

IMPACT OF GANDHIAN THOUGHTS ON THE INDIAN CONSTITUTIONAL JURISPRUDENCE: A POSTMODERNIST PERSPECTIVE

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Abstract

There are lots of similarities between Gandhian thoughts and post-modernist thinking in the matter of questioning the modernity's fruitfulness, promoting of decentralised democracy, recognising of non-state player's role, sensitivity to tradition, culture and ecology, and respect for morality, humanism, pluralism and justice. Gandhian thoughts have wielded considerable impact in shaping the Indian constitutional jurisprudence whether at the stage of making of the Constitution, formulating of the constitutional amendments or in juridical reasoning. This paper traces and analyses the philosophical links that evolved in course of constitutional development and argues that Gandhism's relevance and potentiality in sustaining constitutional morality should be understood from a postmodern outlook.

I Introduction

POLITICAL IDEOLOGIES, social experiences and economic realities shape the thoughts that underlie a Constitution. They are the factors of its social acceptance and justifications for its supremacy in a polity. Hence, philosophical roots of constitutionalism lie in the social thinking which is a product of dialogue between conscious leadership and participative public who collectively aspire for self-governance, socio-economic justice and happy life. The interface between emotion and reason and manifestations of psychological and political choices come to the forefront in such dialogues. Social will as the basis of constitutionalism makes a case for organic theory of growth of a constitution and for relevance of originalism in its interpretation.² When a country is under tutelage of colonial rule which inflicts economic exploitation and oppression upon the commons by denial of their civil and political rights, and the inherent inequalities of the society obstructed development, welfare and justice, the

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- 1 Ivo D Duchacek, *Comparative Federalism: The Territorial Dimension of Politics* 370 (Holt, Rinehart and Winston, New York, 1971); H Arendt, *On Revolution* 91 (Penguin Books, London, 1965) cited by Paul W Kahn, in "Reason and will in the Origins of American Constitutionalism" 98 (3) *The Yale Law Journal*, 459 (1989); Gary D Rowe, "Constitutionalism in the Streets" 78 *Southern California Law Review* 401 (2005); Larry D Kramer, "Popular Constitutionalism, circa 2004" 92 (4) *California Law Review* 959 (2004); Frank I Michelman, "Constitutional Authorship" in Larry Alexander (ed.), *Constitutionalism: Philosophical Foundations* 74-81 (Cambridge university Press, Cambridge 1998).
- 2 Paul W Kahn, "Reason and will in the Origins of American Constitutionalism" 98 (3) *The Yale Law Journal*, 449 at 451 (1989); Joseph Raz, "On the Authority and Interpretations of Constitutions: Some Preliminaries" in Larry Alexander (ed.), *Constitutionalism: Philosophical Foundations* (Cambridge university Press, Cambridge 1998) 152 at 181-185 pointing out factors of fidelity to the original intention and moral merit of the Constitution.

consensus emerging from such dialogue has great significance in the constitution-making process. The logical link between constitutionalism and constituent power emerging in this process needs to be identified in the light of thoughts of key political leaders who spearheaded the national struggle for freedom. Their stature as mass leaders, which gathered support from the society after truly diagnosing its socio-political difficulties and reinforced the social system through their charismatic personality, had distinct significance in the democratic way of constructing the system of governance. In India, Gandhiji's thoughtful and popular leadership, humanist and action-oriented philosophy on varieties of social and political issues ranging from eradication of social evils to building of harmonious society with participative democracy linked with masses gained the support of social power.³ His thoughts had definite and positive impact upon the making, amending and interpreting of the Constitution of India in their own way.

Mohandas Karamchand Gandhi (Gandhiji), revered as Father of the Nation⁴ and *Mahatma*, was the greatest political thinker of 20th century, organiser of freedom movement in India, practitioner of the ideals of non-violence, truth, social welfare and eradication of exploitations. He was visionary with conviction. His ideas had roots in practical social experience which were verified through his experiments with truth and interaction with masses.⁵ On goals of polity, system of governance, people's participation, and on method of transformation of society that had features of inequality, prejudice, poverty and exploitation into a society of harmony and welfare of all he had distinct ideas expressed through prolific and persuasive writings. Based on Gandhiji's writings and duly consulting Gandhiji, Shriman Narayan Agarwal, a follower of Gandhiji had compiled "Gandhian Constitution for Free India" in 1946.⁶ Gandhiji subscribed a foreword to the book acknowledging such consultation. Gandhiji had represented India and the Congress in the Second Round Table Conference, guided the drafting of Aundh Constitution,⁷ negotiated

3 Narendra Chapalgaonker, *Mahatma Gandhi and the Indian Constitution*, Subhaschandra Wagholikar (Tr.) 26-27 (Routledge, London, 2016).

4 According to the Supreme Court such recognition is because it was he who awakened in the people of this country a sense of National consciousness and instilled in them a high sense of patriotism without which it is not possible to build a country into nationhood. *Pradeep Jain v. Union of India*, AIR 1984 SC 1420 (para 2).

5 M. K. Gandhi, *The Story of My Experiments with Truth*, (Navjeevan Publishing House, Ahmedabad, 1940); "Hind Swaraj"; "India of My Dreams" in *Young India* and *Harijan* and other writings and speeches reflect such an outcome.

6 Shriman Narayan Agarwal, *Gandhian Constitution for Free India* (with Foreword by Mahatma Gandhi) (Kitabstan, Allahabad, 1946)

7 Aundh was a tiny princely State of India in the present area of Maharashtra, consisting of four talukas, framed a Constitution under the guidance of Gandhiji in 1923. The Constitution guaranteed fundamental rights, devolved powers to local *panchayats*, provided for *grampanchayats* in all villages, and the *sarpanch* was to be member of taluk *panchayat*. A representative chosen by Taluk *Panchayat* was to be member of Legislative Assembly, which was made a permanent forum without dissolution and one third of members were to retire at the end of every second year. See, Narendra Chapalgaonker, *supra* note 3 at 71-73.

with British officers on political issues,⁸ defended disobedience to unjust law, drafted some resolutions in Congress conferences about the constitutional reforms and gave a theoretic framework of *Swaraj*.⁹ He gave an intellectual leadership in crystallising constitutional values in a multicultural society. Even today Gandhiji's image is part of India's public life and Gandhian values as can be seen in general discourse on policy matters as also in his ubiquitous presence all over India in the form of statues, names of universities, roads, hospitals, schools, buildings, employment guarantee projects. He is commemorated during auspicious days and in the lightning *dharnas* in front of his statues, by protesting against injustice as though he is the ultimate saviour of justice. While Gandhiji had vast followers and people's support throughout the country, it is debatable whether his core and detailed ideas entered into the original constitution to the extent expected by people. There was an impression even among the members of the Constituent Assembly that the Constitution as it stood originally enacted had betrayed the Gandhian ideas and made mere window dressing of them here and there, and that too with a low key approach.¹⁰ But gradually over the decades, Gandhian thoughts were received to some extent in the Indian constitutional jurisprudence either through constitutional amendments or through judicial references in course of constitutional or legal interpretation.

The present paper aims at tracing the influence of Gandhian thoughts in our supreme law and evaluating its contribution. As a prelude to this discussion, a brief perusal of the landscape of Gandhian concepts and their relevance and legitimacy in constitutional jurisprudence will also be made. Then it will examine the approach of Constitution Makers towards them and extent of their application in the original constitution. How the constitutional amendments tried to fill the gap and judiciary understood the Constitution in the light of Gandhian thoughts will also be traced. The paper argues that with an increased attention in recent times on developing constitutional morality through deliberate effort and collective action, and on increased realisation of transformation-potentiality of the Constitution, ascendance of Gandhian values in the constitutional jurisprudence would add to the worth, spirit and competence of constitutionalism.

II Landscape of Gandhian thoughts on polity: A postmodernist discourse

At the outset it should be noted that Gandhian thoughts reflect combination of the best of the ideas of various schools of law: natural law, historical school, sociological

8 Gandhi-Irwin Pact, Poona Pact, etc.

9 M. K. Gandhi, *Hind Swaraj or Indian Home Rule* (Navjeevan Publishing House, Ahmedabad, 1921).

10 K. Hanumantayya criticised the Constitution as providing for strongly centralized State without giving initiative to the provinces, which Gandhiji did not want or envisage. He said, "we wanted the music of veena or sitar, but here we have the music of English band" Constituent Assembly Debates, Nov. 17, 1949.

school, economic school, realism, feminism and post-modernist school. The distinction between just and unjust laws,¹¹ the duty to disobey unjust law and to not cooperate with the authorities in enforcement of unjust law, and sanctity of every life as divine ordaining can be traced in Gandhian thoughts which bring them close to natural law ideology.¹² His idea of duties as primordial and prerequisite to rights, selfless work and non-possession of property is based on ancient thinking rooted in *Bhagavad Gita* and *Upanishads*, reminiscent of historical school of law.¹³ When he sets the objective of wiping out every tear from every eye and the greatest benefit to the least advantaged for social reforms, he believes in the social engineering function of the law.¹⁴ His idea of trusteeship, economic justice and socialistic pattern of society has great resemblance with arguments of economic school of thinking.¹⁵ His perception of colonial judicial approach of supporting the repressive legal measures speaks of realism's scepticism about judicial function.¹⁶ His notions of empowerment of women, the depressed classes and the poor point out the need for radical approach of the legal system.¹⁷

Quite categorically and more appropriately, Gandhian thoughts can be characterised as coming within the thought- frame of postmodernist jurisprudence. Postmodernism in law has canvassed reliance on overall experience of the mankind instead of finding

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- 11 M. K. Gandhi, *Hind Swaraj and other Writings*, Anthony J Parel(ed.), (Cambridge University Press, Cambridge, 1997); Parel writes that learning of law deepened his idea of higher law morally superior over positive law. According to Parel, Gandhiji considered that modern notion of positivism corrupts the notion of law in that it makes obedience to law a political and moral duty irrespective of the question of conformity to dharma. Also see Anthony Parel (ed.), *Gandhi, Freedom and Self-rule* (Lexington Books, 2000); "The Dignity of Man Requires Obedience to a Higher Law – to the Strength of the Spirit" *Young India*, 3 (11-8-1920).
- 12 In the famous sedition trial he submitted before the court that *the Rowlatt Act*, which designed to rob the people of all real freedom, came as a shock. The massacre in Jallianwala Bagh, the crawling order and the public flogging were still more shocking. Non-keeping of Khilafat promise was shattering hopes. He said, "I felt called upon to lead an intensive agitation against it (*Rowlatt Act*)....The law itself in this country has been used to serve the foreign exploiter. My unbiased examination of the Punjab Martial Law cases had led me to believe that at least ninety-five per cent of convictions were wholly bad....In fact, I believe that I have rendered a service to India and England by showing in non co-operation the way out of unnatural state in which both are living. In my humble opinion non co-operation with evil is as much a duty as is co-operation with good." His way of non co-operation was absolutely non-violent.
- 13 *Harijan*, 24-9-1938, 266; *Young India*, 28-4-1927, 137; *Harijan*, 1-2-1942, 20; *Harijan*, 22-2-1942, 20, 49; *Young India*, 13-10-1921, 325; R K Prabhu and U R Rao, *The mind of Mahatma Gandhi 187-195* (Navajivan Publishing House, Ahmedabad , 1967, re pt. 2010).
- 14 Pyarelal, II *Mahatma Gandhi: The Last Phase*, 65 (Navajivan Publishing House, Ahmedabad,1958).
- 15 Nirmal Kumar Bose, *Studies in Gandhism* 45-57 (Navajivan Publishing House, Ahmedabad, 1972, 2012).
- 16 See *supra* note 12.
- 17 R K Prabhu and U R Rao, *supra* note 13 at 296-299.

