KLE LAW ACADEMY BELAGAVI

(Constituent Colleges: KLE Society's Law College, Bengaluru, Gurusiddappa Kotambri Law College, Hubballi, S.A. Manvi Law College, Gadag, KLE Society's B.V. Bellad Law College, Belagavi, KLE Law College, Chikodi, and KLE College of Law, Kalamboli, Navi Mumbai)

STUDY MATERIAL

for

CONSTITUTIONAL LAW I

Prepared as per the syllabus prescribed by Karnataka State Law University (KSLU), Hubballi

Compiled by

Ms. Sharada K.S., Asst. Prof.

Ankita Pandey, Asst. Prof.

Reviewed by Ms. Sharada K.S., Asst. Prof.

KLE Society's Law College, Bengaluru

SYLLABUS

UNIT-I:

Meaning & Definition of Constitution: kinds of Constitution, Constitutionalism, Salient features of Indian Constitution.

Preamble: Meaning, Scope, Importance, Objectives and Values enshrined in the Preamble.

Citizenship- modes of acquisition & termination.

UNIT-II:

State: Definition under Article 12, New Judicial trends on concept of State Action- need for widening the definition.

Definition and Meaning of Law: Pre- Constitutional and Post- Constitutional Laws, Doctrine of Severability and Doctrine of eclipse, Judicial Review and Article 13.

Equality and Social Justice: General Equality Clause under Article 14, New Concept of Equality, Judicial Interpretation on Equality.

UNIT-III:

Protective Discrimination and Social Justice under Articles 15 and 16, New Judicial trends on Social Justice, Constitutional Provisions on Untouchability under Article 17.

Right to Freedom: Freedom of Speech and Expression, Different dimensions - Freedom of Assembly, Association, Movement and Residence, Profession, Occupation, Trade or business, Reasonable restrictions.

UNIT-IV:

Rights of the Accused: Ex-post facto Law; Double jeopardy — Right against self incrimination (Article 20). Rights of the arrested person, Preventive Detention Laws (Article 22), Right to Life and Personal Liberty, Various facets of Life and Liberty (Article.21), Right against Exploitation, Secularism - Freedom of Religion, Judicial interpretation, Restrictions on freedom of religion.

UNIT-V:

Cultural and Educational Rights of minorities - Recent trends - Right to Constitutional Remedies: Article 32 and 226 — kinds of writs - Right to property (prior to 1978 and the present position), Directive Principles of State Policy and Fundamental Duties- inter relation between fundamental rights and directive principles.

UNIT - I

- **Meaning & Definition of Constitution**
- **Kinds of Constitution**
- **Constitutionalism**
- **Salient features of Indian Constitution.**
- **Preamble: Meaning, Scope, Importance, Objectives and Values enshrined in the Preamble.**
- **Citizenship- modes of acquisition & termination.**

Introduction

Every country must have a constitution as the constitution helps and guides in governing a country. History tells that since the origin of the countries there have been some kinds of rules and regulations to maintain the order and harmony. In every country be it democratic or despotic it is essential that rules must be accepted which would decide the role and organization of political institutions in order to save the society from anarchy. And now, in modern states these rules took the appearance in the form of a constitution

Meaning of a constitution

It is the supreme law of the State. It is the foundation and source of the legal authority underlying the existence of the State. It provides the framework for the organization of the State Government. A constitution is a basic design, which deals with the structure and powers of the government. It also includes rights and duties of citizens. Sometimes it is found in an established body of rules, maxims, traditions and practices in accordance with which its government is organized and its powers are exercised. A constitution is a basic design, which deals with the structure and powers of the government. It also includes rights and duties of citizens. Very often 'constitution' is understood as a document which has been written and accepted at a particular time, but this is not the true meaning of constitution, constitution may be written or may be unwritten. The basic principles of a nation state that determine the powers and duties of the

government and guarantee certain rights to the people in it. A written instrument embodying the rules of a political and social organization. The fundamental law, written or unwritten, that establishes the character of a government by defining the basic principles to which a society must conform; by describing the organization of the government and regulation, distribution, and limitations on the functions of different government departments; and by prescribing the extent and manner of the exercise of its sovereign powers.

The term Constitution is derived from Latin 'Constitute' which means 'to establish'. The constitution is the basic document of a state. It is the fundamental rule of a state which regulates

the distribution of powers within organs of government. A constitution means a document having a special legal sanctity which sets out the frame-work and the principal functions of the organs of the Government of a state and declares the principles governing the operation of those organs.

Definition of Constitution

Aristotle explains, "Constitution as the way in which, citizens or the component parts of the state are arranged in relation to one another".

According to Woolsey, a constitution "the collection of principal according to which he powers of the government rights of the government and relations between the two are adjusted."

Bryce defines it as "the aggregate of laws and customs under which the life of state goes on the complex totality of laws embodying the principles and rules whereby the community is organized, governed and held together".

Herman Finer says, - "the state is a human grouping in which rules a certain power relationship between its individuals and associated constituents. This power relationship is embodied in political institutions. The system of fundamental political institutions is the constitution the autobiography of the power relationship."

Austin has defined constitution saying, "That it fixes the structure of supreme government."

Kinds of Constitution Written Constitution

A written constitution is single, formal document that describes the arrangement of governance in a country. It is framed in a systematic manner, usually by a representative body called the constituent assembly after many deliberations and discussions and therefore is also known as codified Constitution or enacted Constitution. It also specifies the date of its enactment. A written constitution is generally rigid in nature, i.e., a defined procedure which is different from the procedure of making an ordinary legislation is laid down to amend it, examples are – American Constitution and Indian Constitution.

Unwritten Constitution

An unwritten Constitution is not written in a single document. It is derived from a number of sources that are part written and part unwritten, including conventions, traditions, customs, Acts of Parliament and the common law, and hence is also called a cumulative Constitution. It evolves over a period of time and therefore is also known as an evolved Constitution. An unwritten constitution is usually flexible in nature as the amendment procedure is simple and usually there is no difference between the procedure of making an ordinary legislation and the procedure of amending the Constitution, example – British Constitution.

However, no Constitution in this world is completely written or unwritten. Outside the Constitution, several conventions are followed in India. For example, according to the Constitution, to be chosen for the post of Speaker of Lok Sabha, the fundamental condition is to be a member of the Lok Sabha. But, in practice, an additional condition in the form of a convention – choosing the Speaker of Lok Sabha from the majority party – is followed in India. Also, though the British Constitution is largely unwritten, it is based on several written laws such as the Magna Charta 1215, the Bill of Rights 1689 and so on. Therefore, every written constitution, includes certain unwritten components and every unwritten constitution, includes certain written components.

Flexible Constitution

The Flexible or Elastic Constitution is the kind of constitution that can easily be changed. For this type, constitutional law can be amended in the same way as ordinary law. The Parliament can alter constitutional principles and define new baselines for government action through ordinary legislative processes, e.g. UK and Canada Constitution.

Some advantages of a flexible constitution include:

i. Its ability to change quickly in accordance with changes in the social and political environment of the society and the state.

ii. Helpful in meeting emergencies since it can be easily amended.

iii. It is dynamic; hence there is less opportunity for revolt. This is also because of its ability to keep pace with changing times.

iv. It keeps on developing with time; hence, it is up to date and popular.

Disadvantages of a flexible constitution include:

i. It is a source of instability. This is because the government in power can use it for its benefit.

ii. It is unsuitable for a federation. This is because it can lead to undesired changes by the federal government or governments of federating units.

Rigid Constitution

The Rigid or Inelastic Constitution is the kind of constitution that cannot be easily amended (usually, a Written Constitution). Moreover, it is a constitution whose terms cannot be altered by ordinary forms of legislation, only by special amending procedures. That is to say, if the constitution itself provides that particular amendment, then it could be possible to amend the Constitution.

Advantages of a rigid constitution include:

i. It is a source of stability in administration

ii. It maintains continuity in administration

iii. It cannot become a tool in the hands of the party exercising the state's power at a particular time.

iv. It prevents the autocratic exercise of powers by the government

v. It is ideal for a federation

Disadvantages of a rigid constitution include:

i. It doesn't keep pace with the fast-changing social environment

ii. It hinders the process of social development because of its inability to change easily

iii. It is a source of hindrance during emergencies

iv. Its inability to change easily can lead to revolts against the government

v. It can be a source of conservativeness.

Federal constitution

Under a federal constitution exists a division of powers between central government and the individual states or provinces which make up the federation. The powers divided between the federal government and states or provinces will be clearly set down in the constituent document.

E.g. the USA, Canada, Australia, Nigeria, Malaysia, Germany, Switzerland and etc.

Some major characteristics of the federal form of the constitution are-

1. Division of power: The distinctive character of a federal constitution is a division of power between the central government and the constituent units-such as states, provinces, regions. This unit has the power to pass laws on the subjects allotted to them.

2. Division of Sovereignty: In a federal constitution, sovereignty is divided between the national and state units.

3. Dual Citizenship: In a federal constitution, it is stated that a citizen can enjoy dual citizenship. Citizens can enjoy the rights given by both the authorities. He must obey the norms of constitutions.

4. Dual Representation: In a federal constitution, the legislature is bicameral. One chamber constitutes the federating units and the other chambers serve the people of the nation.

5. Supremacy of Constitution: The central and state governments must obey the constitution. The federal constitution does not tolerate infringement.

6. Rigid: A federal constitution has the major legal authority than the other laws. It can be amended only in special circumstances. The federal constitution cannot be changed in the same way as the other laws.

Unitary Constitution

Constitutions of this nature exist in a state where a government is formed after a union of two or more sovereign states. A state is governed as a one single unit in which the central government is supreme and any administrative divisions exercise only powers which their government chooses to delegate, e.g. Tanzania (Zanzibar and Mainland Tanzania), U.K (Scotland, Wales, N. Ireland and England) and etc.

Some major characteristics of the unitary constitution are stated below:-

1. Most Effective Form of Constitution: The unitary constitution is said to be the most effective form of constitution. In the unitary system, the uniformity of law, policy and administration exists throughout the country. It promotes national harmony among the citizens of the country.

2. Single Citizenship: In a unitary constitution, a citizen enjoys single citizenship.

3. Efficient in Defence and Foreign Affairs: In the field of defence and foreign affairs the unitary constitution is manifest. The clear cut policies can be executed in foreign policies and securities of the country.

4. Single Government: In a unitary system, there is only one central government and the sovereign power belongs to the central government.

5. Flexible: The unitary constitution is flexible. It can be easily changed according to circumstances.

Difference between a unitary and federal constitution:-

A constitution Lays down the forms of the government it regulates the distribution of power to various organs of governments Constitution have been classified as unitary and Federal constitution the major difference between unitary and federal constitution are stated below:-

1. Meaning: In a unitary constitution, all the powers of the government are concentrated in the central authority. Whereas the federal constitution means that the government shares power in a country with all state levels and units of other agencies. A federal constitution refers to a document that frames the laws, values, and missions of a federal, or supreme, authority in a country or region.

2. Citizenship: In a unitary constitution, a citizen can be entitled to single citizenship. He does not enjoy the rights of another country. On the other hand, in the federal constitution, a citizen can enjoy dual citizenship. He must obey the rights of both countries.

3. Government: In unitary constitution, there is a single power known as a central government and it controls the entire government indeed all the power and administrative authority reside in the central place. On the other hand, In the Federal constitution, there is a dual government central government and state government. A country can have two levels of the Federal government as it performs through the general body or the power prescribed by a constitution of the state.

4. Changeable: A unitary constitution is easily changeable, where the amendment can be as simple as passing a simple part of the law. Whereas, A federal constitution is not easily changeable. It can be only amended by special circumstances.

5. Codified and Uncodified: A unitary constitution is an uncodified constitution that is not coded structurally. The constitutions have evolved day by day and a new set of laws and guidelines are being added over time. On the other hand, federal constitution is coded in a specific document. The constitution is the highest form of law in the country and no other law or country can violate the constitution. The constitution generally defines the power of the state, the organs of the state, and the functions of each, the relationship between each other, and the rights of the people.

Republican Constitution:

A constitutional republic is a form of government in which the head of the state, as well as other officials, are elected by the country's citizens to represent them. Those representatives must then follow the rules of that country's constitution in governing their people. Like the U.S. government, a constitutional republic may consist of three branches – executive, judicial, and legislative – which divide the power of the government so that no one branch becomes too powerful.

A country is considered constitutional republic if:

- It has a constitution that limits the government's power
- The citizens choose their own heads of state and other governmental officials

Constitutional monarchy

It is a form of government in which a monarch—typically a king or queen—acts as the head of state within the parameters of a written or unwritten constitution. In a constitutional monarchy, political power is shared between the monarch and a constitutionally organized government such as a parliament. Constitutional monarchies are the opposite of absolute monarchies, in which the monarch holds all power over the government and the people. Along with the United Kingdom, a few examples of modern constitutional monarchies include Canada, Sweden, and Japan.

Presidential Constitution

Under this constitution model, the head of the executive branch is also head of state, and is not a member of or directly responsible to the legislature, e.g. Tanzania, Kenya, Uganda, and etc.

Merits of Presidential System

- Separation of powers: Efficiency of administration is greatly enhanced since the three arms of the government are independent of each other.
- Expert government: Since the executive need not be legislators, the President can choose experts in various fields to head relevant departments or ministries. This will make sure that people who are capable and knowledgeable form part of the government.

 Stability: This type of government is stable. Since the term of the president is fixed and not subject to majority support in the legislative, he need not worry about losing the government. There is no danger of a sudden fall of the government. There is no political pressure on the president to make decisions.

 Less influence of the party system: Political parties do not attempt to dislodge the government since the tenure is fixed.

Demerits of Presidential System

 Less responsible executive: Since the legislature has no hold over the executive and the president, the head of the government can turn authoritarian.

 Deadlocks between executive and legislature: Since there is a more strict separation of powers here, there can be frequent tussles between both arms of the government, especially of the legislature is not dominated by the president's political party. This can lead to an erosion in efficiency because of wastage of time.

 Rigid government: Presidential systems are often accused of being rigid. It lacks flexibility.

