Review* 1; Shailender Kumar Hooda, 'Health System in Transition in India. Journey from State Provisioning to Privatization' (2020) 11 *World Review of Political Economy* 506.

population). Beneficiaries receive an insurance card linked to the Aadhar card that gives access to services from enlisted hospitals without any payment upfront. If the programme lives up to political expectations, it is indeed ‘the world’s largest government-funded health care programme’, as proclaimed by the NDA government.

Social Security for Unorganised Workers

The Unorganised Workers Social Security Act of 2008 (UWSSA) was to provide for social security of unorganised workers on par with the organised sector. The act aimed to cover disparities between the unorganised and the organised workers with respect to minimum wages, social security benefits, and proper working conditions. The act was a contrast to most labour laws in India which are not universal and are applicable for particular types of work, employment relationships, sizes, and establishment.

The UWSSA incorporated existing social security schemes, such as schemes provided by the National Social Assistance Programme (benefits for the elderly, benefits for families), the Janani Suraksa Yojana (medical care for women prior to and after delivery), and various social insurance schemes for the poor (Aam Aadmi Yojana; Rashtriya Swasthya Bima Yojana).¹⁶² But the central government had the discretion to formulate other suitable welfare schemes – for life insurance and disability cover; health and maternity benefits; and old age protection. The state governments were given the discretion to determine schemes regarding provident funds; employment injury benefits; housing; old age homes etc. Such schemes would be funded by the central government; jointly by the central and state governments; or partly funded through contributions from the beneficiaries of the scheme or employers. The central government was to constitute a National Social Security Board (consisting of the Union Minister of Labour and Employment, representatives of the unorganised sector workers, and employers) to recommend suitable schemes for different sections of unorganised workers, as would the states.¹⁶³

After the NDA government came to power, an additional scheme was introduced at the central level in 2015, the Atal Pension Yojana (APY).¹⁶⁴ The APY is a co-contributory pension scheme to encourage workers in unorganised sector to voluntarily save for their retirement. Although the APY is primarily focused on workers in the unorganised sector, all citizens of the country between 18 and 40 years can join through their bank accounts. A minimum

162 See p. 118 in this chapter.

163 For an analysis of the working of the act see Tina Dutta and Parthapratim Pal, ‘Politics Overpowering Welfare: Unorganised Workers’ Social Security Act 2008’ (2012) 47 *Economic & Political Weekly* 26.

164 For details of Atal Pension Yojana see <https://npsra.nsdl.co.in/nsdl/scheme-details/APY_Brochure.pdf> accessed 28 February 2022.

pension is guaranteed by the central government to the subscriber at the age of 60 years, with a minimum monthly contribution. The central government participates in the making of contributions.

Social Security

The Code on Social Security of 2020 (the ‘Code’) was passed by Parliament in September 2020. The Code merges existing labour laws such as the Employees’ Compensation Act of 1923, the Employees’ State Insurance Act of 1948, the Employees’ Provident Funds and Miscellaneous Provisions Act of 1952, the Maternity Benefit Act of 1961, the Payment of Gratuity Act of 1972, and the Unorganised Workers Social Security Act of 2008. The state governments’ primary responsibility for the formulation and implementation of social security schemes for unorganised sector workers has been reformulated into different jurisdictions for both central and state governments to formulate such schemes.

While the enactment of the Code seems a big step in Indian social policies, the Code has – in fact – not interwoven different social security schemes into one synchronised social security legislation. Rather, the Code appears as a collection of existing legislations without meaningful integration: There still exist centrally sponsored funds for unorganised sector workers’ social security which are outside the purview of the Code. Hence, there is a proliferation of organisational structures which is not based on the principle of pooling of resources and risk profiles. Creating an administrative duality between central and state government social security measures with multiple funds and schemes could add to fragmentation of the social security regimes. Additionally, the Code and the rules make no mention of how and when existing social security schemes for unorganised workers will be funded.¹⁶⁵ There is also no arrangement for interstate coordination in the case of certain mobile segments of unorganised workers such as those in the building and construction sectors who tend to move across state borders. In short, the title of the act notwithstanding, the Code does not advance the universalisation of social security in India.