solution only in a modern way of thinking.¹⁸ It emphasises on tradition, morality, ethical consideration and argues for law's minimalist role.¹⁹ It reflects a cultural situation and social response to the same.²⁰ It has stood for application of equality and dignity in all spheres of life,²¹ and for recognition pluralism as a fact of life, an approach of society, and policy of law.²² It recognises non-state power centres,²³ manifests the conscience of ameliorating the depressed people,²⁴ and favours deconstruction²⁵ and decentralization for facilitating evolution of decisions from below or from within.²⁶ It doubts the competence of science and technology in bringing social happiness as they are inherently destructive and oppressive.²⁷ Post-modernism has also passion for

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- 18 See MDA Freeman (ed.), *Lloyd's Introduction to Jurisprudence* 1414-6 (Sweet & Maxwell, London, 8th edn., 2008); Jurgen Habermas, II *The Theory of Communicative Action* (Beacon Press, Boston, 1987); "Postmodernists stand for communitarian values – solidarity, mutual aid, social integration and survival. One can say that they offer a very topical social and ethical criticism of modern law," views Vihren Bouzov, *Modernism and Postmodernism in Philosophy of Law*; Jurgen Habermas, *Legitimation Crisis* (Beacon Press, Boston, 1975); William Twining, *Globalisation and Legal Theory* 198 (Cambridge University Press, Cambridge, 2000); Ahmad Badri Abdullah, "Postmodernism Approach in Islamic Law (Fiqh)" 13 *Middle East Journal of Scientific Research* 33-40 (2013).
- 19 C Douzinas and R Warrington, "A Well-Founded Fear of Justice: Law and Ethics in Post-modernity" (1991) extracted in MDA Freeman, 1473-5; Aronowitz, "Postmodern and Politics" in A Ross (ed.), *Universal Abandon? The Politics of Postmodernism* 48 (1988).
- 20 J M Balkin, "What is Postmodern Constitutionalism?" 90 *Michigan Law Review* 1966 at 1972 (1992)
- 21 Costas Douzinas, *Law and Justice in Post-modernity* 196 at 219-220; "Treating the other as equal and as different at the same time, in a positive sense, involves more knowledge and more empathy. Only in such a case is it possible to create a new list of human rights avoiding the mistakes of modernity" observes, Bartoz Wypych, "Discrimination, Democracy and Postmodern Human Rights" 42 *Polish Political Science* 163 at 172 (2013).
- 22 Ahmad Badri Abdullah *et al.*, "Postmodernism Approach in Islamic Jurisprudence" 13 (1) *Middle-East Journal of Scientific Research* 36-37 (2013), views that postmodernist discourse of Islamic law has manifested criticisms against gender bias and rejected textual and radical fundamentalism; Boaventura de Sousa Santos, *Toward a New Common Sense: Law, Science and Politics in Paradigmatic Transition* (Routledge, New York, 1995) stresses on the importance of attending to multiple perspectives and points of view and resistance to closure as contemplated by imaginative postmodernism and on cultural relativism as an approach of irrationalist postmodernism.
- 23 Michel Foucault, *Discipline and Punish: The Birth of the Prison*, Alan Sheridan (Tr.), (Allenlane, London, 1971); Edwin Scott Fruehwald, *Power in Contemporary Legal Thought: Postmodernism and behavioural Biology*, available at, <http://ssrn.com/abstract=1890945>; Reza Dibadj, "Postmodernism, Representation, Law" 29 *University of Hawaii Law Review* 377 at 431-2 (2007).
- 24 Jennifer Lynn Orff, "Demanding Justice without Truth" 28 *Loyola of Los Angeles Law Review* 1197 at 1246-49 (1995).
- 25 Jacques Derrida, "Force of Law: The Mystical Foundation of Authority" 11 *Cardozo L. Rev.* 919-1046 (1989-1990), where he for example deconstructs the 'force of law' as legitimate violence and identifies justice even outside law.
- 26 Boyle "Modernist Social Theory: Roberto Unger's Passion" 98 *Harvard Law Review* 1066 (1985)
- 27 Brian Duignan (ed.), *Encyclopaedia Britannica*; available at, <https://www.britannica.com/topic/postmodernism-philosophy> visited on 27/12/2018; Santos considers that modern science goes against common sense, is superficial and illusory. *Supra* note at 22, at 46; also see William Twining, *Globalisation and Legal Theory* 207 (Cambridge University Press, Cambridge, 2000).

protection of environment and absolute love of peace in both national and international life.²⁸ It is possible to find parallels for each and every components of post modernism in Gandhian thoughts. Gandhiji's thoughts and actions had stood for perfect ideals in public and private life, individual and collective approaches and fairness in governmental actions. They were mixture of the old and the new; carefully opposing the evils of modernisation, mechanisation, centralisation and westernisation; and finding solutions in indigenous wisdom. From this angle, they were post-modernist in spirit, style and approach. It is because of emphasis on indispensable ethical considerations, pluralism and pro-people approach that Gandhian thoughts become ever-relevant in constitutional discourse.

With adequate flexibility and enormous dynamism facilitating social transformation, Gandhian thoughts integrated the approaches of conflict and consensus models of social change.²⁹ By aiming at winning the hearts of the oppressors³⁰ and filling confidence in the bosoms of vulnerable sections³¹ and motivating the whole society towards concerted actions to achieve desirable goals, the Gandhian method was pragmatic, transcended black letter law approach, and believed in social dynamism. Proper education, persuasion, negotiation, counselling and creation of public opinion are to be used to win the minds of the oppressors and bring attitudinal change.³² In substance and procedure, this had unique vision, mission and mechanism.

On purposive character of polity, Gandhiji said: "To me political power is not an end but one of the means of enabling people to better their conditions in every department of life. Political power means capacity to regulate national life through nationalist representatives."³³ According to him, patriotism meant making the people free from the tyranny of the colonial rule and native Princes and bring up their welfare as a whole;³⁴ and *Swaraj* meant running the Government of India by the consent of the people as expressed in universal adult franchise, a people educated and service minded and capable of regulating and controlling the authorities.³⁵ Along with attainment of perfection in national life, least governance becomes best governance, he reasoned, concurring with Thoreau.³⁶ He preferred power that is based on love to power which

28 Major Robert P Vicars, *Postmodern Morals, Ends and Means: Shifting Ideas about Why, How and For Whom Wars are Fought* 1-41 (School of Advanced Military Studies, Kansas, 2013).

29 P. Ishwara Bhat, *Law and Social Transformation in India* (Eastern Book Co., Lucknow, 2009)

30 *Harijan*, 25-8-1940, 260-1

31 Gandhiji had observed, "All exploitation is based on co-operation, willing or unwilling, of the exploited."

32 Integration of 560 princely states in free India occurred through this means.

33 *Young India*, 2-7-1931, 162

34 M. K. Gandhi, *supra* note 9 at 36.

35 *Young India*, 29-1-1925, 40.

36 *Id.* at 2-7-1931, 162; also see *Young India*, 7-5-1931 where he explains that for minimising the abuse of democracy the idea of least governance becomes crucial.

is based on fear of punishment.³⁷ Power becomes democratically organised when shared by all and safeguarded against abuses and violence.³⁸ He said, discipline and human orientation in democracy bring highest form of freedom.³⁹ For this to happen, there should be “mobilizing (of) the entire physical, economic and spiritual resources of all the various sections of the people in the service of the common good of all.”⁴⁰ He gave the following talisman in any policy-making task:

Recall the face of the poorest and the weakest man whom you have seen and ask yourself if the step you contemplate is going to be of any use to him. Will he gain anything by it? Will it restore him to control over his own life and destiny? In other words will it lead to Swaraj for the hungry and spiritually starving millions?⁴¹

This approach calls for eradication of poverty, illiteracy, ‘untouchability’, economic exploitation and gender discrimination, and amelioration of the interests of the socially disadvantaged.⁴² As a believer in non-violent economy, he preached humane relationship between the employer and employee and policy of fair wage, which has potentiality of increasing economic efficiency and justice. He warned against abuse of economic power over the unemployed or consumer. He cited from ancient Indian teaching to hold that work and sacrifice alone give entitlement to property, and that too, to the extent of one’s need and nothing more. He was convinced that true economics is the economics of justice, which promoted the good of all including the weakest, and not worships of wealth at the expense of the weak.⁴³ In the context of people having different talents and competences to produce work output, the notion of equal distribution demanded that the surplus producer should hold wealth as a trustee to the State or society and that each man shall have wherewithal to satisfy all his natural wants and no more.⁴⁴ *Zamindars*, industrialists and capitalists were asked to voluntarily forego their resources for the common benefit as the land and wealth belonged to *Gopal* or the state.⁴⁵ He was opposed to machinery which displaced labour and left it idle.⁴⁶ The professions of lawyer, medical doctor, accountant and various occupations should be free from profiteering motive and be service-oriented in order to be non-

37 *Id.* at 8-1-1925, 15.

38 *Young India*, 1-12-1927, 404.

39 *Id.* at 7-5-1931, 99.

40 *Harijan*, 27-5-1939, 143.

41 *Mahatma Gandhi [Last Phase, Vol. II (1958), 65]*.

42 Gandhi had elaborate scheme of measures for each of the objectives.

43 *Harijan*, 9-10-1937

44 *Young India*, 5-11-1931; *Young India*, 26-3-1921; *Harijan*, 16-3-1947; *Harijan*, 1-9-1940; M. K. Gandhi, *Sarvodaya (The Welfare of All)* 34-7 (Navajivan Publishing House, Ahmedabad, 1954, re pt. 2012).