 Spoils system: The system gives the president sweeping powers of patronage. Here, he can choose executives as per his will. This gives rise to the spoils system where people close to the president (relatives, business associates, etc.) get roles in the government.

Parliamentary Constitution:

It is a form of a Constitution of a state in which the chief executive is a Prime Minister who is a member of and is responsible to the legislature, e.g. U.K, and Israel.

Features of the parliamentary system

 Close relationship between the legislature and the executive: Here, the Prime Minister along with the Council of Ministers form the executive and the Parliament is the legislature. The PM and the ministers are elected from the members of parliament, implying that the executive emerges out of the legislature.

- Executive responsible to the legislature: The executive is responsible to the legislature. There is a collective responsibility, that is, each minister's responsibility is the responsibility of the whole Council.

- Dual executive: There are two executives – the real executive and the titular executive. The nominal executive is the head of state (president or monarch) while the real executive is the Prime Minister, who is the head of government.

- Secrecy of procedure: A prerequisite of this form of government is that cabinet proceedings are secret, and not meant to be divulged to the public.

- Leadership of the Prime Minister: The leader of this form of government is the Prime Minister. Generally, the leader of the party that wins a majority in the lower house is appointed as the PM.

- Bicameral Legislature: Most parliamentary democracies follow bicameral legislature.

- No fixed tenure: The term of the government depends on its majority support in the lower house. If the government does not win a vote of no confidence, the council of ministers has to resign. Elections will be held and a new government is formed.

Merits of Parliamentary System

- Better coordination between the executive and the legislature: Since the executive is a part of the legislature, and generally the majority of the legislature support the government, it is easier to pass laws and implement them.

- Prevents authoritarianism: Since the executive is responsible to the legislature, and can vote it out in a motion of no confidence, there is no authoritarianism. Also, unlike the presidential system, power is not concentrated in one hand.

- Responsible government: The members of the legislature can ask questions and discuss matters of public interest and put pressure on the government. The parliament can check the activities of the executive.

- Representing diverse groups: In this system, the parliament offers representation to diverse groups of the country. This is especially important for a country like India.

- Flexibility: There is flexibility in the system as the PM can be changed easily if needed. During the Second World War, the British PM Neville Chamberlain was replaced by

Winston Churchill. This is unlike the presidential system where he/she can be replaced only after the entire term or in case of impeachment/incapacity.

Demerits of Parliamentary System

- No separation of powers: Since there is no genuine separation of powers, the legislature cannot always hold the executive responsible. This is especially true if the government has a good majority in the house. Also, because of anti-defection rules, legislators cannot exercise their free will and vote as per their understanding and opinions. They have to follow the party whip.

- Unqualified legislators: The system creates legislators whose intention is to enter the executive only. They are largely unqualified to legislate.

- Instability: Since the governments sustain only as long as they can prove a majority in the house, there is instability if there is no single-largest party after the elections. Coalition governments are generally quite unstable and short-lived. Because of this, the executive has to focus on how to stay in power rather than worry about the state of affairs/welfare of the people.

- Ministers: The executive should belong to the ruling party. This rules out the hiring of industry experts for the job.

- Failure to take a prompt decision: Because there is no fixed tenure enjoyed by the Council of Ministers, it often hesitates from taking bold and long-term policy decisions.

- Party politics: Party politics is more evident in the parliamentary system where partisan interests drive politicians more than national interests.

- Control by the bureaucracy: Civil servants exercise a lot of power. They advise the ministers on various matters and are also not responsible to the legislature.

CONSTITUTIONALISM

Besides the concept of the Constitution, there is also the all-important concept of 'Constitutionalism'. Modern political thought draws a distinction between 'Constitutionalism' and 'Constitution'. A country may have the 'Constitution' but not necessarily 'Constitutionalism'. For example, a country with a dictatorship, where the dictator's word is law, can be said to have a 'Constitution' but not 'Constitutionalism'. The underlying difference between the two concepts is that a Constitution ought not merely to confer powers on the various organs of the government, but also seek to restrain those powers. Constitutionalism recognises the need for government but insists upon limitations being placed upon governmental powers. Constitutionalism envisages checks and balances and putting the powers of the legislature and the executive under some restraints and not making them uncontrolled and arbitrary. Unlimited powers jeopardise freedom of the people. As has been well said: power corrupts and absolute power corrupts absolutely. If the Constitution confers unrestrained power on either the legislature or the executive, it might lead to an authoritarian, oppressive government. Therefore, to preserve the basic freedoms of the individual, and to maintain his dignity and personality, the Constitution should be permeated with 'Constitutionalism'; it should have some in-built restrictions on the powers conferred by it on governmental organs. 'Constitutionalism' connotes in essence limited government or a limitation on government. Constitutionalism is the antithesis of arbitrary powers. 'Constitutionalism' recognises the need for government with powers but at the same time insists that limitations be placed on those powers. The antithesis of Constitutionalism is despotism. Unlimited power may lead to an authoritarian, oppressive, government which jeopardises the freedoms of the people. Only when the Constitution of a country seeks to decentralise power instead of concentrating it at one point, and also imposes other restraints and limitations thereon, does a country have not only 'constitution' but also 'constitutionalism'. 'Constitutions spring from a belief in limited government'. According to SCHWARTZ, in the U.S.A., the word Constitution means "a written organic instrument, under which governmental powers are both conferred and circumscribed". He emphasizes that "this stress upon grant and limitation of authority is fundamental".

A written Constitution, independent judiciary with powers of judicial review, the doctrine of rule of law and separation of powers, free elections to legislature, accountable and transparent

democratic government, Fundamental Rights of the people, federalism, decentralisation of power are some of the principles and norms which promote Constitutionalism in a country.

Salient Features Constitution of Indian

THE LENGTHIEST CONSTITUTION OF THE WORLD

The Indian Constitution is one of the lengthiest constitutions in the world and it is also very detailed. There are 12 schedules and 448 articles in our Constitution. The Indian Constitution has incorporated various articles by taking inspiration from the various constitutions around the world. As we all know, India is a very diverse country and it was necessary to draft a long Constitution incorporating various provisions in order to accommodate various differences. The parent document for drafting the Indian Constitution was the Government of India Act 1935, and that document itself was very lengthy. The Constitution makers found it necessary to incorporate various provisions to provide special attention to States like Assam, Mizoram, and Nagaland. Various provisions were also incorporated to uplift the Scheduled Castes and Scheduled Tribes.

ESTABLISHMENT OF A SOVEREIGN, SOCIALIST, SECULAR, DEMOCRATIC REPUBLIC

The Preamble of our Constitution provides India to be a Sovereign, Socialist, Secular, Democratic and Republic Country. There are also various other terms in the Preamble which ensure equality and protect people. The various other terms are Justice, Liberty, Equality, and Fraternity.

SOVEREIGNTY

The term Sovereignty was incorporated in the Preamble to provide supreme power to the Government. The term Sovereignty is the backbone of our Indian Constitution that protects the

authority of the people. Sovereignty is an essential factor of every State. The term “sovereignty” as applied to states implies ‘Supreme, absolute, and uncontrollable power by which any state is governed, and which resides within itself, whether residing in a single individual or a number of individuals, or in the whole body of the people’. The Sovereignty in India is of two types:

- Internal Sovereignty- The States have the power to govern themselves and make laws in certain matters.

- External Sovereignty- The Government is the supreme authority and can acquire or cede any part of the territory for proper reasons.

SECULARISM

It is mandatory to incorporate this term to promote peace between various communities in our country. Secularism promotes the development and unity of various religions. The term “Secular” was added by the 42nd amendment in the Preamble. In the case of S.R Bommai v Union Of India, it was held that “in matters of State, religion has no place” and also said that secularism is one of the basic features of the Constitution. In the famous case of Indira Nehru Gandhi vs Shri Raj Narain & Anr, held that the State shall not discriminate against any citizen on the grounds of religion.

DEMOCRACY

Democracy is an ancient concept that is followed by many south Indian rulers from time immemorial. Democracy provides people with the power to govern. The representative form of the Government is suitable for governing our country due to the huge population. In the case of Mohan Lal Tripathi vs District Magistrate, the meaning of the term “Democracy” was discussed and according to the case it was held that “Democracy is a concept, a political philosophy an ideal which is practised by many nations that is culturally advanced and politically mature via resorting to governance by representatives of the people elected directly or indirectly”. The main reason for incorporating democracy is to provide freedom to the people to choose their own representatives and to save them from the tyrant leaders.

SOCIALIST

The system of socialism promotes equality among people and ensures the welfare of people. The term “Socialist” was incorporated by the 42nd amendment. The term Socialist was discussed in the case of Samantha v State of Andhra Pradesh, and according to the case,” the term socialist is used to lessen the inequalities in income and status and to provide equality of opportunity and facilities”. Many leaders were interested in the concept of socialism, especially Jawaharlal Nehru was very much interested in this concept as he was inspired by the Russian Revolution. There were also other famous leaders like Jay Prakash Narayan who helped in the development of this concept. The concept of Socialism expels capitalism which is considered a threat to the economy. There were developments in economic policies to promote the concepts of Socialism.

REPUBLIC

The concept of “Republic” was borrowed from the Constitution of France. The term republic provides the people power to elect their own representatives. The term republic is the basis of our constitution as it ensures there would be no hereditary rulers and also ensures that the election would be happening in our country. The President of India is an elected head of the State for a fixed tenure.

JUSTICE

The Preamble of the Constitution of India guarantees three types of justice to its citizens like:

- Social Justice- The concept of social justice promotes equal treatment of citizens and promotes the rule of law. This term ensures that there would be no discrimination among the citizens on different grounds. The fundamental rights also provided in Part 3 of our Constitution also ensures social justice.

- Economic Justice- The concept of economic justice avoids discrimination between genders, provides equal opportunity to work, and ensures the equal distribution of wealth.

- Political Justice- This term provides all citizens to participate in the political proceedings.

LIBERTY AND FRATERNITY

The term Liberty and Fraternity is provided in the Preamble of the Indian Constitution. The term liberty and fraternity was used in the French revolution.

PARLIAMENTARY FORM OF GOVERNMENT

The Bicameral Legislature system is followed in our country. The Unicameral legislature system is followed in countries like Norway. The law making procedure is easy in the unicameral legislature but the bicameral legislature is effective as there would be a lot of discussions and deliberations before making legislation. Articles 74 and Article 75 is concerned with the Parliamentary system at the centre and Article 163 and Article 164 is concerned with the Parliamentary system at the states. Article 74 of the Indian Constitution provides that there should be a Council of Ministers with the Prime Minister and Council of Minister can aid and advise the President. Article 75 of the Indian Constitution deals with the other provisions relating to the appointment of Ministers.

PARLIAMENTARY V. PRESIDENTIAL SYSTEM

The Presidential form of Government is followed in countries like the United States of America. The President is the head of the State in the Presidential System of Government. The Parliamentary system is preferred over the Presidential system as it ensures the equal distribution of power and also power is not within the hands of a single person. The drafters of our constitution did not prefer the presidential system as the executive and legislatures would become independent of each other. The makers felt that this would be an issue afterwards.

A UNIQUE BLEND OF RIGIDITY AND FLEXIBILITY

The Indian Constitution is neither rigid nor flexible, this is also one of the reasons for its length. The famous example of the rigid constitution is the Constitution of the U.S., and it is known as a rigid constitution as the amendment process is very difficult. The Indian Constitution is not very difficult to amend, as the Constitution of The U.S.A. It has gone through 103 amendments so far

but there are certain steps to be satisfied before bringing in the amendment. Thus the Indian Constitution is a unique blend of rigidity and flexibility.

FUNDAMENTAL RIGHTS AND CONSTITUTIONAL REMEDIES

Like the constitution of the USA and the USSR, the Indian constitution contains a comprehensive Bill of Rights. Right to freedom, right to equality, right to religion, right against exploitation, and cultural rights have been guaranteed to the citizens of India.

The remedies for enforcing the rights, namely, the writs of habeas corpus, mandamus, prohibition and certiorari are also guaranteed by the constitution under Article 32, as the right to constitutional remedies. There are various constitutional remedies allowed under this Article in the form of writs. If there is any violation of fundamental rights, the aggravated person can approach the Supreme Court under the rights provided by this Article. The rights provided under this Article cannot be suspended. The Constitution of India under Article 32 confers power on the Supreme court to issue direction, award or writs. There are five types of writs, that is appropriate to provide relief and for enforcing fundamental rights.

DIRECTIVE PRINCIPLES OF STATE POLICY

Part IV of the Indian Constitution deals with the Directive Principles of State Policy. It is the duty of every State to apply these principles while making any new legislation. The Directive Principles of State Policy is similar to the 'Instrument of Instructions' that is in the Government of India Act 1935. They are basically instructions to the legislature and executive that has to be followed while framing new legislation by the State.

A FEDERATION WITH A STRONG CENTRALISING TENDENCY

The famous salient feature of our Indian Constitution is that it is a federation with a strong centralising tendency. The constitution of India is neither federal nor unitary. The reasons for calling the Indian Government unitary is that,

- The division of powers is not equal. The centre has more powers than the state that is evident from the fact that the Union list contains more matters than the State list.
- The federations like the U.S.A have rights to frame their own constitution, which is not possible in India as the entire country follows the Single constitution.
- During the time of emergency, the states come under the control of the Centre.
- There is a single system of Courts which enforces both the Central and State laws.

- There is no equal representation of States in the houses of Parliament which is not the same in federations like the U.S.A.

The Indian Constitution is considered as federal for various reasons like:

- There is a written Constitution which is an essential feature of every country following the federal system.
- The supremacy of the constitution is always protected.

Thus the Indian Constitution can be described as quasi-federal or a federation with a strong centralizing tendency.

ADULT SUFFRAGE

The concept of Adult suffrage allows every citizen of our country who is above eighteen years has the right to vote in the elections. Any adult who is eligible to vote should not be discriminated on any basis like gender, caste and religion. This provision was added in the sixty-first amendment which is also known as the Constitution Act, 1988. The accepted age for voting was twenty-one before this amendment afterwards it was changed to 18 years of age. Article 326 of the Indian Constitution guarantees this right.