Direct Benefit Transfer

Direct Benefit Transfer (DBT) is the name of a programme or a method that echoes a more general trend to use information technology (also) for social policy purposes. The idea of ‘direct benefit transfer’ was widely discussed around

165 The National Social Security Fund (NSSF, created in 2010 under the Unorganised Workers Social Security Act of 2008, now merged with the Code) was to be used for schemes formulated for the welfare of unorganised sector workers as recommended by a committee. The funds were to be transferred from the Consolidated Fund of India to the NSSF. Santosh Mehrotra and Kingshuk Sarkar, ‘Social Security Code, 2020 and Rules. A critique’ (2021) 56(12) *Economic and Political Weekly*.

2010, and eventually picked up by the UPA government.¹⁶⁶ The NDA government under Modi expanded and strengthened the idea, in particular during the COVID-19 pandemic.¹⁶⁷ At its heart, the method is based on a technology platform, combining three elements, namely Jan Dhan Yojana (a bank account for each household in India), a unique 12-digital identification number carrying biometrical data (Aadhaar), and mobiles (for notifications of bank transfers, for making payments from bank account, ie making use of digital money, and for all sorts of communications). Hence, the technology platform is called the JAM trinity, a term invented by the NDA government.

When the UPA government launched the idea of direct cash payments, the programme was meant to substitute in-kind benefits for cash benefits, to abolish price subsidies (for food, electricity, water, fertilisers), and – regarding existing cash benefits – to alter the mode of making payments from relying on intermediaries (postal services, panchayat offices) to directly addressing beneficiaries. In the context of social policy, the main target was the Public Distribution System that provides food grains to the poor through a system of specified low-price shops. The system is India's largest poverty-reduction programme, but also known for enormous leakages. Huge amounts of food grains meant to reach below-the-poverty-line families are sold (profitably) on the open market (rice mafia), and there is also the problem of fake card attesting eligibility.¹⁶⁸ Hence, the overall goal was to combat corruption and to rationalise anti-poverty schemes and thus save money. In 2019, the method of Direct Benefit Transfer also extended to the wages payable under the National Rural Employment Guarantee Act and the National Social Assistance Programme.¹⁶⁹ In the latter context, the method primarily serves targeting, in other words, making sure that the benefits only reach eligible beneficiaries.

166 See Government of India, *Economic Survey 2013–2014* (Government of India) 94, <www.indiabudget.gov.in/budget2014-2015/es2013-14/echap-05.pdf> accessed 28 February 2022.

167 The first Economic Survey under the NDA government announced the intention to continue the push towards extension of the programme, contending that – as of early 2015 – 757 million Indians had been bio-identified and 139 million bank accounts had been created. Government of India, *Economic Survey 2014–15*, vol 1 (Government of India 2015) 9, <www.indiabudget.gov.in/budget2015-2016/es2014-15/echapter-vol1.pdf> accessed 28 February 2022. In 2021 and at the height of the pandemic, the NDA government stated that – because of Direct Benefit Transfer – ‘the country could transfer money in crores of accounts through a click of button during the pandemic time’. Government of India, *Economic Survey 2020–21*, vol 2 (Government of India 2021) 37, <www.indiabudget.gov.in/budget2021-22/economicsurvey/index.php> accessed 28 February 2022.

168 See eg Himanshu and Abhijit Sen, ‘In-Kind Food Transfers – I: Impact on Poverty’ (2013) 48(45/46) *Economic & Political Weekly* 46; Silvia Masiero, ‘Will the JAM Trinity Dismantle the PDS?’ (2015) 50(45) *Economic & Political Weekly* 21.