45 *Harijan*, 2-1-1937; *Amrit Bazar Patrika*, 2-8-1934; *Young India*, 26-11-1931; *Harijan*, 16-2-1947

46 *Harijan*, 15-9-1946, 310; *Young India*, 13-11-1924, 378; R. K. Prabhu and U. R. Rao, *The Mind of Mahatma Gandhi* 234-243 (Navajivan Publishing House, Ahmedabad, 1967, re pt. 2010).

violent.⁴⁷ Bread labour is to be practised as an ethical imperative.⁴⁸ *Swaraj* meant freedom from evil propensities and idleness.⁴⁹ It meant linking of self-rule of individuals (mastery over minds) with home-rule or political independence. Adherence to these values, according to Gandhiji, avoided stealth and subordinated the brute force to the ethical swords. Avoidance of litigation and of ill-health by rightful conduct and practice make people happy, he reasoned. He said, “A nation with a constitution like this is fitter to teach others than to learn from others.”⁵⁰

Gandhiji found fault with the British colonial policy of draining India’s resources through unjust tariff policies, of unnecessary industrialization and mechanization that has created unemployment and destroyed cottage industry and of converting India into a dependent nation.⁵¹ As an antidote to this, he suggested eschewing of luxury, prevention of over-exploitation of nature and unnecessary competitiveness, and substitution of them by simple and self-sufficient village life, co-operative farming and eco-friendly approach to resources. Further, the British policies of divide and rule, racial superiority, English education at the cost of vernacular languages, and branding of tribes with criminal aptitudes had, according to him, deeply divided the communities and wounded the fabric of social harmony and thwarted the cultural identity.⁵² Again, he advised for non-violent village life with harmonious relations, mother tongue education and measures for tolerance and cooperation. He thought that Hindu-Muslim unity, battle against caste system, eradication of untouchability and gender discrimination could be better planned in an atmosphere of gram swaraj. Gandhiji said, “Society based on non-violence can only consist of groups settled in villages in which voluntary co-operation is the condition of dignified life and peaceful existence.”

Owing to the above sociological and economic reasons, Gandhiji identified decentralised village communities as the building blocks of the nation and located political power in the bottom of the socio-political pyramid. For better human survival and collective joy, village life was offering a benevolent forum. It also promised art, beauty and ease for national defence. Justifications in tradition and survival for centuries have demonstrated that the villages are inevitable units of political organisation and reflect basic instincts of Indian life. They are essential for moral and material existence of the society, for peasant democracy and for practice of universalism through self-contained

47 R K Prabhu and U R Rao, *supra* note 46 at 202-210.

48 *Id.* at 198-201.

49 M. K. Gandhi, *supra* note 9.

50 *Id.* at chapter 13.

51 M. K. Gandhi’s written statement to the Court in a sedition trial as can be found in M. K. Gandhi, *The Law and Lawyers*, S. B. Kher (ed.), 112 (Navajivan Publishing House, Ahmedabad, 1962, re. pt.2009).

52 M. K. Gandhi, *supra* note 9.

just life of *Ramarajya*. According to Gandhiji village as a social unit with equal rights of all provided a practical and lasting solution and paved the way to *sarvodaya*.

The overall framework of Gandhian thoughts reflects what we call today the strong structure of postmodernism. Law's minimalist role has to be matched by people's active role through performance of their duties and by complying with the ethical norms of humanism and pluralism. By combating against social evils, exploitations, poverty and ignorance, Gandhian thoughts set an agenda for social action.

The four decades of intellectual, moral and political leadership that Gandhiji provided to the nation and his insights of philosophical outlook based on down-to-earth experience evolved great ideals of polity with high potentiality of social transformation. Substantial acceptance of them by the people with love and reverence consolidated the constitutional ideals.⁵³ It is for this reason that the Supreme Court has recently considered that any attempt of undermining his iconic figure for such high morals in people's estimation disturbs the contemporary community standard relating to a historic personality.⁵⁴ Keeping the Gandhian objectives in mind, Shriman Narayan depicts Gandhiji's vision of constitutional architecture.

III Contours of Gandhian constitutional plan

Shriman Narayan Agarwal had enunciated basic principles of the *Swaraj* Constitution in consultation with Gandhiji.⁵⁵ Its major components are as follows:

Fundamental rights and duties

The Constitution should enumerate and fully protect fundamental rights and enforce fundamental duties.⁵⁶ In view of the communal problems that face the country fullest protection to all minorities should be integral part of the Constitution. After listing 13 fundamental rights it states that these rights shall be contingent on the performance of 3 fundamental duties by every citizen: (1) duty to be faithful to the state specifically in times of national emergencies and foreign aggression; (2) duty to promote public welfare by contributing to state funds in cash, kind or labour as required by law; (3) duty to avoid, check and if necessary, resist exploitation of man by man.⁵⁷ Right to equality to all citizens, protection from disability, equal rights to make use of public

53 While paying homage to the Father of the Nation, Dr. Rajendra Prasad, President of the Constituent Assembly, described Gandhiji as a person "who breathed life into our dead flesh and bones, who lifted us out of darkness of despondency and despair to the light and sunshine of hope and achievement and who led us from slavery to freedom" and wished that his life and teaching would be the torchlight to take the nation towards the right goal. Constituent Assembly Debates, Book 2, Vol. VII 1 (4th November, 1948).

54 *Devidas Ramachandra Tuljapurkar v. State of Maharashtra*, AIR 2015 SC 2612

55 Shriman Narayan Agarwal, *supra* note 6 at 77-79.

56 *Ibid.*

57 *Id.* at 79.

facilities and equal rights of adult franchise constituted the equality charter. Every citizen's entitlement to freedom of person, speech, assembly and combination, subject to the principles of non-violence and public morality; freedom of conscience and the right to follow personal and social customs subject to public order and morality; right to preserve and develop their script, language and culture; right to obtain legal and police protection from violence, compulsion or intimidation in regard to his/her person and property; and right to keep and bear arms in accordance with law constituted the charter of liberties. The fundamental rights included every citizen's right to free and basic education (*nai talima*); to minimum wages through honest work; to rest and to have no compulsion to work beyond eight hours a day; and right to medical freedom. It is pertinent to note that the welfare rights were treated as fundamental rights.

Panchayati Raj institutions

Gandhiji desired that self-sufficient and self-governing villages should be the basic units of public administration and regarded that essence of non-violence was decentralisation.⁵⁸ He contemplated a three-layered and well-coordinated *Panchayati Raj* Institutions going up from Village *Panchayat* to District *Panchayat*. Five representatives (seven to eleven in case of bigger villages) chosen by all adult citizens of the village for a term of three years (not permitted to have re-election for more than three terms) are authorised to administer and supervise performance of its functions. Any individual member can be removed before the expiry of the tenure by no-confidence vote of 75 per cent of voters. One member is to be chosen as *Sarpanch* or President by elected members unanimously, and in case unanimity does not prevail, shall be chosen directly by the voters directly out of themembers of the *Panchayat*. The Village *Panchayat* has sole power of appointment of village servants. The functions of the Village *Panchayat* include comprehensive functions touching upon social, economic and political life of villages viz., (1) primary education, library and night school for adults; (2) recreation including *akbadas*, playgrounds for *swadeshi* sports, art, craft, exhibition, celebration of festivals and holding of cultural activities; (3) protection against thieves, dacoits and wild animals; (4) agriculture, cooperative farming, irrigation, providing of good seeds, growing food crops, scaling down debts and check soil erosion; (5) industries, *kebadi*, cooperative village industries, dairy farming; (6) trade and commerce, consumers cooperatives, export of surplus; (7) sanitation and medical relief, healthy drinking water; (8) cheap and speedy justice and legal aid; (9) finance and taxation for special purposes.

The *Taluk* and District *Panchayats* co-ordinate the functions of villages and shall act as advisers and supervisors. Duly elected Presidents of villages constitute the *Taluk Panchayat* and all the presidents of *Taluk Panchayats* constitute District *Panchayat*. Ordinarily 20 Villages or approximately 20000 citizens constitute one *Taluka*. The term of Presidents of *Taluka* and district *Panchayats* is three years. The functions of *Taluka Panchayats* include guiding, supervising and coordinating the activities of village

58 *Id.* at 80-87.

panchayats, arranging secondary or upper basic education, maintenance of special guardians, bigger hospitals, cooperative banks and inter-village roads. The functions of District *panchayats* include guiding, supervising and coordinating the activities of *Taluka Panchayats*, arrangements for collegiate education, maintenance of well-equipped hospitals, District Guardians, co-operative banks and arrangement for irrigation. Municipal Councils and Ward Councils shall perform functions of civic importance.

The provincial governments and princely states

The Provincial *Panchayats* are composed of Presidents sent by *Taluka Panchayats* and Municipal Councils of that province.⁵⁹ Its term is three years. Its functions include guiding, supervising and coordinating the activities of District *Panchayats*, maintaining special Reserve Guardians for emergencies, arranging university education, training and research, organising transportation and communication, providing irrigation facilities, organising famine relief, funding district cooperative banks and developing natural resource of the province and manage key industries. The Gandhian Constitution envisages delineation of provincial boundaries on linguistic lines and administrative convenience. Justifications are given for linguistic basis, and for mother tongue instruction. It has listed 19 provinces with their official languages. Ministers shall not be appointed from among the members of Provincial *Panchayat* nor on the basis of party lines. Best of the administrative talents are to be accommodated and the number of ministers shall be dependent upon the size of the province and shall not be less than five and more than nine. Gandhiji was not convinced about the viability and economic strength of the princely states and their readiness to protect rights of people. Instead of putting people to double slavery, he favoured their merger with neighbouring entities.⁶⁰

Central Government

Central Government is at the apex of pyramid of Gandhian idea of self government.⁶¹ All India *Panchayat* is a unicameral legislature composed of all the Presidents of Provincial *Panchayats* and additional Provincial *Panchayat* members sent by bigger Provincial *Panchayats* as their representatives. Gandhiji considered second chamber as unnecessarily complicated and expensive. The term of All India *Panchayat* is three years. Its functions include (a) defending the country against foreign aggression; (b) maintenance of internal law and order through National Force of Guardians in case of emergency; (c) coordination of provincial plans for economic development; (d) running the key industries at the national level; (e) managing all India transportation and communication; (f) regulation of currency, customs and international trade; (g) maintaining few educational institutions of national importance; and (h) shaping the foreign policy of the nation.

59 *Id.* at 88-92.

60 *Id.* at 106-108.

61 *Id.* at 93-96.