AN INDEPENDENT JUDICIARY

The Judiciary ensures the proper functioning of the constitution and the enforcement of various provisions of the Constitution. The Constitution makers ensured that Judiciary has to be independent so that it will not be biased. The Supreme court is considered as the watchdog of democracy. There are various provisions in the Article which ensures the independence of the judiciary,

- The appointment of Judges is independent and there is no involvement of any executive authorities;
- The tenure of Judges is secured;

- The removal of judges from the tenure must be also based on the constitutional provisions.

A SECULAR STATE

The term Secular State means that there is no separate religion for the State and every religion is respected equally in the State. The Preamble of the Indian Constitution itself states that India has to be a secular state. The Fundamental rights provide the citizens' freedom to follow their own religion and religious practices and no one can be forced to follow any religion. The proposal of developing a uniform civil code is also provided in the directive principles of State policy in order to resolve the differences between various religions, though it is not implemented still. Article 26 also provides the right to manage their own religion in order to prevent any intrusion. The Supreme Court has also held that various religious denominations like Anandmargi though they are not considered as separate religion will also enjoy protection under Article 26.

SINGLE CITIZENSHIP

There is no separate citizenship for the States and the Centre like in various federal countries like the U.S.A. There is single citizenship provided to our citizens. Part 2 of the Indian Constitution,

i.e. Article 5 to Article 11 of the Indian Constitution deals with citizenship. The Citizenship Act, 1955 which was amended recently in 2019 also deals with citizenship. Single citizenship allows the persons to enjoy equal rights in various aspects across the country. According to Article 5, it is clearly mentioned that the persons will be considered as citizens of the territory of India, which ensures that there would be only single citizenship. The citizenship of Indians is largely determined by the principle of jus sanguinis (i.e. the citizenship is based on the citizenship of the parents).

FUNDAMENTAL DUTIES

Article 51A of the Indian Constitution provides various fundamental duties. There are no specific provisions to enforce fundamental duties in the Courts like the fundamental rights but it is also necessary to follow the fundamental duties. In the case of AIIMS Student Union vs AIIMS, it was held that the fundamental duties are equally important as the fundamental rights

JUDICIAL REVIEW

The concept of judicial review is an essential feature of the Constitution which helps the constitution to work properly. The judiciary is considered to be the guardian of the constitution, thus it is the duty of the judiciary to check the actions that are violative of various articles in the Constitution. The actions of various organs of the government like executive and legislature can be questioned by the judiciary using the judicial review. The judicial review is an important check and balances in the separation of powers. The court that is authorized with the power of judicial review can invalidate any act that is violative of the various basic features of the Constitution. Article 32 and Article 136 of the Indian Constitution are the articles related to the judicial review in the Supreme Court. Article 226 and Article 227 are related to the judicial review in the High Court.

Preamble

The Preamble to a Constitution embodies the fundamental values and the philosophy, on which the Constitution is based, and the aims and objectives, which the founding fathers of the Constitution enjoined the polity to strive to achieve. The Preamble to the Constitution of India records the aims and aspirations of the people of India which have been translated into the various provisions of the Constitution. A Preamble means the introduction to the statute. The importance and utility of the Preamble has been pointed out in several decisions of the Supreme Court of India. Though, by itself, it is not enforceable in Court of Law and does not constitute an operative part of the Indian constitution, yet it serves several important purposes. The basic idea behind it was the preamble should be in conformity with the provisions of the constitution and express in a few words the philosophy of the constitution. It may be recalled that after the transfer of power, the Constituent Assembly became sovereign, which is reflected in the use of words “give to ourselves this constitution” in the preamble. It also implied that the preamble emanated from the people of India and sovereignty lies with them.

History of the Preamble

The Preamble to the Indian constitution is based on “Objective Resolution” of Nehru. Jawaharlal Nehru introduced an objective resolution on December 13, 1947, and it was adopted by Constituent assembly on 22 January 1947. The drafting committee of the assembly in

formulating the Preamble in the light of "Objective Resolution" felt that the Preamble should be restricted to defining the essential features of the new state and its basic socio-political objectives and that the other matters dealt with Resolution could be more appropriately provided for in the substantive parts of the Constitution.

The committee adopted the expression 'Sovereign Democratic Republic' in place of 'Sovereign Independent Republic' as used in the "Objective Resolution," for it thought the independence was implied in the word Sovereign. The committee added the word Fraternity which was not present in the Objective Resolution. "The committee felt that the need for fraternal concord and goodwill in India was never greater than now and that this particular aim of the new Constitution should be emphasized by special mention in the Preamble." In other respect the committee tried to embody in the Preamble "the spirit and, as far as possible, the language of "Objective Resolution."

Meaning of Preamble

- The term 'Preamble' means the introduction to a statute. It is the introductory part of the constitution. A preamble may also be used to introduce a particular section or group of sections.

- According to Chambers Twentieth Century Dictionary, a preamble means preface, introduction, especially that of an act of Parliament, giving its reasons and purpose – a prelude.

- Black's Law Dictionary states that the preamble means a clause at the beginning or a statute explanatory of the reasons for its enactment and the objectives sought to be accomplished. Generally, a Preamble is a declaration made by the legislature of the reasons for the passage of the statute and is helpful in the interpretation of any ambiguities within the statute to which it is prefixed.

THE PURPOSE IT SERVES

The Preamble serves the following purposes:

(a) The source from which the Constitution comes is indicated viz., the people of India.

(b) The enacting clause which brings the Constitution into force is contained.

(c) The rights and freedoms which the people of India intended to secure to all citizens are declared and the basic type of government and polity which were to be established.

Therefore, it declares that the source of authority under the Constitution is the People of India and there is no subordination to any external authority.

In A.K Gopalan v. State of Madras, it was contended that the preamble to our constitution which seeks to give India a 'democratic' constitution should be the guiding start in its interpretation and hence any law made under Article 21 should be held as void if it offends the principles of natural justice, for otherwise the so-called "fundamental" rights to life and personal liberty would have no protection. The majority on the bench of the Supreme Court rejected this contention holding that 'law' in Article 21 refers to positive or state made law and not natural justice and that this meaning of the language of Article 21 could not be modified with reference to the preamble.

In Berubari Union case the Supreme Court held that the preamble had never been regarded as the source of any substantive power conferred on the government or on any of its departments. The court further explained that "what is true about the powers is equally true about the prohibitions and limitations". It, therefore, observed that the preamble had limited application. The court laid down that the preamble would not be resorted to if the language of the enactment contained in the constitution was clear.

However, "if the terms used in any of the articles in the constitution are ambiguous or capable of two meanings, in interpreting them some assistance may be sought in the objectives enshrined in the Preamble." In State of Rajasthan v. Basant Nahata it was held that a preamble with an ordinary Statute is to be resorted only when the language is itself capable of more than one meaning and not when something is not capable of being given a precise meaning as in case of public policy.

In Kesavananda Bharati case the Supreme Court attached much importance to the preamble. In this case, the main question before the Supreme Court related to the scope of amending power of the Union Parliament under Article 368 of the Constitution of India. The Supreme Court traced the history of the drafting and ultimate adoption of the Preamble. Chief Justice Sikri observed,

"No authority has been referred before us to establish the propositions that what is true about the powers is equally true about the prohibitions and limitations. Even from the Preamble limitations have been derived in some cases. It seems to me that the preamble of our Constitution is of extreme importance and the constitution should be read and interpreted in the light of the grand and noble vision expressed in the preamble."

Preamble: scope

The Preamble sets out the objectives which the constituent assembly intended to achieve. As Supreme Court has observed, the Preamble is a key to unravel the minds of the makers of the Constitution. It also embodies the ideals and aspirations of the people of India. The Preamble is non-justifiable in nature, like the DPSPs and cannot be enforced in a court of law. The Preamble cannot override the specific provisions of the constitution. In case of any conflict between the two, the latter shall prevail. The Preamble can neither provide substantive power (definite or real) to the three organs of the State, nor limit their powers under the provisions of the constitution. As observed by the Supreme Court, the Preamble plays a limited and yet vital role in removing the ambiguity surrounding the provisions of the Constitution.

Whether the Preamble is a part of the Constitution?

It has been highly a matter of arguments and discussions in the past that whether Preamble should be treated as a part of the constitution or not. The vexed question whether the Preamble is a part of the Constitution or not was dealt with in two leading cases on the subject:

1. Beruberi Case

Berubari case was the Presidential Reference "under Article 143(1) of the Constitution of India on the implementation of the Indo-Pakistan Agreement Relating to Beruberi Union and Exchange of Enclaves which came up for consideration by a bench consisting of eight judges headed by the Chief Justice B.P. Singh. Justice Gajendragadkar delivered the unanimous opinion of the Court.

The court ruled out that the Preamble to the Constitution, containing the declaration made by the people of India in exercise of their sovereign will, no doubt it is "a key to open the mind of the

makers" which may show the general purposes for which they made the several provisions in the Constitution but nevertheless the Preamble is not a part of the Constitution.

2. Kesavananda Bharati case

Kesavananda Bharati case has created history. For the first time, a bench of 13 judges assembled and sat in its original jurisdiction hearing the writ petition. Thirteen judges placed on record 11 separate opinions. To the extent necessary for the purpose of the Preamble, it can be safely concluded that the majority in Kesavananda Bharati case leans in favor of holding,

(i) That the Preamble to the Constitution of India is a part of the Constitution;

(ii) That the Preamble is not a source of power or a source of limitations or prohibitions;

(iii) The Preamble has a significant role to play in the interpretation of statutes and also in the interpretation of provisions of the Constitution.

D.G. Palekar, J. held that the Preamble is a part of the Constitution and, therefore, is amendable under Article 368. Preamble is an introductory part of our ConstitutionPreamble tells about the nature of state and objects that India has to achieve. There was a controversial issue whether Preamble was part of Indian Constitution there were a number of judicial interpretation but finally Kesavanada Bharati case it was held that the Preamble is a part of the Constitution.

Amendment to the Preamble

The issue that whether the preamble to the constitution of India can be amended or not was raised before the Supreme Court in the famous case of Kesavananda Bharati v. State of Kerala, 1973. The Supreme Court has held that Preamble is the part of the constitution and it can be amended but, Parliament cannot amend the basic features of the preamble. The court observed, "The edifice of our constitution is based upon the basic element in the Preamble. If any of these

elements are removed the structure will not survive and it will not be the same constitution and will not be able to maintain its identity."

The preamble to the Indian constitution was amended by the 42nd Amendment Act, 1976 whereby the words Socialist, Secular, and Integrity were added to the preamble by the 42nd Amendment Act, 1976, to ensure the economic justice and elimination of inequality in income and standard of life. Secularism implies equality of all religions and religious tolerance and does not identify any state religion. The word integrity ensures one of the major aims and objectives of the preamble ensuring the fraternity and unity of the state.

PRINCIPLES ENSHRINED IN THE PREAMBLE

"We, the People of India"

The words "We, the people of India" declares in unambiguous terms that the Constitution has been adopted, enacted and given to themselves by the people of India. It emphasizes the sovereignty of the people and the fact that all powers of government flow from the people. It is the people of India on whose authority the Constitution rests. The preamble surmises that it is the

people of India who are the authors of the constitution. Although the constitution was not directly voted upon by the people of the country as it was practically impossible for four hundred million people to take part in the voting, it is clear from the Preamble that the framers of the constitution has been promulgated in the name of the people, attached importance to the sovereignty of the people and the constitution. The constitution is not based on the mandate of several states which constitute the units of the Union.

Sovereign

According to Preamble, the constitution of India has been pursuance of the solemn resolution of the people of India to constitute India into a 'Sovereign Democratic Republic', and to secure well-defined objects set forth in the preamble. Sovereignty denotes supreme and ultimate power. It may be real or normal, legal or political, individual or pluralistic. In monarchial orders, sovereignty was vested in the person of monarchs. But, in the republican form of governments,

which mostly prevail in the contemporary world, sovereignty is shifted to the elected representatives of the people.

According to D.D Basu, the word ‘sovereign’ is taken from Article 5 of the constitution of Ireland. ‘Sovereign or supreme power is that which is absolute and uncontrolled within its own sphere’. In the words of Cooley, “A state is sovereign when there resides within itself supreme and absolute power, acknowledging no superior”.

Sovereignty, in short, means the independent authority of a state. It has two aspects- external and internal. External sovereignty or sovereignty in international law means the independence of a state of the will of other states, in her conduct with other states in the comity of nations. Sovereign in its relation between states and among states signifies independence. The external sovereignty of India means that it can acquire foreign territory and also cede any part of the Indian territory, subject to limitations(if any) imposed by the constitution.

On the other hand, internal sovereignty refers to the relationship between the states and the individuals within its territory. Internal sovereignty relates to internal and domestic affairs and is divided into four organs, namely, the executive, the legislature, the judiciary and the administrative.

Socialist

The constitutional commitment to the goal of socio-economic justice, as envisaged by the original preamble by the constitution of India has been fortified by the Constitution (42nd Amendment) Act, 1976. The term ‘socialist’ literally means a political-economic system which advocates the state’s ownership of the means of production, distribution, and exchange. Concise Oxford Dictionary defines ‘socialism’ as a political and economic theory of a social organization which advocates that the means of production, distribution, and exchange should be owned or regulated by the community as a whole.”

The term ‘socialist’ has not been defined in the constitution. Professor M.P Jain observes that the term ‘does not, however, envisage doctrinaire socialism in the sense of insistence on state ownership as a matter of policy’. It does not mean total exclusion of private enterprise and complete state ownership of material resources of the nation. D.D. Basu regards that the

Supreme Court has gone a step further toward social justice. P.M Bakshi understands socialism in the context of social justice. A broad spectrum of Indian jurists and authors admit the relevance of socialism in India.

In Excel Wear v. Union of India, the Supreme Court observed that "the addition of the word socialist might enable the courts to lean more in favor of nationalization and state ownership of the industry. But, so long as private ownership of industries is recognized and governs an overwhelming large proportion of our economic structure, the principle of socialism and social justice cannot be pushed to such an extent so as to ignore completely or to a very large extent, the interest of another section of the public, namely, the private owners of the undertaking."