169 Government of India, *Economic Survey 2018–19*, vol 1 (Government of India 2019) 3, <www.indiabudget.gov.in/budget2019-20/economicsurvey/index.php> accessed 28 February 2022.

Even though about 90 percent of India's residents by now have their Aadhaar cards carrying their unique 12-digit Aadhaar number, and the government strongly favours the method of direct benefit transfers, it seems unclear whether the efforts made have led to the success that the government was hoping for. The programme has been criticised from early on, and not only from the point of view of the right to privacy.¹⁷⁰ For one, having a bank account makes sense only when used but it seems that many accounts remain empty, for a number of reasons (lack of access to technologies; lack of availability of technologies; preference for cash to make ends meet). For another, the National Food Security Act is still implemented primarily through the Public Distribution System for in-kind benefits. While the UPA and NDA governments wished to transfer food subsidies to bank accounts of the beneficiaries who were then expected to buy food grains from the open market, by 2019, only very few localities made use of the cash transfer mode.¹⁷¹ Finally, and more fundamentally, the replacement of in-kind benefits (food grains) creates new vulnerabilities, for instance, due to inflation, or power inequalities in household relations that disadvantage women and female children.¹⁷² In short, the implementation of the programme has not (yet) met the goals set by the various governments involved.

Conclusions

The emergence of social policies in Europe was the result of the acknowledgement of a political responsibility for the welfare of citizens and constituted the compatibility of capitalism and democracy. However, its legitimating reasons, specific goals, and institutional realisations varied.¹⁷³ This chapter considers the

170 See eg Jayati Ghosh, 'Cash Transfers as the Silver Bullet for Poverty Reduction. A Skeptical Note' (2011) 46(21) *Economic & Political Weekly* 67; Peter Svedberg, 'Reforming or Replacing the Public Distribution System with Cash Transfers?' (2012) 47(7) *Economic & Political Weekly* 53; R.K.A. Subrahmanya, 'Social Protection of the Workers in the Unorganized Sector' (2013) 48 *Indian Journal of Industrial Relations* 460; Dipa Sinha, 'Cash for Food. A Misplaced Idea' (2015) 50(16) *Economic & Political Weekly* 17. Speaking out in favour of direct cash benefits eg Devesh Kapur, Partha Mukhopadhyay and Arvind Subramanian, 'The Case for Direct Cash Transfers to the Poor' (2008) 43(15) *Economic & Political Weekly* 37; Devesh Kapur, Partha Mukhopadhyay and Arvind Subramanian, 'More on Direct Cash Transfers' (2008) 43(47) *Economic & Political Weekly* 85.

171 Government of India, *Economic Survey 2019–20*, vol 2 (Government of India 2020) 211, <www.indiabudget.gov.in/budget2020-21/economicsurvey/index.php> accessed 28 February 2022.

172 See the ethnographic account by Emilija Zabaliūte, "'Cards Are for Showing Off'. Aesthetics of Cashlessness and Intermediation among the Urban Poor in Delhi' in Atreyee Sen, Johan Lindquist and Marie Kolling (eds), *Who's Cashing In? Contemporary Perspectives on New Monies and Global Cashlessness* (Berghahn Books 2020) 73.

173 Franz-Xaver Kaufmann, *European Foundation of the Welfare State* (Berghahn Books 2012) 20, 42. The underlying assumption is that the welfare state is a kind of consensual definition of a society's 'legal and therefore formal and explicit responsibility for the basic well-being of all of its members'. Harry K. Girvetz, 'Welfare State' in David L. Sills (ed), *International Encyclopedia of the Social Sciences*, vol 16 (The Macmillan Company & The Free Press 1968) 512.

development of social policies in India by focusing on the political, social, and economic circumstances in which the policies were made, by examining state responses (primarily through constitutional amendments, statutory law, government regulations, and judgements), and by elaborating on the ideas and values informing such action and the content of the law.