The president of All India *Panchayat* is the executive head of central government. The AIP shall appoint Ministers or Commissars for various departments, and the Council of Ministers so formed is accountable to the AIP. The Ministers will be drawn from the best of the talents of the country irrespective political parties and from various communities. Communal and political party considerations should not prevail at AIP or Central Ministry. The individual ministers are removable by AIP only on grounds of inefficiency and corruption. Gandhian Constitution makes AIP voluntary federation of provinces and princely states. Although theoretically freedom to join the Union envisages right of secession, because of tolerance, good will and cooperation and geographical compulsions, Gandhiji hoped to have permanent accession and continuation of all the federating units. The language of AIP shall be Hindustani with *Devanagari* and Urdu scripts.

The judiciary and legal system

Gandhiji was deeply disappointed by the colonial legal system which had made justice delayed, costly and complicated.⁶² In addition it had played havoc by allowing immoralities like perjury and false witness. Both the civil and criminal law were alien, complex and cumbersome, which needed thorough revision under the new constitution. For this purpose a special committee is also contemplated. At village level Village *Panchayats* shall act as courts and resolve the disputes. For resolving case involving legal complication sub-Judge from the district may be invited to act as guide. Appeals could be made to district courts. Further, cases originated from municipalities will go to district courts. The judges shall be independent of local administration and be appointed by District *Panchayat* for life. Appeals lie from district courts to high courts in exceptional cases. The judges of high courts shall be appointed by Provincial *Panchayat*. They shall hold office for life and not removable during good behaviour. The Supreme Court, which is the highest judicial authority in the country, has appellate jurisdiction from high courts, original jurisdiction in disputes between provinces regarding constitutional matters and jurisdiction to safeguard the interests of minorities and protect fundamental rights.⁶³ The judges, who shall be men of highest merit and character and free from communalism and party politics, shall be appointed by AIP for life and not removable during good behaviour.

System of elections

In view of the autonomous local self government and of advisory or coordinative function of higher bodies, Gandhiji contemplated direct election for village *panchayats* and municipalities and indirect elections to all the higher layers of government.⁶⁴ The objectives were avoidance of colossal wastage of national energy, time and money in a

⁶² *Id.* at 97.

⁶³ *Id.* at 99.

⁶⁴ *Id.* at 101-105.

vast nation and checking unhealthy growth of political parties and communal feelings. *Ex officio* membership of presidents of lower layer of government in the higher levels of government was the connecting link. The Gandhian Constitution rejects the practice of communal electorate. It prescribes special qualifications to voters such as literacy, mature experience of civic life, non-corruption and record of solid and selfless service to the village.⁶⁵

National defence and foreign policy

Although believer in non-violence, Gandhiji advised to have a National Defence, mainly as National Police in order to defend the country against external aggression.⁶⁶ The policy of self sufficient villages, abstinence from competitive foreign trade and geographical position of India inherently eschewed war. Foreign policy of India should include: peaceful and friendly relation with all countries on the footing of equality and respect to their freedoms; non-exploitation in international trade and resistance against exploitation; full support for movements for nationhood, freedom and democratic government all over the globe.

Gandhiji considered Indian defence mainly as a national police organisation – disciplined, intelligent and educated – without imperial design or territorial ambition but committed to maintenance of order. Foreign policy in the constitution should include: desire to live in peace and friendship with neighbours and all other countries on the basis of absolute equality; non-exploitation of any country economically through trade and commerce; establishment of world federation; support through economic sanctions to national, democratic and socialist forces against aggressor; cooperation with other nations to combat against suppression of the freedom of any country; standing for freedom to all the big and small nations without any distinctions of race, colour, economic and cultural backwardness.

Protection of minorities

Gandhiji was clearly against the idea of partition and passionately in favour of Hindu-Muslim unity. He had fond hope that the iceberg of communal differences will melt under the warmth of the sun of freedom.⁶⁷ For resolving the problem of minorities and establishing social harmony, he suggested for inclusion of the following measures in the future constitution: (a) guarantee of fundamental rights to all the communities full protection of their cultures, languages, education, profession and practice of religion, social customs and personal laws; (b) fullest possible local autonomy in economic, political and cultural spheres in each territorial unit and self-governing village communities; (c) no communal electorate; (d) universal adult franchise; (e) principle of fair share in opportunities of public employment to all the communities.⁶⁸

65 *Id.* at 103.

66 *Id.* at 109-111.

67 M K Gandhi, The Case for Swaraj, 103, Shriman Narayan 120.

68 *Supra* note 6, Shriman Narayan 113-120.

Finance and taxation

Gandhiji considered the prevalent system of finance and taxation as highly centralised and irrational. He suggested overhauling through radical measures such as: decentralised finance to make local self government a reality; limits on sharing of land revenue by district, provincial and AIP; allocation of arbitration fee, fines and grazing charges to villages; practice of economy measures in military and public service system and cap on the income of government servants; more state expenditure for education, health and research; no burden of war debts; imposition of inheritance tax above a particular limit; income tax to be a provincial source of revenue; no tax on salt; total prohibition on intoxicants and no excise tax on the same; profits from management of key industries to be the income of provinces and AIP.⁶⁹

National property

Non-abolition of private property but eschewing the patent evil of acquisitive society was Gandhian Constitution's policies. All lands shall belong to the state, which will lease land to farmers who actually till the soil. Private landlord and *zamindari* system were to discontinue. Key industries should be owned by states. Mines, rivers, forests, roads, railways, air transport, posts and telegraphs shall be national property. Reasonable compensation shall be paid in case of acquisition of properties from private owners.⁷⁰

Education

Far-reaching reforms in the field of education were contemplated: Free and compulsory basic education up to the age of 14 years along with productive craft like spinning, weaving and agriculture. Mother tongue shall be medium of instruction at all stages of education as English medium saps nation's energy, estranges from the masses; is costly and robs the nation's soul. Village *panchayat* shall liquidate illiteracy; general education ought to promote awareness about health, hygiene, sanitation, agriculture, cooperation and civic rights; graduates should render free social service; universities to involve in training and research.⁷¹

Crime and punishment

Gandhiji was believer in prevention of crimes and reforms of criminals.⁷² He regarded that crime is a social product and has roots in poverty, unemployment, inadequate education and broken homes. His idea of self-sufficient village, *nayee talim* and economic justice dries up the spring of criminality. He wished that under the new constitution prisons will be well-organised reformatories. He contemplated humane atmosphere in prisons conducive for moral regeneration and economic empowerment through self

69 *Id.* at 124-5

70 *Id.* at 126.

71 *Id.* at 127-8.

72 *Id.* at 129-131.

employment skill. Abolition of capital punishment for any of the crimes, clinics for delinquent children and simplification of criminal law were in his agenda.

Amendment of the Constitution

The Constitution Amendment Bill shall be passed by All India *Panchayat* and all Provincial *Panchayats* with seventy-five per cent majority in each case.⁷³ In case the amendment is pertaining to a single province reference to that Provincial *panchayat* would suffice. Supreme Court's written sanction is required before amending any provisions on fundamental rights. Compared to the present scheme, the amendment procedure was more rigid.

By and large, the scheme of Gandhian Constitution was comprehensive, innovative and essentially responding to the needs of Indian society. It was conspicuously different from the western models regarding institutions, mechanisms and value orientation. The broad-based pyramid that covered the innumerable villages made the political structure more suitable for multicultural democratic system. Paramount position of fundamental duties, abolition of 'untouchability', entrenched position of fundamental rights, recognition of social, economic and cultural rights, accommodation of linguistic, ethnic and minority interests and focus on education, and provisions for land reforms and community development made the Constitution specifically orienting towards well-planned social transformation. The Gandhian thoughts range from high standards of ethics at the individual level to essential principles of social morality at the community level in addition to the concepts and institutions of good governance. The ideas of decentralisation of power, ethics, human dignity, justice, welfare and reliance on non-state power centres for bringing social transformation and demystification of power and law underlying Gandhian model of Constitution exhibit waves of postmodernism.

Now the extent of influence the ideas of Gandhian Constitution cast upon the constitution making process may be considered.

IV How far Gandhian thoughts were absorbed into the original constitution?

Most of the members of the Constituent Assembly were followers or great admirers of Gandhiji closely acting with him in the freedom struggle or associated in varieties of social reform measures. In the Constituent Assembly, they expressed their high regards to Gandhiji and acknowledged his glorious influence.⁷⁴ But they were not

73 *Id.* at 134.

74 Rajendra Prasad in Constituent assembly Debates, Book No 5 994 (26/11/1949); Shri Kamaleshwari Prasad Yadav, Constituent assembly Debates, Book no. 5 971 (25/11/ 1949); Shri Suresh Chandra Majumdar, Constituent assembly Debates, Book No. 5 965 (25/11/ 1949); Shri Pattabhi Sitaramayya Constituent assembly Debates, 944; Shri Ammu Swaminathan, Constituent assembly Debates, Book No. 5 944 (24/11/ 1949); L Krishnaswami Bharathi, Constituent assembly Debates, 906; Shri Kamalapati Tripathi, Constituent assembly Debates, Book No. 5 863 (23/11/ 1949); Shri Balawant Sinha Mehta, Constituent assembly

inclined to fully accept the Gandhian ideologies or were satisfied in low-key treatment of some of them as constitutional principles.⁷⁵ Jaspal Roy Kapoor,⁷⁶ one of the members of CA lists the points of inclusion of Gandhian thoughts in the Constitution as enacted by the CA in response to the lament in the CA by some members that Gandhian thoughts and ideologies were jettisoned in the constitution making process.⁷⁷ Broadly on the following matters the Gandhian constitutional ideals had impact:

Firstly, the Constitution makers were not very much enchanted by the Gandhian idea of decentralised governance and indirect representation to the Provincial and Central Government. The idea of decentralised democracy implied underplaying the importance of party government, which was unpalatable for Congress.⁷⁸ It meant deviation from the hitherto practice of parliamentary democracy supported by direct election from the electorate, which the liberal socialist leaders of freedom movement were considering as instrumental for welfare state.⁷⁹ There was also disbelief about village *panchayats*' competence for change because of their position as 'sink of localism, a den of ignorance, narrow mindedness and communalism'.⁸⁰ There were staunch criticisms by the members of CA against the approach of undermining the idea of *panchayatraj*.⁸¹ It was viewed that village *panchayat* could be unit of all round development, rearing of socio-political life from the bottom and antidote to centralization of power.⁸² The modest concession

Debates, 848; Shri B P Jhunjhunwala, Constituent assembly Debates, 832; Shri Giani Gurmukh Singh Musafir, Constituent assembly Debates, 825; Shri Ajit Prasad Jain, Constituent assembly Debates, Book No. 5 807 (22/11/ 1949); Rohini Kumar Chaudhury, Constituent assembly Debates, 794; Syamanandan Sahaya, Constituent assembly Debates, 788; P Deshmukh, Constituent assembly Debates, 779; most of the speakers spoke about *satyagraha* movement, village *panchayat*, cottage industry, prohibition of liquor and eradication of 'untouchability'. Sri M. Anantasayana Ayyangar proposed, although unsuccessfully, the idea of mentioning Gandhiji's benediction in the Preamble. Constituent assembly Debates, Book No. 5 664 (18/11/ 1949).