In D.S Nakara v. Union of India, the court observed that "the basic framework of socialism is to provide a decent standard of life to the working people and especially provide security from cradle to grave." The principal aim of the socialist State, the Supreme Court held, was to eliminate inequality in income and status and standard of life.

In Air India Statutory Corporation v. United Labour Union, the Supreme Court elaborated the concept of "socialism" and stated that the word socialism was expressly brought in the constitution to establish an egalitarian social order through rule of law as its basic structure.

Secular

In Webster's Dictionary, the word 'secular' has been described as a 'view of life', or of any particular matter based on premise that religious considerations should be ignored or purposefully excluded or as a system of social ethics based upon doctrine that ethical standards and conduct be determined exclusively without reference to religion. It is the rational approach to life and it refuses to give a plea for religion. For the first time, by the 42nd amendment of the constitution in 1976, the term-secular' was inserted into the Preamble but without a definition of the term. Secular is derived from the Latin word speculum, which means an indefinite period of time. Before the mid-nineteenth century, the word 'secular' was occasionally used with contempt.

The term secular inserted by the Constitution (42nd Amendment) Act, 1976, explains that the state does not recognize any religion as a state religion and that it treats all religions equally, and

with equal respect, without, in any manner, interfering with their individual rights of religion, faith or worship. It does not mean that it is an irreligious or atheistic state. Nor, it means that India is an anti-religious state. It neither promotes nor practices any particular religion, nor it interferes with any religious practice. The constitution ensures equal freedom to all religions.

The Supreme Court in St. Xavier's College v. State of Gujarat, explained "secularism is neither anti-God nor pro-God; it treats alike the devout, the agnostic and the atheist. It eliminates God from the matters of the state and ensures that no one shall be discriminated against on the

grounds of religion". That, every person is free to mold or regulate his relations with his God in any manner. He is free to go to God or to heaven in his own ways. And, that worshipping God is left to be dictated by his own conscience.

I.R Coelho v. State of Tamil Nadu it has been held that secularism is a matter of conclusion to be drawn from various Articles conferring Fundamental Rights. "If the secular character is not to be found in Part III", the Court ruled, "it cannot be found anywhere else in the Constitution, because every fundamental right in Part III stands either for a principle or a matter of detail".

Democratic

The term Democracy is derived from the Greek words 'demos' which means 'people' and 'kratos' which means 'authority'. It thus means government by the people. Democracy may properly be defined as that form of government in the administration of which the mass of the adult population has some direct or indirect share.

The Supreme Court in Mohan Lal v. District Magistrate, Rai Bareilly, observed: "Democracy is a concept, a political philosophy, an ideal practiced by many nations culturally advanced and politically matures by resorting to governance by representatives of the people elected directly or indirectly". The basic principle of democracy in a society governed by the rule of Law is not only to respect the will of the majority but also to prevent the dictatorship of the majority".

The apex court in Union of India v. Association for Democratic Reforms, observed: "A successful democracy posits an 'aware' citizenry". "Democracy cannot survive", the court said,

without free and fair elections, without free and fairly informed voters." This states that free and fair elections are the most important features of democracy. Thus democracy implies that all three powers of the government i.e. the executive, the legislature and the judiciary should be separate, yet mutually independent. Democracy is also a way of life and it must maintain human dignity, equality and rule of law.

Republic

A republic means a state in which the supreme power rests in the people and their elected representatives or officers, as opposed to one governed by the king or a similar ruler. The word 'republic' is derived from res publica, meaning public property or commonwealth. According to Montesquieu, "a republican government is that in which a body, or only a part of people, is possessed of the supreme power". The term 'republic' is used in distinction to the monarchy. A republic means a form of government in which the head of the state is an elected person and not a heredity monarch like the king or the queen in Great Britain. Under such a system, political sovereignty is vested in the people and the head of the state is the person elected by the people for a fixed term. In a wider sense, the word 'republic' denotes a government where no one holds the public power as a proprietary right, but all power is exercised for the common good-where

inhabitants are the subjects and free citizens at the same time. The Indian government as a 'republican form of government', in which, the ultimate power resides in the body of the people exercised via universal adult suffrage. The president of India who is the executive head of the state is elected by the people (though indirectly) who holds office for a term of five years. All citizens are equal in the eyes of law, there is no privileged class and all public offices are open for all the citizens without any distinction on the basis of race, caste, sex or creed.

OBJECTIVES ENSHRINED IN THE PREAMBLE

Justice (social, economic and political)

The preamble of the constitution of India professes to secure to all its citizens political, economic and social justice. The expression 'justice' is the harmonious reconcilement of individual conduct with the general welfare of society. An act or conduct of a person is said to be just if it

promotes the general well-being of the community. Therefore, the attainment of the common good as distinguished from the good of individuals is the essence of justice. Justice is considered to be the primary goal of a welfare state and its very existence rests on the parameters of justice. Social justice means the abolition of all sorts of inequities which may result from the inequalities of wealth, opportunity, status, race, religion, caste, title and the like. To achieve this ideal of social justice, the constitution lays down the directives for the state in Part IV of the constitution.

The expression ‘economic justice’ means justice from the standpoint of economic force. In short, it means equal pay for equal work, that every person should get his just dues for his labor irrespective of his caste, sex or social status.

Political justice means the absence of any unreasonable or arbitrary distinction among men in political matters. The constitution has adopted the system of universal adult suffrage, to secure political justice.

Liberty (of thought, expression, belief, faith, and worship)

Liberty has been derived from the Latin word 'liber' which means free. The idea of Liberty came to the forefront with the French Revolution in 1789 and the leaders defined liberty as "the power to do like anything that does not injure another is liberty." [14] The term liberty' is used both in a negative as well as positive sense. As a negative concept liberty means the absence of all undue or arbitrary % interference with individual's action on the part of the State. In a positive sense, liberty comprises of liberties or rights which are considered essential for an individual to attain his potentialities and for the perfection of the national life. The Constitution of India professes to secure the liberty of thought, expression, belief, faith, and worship, which are regarded as essential to the development of the individual in the Nation. The same principle is reflected in Articles 25-28 of the Constitution which talk about the Right to Freedom of Religion and Article 19 (1) (a) which talks about the liberty in the field of expression.

Equality (of status and of opportunity)

Guaranteeing of certain rights to each individual is meaningless unless all equality is banished from the social structure, and each individual is assured of equal status and opportunity for the development of what is best in him. Equality of status and of opportunity is secured to the people

of India by abolishing all distinctions or discriminations by the State, between citizen and citizen, on the ground of religion, race, caste, sex or place of birth and by throwing open 'public places' to all the citizens. This has been provided for in the Articles 14 and 15 of the Constitution of India and the same talk about equality before law and prohibition of discrimination. The Constitution also abolishes untouchability and titles by the Articles 17 and 18 respectively. This helps in securing equality of opportunity in the matters relating to employment or appointment to any office under the State under Article 16 of the Constitution of India.

Fraternity

Fraternity means a feeling of brotherhood, brotherliness, a feeling that all people are children of the same soil, the same motherland. The term was also inspired by the French Revolution and was added to the Preamble by the Drafting Committee of the Constituent Assembly because, "The Committee felt that the need for fraternal concord and goodwill in India was never greater than now and that this particular aim of the new constitution should be emphasized by special mention in the Preamble". There is no express provision in the Constitution which reflects r 'fraternity as an object. However, there are provisions in the Constitution, such as common citizenship, the right of the citizen of India to move freely, to reside and settle in any part of the territory of India, etc., which generate their spirit of brotherhood. the Preamble assures the dignity of each and every individual. This dignity is assured by securing to each individual equal fundamental right and at the same time laying down a number of Directives for the State which directs the State policies towards the betterment of citizens.

It will not be wrong to say that the preamble is an integral part of the Constitution because it contains the spirit and ideology of the Constitution. The preamble highlights the fundamental values and guiding principles of the Constitution. The preamble declares that the citizens of India accepted the Constitution on 26th November 1949, but the date of commencement of the Constitution was decided to be 26th January 1950.

CITIZENSHIP

A citizen enjoys fundamental rights including right to work, right to vote, right to return, etc. in his or her country. At the same time, the citizen is also bound to observe duties of citizenship. It reflects that the right to citizenship is not an absolute one, and the legislature may impose

reasonable restrictions on the enjoyment of one's citizenship. Every country has its own immigration laws which regulate the entry and stay of immigrants. Right to participate in the government is also being regulated by the immigration laws. For this, the countries differentiate between 'nationality' and 'citizenship'. However, it has also been seen that the countries sometimes make strict immigration laws, and exclude foreigners on the discriminatory basis. That's why the International Conventions and other instruments have a check on such immigration laws. There are many ways of acquiring citizenship of a country. A citizenship can be acquired by birth, marriage, honorary basis, etc. is automatic. But immigration laws nowadays are strict in order to regulate false marriages, where people marry each other for money or other benefits. States also grant honorary citizenship.

Citizens are full members of the state. These citizens enjoy full civil and political rights. Aliens are not entitled to all constitutional and other rights because they are not citizens. For example, in India, aliens have right to life and personal liberty but not the freedoms guaranteed under Article 19 of the Indian Constitution. Furthermore, enemy aliens suffer many more difficulties. In India, enemy aliens cannot enforce Article 22 of the Constitution which protects the rights of accused persons detained under preventive detention laws. Stateless Persons' are persons who are not citizens of any country. Their status is similar to aliens.

What is citizenship?

The population of a state is divided into two categories: citizens and non-citizens. A citizen of a state enjoys all civil and political rights. A non-citizen, on the other hand, doesn't enjoy these rights.

Under the Indian constitution, certain fundamental rights are available only to the citizens, namely: Right against discrimination on the grounds of religion, race, caste, sex or place of birth (Article 15); right to equality of opportunity in matter of public employment (Article 16); freedom of speech and expression, assembly, association, movement, residence and profession (Article 19); cultural and educational rights (Article 29 and 30); and right to vote and become members of the union and state legislatures.

Several offices can also be occupied exclusively by citizens: president (Article 58(1)(a), vice-president (Article 66(2)), judges of the Supreme Court (Article 124(3)) and high court (Article

217(2)), governor of a state (Article 157), attorney general (Article 76(1)) and advocate general (Article 165). Equality before the law or equal protection of the laws within the territory of India (Article 14) and protection of life or personal liberty (Article 21) are applicable to non-citizens as well.

What are the constitutional provisions relating to citizenship in India?

The Indian constitution doesn't prescribe a permanent provision relating to citizenship in India. It simply describes categories of persons who are deemed to be citizens of India on the day the Indian constitution was promulgated on January 26, 1950, and leaves citizenship to be regulated by law made by the parliament. Article 11 of the constitution confers power on the parliament to make laws regarding citizenship. The Indian Citizenship Act, 1955 was enacted in exercise of this provision.

Who were the persons who were deemed to be citizens of India when the constitution was promulgated?

i) Citizenship by domicile (Article 5): A person who was born in India or either of the person's parents was born in India or the person must have been an ordinarily resident in the territory of India for not less than five years immediately before the commencement of the constitution. Domicile of a person is in that country in which the person either has or is deemed by law to have his/her permanent house.

The term 'domicile' has not been defined in the Indian Constitution. 'Domicile' means the place where a person's habitation is fixed without any present intention of moving there from. Every person has a domicile at his birth called the domicile of origin. The domicile of origin remains unchanged until the person acquires a new domicile, i.e. by actually settling in another country with the intention of permanently residing there. Till then the domicile of origin continues even if he has left the country with an intention of never returning again. The onus to prove that a

person has changed his domicile of origin lies upon him. It has been held by the Supreme Court that there must be factum and animus to constitute the existence of domicile in India.8 Similarly, the Supreme Court said in Louis De Raedt v Union of India, that the person should show his appropriate state of mind required for acquisition of domicile by choice. In Pradeep Jain v Union

of India, the Supreme Court held that there is only one domicile in India. The court said that the domicile does not change with the change of residence within India. A minor or married person does not have the legal capacity to make a change of domicile. Therefore, a minor carries the domicile of his father and a married woman gets the domicile of her husband.

ii) Citizenship of migrants to India from Pakistan (Article 6): Persons who have migrated from Pakistan to India have been classified into two categories: i) those who came to India before July 19, 1948, and

ii) those who came on or after July 19, 1948.

In the case of persons migrating before July 19, 1948, if the person has been ordinarily residing in India since the date of her migration, and in case of a person migrating on or after July 19, 1948, if he/she has been registered as a citizen of India, after residing for at least six months immediately before the date of applying for registration, by an officer appointed by the government of India, shall be deemed to be a citizen of India.

iii) Citizenship of migrants of Pakistan (Article 7): If a citizen of India has migrated to Pakistan after March 1, 1947, but returned to India on the basis of permit for resettlement in India, the person is entitled to become a citizen of India if he/she registers herself as a citizen of India, after residing for at least six months immediately before the date of applying for registration, by an officer appointed by the government of India.

Both Articles 6 and 7 use the term 'migrated'. The meaning of the term 'migrated' came into consideration of Supreme Court in Kulathi v State of Kerala. The majority held that the word 'migrate' was used in a wider sense of moving from one country to another with the qualification that such movement was not for a short visit or for a special purpose.

State of Bihar v. Kumar Amar Singh

Kumar Rani went to Karachi in July 1948 leaving her husband in India. She returned to India in December 1948 after obtaining a temporary permit, stating in her application that for the said permit that she was domiciled in Pakistan and she was a Pakistani national. On expiry of the

permit she went back to Pakistan in the April 1949. On May 14, 1953 she came back to India under permanent permit obtained from High Commissioner for India in Pakistan, which was cancelled on July 12, 1950, because it was wrongly issued without the concurrence of the government as required by the rules made under the Influx form Pakistan (control) Act, 1949. She contended, alternatively that the proviso to A.7 applied to her since she had returned to India on a permanent permit and the subsequent cancellation of the permit was illegal and irrelevant. She made an application for permanent settlement in India through having citizenship under Art.