It is only since the economic reforms of the 1990s that a tenuous social security regime started to emerge in India. The chapter traces this delayed emergence back to the British period. During this period, despite periodic studies by investigative committees appointed by the Indian legislative assembly, Royal commissions, ministerial conferences, ILO reports, and precedents such as the Beveridge Report of 1942, a comprehensive system of national social welfare did not emerge. The unrepresentative and unjust administrative and legal framework primarily furthered imperial interests rather than the welfare of the Indian people. Lack of economic development, restricted public financial resources, poverty, illiteracy, and lack of organisation of workers and other vulnerable groups were factors responsible for the failure of a national welfare regime to emerge. Though schemes such as the centrally legislated Workmen's Compensation Act (1923), the Employees' State Insurance Act (1948), or provincial maternity benefits laws emerged, there were almost no provisions for financial contributions by the state nor were benefits tax-based. Contributions were made primarily by the employers and employees and intended to meet certain contingencies such as sickness, unemployment, or maternity. The schemes primarily targeted industrial workers. Inadequate statistical data and the unwillingness on the part of the central and provincial governments to bear an additional financial burden often caused schemes to fail.

The nationalist discourse and attempts at constitutional drafting that emerged during the colonial period such as the Commonwealth of India Bill (1925), the Nehru report (1923), and the Karachi Resolution (1931) did respond to widespread social and economic hardships. Different perspectives (ranging from communist thinking to Gandhian and Nehruvian thought) emerged on state-society relations. But the idea of an adequate system of social welfare did not play an important role in such debates, which primarily concentrated on the political revolution and the idea of securing political independence from British rule.

Similarly, during the period of drafting the constitution, the dominant focus was on building a modern nation state, with representative and responsible forms of government rather than creating a national welfare regime. However, there was also thinking by Nehru and the Congress socialists on state responsibility for promoting economic progress and social transformation, influenced by the ideas of Marx, T.H. Green, Laski, and the Webbs. Nehru's pragmatic approach – a state-sponsored welfare regime required certain preconditions such as a stable and united political community based on a representative and responsible form of government, social restructuring, and economic progress – ultimately prevailed. The constitution created the foundations of a democratic constitution

with a socialist bias. The possibility of social welfare measures was left open to future politics and democratic processes. Consequently, state responsibilities for the welfare of citizens were not inserted as citizens' entitlements against the state. Rather, they took the form of guidelines for state action in the Directive Principles. The concept of 'welfare' that emerges from the Principles included the state directing its policies to securing 'adequate means of livelihood', the right to work, a living wage, decent conditions of work, maternity relief, securing the health of workers, women, and children, and free education to children. Most of the Principles required the state to 'endeavour' to reach these goals. Article 41 mentioned that there can be 'limits of its [the state's] economic capacity and development' when attempting to reach these goals.

The ratification of the constitution saw the emergence of a liberal democratic constitutional system. But creating a formal social welfare system was again – and for many decades – subordinated to the enterprise of nation building, economic growth and development, as a necessary precondition to the emergence of a national welfare state. Along with socialist ideas, Gandhian thinking, and his critique of modern industrialised societies influenced policy makers. Up to the 1970s, the Nehruvian approach to economic development tried to find an alternative to a capitalist mode in the form of a 'scientific' Soviet style state planning, and an incremental and non-violent method for economic and social progress. This approach focused on principles of state responsibility for nation building and economic planning, and social restructuring through legal means in order to lay the foundations of a socialist pattern of society. Such a society would be characterised by state ownership of the means of production and equitable distribution of wealth. A primary influence on state social policy were the Directive Principles in Part IV. Even though no social welfare measures that were state-sponsored or tax-financed emerged during this period, certain social welfare goals were enunciated in the Five Year Plans. 'Special care' provisions in the constitution for backward classes were strengthened, and certain statutory provisions were enacted for the granting of some social benefits to industrial labour.