75 See for discussion, Narendra Chapalgaonkar, *supra* note 3 at 100.

76 Jaspal Kapoor, Constituent assembly Debates, Book No. 5 760-61 (21/11/ 1949).

77 Arun Chandra Guha, Constituent assembly Debates, Book No. 5 728 (21/11/ 1949); Seth Damodar Swarup, Constituent assembly Debates, Book No. 5 696 (19/11/ 1949); T Prakasham Constituent assembly Debates, 696-7; K Hanumantayya, Constituent assembly Debates, Book No. 5 616 (17/11/ 1949), who commented that "we wanted the music of Veena or Sitar, but here we have the music of English band". He said at p 617: "...whether or not we are right in having discarded Gandhiji's idea of making of Constitution, it is too soon for us to judge. The future will judge for itself."

78 Granville Austin, *The Indian Constitution: Cornerstone of a Nation* 31 (Oxford University Press, New Delhi 1966, re. Pt. 2010).

79 *Ibid.*

80 Dr. B R Ambedkar in Constituent assembly Debates, Book 3 at 39.

81 Damodar Swarup Seth, Constituent assembly Debates, Book 3 at 212; Shibban Lal Saxena, Constituent assembly Debates, Book 3 216; H. V. Kamath, Constituent assembly Debates, Book 3 219; Ramnarayan Singh, Constituent assembly Debates, Book 3 at 285.

82 *Ibid.*

that Constituent Assembly ultimately provided to the romanticism of decentralisation was a provision in the Directive Principle of State Policy obligating the State to organise village *panchayats* and empower them to function as units of self-government.⁸³ Still, it was expected to yield result in course of time through firm determination by the states.⁸⁴ The setback for Gandhian idea of decentralisation was to a certain extent remedied in 1990s through constitutional amendment.

Secondly, by abolishing ‘untouchability’, the CA did what was nearest to Gandhiji’s heart. The incorporation of relevant provision in Part III of the Constitution was greeted by all members with a slogan, ‘*Mahatma Gandhiji ki Ja?*’⁸⁵

Thirdly, Gandhiji was believer in secularism, and considered religion as personal affair, concerning which every individual should have absolute and equal freedom. The elaborate provisions relating to this concept and specific protection to minorities and linguistic or cultural communities amply substantiate acceptance of this approach.

Fourthly, Gandhian idea of vesting powers in the hands of the masses, peasants and labourers was duly incorporated by the bold step of universal adult suffrage.⁸⁶

Fifthly, specific provisions on encouragement to cottage industry and prohibition of intoxicant liquors and cow slaughter were proving the acceptance of Gandhian ideas, which no other Constitution in the world had provided for.⁸⁷

Sixthly, promotion of international peace, respect for international treaties and obligations and encouragement to settle international disputes by peaceful means, which Gandhiji had ardently advocated found a place in the Constitution.⁸⁸

Seventhly, and most importantly, the resolution of language issue by accommodating regional languages at the States and Hindi at the national level had largely had largely satisfied the Gandhian approach relating to languages.⁸⁹ The position of continuation of use of English for 15 years as official language of the Union might not have been strictly on Gandhian lines. But the Gandhian idea of linguistic organisation of states came into vogue in constitutional practice and the policy of mother tongue

83 The Constitution of India, art. 40.

84 Alladi Krishnaswami Aiyar in Constituent assembly Debates, Book 3 at 336.

85 Constituent assembly Debates, Book Number 2, Volume VII 669 (29/11/1949).

86 Gandhiji propounded the system of adult franchise, and insisted for the same in many resolutions of Congress. See Narendra Chapalgaonkar, *supra* note 3 at 99; The Constitution of India, art. 325.

87 The Constitution of India, arts. 43, 47, 48.

88 The Constitution of India, art. 51.

89 Gandhiji had said in his speech in Hindi Sahitya Sammelan at Indore, in 1918: “It is my humble but firm opinion that unless we give Hindi its national status and the provincial languages their due place in the life of the people, all talks of *Svaraj* is useless.” Also see Granville Austin, *supra* note 78 at 270; also see P. Ishwara Bhat, *supra* note 29, ch. 5 and 7.

instruction became a constitutional principle, although it got overpowered by parental right of choice in the matter of education of their wards, especially in the era of globalization.⁹⁰

Eighthly, the accommodation of land reform measures and *zamindari* abolition with certain constitutional protections reflected Gandhian ideology to some extent.⁹¹ Regarding protection of rights of workers, right to basic education, right to medical aid, which Gandhiji planned to have in the form of fundamental rights, the CA had the approach of accommodating them only as directive principles.⁹²

From the above, it can be inferred that there was substantive impact of Gandhian thoughts upon the Indian Constitution, so much so that it is not possible to think about the Constitution without Gandhian thoughts in mind. This impact continued in subsequent times in further refining the constitutional principles either through constitutional amendments or judicial interpretation.

V Constitutional amendments that further brought the Gandhian ideas into the Constitution

Constitutional amendments make good the shortcomings of the original constitution and address the problems arising from changes that the society faced from time to time.⁹³ The idea of economic reforms, *zamindari* abolition and assistance to actual cultivators, which Gandhiji had visualised as essential for economic justice, had faced a setback due to judicial interpretation of property clauses that ignored the interests of the poor. A series of amendments to property clause provided for exclusion of judicial review in the matter of acquisition of agrarian property and adequacy of compensation.⁹⁴ This had the potentiality of supporting socialization of property.

Ignoring the very notion of fundamental duties in the original constitution was theoretically and practically big deviation from Gandhian thoughts. The Forty-second Constitutional Amendment incorporated article 51-A listing various fundamental duties

90 P. Ishwara Bhat, *Ibid.*

91 Gandhiji was in favour of nationalization of agricultural property as contemplated in Shriman Narayan Agarwal, op cit p. 126. After referring to Gandhian thought, Mahavir Tyagi spoke in CA to the effect that shutting the doors of socialization as is done by protection of property right would invite bloody revolution by Indian youths, knocking and smashing the door; Constituent assembly Debates, Book 3 at 360-61.

92 The Constitution of India, arts. 41, 42, 43, 45 and 47.

93 John Rawls considers the role of legislature as part of four fold mode of making the Constitution. See John Rawls, *Theory of Justice* 215-230 (Oxford University Press, Oxford, 1972); John Rawls, *Political Liberalism* 174-76 (Columbia University Press, Columbia, 1993).

94 *The Constitution (First) Amendment Act, 1951* inserted Art. 31 A and 31 B. The Fourth, Sixteenth, Twenty fifth and Twenty ninth Amendments brought necessary changes facilitating land reforms. The Forty fourth Amendment removed property right clause from Part III of the constitution.

and tried to bring in Gandhian idea although without making them automatically enforceable or pre-requisite for entitlement to fundamental rights as Gandhiji had contemplated.⁹⁵

The Directive Principles of State Policy obligating the state to take steps for organising village *panchayat* became a victim of neglect and callous approach by the states. In order to make *panchayatraj* system compulsory and effective with periodical election, adequate representation to women, scheduled castes and scheduled tribes, democratic functioning with objectives of planning and implementation of social justice measures, *the Constitution (Seventy third) Amendment Act 1992* was incorporated. Denial of the status of fundamental right to the claims of basic education was a serious departure from Gandhian ideology, which was made good by *the Constitution (Eighty sixth) Amendment Act 2002*, i.e., after 50 years of the commencement of the Constitution. Right to cooperative societies, which Gandhiji contemplated as live veins of rural economy that would usher in economic development, had faced the problems of undue state interference, lack of periodical election and accountability and discriminations amidst beneficiaries. *The Constitution (Ninety seventh) Amendment Act, 2011* brought necessary change to make cooperative societies vibrant instruments helping the common people. All these amendments enhanced the Gandhian content of the Constitution.

VI Judicial references to Gandhian thoughts in interpretation of the Constitution

In a normative constitutional system, judiciary is the ultimate interpreter of the Constitution adding flesh and blood to its structure. The Supreme Court has the final voice about the meaning of its provisions. As language is ‘socially and culturally constructed’ and the judicial decision making cannot be done exclusively on the basis of text, the whole body of thought that gave birth to that clause needs to be considered along with meanings unearthed through other interpretative practices, as per the postmodernists.⁹⁶ One of the key principles of constitutional interpretation is originalism, which demands the judiciary to go through the thoughts of makers of the constitution as expressed in the CA debates and other preparatory documents. Since Gandhian thoughts had become intellectual tradition of the time visualising about social transformation which is a conspicuous ‘mark of the Constitution’⁹⁷ and an

95 See *supra* note 58 and text.

96 Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* 245 (NYU Press, Newyork and London, 1995); He is suspicious about consensus in vies of proliferation of different interpretive methods.

97 Dhananjay Chandrachud J. has focused on transformative vision and potentiality of the Constitution as follows in *IndianYoung Lawyers' Association v. State of Kerala*, MANU/SC/1094/2018: “Our Constitution marks a vision of social transformation. It marks a break from the past-one characterized by a deeply divided society resting on social prejudices, stereotypes, subordination and discrimination destructive of the dignity of the individual. It speaks to the future of a vision which is truly emancipatory in nature.” (para. 276).

embodiment of nation's conscience for people's welfare, they considerably influenced the constitution making process. Judicial understanding of these visions and wisdom of the father of the nation entered into the judicial process on several crucial issues.

Economic justice

Economic justice is a major value goal in the Constitution, which has several dimensions including labour welfare, poverty eradication, prevention of economic exploitation, equitable distribution of resources, protection of tribal communities, *etc.*

In contrast to the initial approaches, the judiciary, by and large, gave effect to the constitutional goals of non-concentration of wealth and equitable distribution of material resources of production to sub-serve the common good. In *I. C. Golkanath*,⁹⁸ while deciding the validity of constitutional amendment on right to property which had an adverse impact upon the idea of just and fair compensation equivalent to market value, Hidayatullah J. referred to the views of Gandhiji and resolutions of the Congress session to the effect that payment of full compensation to the land lords and *zamindars* in lieu of landed property acquired from them amounted to rob Peter to pay Paul. The court reiterated this view in upholding law which took over contract carriage buses in *Ranganatha Reddy* case.⁹⁹ The approach continued in *Bhim Singhji* case in rejecting the arguments relating to requirement of 'just compensation' in taking over of surplus property under the urban land ceiling law.¹⁰⁰ V. R. Krishna Iyer J. referred to the omission of the term 'just' on the basis of recommendation of a Committee in the Constituent Assembly, and in order to press the point that property was not part of basic structure of India, let alone of its constitution, he observed, ".....Gandhiji took the view that anything like compensation could possibly not be given when property was taken from the property owners by the State for community benefit."¹⁰¹ In arguing that removal of poverty is the 'whole adventure' of the

98 *I. C. Golakanath v. State of Punjab*, AIR 1967 SC 1643.