5. SC observed "Article 7 clearly overrides Art.5. It is pre- emptory in its scope and makes no exception for such a case i.e of the wife migrating to Pakistan leaving her husband in India."

iv) Citizenship of persons of Indian origin residing outside India (Article 8): Indian nationals (whose parents or any grandparents were born in India as defined in the Government of India Act, 1935) residing abroad shall be conferred Indian citizenship, as if they have been registered by the diplomatic or consular representatives of India in the country where they are residing.

Article 8 provides for the Rights of citizenship of certain persons of Indian origin residing outside India. Article 9 provides that no person shall be a citizen of India by virtue of Article 5, or be deemed to be a citizen of India by virtue of Article 6 or Article 8, if he has voluntarily acquired the citizenship of any foreign State. It deals only with voluntary acquisition of citizenship of a foreign state before the Constitution came into force. Under Article 10 Parliament may take away the right of citizenship of any person.

Article 11 gives a proper way to the Parliament for making any law relating to Citizenship. While exercising the authority, the Parliament enacted the Citizenship Act, 1955 for the acquisition and termination of the citizenship in India.

Citizenship under the Citizenship Act, 1955 Parliament has enacted the Citizenship Act, 1955, to provide for the acquisition and determination of Indian Citizenship. The Act provides for acquisition of Indian citizenship after the commencement of the Constitution in five ways, i.e., birth, descent, registration, naturalization and incorporation of territory.

Citizenship by Birth: A person acquires citizenship by birth if he is born on or after 26th January 1950 but before 1st July, 1987. In this case, there is no need to determine the nationality of his

parents. But in case where he born on or after 1st July, 1987 but before 3rd December, 2004, it is necessary that either of his parents is a citizen of India at the time of his birth. After 3rd December, 2004, he acquires citizenship by birth if both the parents are citizens of India or one of the parents is a citizen of India and the other is not an illegal migrant at the time of his birth. An 'illegal migrant' means a foreigner who entered India without a valid passport or documents or remains in India beyond the permitted period of time.

Citizenship by Descent: Section 4 of the Citizenship Act, 1955 provides that a person born outside India on or after 26th January 1950 but before 10th December 1992 is a citizen of India by descent, if his father was a citizen of India by birth at the time of his birth. A person born outside India on or after 10th December 1992 but before 3rd December, 2004, is considered to be a citizen of India if either of his parents was a citizen of India by birth at the time of his birth. A person born outside India on or after 3rd December, 2004 shall not be a citizen of India, unless the parents declare that the minor does not hold passport of another country and his birth is registered at an Indian consulate within one year of the date of birth or with the permission of the Central Government, after the expiry of the said period.

Citizenship by Registration: Under Section 5 of the Citizenship Act, 1955, a person who has been ordinarily residing in India for seven years before making the application or who has been ordinarily residing in any other country outside undivided India, would acquire Indian citizenship by registration. A person can also register himself or herself as Indian citizen if he or she gets married to an Indian citizen who has been ordinarily residing India for seven years before making application. Both minor and major children of Indian citizens could also acquire citizenship by registration. A registered overseas citizen of India (OCI) for five years and who has been residing in India for one year before making application, would also get citizenship by registration.

Citizenship by naturalisation: A person is granted a certificate of naturalisation if the person is not an illegal migrant and has resided in India for 12 months before making an application to seek the certificate. Of the 14 years preceding this 12-months duration, the person must have stayed in India for 11 years.

Citizenship by incorporation of territory: If any new territory becomes a part of India, the government of India shall specify the persons of the territory to be citizens of India. If the central government is of the opinion that an applicant is a person who has rendered distinguished service to the cause of science, philosophy, art, literature, world peace or human progress generally, it may waive all or any conditions specified to attain Indian citizenship.

Overseas Citizenship: The Citizenship Amendment Act of 2003, provided for acquisition of overseas citizenship of India by persons of Indian origin of 16 specified countries other than Pakistan and Bangladesh. In 2005, the Act was further amended in order to grant more and more overseas citizenship of India to persons of Indian origin of all Countries except Pakistan and Bangladesh. By this amendment, the earlier requirement of period of residence in India was also reduced from two years to one year for persons registered as overseas citizens of India to acquire Indian citizenship. The Overseas Citizenship of India (OCI) Scheme was introduced by amending the Citizenship Act, 1955 in August 2005. The Scheme was launched in 2006. The Scheme provides for registration as Overseas Citizen of India (OCI) of all Persons of Indian Origin (PIOs) who were citizens of India on 26th January, 1950 or thereafter or were eligible to become citizens of India on 26th January, 1950. But the scheme excludes citizens of Pakistan and Bangladesh.

Overseas Citizen of India (OCI) does not mean ‘dual citizenship’. Overseas Citizen of India (OCI) does not confer any political right on the concerned persons. The registered Overseas Citizens of India cannot enjoy the same status as that of Indian citizens in case of equal opportunities in public employment. It means Overseas Citizen of India (OCI) cannot enforce

Article 16 of the Indian Constitution. 15 Furthermore, Overseas citizens of India cannot enjoy voting rights. Overseas Citizen of India (OCI) cannot enjoy the right to hold offices like President, Vice-President, Judge of Supreme Court and High Court, Member of Lok Sabha, Rajya Sabha, Legislative Assembly or Council. Overseas Citizen of India (OCI) cannot be appointed to the Public Services. However, Overseas Citizen of India (OCI) enjoys some other rights. A registered Overseas Citizen of India gets Indian visa for his whole life. He or she enjoys the same status as that of Non-Resident Indians in matters of inter-country adoption, tariffs in domestic air fares, entry fee for visiting national parks, the national monuments, museums, etc. in India. Overseas citizen is eligible to practice professions of doctors, dentists, nurses and

pharmacists, Advocates, Architects, Chartered Accountants in India. But Overseas Citizen of India (OCI) does not enjoy the same parity with Non-Resident Indians in matters of agricultural properties.

Renunciation, Termination and Deprivation of Citizenship

Section 8 of the Citizenship Act 1955 provides that a major and capable person can renounce his or her Indian citizenship. On renunciation, his minor child also loses citizenship. But the minor child can resume the Indian citizenship after attaining the age of majority. Section 9(1) of the Citizenship Act 1955 provides that an Indian citizen loses his Indian citizenship if he or she acquires the citizenship of another country. It has also been held by the Hon'ble Supreme Court that section 9 is a complete code regarding the termination of Indian Citizenship on the acquisition of the citizenship of a foreign country. On renunciation or termination, the concerned person has to surrender his or her Indian passport to the authorities under the Passport Act. If he or she fails to do so, he or she is liable to receive prescribed punishment. Deprivation of citizenship means compulsory termination of citizenship in India. Section 10 provides that the Central Government may terminate a person's citizenship on certain grounds like the person commits fraud in registration, the person is not loyal towards the Constitution of India, the person is trading or communicating with enemy when India is at war, the person's citizenship is not in favour of public good, etc. Increasingly, in the case of Hari Shankar Jain v Sonia Gandhi, the Supreme Court opined that a petition to challenge one's citizenship can be filed before the High Court or election judge.

Is Corporation a Citizen?

The Supreme Court in State Trading Corporation v Commercial Tax Officer held that company or corporation is not a citizen of India and cannot claim fundamental rights. The court said that citizenship is concerned with natural persons only. The court said that citizenship cannot be conferred upon the juristic persons.

However, the Supreme Court in Cooper v Union of India, also known as Bank Nationalization case, held that a shareholder of a company should be considered as an Indian citizen and is entitled to the protection given under Article 19 of the Indian Constitution. The Fundamental rights of the shareholders as citizens should not be violated by any state action.

In Bennett Coleman Case, the Supreme Court again said that the State Action not only affects the right of newspapers companies but also of the editors, readers and shareholders. These individuals do have freedom of speech and expression which should be protected against any unreasonable State action.

In Godhra Electric Co. Ltd v State of Gujarat the court held that a managing director of a company had right to carry on business through agency of company. The court said that he had right to challenge the constitutional validity of the concerned enactment.

Following Bank Nationalization and Bennet Coleman cases the Supreme Court in D.C. & G.M. v Union of India, has held that writ petition filed by a company complaining denial of fundamental rights guaranteed under Article 19 is maintainable.

The Constitution of India provides for a single citizenship for the entire country. The provisions relating to citizenship at the commencement of the Constitution are contained in Articles 5 to 11 in Part II of the Constitution of India. The Citizenship Act enacted by the Parliament in 1955 provides for acquisition and determination of citizenship.

UNIT-II:

- **State: Definition under Article 12, New Judicial trends on concept of State Action- need for widening the definition.**

- **Definition and Meaning of Law: Pre- Constitutional and Post- Constitutional Laws, Doctrine of Severability and Doctrine of eclipse, Judicial Review and Article 13.**

- **Equality and Social Justice: General Equality Clause under Article 14, New Concept of Equality, Judicial Interpretation on Equality.**

STATE (ARTICLE – 12)

Most of the Fundamental Rights are claimed against the state and its instrumentalities and not against private bodies.

According to Art. 12, the term 'state' includes— (i) the Government and Parliament of India: (ii) the Government and the Legislature of a State; (iii) all local authorities; and (iv) other authorities within the territory of India, or under the control of the Central Government.

The most significant expression used in Art. 12 is "other authorities". This expression is not defined in the Constitution. It is, therefore, for the Supreme Court, as the Apex Court, to define this term. It is obvious that wider the meaning attributed to the term "other authorities" in Art. 12, wider will be the coverage of the Fundamental Rights, i.e., more and more bodies can be brought within the discipline of the Fundamental Rights.

(a) OTHER AUTHORITIES

The interpretation of the term 'other authorities' in Art. 12 has caused a good deal of difficulty, and judicial opinion has undergone changes over time. Today's government performs a large number of functions because of the prevailing philosophy of a social welfare state. The government acts through natural persons as well as juridical persons. Some functions are discharged through the traditional governmental departments and officials while some functions are discharged through autonomous bodies existing outside the departmental structure, such as, companies, corporations etc. While the government acting departmentally, or through officials, undoubtedly, falls within the definition of 'state' under Art. 12, doubts have been cast as regards

the character of autonomous bodies. Whether they could be regarded as ‘authorities’ under Art. 12 and, thus, be subject to Fundamental Rights? An autonomous body may be a statutory body, i.e., a body set up directly by a statute, or it may be a non-statutory body, i.e., a body registered under a general law, such as, the Companies Act, the Societies Registration Act, or a State Cooperative Societies Act, etc. Questions have been raised whether such bodies may be included within the coverage of Art. 12. For this purpose, the Supreme Court has developed the concept of an “instrumentality” of the state. Any body which can be regarded as an “instrumentality” of the state falls under Art. 12. The reason for adopting such a broad view of Art. 12 is that the Constitution should, whenever possible, “be so construed as to apply to arbitrary application of power against individuals by centres of power. The emerging principle appears to be that a public corporation being a creation of the state is subject to the Constitutional limitation as the state itself.

In University of Madras v. Santa bai The principle of ejusdem generis or things of like nature was applied and this meant that authorities exercising governmental or sovereign function would only be covered under other authorities. The liberal interpretation came when the Apex court in Ujjambai v. State of U.P rejected the interpretation on the basis of ejusdem generis and held that no restriction can be assigned to the interpretation of the term.

In Rajasthan State Electricity Board v. Mohanlal, the Supreme Court ruled that a State electricity board, set up by a statute, having some commercial functions to discharge, would be an ‘authority’ under Art. 12.

In Sukhdev v. Bhagatram, three statutory bodies, viz., Life Insurance Corporation, Oil and Natural Gas Commission and the Finance Corporation, were held to be “authorities” and, thus, fall within the term ‘state’ in Art. 12. These corporations do have independent personalities in the eyes of the law, but that does not mean that “they are not subject to the control of the government or that they are not instrumentalities of the government”

The question was considered more thoroughly in Ramanna D. Shetty v. International Airport Authority, The International Airport Authority, a statutory body, was held to be an ‘authority’. The Supreme Court also developed the general proposition that an ‘instrumentality’ or ‘agency’ of the government would be regarded as an ‘authority’ or ‘State’ within Art. 12 and laid down

some tests to determine whether a body could be regarded as an instrumentality or not. Where a corporation is an instrumentality or agency of the government, it would be subject to the same constitutional or public law limitation as the government itself. In this case, the Court was enforcing the mandate of Art. 14 against the Corporation.

In Som Prakash v. Union of India, the company was held to fall under Art. 12. The Court emphasized that the true test for the purpose whether a body was an 'authority' or not was not whether it was formed by a statute, or under a statute, but it was "functional". In the instant case, the key factor was "the brooding presence of the state behind the operations of the body, statutory or other". In this case, the body was semi-statutory and semi-non-statutory. It was non-statutory in origin (as it was registered); it also was recognised by the Act in question and, thus, had some "statutory flavour" in its operations and functions. In this case, there was a formal transfer of the undertaking from the Government to a government company. The company was thus regarded as the "alter ego" of the Central Government. The control by the Government over the corporation was writ large in the Act and in the factum of being a government company. Agency of a State would mean a body which exercises public functions.

The question regarding the status of a non-statutory body was finally clinched in Ajay Hasia, where a society registered under the Societies Registration Act running the regional engineering college, sponsored, supervised and financially supported by the Government, was held to be an 'authority'. Money to run the college was provided by the State and Central Governments. The State Government could review the functioning of the college and issue suitable instructions if considered necessary. Nominees of the State and Central Governments were members of the society including its Chairman. The Supreme Court ruled that where a corporation is an instrumentality or agency of the government, it must be held to be an authority under Art. 12. "The concept of instrumentality or agency of the government is not limited to a corporation created by a statute but is equally applicable to a company or society…." Thus, a registered society was held to be an 'authority' for the purposes of Art. 12. Ajay Hasia has initiated a new judicial trend, viz., that of expanding the significance of the term "authority". In Ajay Hasia, The Supreme Court laid down the following tests to adjudge whether a body is an instrumentality of the government or not:

(1) If the entire share capital of the body is held by the government, it goes a long way towards indicating that the body is an instrumentality of the government.

(2) Where the financial assistance given by the government is so large as to meet almost entire expenditure of the body, it may indicate that the body is impregnated with governmental character. (3) It is a relevant factor if the body enjoys monopoly status which is conferred or protected by the state.