However, by the 1970s, promises given by the Congress government to provide basic needs such as food, housing, education, and health care could not be met. Such failures created ideological conflict within the Congress party. The party split and the re-election of Indira Gandhi's Congress faction in the 1971 elections on the strength of political slogans such as 'Garibi Hatao' saw a more authoritarian trend in politics and the passage of key constitutional amendments such as the 24th and 25th amendments (1971) and the 42nd amendment (1976). These changes sought to protect social reforms legislation purporting to give effect to the Directive Principles from judicial scrutiny on grounds of violation of the Fundamental Rights.

The conflict between such legislation intending to give effect to certain Directive Principles and Fundamental Rights was eventually resolved by the Supreme Court through decisions such as *Kesavananda Bharati* and *Minerva*

Mills making a harmonious balance between Parts III and IV a part of the basic structure of the constitution. Moreover, the court was also willing to read Directive Principles into Fundamental Rights, most notably the 'right to life' under Article 21 of the constitution. Hence, it was the Supreme Court who took the first step toward welfare entitlements, allowing civil society groups to voice their discontent and raise various demands under the 'right to life' (public interest litigation).

The economic crisis of the early 1990s facilitated the passage of economic reforms under Manmohan Singh that paved the way for faster economic growth. The economic progress caused the Congress-led UPA coalition government (2004–2014) to not only prioritise rapid economic growth, but to develop a goal of 'inclusive development' for all citizens. There was no longer an excuse of lack of resources for not enacting a state-sponsored welfare regime. The court's activist jurisprudence from the 1980s and 1990s had laid the foundation for the emergence of an 'entitlements' approach to welfare during the UPA regime, prompting legislation on the right to food, on primary education, and on the right to earn a living. The 'entitlements' approach created a social security regime based on formal rights to state-sponsored and tax-financed benefits which changed the status of citizens vis-à-vis the state and the deepening of a sense of 'social citizenship' based on political, social, and economic inclusivity. Processes within welfare legislation such as social audits, grievance redressal systems, participatory planning, and the right to information, attempted to build state capacity, transparency, and accountability, which also empowered citizens against the state.

For the first time, the universalisation of benefits securing basic needs became a political goal. In contrast to the social welfare measures taken by the government in the periods of the 1950s and 1970s, welfare entitlements under the UPA were state-sponsored and tax-financed, and not primarily based on contributions by employers and employees. Both conditional and unconditional schemes emerged as well as social assistance programmes to provide immediate relief to the poor living below the poverty line in case of certain vulnerabilities. Additionally, the UPA's welfare policies were not based on the principle of 'reciprocity' like the schemes that characterised the earlier periods but on 'need'.

The NDA's welfare approach has tried to distinguish itself from the UPA regime. The NDA approach emphasised minimising state involvement in promoting welfare and used the rhetoric of 'empowerment' as opposed to 'entitlements'. However, despite the new rhetoric, the NDA's approach remains close to the UPA's 'entitlements' vision. The NDA did not attempt to dismantle the welfare regime put in place under the UPA government. Instead, the NDA government focused on improving existing delivery systems, favouring 'direct benefit transfers' over in-kind benefits (food grains), with mixed results at best. Apart from emphasising delivery, the NDA government continued the push towards universalisation, in particular in the field of low premium social

insurance schemes and medical care services. In 2020, the NDA government, in an attempt to streamline the administrative framework for implementing welfare provisions and to consolidate existing labour laws and social legislation, enacted the Social Security Code, a political move that assembled all important statutes enacted since independence within a single framework titled 'social security', a term that had not been used by lawmakers earlier.

Thus, the UPA and NDA governments have seen the emergence of a legal and constitutional framework of welfare entitlements which citizens can enforce against the state, and which now marks a significant progress towards the creation of a comprehensive and universal state-sponsored welfare regime which was delayed in the periods of the 1950s and 1970s. But weak state capacity and delivery systems and the lack of a coherent and consistent vision of the ruling parties for such a welfare regime has adversely affected an effective implementation of this new welfare regime's ultimate goals.