99 *State of Karnataka v. Ranganath Reddy*, AIR 1978 SC 215; the Court cited from the observation of Gandhiji in Round Table Conference: "If the national government comes to the conclusion that the step is necessary no matter what interests are concerned, they will be dispossessed and they will be dispossessed. I might tell you, without any compensation because if you want this government to pay compensation, it will have to rob Peter to pay Paul, and that would be impossible." "I have in mind many things I would have to do in order to equalise conditions. I am afraid that for years together India would be engaged in passing legislation in order to raise the downtrodden, the fallen, from the mire into which they have been sunk by the capitalists, by the landlords, by the so-called higher classes and then, subsequently and scientifically by the British rulers." "If we are to lift these people from the mire then it would be the bounden duty of the National Government of India in order to set its house in order, continually to give preferences to these people and even free them from the burden under which they are being crushed." (Para. 72).

100 *Maharao.Sabeh Shri Bhim Singhj, Anantalakhsbmi Pathabi and others v. Union of India*, AIR 1981 SC 234

101 *Id.*, para. 13.

Constitution, and that if justice of the situation demanded acquisition of concentration of property at lesser compensation it was permissible, the Gandhian view was relied upon.

Minerva Mills case¹⁰² is a landmark case which set right the relation between part III and part IV of the Constitution and upheld the superiority of economic justice principles under article 39 (b) and (c) over some of the provisions of part III by applying the basic structure doctrine. Tracing the background of the economic justice along with liberty after the entry of Gandhiji into freedom movement, the Court relied upon Gandhiji's following observation in support of the decision:

“Economic equality is the master key to non-violent independence. A non-violent system of Government is an impossibility so long as the wide gulf between the rich and the hungry millions persists. The contrast between the palaces of New Delhi and the miserable hovels of the poor labouring class cannot last one day in a free India in which the poor will enjoy the same power as the rich in the land. A violent and bloody revolution is a certainty one day, unless there is voluntary abdication of riches and the power that riches give and sharing them for common good.”¹⁰³

In *Ambika Prasad Mishra*,¹⁰⁴ the court referred to the contribution of social reformers including Gandhiji in advocating for gender justice as against the ‘traumatic distortion’ and arguing for equal partnership of women with men in matters of property. But in the actual outcome of the decision, this did not cast any impact as the legislative denial of separate ceiling unit for adult daughter was allowed as valid. The court's reasoning that it is not a law relating to succession; that it is for the legislature to bring pro-woman change to accommodate the rights of daughters whether married or not; and that judiciary cannot go for legislative judgment had moulded the course of decision in addition to the fact that the law had protection under Articles 31A, 31B and 31C.

For developing economic justice as a means of labour welfare, judiciary used Gandhian thoughts. In rejecting application of the English common law concept of conspiracy on whose basis an arbitration award obligated workers to compensate the employer for wrongful strike, the court in *Robtas Industries* case¹⁰⁵ cited from the example of social emancipation aimed at by Gandhiji during freedom struggle that redressing a grievance even if it meant loss of profit to business is worth pursuing. In recognising education as industry under Industrial Disputes Act, the court in *Rajappa* case¹⁰⁶, along with identifying corporate activity of labour in educational process, invoked the Gandhian notion of basic education that makes the student to learn the skills of work with an understanding that work is worship. V. R. Krishna Iyer J. in *Gujarat Steel Tube*

102 *Minerva Mills v. Union of India*, AIR 1980 SC 1789.

103 *Id.*, para. 109.

104 *Ambika Prasad Mishra v. State of Uttar Pradesh*, AIR 1980 SC 1762.

105 *Robtas Industries Ltd. and another v. Robtas Industries Staff Union*, AIR 1976 SC 425.

106 *Bangalore Water Supply and Sewerage Board v. A. Rajappa and others*, AIR 1978 SSC 548.

case¹⁰⁷ considered cooperation between capital and labour as essential for implementing the values underlying articles 39, 41, 42, 43 and 43A. He gathered support from Gandhiji's writing to the effect that in case of conflict between capital and labour emerging in the form of strike, every strike should be considered on its merit and by giving to labour its due from the labour's perspective and not what capital considers as due to the labour.¹⁰⁸ The RBI Regulations for protecting the interests of depositors in non-banking institutions were upheld in Peerless General Finance and Investment case as safeguarding right to life and right to development. The Court gathered support from Gandhiji's words: "Every human being has a right to live and therefore to find the wherewithal to feed himself and where necessary, to clothe and house himself." When law abolishes the practice of contract labour, and as a result of which workers lose their jobs, the Court in *Air India Statutory Corporation* case¹⁰⁹ used the concept of 'economic justice' to recognise employer-employee relation and prevail upon the appropriate government to submit report and provide suitable relief. In this context, the Court cited from Gandhiji as follows: "On a well ordered society the securing of one's livelihood should be, and is found to be the easiest thing in the world."¹¹⁰ While pauperism leads to moral degradation and starvation, it is recognition of economic opportunity that saves the community from economic injustice. Although in later cases on job losses,¹¹¹ a less enthusiastic approach prevailed in judicial approach, the link between economic justice and right to life established in *Air India Statutory Corporation* case remains undisturbed.

In *Samata*,¹¹² for avoiding deforestation in the Fifth Schedule occurring from unauthorised mining and the possible adverse effect upon the tribal communities, the Supreme Court invoked the idea of economic justice underlying Gandhian thoughts which ran to the effect that :¹¹³

true economics never militates against the highest ethical standard, just as all true ethics to be worth its name must at the same time be also good economics. An economics that inculcates Mammon worship, and enables the strong to amass wealth at the expense of the weak, is a false and dismal science. It spells death. True economics, on the other hand, stands for social justice, it promotes the good of all equally, including the weakest, and is indispensable for decent life.

107 *Gujarat Steel Tubes Ltd. v. Gujarat Steel Tubes Mazdoor Sabha* AIR 1980 SC 1896.

108 Anand Hingorani (ed.), *Collected Works of Mahatma Gandhi*, (*Bharatiya Vidya Bhavan*, Bombay, 1966)

109 *Air India Statutory Corporation v. United Labour Union*, AIR 1997 SC 647.

110 *Id.*, para. 51.

111 *Secretary, State Of Karnataka v. Umadevi and Others*, Civil Appeal no. 3595-3612 of 1999.

112 *Samata v. State of Andhra Pradesh*, AIR 1997 SC 3297

113 *Id.*, para. 102.

In *Mabesh Chandra* case,¹¹⁴ in holding that the State Finance Commission has obligation of conducting the public audit of defaulter's property fairly and the defaulter has also an opportunity to participate as bidder with entitlement to instalments, the Supreme Court employed the concept of economic justice. The court referred to the emphasis given by Gandhiji to cottage and village industries, support to village industries on non-exploitative mode, and fairness required in matters of finance by public sector in relation with private sector,¹¹⁵ and provided suitable remedies.

The judgments discussed in this section point out how in the spheres of land, labour, capital and enterprises, Gandhian thoughts provide guidance for economic justice, which is a key goal under the constitution.

Social justice

Social justice is not only justice in inter-personal and inter-class relation in a society it is also a dynamic device to mitigate the sufferings of the disadvantaged and to elevate them to a life of dignity and equality.¹¹⁶ The landmark judgment in *Appa Balu Ingale*¹¹⁷ acknowledged Gandhiji as a leader sincerely worked for the abolition of untouchability and a person who attributed high dignity by referring them as children of god (harijan) and relied on Gandhiji's explanation of untouchability for finding its meaning: "untouchability means pollution by the touch of certain persons by reason of their birth in a particular state of family."¹¹⁸ In reducing the rigour of burden of proof and narrowing down the scope of benefit of doubt in the matter of constitutionally criminalised offence, the overall discussion based on views expressed by Ambedkar and Gandhiji the pronouncement made a big contribution.

In *N. M. Thomas*, the Supreme Court remembered in the course of egalitarian reasoning, Gandhiji, the mass leader who had adopted as his fighting faith, the uplift of the bhangi and his assimilation into Hindu society.¹¹⁹ The Supreme Court in *K. C. Vasanth Kumar*¹²⁰ refers to Nehru's description of Gandhiji as a person who had shaken the foundation of caste system and the vision of Gandhiji that "The caste system as we know is an anachronism. It must go if both Hinduism and India are to live and grow from day to day."¹²¹ This vision was reiterated in subsequent cases on rights of converttees, right to serve in temples as *archaka* and reservation policy.¹²² In concluding

114 *Mabesh Chandra v. Regional Manager, U.P. Financial Corporation and others*, AIR 1993 935.

115 *Id.*, paras. 4 and 5.

116 K Ramaswamy J. AIR 1996 SC 2578.

117 *State of Karnataka v. Appa Balu Ingale*, AIR 1993 SC 1126.

118 Anand T Hingorani (ed.) M K Gandhi's *My Philosophy of Life*, 146 (Pearl Publications, 1961), cited in paragraph 18, AIR 1993 SC 1126.

119 *State of Kerala v. N M Thomas*, (1976) 2 SCC 320.

120 *K C Vasanth Kumar v. State of Karnataka*, AIR 1985 SC 1495.

121 *Id.*, para. 24.