(4) Existence of deep and pervasive state control may afford an indication that the body is a state instrumentality.

(5) If the functions performed by the body are of public importance and closely related to governmental functions, it is a relevant factor to treat the body as an instrumentality of the government.

The law appears to be now settled in view of the judgment of a seven Constitution Bench of the Supreme Court in Pradeep Kumar Biswas where, after considering the authorities it concluded that the tests formulated in Ajay Hasia were not a rigid set of principles so that if a body falls within any of those tests, ex hypothesi, it must be considered to be a State within the meaning of Article 12. The Court suggested a general guideline observing: "The question in each case would be whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State."

In Zee Telefilms v. Union of India as BCCI is not created by a statute, not dominated by government either financially, functionally or administratively. Hence,it cannot be called a State as under Article 12 of The Constitution.

(b) LOCAL AUTHORITY

The expression 'local authority' in Art. 12 refers to a unit of local selfgovernment like a municipal committee or a village panchayat. The Delhi Development Authority, a statutory body, has been held to be a 'local authority' because it is constituted for the specific purpose of

development of Delhi according to plan which is ordinarily a municipal function. The activities of the D.D.A. are limited to Delhi. It has some element of popular representation in its composition and enjoys a considerable degree of autonomy.

In the instant case, reference was made to the definition of "local authority" given in S. 3(31) of the General Clauses Act which runs as follows: "'Local authority' shall mean a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund."

RIGHT TO EQUALITY (Art.13)

Article 13 of the constitution do talks about the four principles relating to fundamental rights. Fundamental rights do exist from the date on which the Indian constitution came into force i.e on 26th January 1950 hence fundamental rights became operative from this date only.

Article 13(1) talks about the pre-constitutional laws i.e the day from which the constitution came in existence there were many laws in the country and when the constitution came into existence fundamental rights do came, therefore the laws before the existence of the constitution must prove their compatibility with the fundamental rights, only then these laws would be considered to be valid otherwise they would be declared to be void.

For example article 15 of the constitution do gives the right to education to all without any discrimination on the basis of caste, sex, religion, etc, but an Education act which came in existence in 1930 says that a particular group of kids would not be provided education on the basis of their caste'. As this particular clause of the act is inconsistent with that of the fundamental rights therefore it is declared to be null and void.

Moreover article 13(1) is prospective in nature but not retrospective i.e the article will be in effect from the day when constitution came in effect.

Article 13(1) refers to pre-Constitution laws: According to clause (1) of Article 13 all pre constitution or the existing laws, i.e. laws which were in force immediately before the

commencement of the constitution shall be void to the extent to which they are inconsistent with fundamental rights from the date of the commencement of the constitution.

Art. 13(1) is prospective and not retrospective. Therefore, a pre Constitution law inconsistent with a Fundamental Right becomes void only after the commencement of the Constitution. Any substantive rights and liabilities accruing under it prior to the enforcement of the Constitution are not nullified. It is ineffective only with respect to the enforcement of rights and liabilities in the post-Constitution period.

A person was being prosecuted under a law before the Constitution came into force. After the Constitution came into force, the law became void under Art. 19(1)(a). Keshva Madhav Menon v. State of Bombay, In this case the petitioner published a pamphlet according to the pre-constitutional laws in 1949 but as the Indian constitution came in effect from 1950 it gave the freedom of speech and expression under article 19 of the Indian constitution, therefore the apex court said that the petitioner's trial must go on as the benefit of article 13 would not be given to him because article 13 is not retrospective in nature. It was held that Art. 13(1) could not apply to him as the offence had been committed before the enforcement of the Constitution and, therefore, the proceedings against him were not affected.

But the procedure through which rights and liabilities were being enforced in the pre-Constitution era is a different matter. A discriminatory procedure becomes void after the commencement of the Constitution and so it cannot operate even to enforce the pre-Constitution rights and liabilities, Lachmandas v. State of Maharashtra.

A law inconsistent with a Fundamental Right is not void as a whole. It is void only to the extent of inconsistency. This means that the doctrine of severability has to be applied and the offending portion of the law has to be severed from the valid portion thereof, Sub-Inspector Rooplal v. Lt. Governor.

DOCTRINE OF SEVERABILITY

According to Art. 13, a law is void only “to the extent of the inconsistency or contravention” with the relevant Fundamental Right. The above provision means that an Act may not be void as a whole; only a part of it may be void and if that part is severable from the rest which is valid,

then the rest may continue to stand and remain operative. The Act will then be read as if the invalid portion was not there. If the valid portion is so closely mixed up with invalid portion that it cannot be separated without leaving an incomplete or more or less mingled remainder the court will declare the entire Act void.

A.K Gopalan v. State of Madras

In this case section 14 of Preventive detention act,1950 was challenged. Section 14 of the act says that if any person is being detained under this act then he or she may not disclose the grounds of his or her detention in court of law, this particular statement is inconsistent with that of fundamental rights as per article 22 of the Indian constitution, thus if we do apply the doctrine of severability here so the whole act (preventive detention act,1950) would not be declared as void but only section 14 of the act would be declared as void as it is inconsistent with the fundamental rights.

R.M.D.C. v. Union of India

The Supreme Court has explained the doctrine as follows “When a legislature whose authority is subject to limitations aforesaid enacts a law which is wholly in excess of its powers, it is entirely void and must be completely ignored. But when the legislation falls in part within the area allotted to it and in part outside it, it is undoubtedly void as to the latter; but does it on that become necessarily void in its entirety? The answer to this question must depend on whether what is valid could be separated from what is invalid, and that is a question which has to be decided by the Court on a consideration of the provisions of the Act”.

DOCTRINE OF ECLIPSE

The prospective nature of Art. 13(1) has given rise to the doctrine of eclipse. The Doctrine of Eclipse is based on the principle that a law which violates Fundamental Rights is not nullity or void ab initio but becomes only unenforceable. It is over-shadowed by the Fundamental rights and remains dormant, but it is not dead. They exist for all post transactions and for the enforcement of the rights acquired and liabilities incurred before the commencement of the Constitution. The doctrine of eclipse envisages that a pre-Constitution law inconsistent with a Fundamental Right was not wiped out altogether from the statute book after the commencement

of the Constitution as it continued to exist in respect of rights and liabilities which had accrued before the date of the Constitution. Therefore, the law in question will be regarded as having been 'eclipsed' for the time being by the relevant Fundamental Right. It was in a dormant or moribund condition for the time being. Such a law was not dead for all purposes. If the relevant Fundamental Right is amended then the effect would be "to remove the shadow and to make the impugned Act free from all blemish or infirmity".

A legal provision enacted in 1948, authorising the State Government to exclude all private motor transport business, became inconsistent with Art. 19(1)(g) when the Constitution came into force in 1950. In 1951, Art. 19(1) (g) was amended so as to permit the State Government to monopolise any business. What was the effect of the constitutional amendment of 1951 on the law of 1948? Whether the law having become void was dead once for all and so could not be revitalised by a subsequent constitutional amendment without being re-enacted, or whether it was revived automatically? It was to solve this problem that the Supreme Court enunciated the doctrine of eclipse in Bhikaji v. State of Madhya Pradesh.

The doctrine of eclipse has been held to apply only to the pre-Constitution and not to the post-Constitution laws. The reason is that while a pre-Constitution law was valid when enacted and, therefore, was not void ab initio, but its voidity supervened when the Constitution came into force, a post-Constitution law infringing a Fundamental Right is unconstitutional and a nullity from its very inception. Therefore, it cannot be vitalised by a subsequent amendment of the Constitution removing the infirmity in the way of passing the law.

Post- constitutional law: Article 13 (2) talks about the post constitutional laws i.e it says that once the constitution is framed and came in effect then any of the state may not make laws that takes away or abridges the fundamental rights of an individual and if done so then it would be void till the extent of contravention.

Does the doctrine of eclipse apply to a post- constitutional law?

In Deep Chand v. State of U.P., SC held that a post constitutional law made under A.13(2) which contravenes a fundamental right is nullity from its inspection and a still- born law. It is void ab initio. The doctrine of eclipse does not apply to pots- constitutional laws and therefore, a subsequent constitutional amendment cannot revive it.

State of Gujrat v. Ambika mills

Here a certain labour welfare fund act was challenged, as certain sections in it were against the fundamental rights. Since the fact that the laws made by the state after the constitution is framed would be declared void if those laws are against the fundamental rights, but here the question arose that fundamental rights are only granted to citizens but what will happen in the case of non-citizens or a company (company here is the respondent i.e Ambika mills). It was held by the apex court that since the fundamental rights are only granted to the citizens but not to the company or any non-citizen, therefore the labour welfare fund act is valid. In this case SC modified its view as expressed in Deep Chand case. In case the law contravenes a Fundamental Right limited to the citizens only, it will operate with respect to the non-citizens. Such a law will be regarded as 'still-born' vis-à-vis the citizens even though it may be operative qua the non-citizens, and so it will have to be re-enacted if it is desired to make it valid qua the citizens.

'Law' and 'Law in force'

The term 'law' in Art. 13 has been given a wide connotation so as to include any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law [Art. 13(3)(a)]. The definition of 'law' in this article is wider than the ordinary connotation of law which refers to enacted law or legislation. It includes even the administrative order issues by an executive officer, but does not include administrative directions or instructions issued by the government for the guidance of its officers. Accordingly, inter alia the following have been held to be 'law' under Art. 13, the validity of which can be tested on the touchstone of Fundamental Rights:

(i) a resolution passed by a State Government under Fundamental Rule 44 of the State;

(ii) a government notification under the Commissions of Inquiry Act setting up a commission of inquiry;

(iii) a notification or an order under a statute;

(iv) an administrative order; but administrative instruction is not law within the meaning of Article 13.

(v) a custom or usage;

(vi) bye-laws of a municipal or a statutory body;

(vii) regulations made by a statutory corporation like the Life Insurance Corporation.

The validity of the above can be questioned under the Fundamental Rights. The bye-laws of a co-operative society framed under the Co-operative Societies Act do not fall within the purview of Art. 13. Parliament, while making an Act cannot be deemed to have taken into consideration an earlier law found to be in contravention of Art. 13. Though a law as such may not be invalid, yet an order made under it can still be challenged as being inconsistent with a Fundamental Right because no law can be presumed to authorize anything unconstitutional.

Article 13(3) (b) "laws in force" includes laws passed or made by Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.

Clause (3) of Article 13 consists of the word 'law' and 'law in force'. The law can be of the following kinds:

1. Statutory Law: These are the laws which may be directly enacted by the legislature or by the other subordinate authorities under the delegated lawmaker powers. The delegated legislations appears under various names – rules, regulations, notifications, and bye- laws.

2. Customs: The term 'law' includes 'customs' and 'usages'. In early times, custom was the main source of law but now to a large extent, it has been suspended by statutory law. However, custom has not wholly lost its law creating efficacy. A reasonable and certain ancient custom is binding on the courts like an Act of legislature. In Gazula Dasaratha Rama Rao v. State of A.P. the SC held that the customs yielding to the fundamental rights and recognized by law will be law under the purview of this provision. Personal laws like Hindu Law and Mohammedan Law are not included within this expression.

Is constitutional Amendment a law?

The question whether the word “law” in clause (2) of Art.13 also includes a ‘Constitutional amendment’ was for the first time considered by the supreme court in Shankari Prasad Singh Deo v. Union of India the Constitutional (1st Amendment) Act, 1951, which amended the fundamental rights guaranteed under the constitution, which was challenged on the ground that since the amendment has the effect of abridging the fundamental rights it was not valid law within the meaning of clause (2) of Article 13. The contention was rejected by the apex court and held that the word ‘law’ in clause (2) did not include a law made by the Parliament under Article

368 amending the constitution. It was said that the word ‘law’ means the “the rules and regulations enacted by legislatures” and not the “constitutional amendments made in exercise of constituent powers.” Therefore, this judgment was followed by majority of judgments such as in Sajjan Singh v. State of Rajasthan. However, in the case of Golak Nath v. State of Punjab, the apex court by 6:5 majority held that the word ‘law’ in Article 13 (2) included the amendment of the constitution and as a consequence, if an amendment abridged or took away fundamental rights guaranteed under Part III of the Constitution of India, the amending Act itself will become void and ultra vires. Subsequently, in the case of Kesavananda Bharati v. State of Kerala, the Supreme Court of India overruled the Golak Nath case and unanimously held that the Constitution (24th amendment) Act, 1971, which inserted clause (4) in Article 13 and clause (3) in Article 368 was valid. Therefore, all the judges agreed that the amended Article 368, all the provisions including those enshrining fundamental rights (Part III) could be amended.

Judicial review

The Doctrine of Judicial Review was for the first time propounded by the Supreme Court of America. Originally, the constitution of United States did not contain an express provision for judicial review but it was assumed by the Supreme Court of United States in the historic case of Marbury vs Madison The case was rooted in division between the Federalist and Republican parties following election 1800. During election, Thomas Jefferson(Republican) defeated John Adams(Federalist). While Adams lost election in November 1800, his term of office did not expire until following march 1801. Adams used this period to appoint several federal judges to bench. Some of these appointments were made during final hours of his presidency, earning dubious title 'the midnight judge'. Judges could not assume position until a commission was officially delivered by secretary of state. Since many of Adams appointments were made in final

days of his presidency many of commissions were not delivered when he left office. The new president, Thomas Jefferson ordered his new secretary of the state James Madison not to deliver the commission. William Marbury, who expected his commission requested the SC to issue a writ of mandamus(an official order to govt officer) to Madison ordering him to deliver the commission. Marbury argued that SC had power to issue writ under provisions of judiciary act of 1789,passed by congress.In 1803,the chief justice John Marshall of SC ruled that:

Madison should not have withheld Marbury's commission

Since the commission was signed & sealed it was rightfully owed to Marbury.

However he also ruled that SC did not have jurisdiction in this matter & could not force Madison to deliver commission.

U/s.13, Judiciary act,1789 passed by congress gave supreme court the power to issue writs & orders. (In Marshall's opinion, Congress could not give the Supreme Court the power to issue an order granting Marbury his commission. Only the Constitution could, and the document said nothing about the Supreme Court having the power to issue such an order.) Sec.13 of judiciary act,1789,was declared unconstitutional because congress tries to expand SC authority to include writ of mandamus under court's original jurisdiction. (Art.3, sec.2 of U.S constitution specifically listed 3 types of original jurisdiction). Marshall stated that congress overstepped its authority by changing SC jurisdiction without following proper amendment procedure. Thus, CJ Marshall declared s.13 ,judiciary act of 1879,as unconstitutional. This case became a landmark case for judicial review. Marshall stated, "constitution is the supreme law of land"& SC has final say over meaning of constitution. Thus, court itself asserted the doctrine of judicial review.

Shankari Prasad V. Union of India

In this case, the Zamindars challenged the constitutional validity of the first amendment Act 1951 on the ground that it violates fundamental rights and Article 13(2) of the Constitution of India and contended that Article 31 is unconstitutional. The court held that any amendment made under Article 368 is not a law under Article 13 of the constitution. So, the First Amendment Act is constitutionally valid.

After this case, the Fourth Amendment Act came, which added Article 31(2A) which stated that unless the ownership of property acquired is transferred to state or state corporation, there would be no compensation. It also stated that the adequacy of compensation which is to be fixed by law is not non-justiciable.

Further 17th Amendment came in 1964 which was given retrospective effect. It added Article 31A(2)(a)(iii) and laid down that estate includes Any land for the purpose of agriculture or ancillary purpose which includes wasteland or forest land.

Sajjan Singh V. State of Rajasthan

In this case, the constitutional validity of the 17th Amendment Act of 1964 was challenged. Hon'ble court by the ratio of 3:2 rejected the contention and applied the doctrine of pith and substance and held that Article 368 gives the power to amend 13(2). The judgement made in Shankari Prasad was upheld in this case.

I.C. Golak Nath & Ors V. State of Punjab

n this case, the validity of the 17th Amendment Act of 1964 was challenged again and was referred to a larger bench of 11 Judges. Court by the ratio 6:5 overruled the earlier judgement made in Shankari Prasad and Sajjan Singh and held that the word Law in Article 13 includes constitutional amendment made under Article 368.

CJI Subba Rao, speaking for 5 Judges held that Article 368 provides only for the procedure and not power to amend. As it derives its power from Article 248 i.e Residuary Power (as not mentioned specifically) that is an ordinary law, so the test of Article 13 will apply.

After this landmark case 24th Amendment of 1971, came to neutralize the effect of Golaknath case. It gave us Article 13(4), which says that any amendment made under Article 368 is not a law under Article 13. It also changed the Marginal note of Article 368 to Power of parliament and procedure to amend the constitution.

Soon the 25th Amendment of 1971 came which changed the word "compensation" in Article 31(2) to "amount" to remove the obligation that the government is bound to give compensation.

It added Article 31C to the constitution which stated that Article 14,19,31 won't apply to a law enacted to effectuate policy underlying Article 39(b) and (c) [DPSP].

Kesavananda Bharti V. State of Kerala

In this case, the 24th and 25th Amendment Act of 1971 was challenged. A Judge Bench of 13 Judges was constituted. With the ration of 7:6 held that:

1. Power to amend the constitution is to be found in Article 368. It is hard to believe that it lies in residuary power.

2. There is a difference between ordinary law and constitutional amendment.

3. Parliament can't destroy or amend the basic structure of the constitution.

CJI Sikri gave the list of the Basic structure though not exhaustive;

- The supremacy of the constitution.
- Republic and democratic form of government.
- Secular character of the Indian Constitution.
- Separation of Power.
- Federal character.

1. Court also held that "compensation" can't be replaced with "amount".

2. Article 31(c)(i) was held valid but Article 31(c)(i was declared invalid.

Indira Nehru Gandhi V. Raj Narain

In this case, the 39th Amendment Clause 4 was challenged as it puts a bar to challenge the election of Speaker and Prime Minister. It was struck down in this case and the court declared it unconstitutional.

Minerva Mills V. Union of India

In this case, further Judicial Review was added to the list of Basic Structure of the constitution along with the balance between Fundamental Rights and Directive Principles.

I.R. Coelho V. State of Tamil Nadu

In this case the court held that any act inserted in Schedule 9 can be judicially scrutinized but only those enactments which are inserted after 24th April 1973.

Article 13 of the constitution do upholds the supremacy over Indian constitution and do paves the way to judicial review. This prescription do enables us to review the pre-constitutional and existing laws.

Although the intervention of the judiciary in constitutional matters is a debatable topic, yet in most of the cases, the power of judiciary is considered to be the supreme and is summoned to guard and enforce the fundamental rights guaranteed in the Indian constitution under part III.

RIGHT TO EQUALITY

The Constitution of India guarantees the Right to Equality through Articles 14 to 18. “Equality is one of the magnificent corner-stones of Indian democracy.

Article 14 outlaws discrimination in a general way and guarantees equality before law to all persons. In view of a certain amount of indefiniteness attached to the general principle of equality enunciated in Article 14, separate provisions to cover specific discriminatory situations have been made by subsequent Articles. Thus, Art. 15 prohibits discrimination against citizens on such specific grounds as religion, race, caste, sex or place of birth. Art. 16 guarantees to the citizens of India equality of opportunity in matters of public employment. Art. 17 abolishes untouchability, and Art. 18 abolishes titles, other than a military or academic distinction. Thus, the Supreme Court has said that the Constitution lays down provisions both for protective discrimination as also affirmative action.

It may be noted that the right to equality has been declared by the Supreme Court as a basic feature of the Constitution. The Constitution is wedded to the concept of equality. The Preamble to the Constitution emphasizes upon the principle of equality as basic to the Constitution. This means that even a constitutional amendment offending the right to equality will be declared

invalid.6 Neither Parliament nor any State Legislature can transgress the principle of equality.7 This principle has been recently reiterated by the Supreme Court in M.G. Badappanavar v. State of Karnataka in the following words: “Equality is a basic feature of the Constitution of India and any treatment of equals unequally or unequals as equals will be violation of basic structure of the Constitution of India.”

Equality before the Law:

(a) This is a negative concept taken from the English Constitution. It implies the absence of any privilege in favour of any person. It means that among equals the law should be equal and should be equally administered and that 'like should be treated alike' (Jennings). It also means the right to sue and to be sued, to prosecute and to be prosecuted for the same kind of action should be the same for all without distinction of race, religion, wealth, social status or political influence (Jennings).

(b) Dicey's concept of Rule of law has equality as its central core. According to him it means the 'Supremacy of Law'. Equality requires that Justice must be available to all. Hence, Justice should not be denied to the accused who on grounds of poverty is not in a position to maintain an advocate to defend him . Legal aid is provided in England under the Poor Prisoners Defence Act, and, Legal Aid and Advice Act. In the U.S, the Supreme Court held in Powell V. Alabama that under "due process of law", the State was under a duty to meet the expenses of defence. In this case, 6 negroes had been accused of ravishing a white girl to death. There was no defence. The Supreme Court declared that the state should pay for the defence. In India, in Tara Singh's Case, it was held that opportunity should be provided to such accused as per Art. 22. In Hasinara Khatoon V. State of Bihar, the Supreme Court has held that Justice required that accused should be defended or State should ensure such legal defence, at its own cost. If legal defence is not provided, the trial would be vitiated. High Court Rules have however provided for defence as a 'must when the accused has no means. 'Legal Aid Clinics' are now protecting the interests of such persons in Lower Courts.

Dicey had given three meanings to this term:

1. The supremacy of law: It means that the law is supreme and the Government cannot act arbitrarily. If a person has violated any law, he can be punished but he cannot be punished for anything else at the whim of the Government.

2. Equality before Law: It means that all the people should be subject to the same provisions of law which is administered by the ordinary courts of the land. Thus, no person is above the law and has to follow the law. Dicey had given an exception to the Monarch under this rule because in England it is believed that the King can do no wrong.

3. Constitution originates from the ordinary law: It means that the rights of the people is not granted by the constitution but instead it is the result of the law of the land which is administered by the courts.

In India, the first and second rule has been adopted but the third rule has been omitted because the Constitution is the supreme law of the land and the rights of the people originate from it and all the other laws which are passed by the Legislature should not violate the provisions of the Constitution.

An exception to Equality before Law

There is some exception to the rule of equality which has been provided under the Indian Constitution. Under Articles 105 and 194, the Members of the Parliament and the State Legislatures respectively are not held liable for anything which they say within the House.

Under Article 359 when there is a proclamation of Emergency, the operation of Fundamental Rights including Article 14 can be suspended and if any violation of this right is done during such proclamation, it cannot be challenged in the Courts after the proclamation ends.

Under Article 361 the President and the Governors are not liable to any court for any act which is done by them in exercising their power and duties of the office.

(c) Equal Subjection to Courts: According to Dicey, equality before the law means that no man should be made to suffer in body or goods except for a distinct breach of law ; It also means that no man is above the law and that all are amenable to the jurisdiction of the ordinary courts. Dicey was against the Administrative tribunals as they differed fundamentally from the Ordinary

courts. The tribunals do not follow the court procedures (Civil and Criminal) and also the law relating to Evidence.But, these tribunals had come to stay. Hence, the courts have imposed a duty on these tribunals that they should follow the principles of natural justice.

Equal protection of the Laws:

This is a dynamic concept taken from the American Constitution. It implies equality of treatment in equal circumstances. The essence of it is that when persons are similarly placed they must be similarly treated. It imposes a duty on the State to take all the necessary steps to ensure that the guarantee of equal treatment of people is followed. Like people being treated alike is followed under this rule and another important point under this rule is that unlike should not be treated alike. Thus, even if people who are under different position and circumstances are governed by the same rule then it will also have a negative effect on the rule of equality. It is a guarantee of equal treatment. An equal law should be applied with an equal hand to all persons who are the equals. The rule is that the like should be treated alike and not that unlike should be treated alike. The same or uniform treatment of unequals is as bad as unequal treatment of equals. It has been said that the equal protection of the law is a pledge of protection or guarantee of equal laws. The Rule of Law embodied in Article 14 is the 'basic feature' of the Indian Constitution and hence it cannot be destroyed even by an amendment of the Constitution under Article 368 of the Constitution.

Article 14 Permits Classification But Prohibits Class Legislation

Article 14 guarantee equal protection of laws and they are:

- Neither means that the laws need to be general in character nor that it should be applicable to everyone, which means, the same law applies to every person.
- It does not assess attainment or situations in the same position. Different classes have various needs that require separate treatment.
- For safety and security different laws for varying places and legitimate control policies enacting laws lie at the best interest of the state.
- Identical treatment in unequal situations, in fact, would amount as inequality.

Therefore for the society to progress a reasonable classification is not only permitted but also necessary. Article 14 forbids class legislation but not reasonable classification. The article applies on the reasonable basis, equals are treated differently. The article does not apply where unequals and equals are given different treatments.

Conferring particular privileges upon a class of persons, class legislation makes improper discrimination by selecting a large number of persons arbitrarily. No reasonable or substantial difference can be found in justifying the exclusion of the one and the inclusion of the other from such privilege.

Article 14 and Reasonable Classification

Article 14 has provided the provision for equality of all people before the law but every person is not the same and therefore it is not practically possible to have a universal application of equality. Thus, the laws cannot be of a general character and some classification is permitted under Article 14.

Thus, the legislature has been allowed to identify and classify different people in groups because it has been accepted that treating the unequal in the same manner is likely to cause more problems instead of preventing them. So for the society to progress, classification is important.

This classification cannot be done arbitrarily because in such case, there will be no justification, so even though Article 14 allows for classification such classification should not confer special privileges to any group arbitrarily and such a classification has to be done on a rational basis. For

e.g. the Legislature cannot pass a law which favours a particular caste of people without any rational basis for it and if such a law is passed, it is bound to be held unconstitutional by the Judiciary.

Such arbitrary classification by the legislature is known as class legislation ad it is forbidden by the Constitution but it allows for reasonable classification in which the legislation is passed on a rational basis for the purpose of achieving some specific objectives.

Test of Reasonable Classification

Article 14 of the Indian constitution forbids class legislation but it does not prohibit the reasonable classification of objects, persons, and transactions for the purpose so as to achieve specific ends by the parliament. Such classification should not be artificial, arbitrary or evasive and it must rest on substantial distinction which is real. It must bear a reasonable and just relation to the sought object which is to be achieved by the legislation. Classification of reasonable as laid by the Indian Supreme Court has two conditions as in the case of Saurabh Chaudhari v Union Of India, are-

(i) The classification must be founded on intelligible differentia, distinguishing grouped together persons or goods from the left out ones of the group.

(ii) The differential must be in a rational relation with the sought object that is to be achieved by the act.

The object of the act and differential on the basis of classification are two separate things. It is essential that there must be the presence of nexus between the object of the act and the basis of classification. When a reasonable basis is not present for classification then such classification made by the legislature must be declared discriminatory. The age at which a person would be deemed competent between themselves can be fixed by the legislature but competency cannot be claimed. A contract made dependent on the color of hair cannot be made, and such a classification would be arbitrary.

Supreme Court in Re Special Courts Bill case had warned against overemphasizing the classification. The court observed that the doctrine of classification is a subsidiary rule which has been used by the court to facilitate the doctrine of equality. If there is an overemphasis on the doctrine of classification it would inevitably result in the doctrine of equality under Article 14 to erode and will lead to the substitution of equality by classification.

The true meaning and scope of Article 14 have been explained in a number of cases by the Supreme Court. In view of this the propositions laid down in DaLmia case still hold good governing a valid classification and are as follows.

1.A law may be constitutional even though it relates to a single individual if on account of some special circumstances or reasons applicable to him and not applicable to others, that single individual may be treated as a class by itself

2. There is always presumption in favour of the constitutionality of a statute and the burden is upon him who attacks it to show that there has been a clear transgression of constitutional principles.

3. The presumption may be rebutted in certain cases by showing that on the fact of the statue, there is no classification and no difference peculiar to any individual or class and not applicable to any other individual or class, and yet the law hits only a particular individual or class

4. It must be assumed that Legislature correctly understand and appreciates the need of its own people that its law are directed to problem made manifest by experience and that its discrimination are based on adequate grounds

5. In order to sustain the presumption of constitutionality the court may take into consideration maters of common knowledge, matters of report, the history of the times and may assume every state of facts which can be conceived existing at the time of the legislation.