122 *Kailash Sonkar v. Maya Devi*, AIR 1984 SC 600; *N Adityan v. Travancore Dewaswom Board*, AIR 2002 SC 3538; *Asbok Kumar Thakur v. Union of India*, AIR 2008 SC (Supp) 1.

that recruitment process cannot be a mechanical one based on narrow concept of efficiency alone the Supreme Court in ABSKS relied on Gandhiji's thoughts which reflected heart beat of people.¹²³

Political justice

Gandhiji's political ideals were based on traditional understanding of the Indian polity's commitment to welfare. His nationalist movement for *swaraj*, as perceived by S N Dwivedi J. in *Kesavananda*¹²⁴ was influenced by non-violence (*ahimsa*) and absence of desire for self acquisition (*aparigraha*). His notion of humanism coupled with instincts for socio-economic equality constituted catalyst of nationalist movement for *swaraj*. Hence trinity of justice –social, economic and political- was in logical order. How political justice is a means to economic and social justice, and how Gandhian idea becomes relevant to amplify the same is illustrated in *Panchayat Varga Shramajivi Samudaik Sahakari Khedut Co-op Society* case.¹²⁵ The case involved validity of district collector's order of allotting 300 acres of waste land to the co-operative society of labourers and Scheduled Caste persons on the basis of unanimous recommendation of *Grama Panchayat* for enabling cooperative farming and economic empowerment of the disadvantaged community but without issuing notice to any villager. The state government had nullified the order when objection was raised on the ground of non issuance of notice. The single and divisional benches of High Court of Gujarat asked the government to make order afresh after issuing public notice to villagers under section 96 (4) of the *Grama Panchayat Act, 1961*. The Supreme Court, while reversing the decision of the high court on the ground that the case did not come under section 96 (4) as no villager's interest was adversely affected, and that it had approval of the *Grama Panchayat*, referred to the basic objective of the law in promoting the goal laid down in articles 39 (b) and 46. The court reasoned on the basis of trinity of equality, dignity and justice and considered that providing of means of livelihood to the poor and the scheduled castes was the creative side of social justice. In arriving at such a conclusion, the court took support from Gandhiji's idea that true independence meant not merely freedom from the British rule but also justice to all citizens of India, irrespective of religion, caste, creed, language, each getting his legitimate due. The Gandhian notion of *Panchyat Raj* provides for participatory democracy, which is a means of political justice and a forum for justice according to law.¹²⁶

Secularism

Secularism was a prominent and intimate value for upholding of which Gandhiji fought an incessant struggle and laid his life. In a multi-religious society like India, it is a

123 *Akhil Bharatiya Soshit Karamchhari Sangh (Railway) v. Union of India*, AIR 1981 SC 298, para. 98.

124 *Kesavananda Bharathi v. State of kerala*, AIR 1973 SC 1461.

125 *Panchayat Varga Shramajlvi Samudaik Sahakari Khedut Co-op Society v. Haribhai Menabhai* AIR 1996 SC 2578.

126 This will be discussed under the heading *panchayat raj*.

notion of great strength. In building up the grand philosophy, design and structure of secularism in *S. R. Bommai* case¹²⁷ the Supreme Court relied on the idea of secularism which Gandhiji contemplated in *Hind Swaraj* in 1908: "India cannot cease to be one nation, because people belonging to different religions live in it....In no part of the world are one nationality and one religion synonymous terms; nor has it ever been so in India."¹²⁸ In *Pradeep Jain* case, Gandhiji was remembered for raising the national consciousness for unity in a pluralist society.¹²⁹ The judgment by the majority in *Ismail Furuqui*,¹³⁰ after engaging in discussion about the philosophy and social side of secularism concludes with a note that, Ishwar and Allah are the names of the same Almighty whose grant of wisdom to all brings peace and prosperity.

Right to life and the issues of death penalty, suicide and euthanasia

Gandhiji had a philosophically profound idea about value of human life. His love for humanity comes from cultural ethos of India and pragmatic understanding of penology and responsibility of the state. He wrote, "Destruction of individuals can never be a virtuous act. The evil-doers cannot be done to death. Today there is a movement afoot for the abolition of capital punishment and attempts are being made to convert prisons into hospitals as if they are persons suffering from a disease." His firm belief was "God alone can take life, because He alone gives it." Strongly relying on these thoughts, V. R. Krishna Iyer J. in *Rajendra Prasad* case carried battle against death penalty or at least commutation of it into life sentence.¹³¹ In *Bachan Singh* case the dissent by P. N. Bhagwati J. relies on Gandhian idea that every offender can be reclaimed and transformed by love and it is unethical and immoral to kill him.¹³² While the rule of rarest of rare case prevails in the matter of imposition of death penalty, the inherent defects in the system resulting in the possibility of hanging innocent persons have proved the merits of Gandhian approach on the issue.

In *Rathinam Patnaik*, the discussion on criminalisation of suicide starts with a quote from Gandhiji to the effect that "Death is our friend, the trust of friends. He delivers us from agony. I do not want to die of a creeping paralysis of my faculties-a defeated man".¹³³ The judgment cites from Gandhiji again for dealing with the question of morality *vis-a-vis* law. It recognises right to die as a part of right to life, a proposition

127 *S R Bommai v. Union of India*, AIR 1994 SC 1918.

128 *Id.*, para. 24.

129 *Pradeep Jain v. Union of India*, AIR 1984 SC 1420.

130 *Ismail Furuqui v. Union of India*, AIR 1995 SC 605.

131 *Rajendra Prasad v. State of Uttar Pradesh*, AIR 1976 SC 916; also see *Dalbir Singh v. State of Punjab*, AIR 1979 SC 1384.

132 *Bachan Singh v. State of Punjab*, AIR 1982 SC 1125.

133 *Rathinam/Nagbhushan Patnaik v. Union of India*, AIR 1994 SC 1844.

overruled by the Supreme Court in *Gian Kaur* case. Since the question of euthanasia was not decided in that case,¹³⁴ the matter was taken up in *Common Cause* case.¹³⁵

In the *Common Cause*, the judgment by Dipak Misra CJI and A M Kanwilkar J elaborately refer to Gandhian thoughts on *euthanasia*. The discussion that took place around the issue of mercy killing of an ailing calf in Gandhi Ashram throws much light about the controversial issue. After a heated debate, Gandhiji took a decision of 'painlessly ending the life of suffering'.¹³⁶ He concluded that while the positive outlook towards life required humane nursing and medical care, when continuance of life is an instance of suffering *karma*, does not object painless ending. The argument that one cannot take away a life, which he cannot give did not become convincing as the taking was not with self-interest. Regarding one's own close relatives suffering from terminal illness a man or woman may have inclination to support to the extent of his or her possible ability, regarding others including friends, there would be hesitations to support. Both the medical assistance to prolong life and the assistance to end the life of suffering are efforts of freeing the soul from the suffering body. So long as the intention of violence, anger or self-interest is not working behind the decision to end life the decision to end a life of intolerable suffering becomes acceptable. Delving in this deep logic and other inputs, the Supreme Court unanimously approved passive *euthanasia* and condemned active *euthanasia*.¹³⁷ The court also laid down procedural guidelines for executing passive euthanasia by private parties. Gandhian thoughts became convincing moral arguments in support of decisions relating to human dignity in complex circumstance of coma.

Fair treatment by the criminal justice system

As a legal practitioner, target of repressive measures of the colonial authority, lover of human rights and organiser of mass movements, Gandhiji had experiential insights for fair legal procedure and just treatment of the accused and the convicts. His criticism of unfair procedure followed by the British in post-Jalianwallahbaug era is explicit in his classic written submission in the famous sedition case. In *Lingala Vijaya Kumar*¹³⁸ the issue was excessive sentencing of seven young naxalites for acts of dacoity in a bank for few thousand rupees. The trial judge had awarded punishment for 2 and an half years in view of the age, good behaviour during trial and their attitude to help the poor. The appellate court enhanced the sentence to seven years of rigorous imprisonment. V. R. Krishna Iyer J, gathered support from Gandhiji's idea of criminal as morally aberrant patient, prison as a hospital for correctional treatment and sympathetic and reformatory treatment as an approach that instils human dignity.¹³⁹

134 This is the viewpoint of the Supreme Court in *Aruna Shanubhagh v. Union of India*, (2011) 4 SCC 454.

135 *Common Cause (A Registered Society) v. Union of India*, Civil WP no. 215 of 2005.

136 *Navajivan* (30-9-1928); *Young India* (4.10.1928).

137 *Common Cause (A Registered Society) v. Union of India*, Civil WP no. 215 of 2005, para. 49.

138 *Lingat Vijaya Kumar v. Public Prosecutor, AP, Hyderabad*, AIR 1978 SC 1485.

139 *Id.* para. 10.

The court commuted the sentence to the period indicated by the trial judge, and directed for orienting the prisoners in humane course, facilitating good reading for improving and nourishing of their minds, separating them from other criminals and providing recreational facilities. The Supreme Court again emphasised the need for bringing correctional orientation to child prisoners in *Hira Mallick* case,¹⁴⁰ gathering inspiration from Gandhian thoughts on penology and correctional reforms. In *Mobd. Giasuddin*,¹⁴¹ while deciding about fair wages to prisoners for their work, the Court again invoked the Gandhian model of correctional reforms in jails so that prison justice is a part of social justice. While interpreting that the period of release under parole should also be included in the calculation of period of imprisonment, the court in *Maru Ram* gathered support from Gandhian ideas of prison reform.¹⁴²

Right to education and mother tongue instruction

Gandhiji considered that education, by all-round drawing out the best in a child – mind, body and spirit- casts great impact upon the society. He experimented in *nai talim*, and appealed, “Learn as if you were to live forever.” Taking a clue of diversity of educational activities from this message, the Supreme Court in *Maharshi Mahesh Yogi Vedic Vishwa Vidyalaya* case considered that disallowing education other than dissemination of *vedic* knowledge violated rights under articles 14, 21A, 45 and 46.¹⁴³

While upholding a government order mandating for compulsory study of regional language as one of the subjects in primary schools and high schools in English Medium Students Parents Association case,¹⁴⁴ the Supreme Court analysed its rationale in the light of Gandhiji’s observation that it is but natural for the child to learn in her mother tongue for her mental development, and it is an unnecessary burden to study in an alien language. Although in the matter of medium of instruction, the policy of regional language as the sole medium of instruction was rejected by the Supreme Court in a subsequent case¹⁴⁵ on account of minority right, the principle laid down in the English Medium Students Parents Association case is kept intact. Gandhiji’s idea of developing hindi as a language acceptable to majority of people by borrowing from other Indian languages and his idea of linguistic organisation of states came to be recognised in constitutional policy and practice.¹⁴⁶

140 *Hiralal Mallick v. State of Bihar* AIR 1977 SC 2236.

141 *Mobd. Giasuddin v. State of A.P.*, AIR 1977 SC 1926.

142 *Maru Ram v. Union of India*, AIR 1980 SC 2417; also see *Inder Singh v. State (Delhi Administration)*, AIR 1978 1091.

143 *Maharshi Mahesh Yogi Vedic Vishwa-vidyalaya v. State of M. P.*, AIR 2013 SC (Supp) 744.

144 *English Medium Students Parents Association v. State of Karnataka*, AIR 1994 SC 1702.

145 *State of Karnataka v. Associated Management of (Government Recognised Unaided English Medium) Primary and Secondary Schools*, AIR 2014 SC 2094.

146 The Constitution of India, art. 351; State Reorganisation Commission Report 1955; also see *U. P. Hindi Sabitya Sammelan v. State of U.P.*, AIR 2015 SC 1154.

Panchayat Raj

Village *Panchayat* is a key institution of self-government in Gandhian polity and the State is contemplated in Article 40 to organise them with devolution of necessary powers. In *Narendra Madivalappa Kheni*,¹⁴⁷ the Supreme Court noted with sadness the State inaction obstructing devolution and decentralisation of powers, unwarranted suppressions of elected bodies and gross failure to notify the election process, which were going against the spirit of article 40. The Court expressed disappointment for not effectuating the Gandhian idea underlying it in the course of redressing electoral malpractice.

The concept of participative democracy included accountability of the elected body through confidence motion. When this is introduced through a legislative amendment, its constitutionality was challenged. In upholding the constitutionality of the amendment the court in *Bhanumati*¹⁴⁸ relied on the Gandhian principle of participatory democracy which provides that the *Panchayat* may become viable and responsive people's bodies as an institution of governance and thus it may acquire the necessary status and function with dignity by inspiring respect of common man. The court viewed that the constitutional policy was initiating changes to replace ascendancy of rural feudal oligarchy by facilitating the voiceless mass to realize their strength. In identifying such a dynamic role of *Panchayat Raj* Institution, reference to Gandhian idea had come to court's help.

Cow protection

Gandhiji's concept of cow protection, in addition to be philosophic,¹⁴⁹ had a pragmatic approach in the context of an agrarian economy. According to him, preservation of the cow called for positive measures such as performance of duty towards the cow by feeding, rearing, breeding and scientific management of cow shelter for aged cows, which will comprehensively make all to respect cows.¹⁵⁰ But as ardent believer and practitioner of *ahimsa*, he strongly condemned killing of human being for protecting the cows.¹⁵¹ When one reads the Supreme Court's judgment in anti-lynching case, he finds the importance of this approach of Gandhi vindicated.¹⁵² R. C. Lahoti's CJ, reasoning in *Mirzapur Moti Kuresbi* case in expounding the meaning of 'compassion to living creatures' in article 51A (g) echoes Gandhian argument of avoiding ingratitude

147 *Narendra Madivalappa Kheni v. Manikrao Patil*, AIR 1977 SC 2171.

148 *Bhanumati v. State of UP*, AIR 2010 SC 3796.

149 He looks at cows as poem of pity, gentle and dumb creation of God, supporter of life, an object of piety and representative of the helpless and the weak in the world. R K Prabhu and U R Rao, *The Mind of Mahatma Gandhi* 387 (Navajivan Publishing house, Ahmedabad, 1945, 1987).

150 *Id.* at 390. He said, "Cow slaughter can never be stopped by law. Knowledge, education, and the spirit of kindness towards her alone can put an end to it." at 388.

151 *Id.* at 398.

152 *Tehseen S Poonavalla v. Union of India*, MANU/SC/0738/2018.

to the helpless cows especially in their old age and the need for compassion to the weak and the meek.¹⁵³ It is the duty towards nature which stands above the modernist approach of ‘my food, my stomach and my wish or privacy’. The Supreme Court, while upholding a Municipal Corporation’s notification of list of holidays for slaughter houses, which included birthdays of Rama, Krishna, Mahaveera and Gandhiji referred to Gandhiji as a champion of non violence and to the cultural practice that festive days are to be celebrated by abstinence of meat.¹⁵⁴

Cleanliness, hygiene and environmental protection

Gandhiji emphasised on cleanliness and hygiene as a means of healthy life. In *Rajbala*¹⁵⁵ the Supreme Court remembered the copious writing of Gandhiji against the practice of open defecation and his missionary zeal for eradicating that practice altogether. Gandhiji’s priority to attain this goal even over freedom struggle, speaks about the high importance of hygiene. The court upheld an amendment to *Haryana Panchayati Raj Act, 1994* and insertion of clause (w) to section 175 (1) requiring the candidates to possess a functional latrine at their homes as the need of the hour and an objective that should have been realised long back.

Gandhiji ventured to suggest that “it is the fundamental law of Nature, without exception, that Nature produces enough for our wants from day to day, and if only everybody took enough for himself and nothing more, there would be no pauperism in this world, there would be no more dying of starvation in this world.”¹⁵⁶ In building up the doctrine of public trust and ecocentrism, and effectuating them the Supreme Court has employed the message underlying this approach.¹⁵⁷ These approaches are basic ideas around which the present environmental law has enormously developed.

Prohibition of alcohol

Gandhiji was a strong advocate of non-alcoholism and initiator of temperance movement. He considered drugs and alcohol as ruining the lives of their users.¹⁵⁸ In the CA the policy of prohibition of consumption of alcohol was discussed from the perspective of health, morality and proper use of resources by the poor by remembering

153 *State of Gujarat v. Mirzapur Moti Kuresbi Kassab Jamat*, AIR 2006 SC 212 Para 71.

154 *Municipal Corporation of the City of Ahmedabad v. Jan Mohammed Usmanbhai*, AIR 1986 SC 1205; *Hinsa Virodhak Sangh v. Mirzapur Moti Kuresb Jamat*, AIR 2008 SC 1892.

155 *Rajbala v. State of Haryana*, AIR 2016 SC 33.

156 M K Gandhi, *Trusteeship*3 (Navajivan Publishing House, Ahmedabad, 1960); Rabindranath Tagore’s words to the effect that earth provides enough to satisfy everyman’s need but not his greed resonates same message.

157 *T. N. Godavarman Thirumulpad v. Union of India* (2012) 4 SCC 362; also see *T. N. Godavarman Thirumulpad v. Union of India*, AIR 2012 SC 1254.

158 Available at https://www.mkgandhi.org/ebks/peace_nonviolence.pdf, (last visited on May 17, 2019.)

Gandhiji.¹⁵⁹ The Supreme Court in *P N Kaushal*¹⁶⁰ has elaborately referred to Gandhiji's writings about the evils of drinking: the poor as the greatest sufferers because of denial of food and necessities to family members, ill treatment of starving members of the family, misery, ill health and premature death.¹⁶¹ Hence the policy of prohibition has great reformative potential for the society. The court upheld the law which declared few days as 'dry'. It is the constitutional morality that an individual shall not become a victim of drinking alcohol.

What is conspicuous in the above judicial references to Gandhian thoughts and the juristic approach is that they were more aimed at bringing the essential ethics required in public life rather than using Gandhi quotes as rhetoric flourish or decorative embellishment of language. Each of the aspects discussed above were questioning modernity and reflecting postmodernism in one way or other. They are intimate to the people who consider Gandhian thoughts as always relevant for people's welfare. It is for this reason that, after referring to various Supreme Court judgments which used Gandhian ideas for their reasoning and other Gandhian literature, Dipak Misra J in *Devidas Ramachandra Tulzapurkar* defends people's image of Gandhiji against obscene depictions as it is symbol of the ideas of people's welfare, a core outlook of postmodernism.¹⁶²

Reference to Gandhian thoughts has enabled the judiciary to go beyond the constitutional text, unearth the philosophy underlying constitutional morality and fill the silences by invoking the constitutional values. High watermark of references to Gandhian thoughts can be found in the judgments rendered by Justice V R Krishn Iyer and Justice K Ramaswamy and the trend is revived in the judgments of Justice Dipak Misra. In the latest judicial discourse, this is bringing constitutional morality to the forefront and defending it by gathering support from people's support at the back of the Constitution.¹⁶³ In fact, for a flourish of constitutional morality people's performance of duty is a must as per Gandhiji. The wide range of topics on which the judiciary has invoked support from Gandhian thoughts, reflect the comprehensive nature of their canvas and the interrelated network of values that uphold constitutional morality purging individual, public and social morality. The judicial references have looked at Gandhian thoughts as compatible with progressive outlook, and fall in line with the effort of fulfilling aspirations of transformation underlying the Constitution.

159 Prof Shibban Lal Saksen and B H Khandekar's speech on 24/11/1949 in Constituent Assembly Debates Book 2, Vol. VII 555-559.

160 *P. N. Kaushal v. Union of India* AIR 1978 SC 1457; also see *Lakshmi Narain v. District Excise Officer, Fatehpur etc.*, AIR 1978 SC 1476; *State of U.P. v. Jagjeet Singh and others* AIR 2004 SC 1073; *Ashok Lenka v. Rishi Dikshit* AIR 2006 SC 2382.

161 Anand Hingorani(ed.), *supra* note 108 at 29-30, 47.

162 *Devidas Ramachandra Tulzapurkar v. State of Maharashtra*, AIR 2015 SC 2612.

163 *State (NCT of Delhi) v. Union of India*, (2018) 8 SCC 501.

VII Conclusions

Disappointed with modernist solution, a search for the links of law with the ethos of culture, decentralised democracy, social morality, humanism, pluralism, welfare and reasonable approach of non-state actors has great potentiality of unravelling the intimate social values and appropriate direction for legal development. In this matter, the resemblance between Gandhian thoughts and postmodernism is both wide and deep. Gandhian thoughts were ahead of jurisprudential thinking on postmodernism, not only chronologically, but also in their wide reach, practical social foundation, convincing philosophical reasoning and concern for ethical good among people both individually and collectively. They are ever-relevant because of their comprehensive vision, focus on all-round development of individuals and communities and love for humanism and pluralism. They are pragmatic and worth following in a socially inclusive participative democracy. Many of his ideas such as civil disobedience, primacy of duties, gram swaraj, cleanliness, abolition of untouchability, women's equal rights, vernacular education were tested by himself on the basis of experiment and experience and were put forward as attainable goals.

Although there was no wholesale incorporation of Gandhian Constitution, the Indian Constitution that emerged as originally or through constitutional amendments and judicial interpretations has greatly gained from Gandhian thoughts. The judicial approach has not been ritualistic showering of homage to the father of the nation, but one of discovering new meaning to the text in the light of extensive writings of Gandhiji which were based on the life experiences of a statesman, who visualised all-round development of the society through collective effort.

Gandhian thinking on constitutional values and institutions has focused on purposive character of the polity and conceptualises constitutional morality as a means of social transformation that blesses both individual and community life towards higher levels of achievement. The fact that Gandhism is central to the vision and working of the Constitution should compel 'We the People' to develop strong constitutional morality with effective functioning of decentralised democracy in a multicultural set up, aspiring for the trinity of justice, social, economic and political.

In synthesizing Gandhian philosophy with constitutional philosophy, the role of judiciary has been significant. Gandhian thoughts have helped the judiciary to transcend the text and build up constitutional jurisprudence on sound ethical foundation by drawing the juice of humanism, dignity and equality. Judiciary could prioritize the goals of environmental protection and socio-economic justice by reference to Gandhian thoughts. The Parliament's approach to implement Gandhian thoughts through constitutional amendments, whether relating to agrarian reforms, recognition of fundamental duties or activating Panchayat raj and cooperative societies shows consensus about making the Constitution to breathe the air of Gandhian thoughts. The rich post-modernistic discourse on Gandhism is matching with the great tasks set by transformative constitutionalism.