6. Thus the legislation is free to recognize degrees of harm and may confine its restriction to those cases where the need is deemed to be the clearest.

7. While good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonable be regarded as based, the presumption of constitutionality cannot be carried to extent always that there must be some undisclosed and unknown reason for subjecting certain individuals or corporation to be hostile or discriminating legislation

8. The classification may be made on different bases e.g. geographical or according to object or occupation or the like.

9. The classification made by the legislature need not be scientifically perfect or logically complete. Mathematical nicety and perfect equality are not required. Equality before the law does not require mathematical equality of all persons in all circumstances. Equal treatment does not mean identical treatment. Similarly not identity of treatment is enough.

10. There can be discrimination both in the substantive as well as the procedural law. Article 14 applies to both. If the classification satisfies the test laid down in the above propositions, the law will be declared constitutional. The question whether a classification is reasonable and proper and not must however, be judged more on commonsense than on legal subtitles.

NEW CONCEPT OF EQUALITY

E.P. Royappa v state of Tamilnadu

This is a very prominent case where the Article 14 of the Indian Constitution was further interpreted and the ambit of this Article was broaden by the judgment given by renowned Supreme Court Judges. It was for the first time in Royappa case that the Supreme Court laid a basic, new dimension to Article 14 and that it was a guarantee against arbitrariness. Equality is a dynamic concept with many aspects and dimensions and it cannot be "cribbed cabined and confined" within traditional and doctrinaire limits. From a positivistic point of view, equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic while the other, to the whim and caprice of an absolute monarch. Where an act is arbitrary it is implicit in it that it is unequal both according to political logic and constitutional law and is therefore violative of Art. 14.

In Maneka Gandhi's Case, the Govt. had impounded the passport, and this was held as "not justified". The Supreme Court held that equality was not limited to the "judicial formula" of reasonable classification. It was much -wider. The Legislative Act should not only pass the two tests of reasonable classification, but also be NOT ARBITRARY. Accordingly, impounding a passport without hearing was "not fair". (The petitioner was heard &passport issued.) In International Airport Authority Case, the court held that equality had an "activist magnitude" and embodied guarantee against arbitrariness.

In Mithu V. State of Punjab, S. 303. I.P.C. was struck down. In this case, if a person is guilty of murder under S.3021.P.C. the court in its discretion may award death penalty, but under S.303

I.P.C. if the person, a prisoner (under life imprisonment), commits murder, then the court shall give death penalty. This classification was held bad as under Sn.302, there was judicial discretion but there was no such discretion under S. 303. Hence S. 303 was arbitrary and bad.

In the case of Air India v. Nargesh Meerza, the regulation of the Indian Airlines provided that an Air Hostess had to retire from their services on attaining the age of 35 or if they married within 4 years of their service or on their first pregnancy whichever occurred earlier. The court held that terminating the services of an air hostess on the grounds of pregnancy amounted to discrimination as it was an unreasonable ground for termination. The regulations provided that after 4 years of service the air hostess could marry therefore the grounds of pregnancy was not reasonable. Thus, it was held that this regulation flagrantly violated Article 14 and such termination would not be valid.

In the case of D.S. Nakara v. Union of India, Rule 34 of the Central Services rules was held to be violating Article 14 and thus unconstitutional. Under this rule, a classification was made between the pensioners who retired before a specific date and those who retired after that date. Such classification was held irrational by the Court and it was arbitrary. Thus it was an infringement of Article 14 and as a result, was set aside.

In Pradeep Jain vs Union Of India, In regard to admission to M.B.B.S. and post-graduate medical courses, a somewhat uniform and consistent practice had grown in almost all the States and Union Territories to give preference to those candidates who had their domicile or permanent residence within the State for a specified number of years ranging from 3 to 20 years and to those who had studied in educational institutions in the State for a continuous period varying from 4 to 10 years. Sometimes the requirement was phrased by saying that the applicant must have his domicile in the State. The petitioners and the appellant who sought admission in

M.B.B.S. and M.D.S. courses in different universities of different States and Union Territory of Delhi challenged the residential requirement and institutional preference on the ground of being violative of Constitution. The question which arose for consideration was whether, consistently with the constitutional values, admissions to a medical college or any other institution of higher

learning situate in a State could be confined to those who had their 'domicile' within the State or who were resident within the State for a specified number of years or can any reservation in admissions be made for them so as to give them precedence over those who do not possess 'domicile' or residential qualification within the State, irrespective of merit. Disposing of the writ petitions and the civil appeal.

HELD: The entire country is taken as one nation with one citizenship and every effort of the Constitution makers is directed towards emphasizing, maintaining and preserving the unity and integrity of the nation. Now if India is one nation and there is only one citizenship, namely, citizenship of India, and every citizen has a right to move freely throughout the territory of India and to reside and settle in any part of India, irrespective of the place where he is born or the language which he speaks or the religion which he professes and he is guaranteed freedom of trade, commerce and intercourse throughout the territory of India and is entitled to equality before the law and equal protection of the law with other citizens in every part of the territory of India, it is difficult to see how a citizen having his permanent home in Tamil Nadu or speaking Tamil language can be regarded as an outsider in Uttar Pradesh or a citizen having his permanent home in Maharashtra or speaking Marathi language be regarded as an outsider in Karnataka. He must be held entitled to the same rights as a citizen having his permanent home in Uttar Pradesh or Karnataka, as the case may be. To regard him as an outsider would be to deny him his constitutional rights and to derecognise the essential unity and integrity of the country by treating it as if it were a mere conglomeration of independent States.

Charanjit Lal Chowdhury v. Union of India,

- The petitioner was an ordinary shareholder of the Sholapur Spinning and Weaving Co. Ltd. The petitioner approached the Supreme Court for the protection against the enforcement of a Central Act, the Sholapur Spinning and Weaving Co. (Emergency Provisions) Act, 1950.

- On Account of mismanagement and neglect of the affairs of the Company, a situation had arisen that brought about the closing down of the mill.

 The Central Government thereupon issued an Ordinance which was later replaced by the above-mentioned Act. By this Act, the management and administration of the assets of the Company were placed under the control of the directors appointed by the government.

 The contention of the petitioner was that the impugned Act infringed the rule of equal protection of the laws embodied in Article 14 because a single company and its shareholders were being subjected to disabilities vis-à-vis other companies and held the legislation valid.

Sri Srinivas Theatre v. Govt. of Tamil Nadu

Whether it was not competent for the Tamil Nadu Legislature to declare that the theatres situated within the 5 kms radius (belt) of the municipal corporation areas and the areas of special grade municipalities shall be subjected to the same method of taxation as the theatres situated within the said areas. Appeal dismissed.

Basis of Classification:

Reasonable classification may be based on different grounds:

(i) Geographical basis : Depending on the peculiar circumstances and situations, the classification may be based on territorial grounds. Thus, in Ram Chandra V. State of Orissa, two Nationalizations Acts, to take over road transport for different areas in the State of Orissa were held valid, as there were material differences peculiar to the two Acts. But, district wise distribution of seats in the Medical College was held bad in Rajendran V. Tamilnadu. Law providing for different fees in Medical and Engineering Colleges between residents and non-residents was held valid in Joshi V. State of M.P.

(ii) Historical basis: Merger, State reorganization etc. may be grounds for reorganization. In Pavitra Kumar V. State of W.B.,he different categories of Advocates into Barrister advocates and non-barrister advocates was held valid for "historical reasons". (Now Under Advocates Act 1962 there is no such classification). Special immunity to Ex- Rulers in C.P.C. was held valid on historical grounds.

(iii) Time as the basis: The basis of classification maybe based on date of operation of law. For instance, an enhanced tax rate may be imposed from a particular date. Pending cases may be taxed at old rates. This is not hit by Art. 14.

(iv) Nature of persons, trade, calling or business: Classification of persons, on the basis of age, for instance is valid (S. 11 Contract Act). Small Scale Industries, may be classified as one group for favoured treatment; Classification of News papers into Small, Medium and Big for levying customs duty on newsprint was held valid (Express Newspaper Case).

(v) Special Courts and Special Procedure: Leading case: Kathi Ranning V. State of Saurastra. In re Special Courts Bill the Supreme Court has held that Special Courts and Special Procedures were valid if the law clearly lays down the guiding principles

e.g. public safety, maintenance of public order etc. The offences must be properly classified in relation to the objective to be achieved.

(vi) Tax basis: The basis of tax must pass the test of classification under Art. 14. Hence, tax on Virginia tobacco but no tax on country tobacco was held valid in E-I-Tobacco Case.

(vii) Individual or group may be classified, if it is not arbitrary and answers the two tests.

Ameerunisa V. Mehboob: There were continuous court litigations between two claimants. The Hyderabad Legislature passed the Walud Dowla Succession Act and gave the property of the deceased Nawab of Hyderabad to one party. The other party challenged this law as it denied its right to claim the property, just as any other citizen, in a court. Held, classification was bad. The essence of Art. 14 is that not only that there must be a reasonable classification having a relation to the objective to be achieved, but that such a classification itself should not be arbitrary.

Art. 14 and Special Courts:

Whether Special Courts may be constituted by the Legislature to try certain types of offences, was discussed in detail by the Supreme Court in 'in re Special Courts 'case. The Court held that the Bill was valid. The classification of offences during Emergency had been defined. The duration had been specified. There were no unguided and uncontrolled powers to the Executive.

The guide lines were clear. Art. 14 guarantees to all persons (1) Equality before the law and (2) Equal protection of the Laws, within the territory of India.

Equality before the law means that among equals, law should be equal and should be equally administered, and that like should be treated alike. It includes the right to sue and to be sued, to prosecute and to be prosecuted without any distinction of religion race, Wealth, Social Status or Political Influence. This includes the concept of "Rule of Law". According to Dicey, this means the supremacy of law, and, that no man is above the Law; It means that no person shall suffer in body or goods except for a distinct breach of law, and, that all persons are amenable to the jurisdiction of the ordinary Courts.

In State of West Bengal V Anwar Ali, the Act had provided for special courts to conduct "speedier trial of certain offences". The Govt. could select the offences for speedy trial. The Supreme Court held that this was an arbitrary Power and violated Art. 14. No guidelines were given by the Act to classify the offences. Further, the procedure for trial also varied from the general procedure provided in the Cr.P.C. This was also held bad. However, in Kathai Raning V.State of Saurastra, the law had given proper guidelines and also had specified the categories of offence that could be selected for special trial. Hence, the law was held good. In its advisory opinion, in "In re special courts case ", the Supreme Court held that special courts set up to try offences committed during national emergency of 1975-77,did not violate Art. 14. and the procedure provided therein, was held not against the Constitution. Hence, in India ,Special

Courts may be constituted by law, but the law should classify the offences or provide clear guidelines to the Govt. to classify. There should be no room for any arbitrary discretion of the executive. The procedure should not be substantially different from the one prescribed by ordinary law.

Article 14 of the Constitution is part of the Fundamental rights under Part III of the Indian Constitution and it is regarded as one of the most important Articles of the Constitution. Article 14 provides for equality to all the people and absence of any discrimination on grounds such as sex, caste, religion etc.

Under Article 14 two important aspects have been included which are equality before the law and the equal protection of the law and both of them play an important role.

Under Article 14 the concept of Rule of law has been adopted under which no person can be said to be above the law and every person has to abide to the provisions of law. But the equality which has been provided for under Article 14 is not universal and the principle of equality among the equals is followed. This is the reason why many laws are made which some people such as laws for the benefit of children. Such classification is reasonable and not arbitrary.

The new dimensions of Article 14 have been developed by the judiciary and the main purpose of Article 14 is to remove any arbitrariness which may exist in the actions of the State and thus this Article has a much wider scope in the present time as compared to its scope at the time of enactment of the Constitution. Thus, the scope of this article has been enlarged by various judicial pronouncements.

UNIT - III

- **Protective discrimination and Social Justice under Articles 15 and 16,**
- **New Judicial Trends on Social Justice**
- **Constitutional Provisions on Untouchability under Article 17**
- **Right to freedom of speech and expression and different Dimensions**
- **Reasonable Restrictions**
- **Freedom of Assembly, Association, Movement, and Residence, Professional, Occupation, Trade or Business.**

Protective discrimination and Social Justice under Articles 15 and 16 and Judicial Trends

Social justice means availability of equal social opportunities for the development of personality to all the people in the society, without any discrimination on the basis of caste, sex or race. No one should be deprived, because of these differences, those social conditions which are essential for social development. The issue of social justice is associated with social equality and social equality and social rights and these are depended on economic equality and rights. Social justice can be made available only in a social system where the exploitation of man by man is absent, and where privileges of the few are not built upon the miseries of the many.

The Preamble to the constitution of India assures to all citizens, justice-social, economic and political; Liberty of status and of opportunity, and promotion among them all; Fraternity assuring the dignity and the unity of the nation. The spirit represented in the Preamble is further enshrined in the chapter of Fundamental Rights and Directive Principles of State Policy, the purpose of which is to promote the social welfare of the by securing and protecting as effectively as it may social order in which justice- social, economic and political shall inform to all the institution of national life. The 42nd Amendment Act by introducing the word “Socialist” in the preamble has strengthened the constitutional ethos of social and economies justice.

The constitution of India recognizes and seeks to realize the various components of social justice. Article 14 guarantees to every person “equality before law or equal protection

of the laws within the territory of India". Article 15(1) prohibits discrimination against any citizen on grounds of religion, race, caste, and place of birth or any of them. In the same view Article 16 (1) provide equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state. By Article 17 "untouchability" the age-old practice has been done away all its manifestations.

Article 15(1) specifically bars the state from discriminating against any citizen of India on grounds only of religion, race, caste, sex, place of birth, or any of them. Article 15(2) prohibits subjection of a citizen to any disability, liability, restriction or condition on grounds only of religion, race, caste, sex or place of birth with regard to— (a) access to shops, public restaurants, hotels and places of entertainment, or, (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of general public. Under Art. 15(3), the state is not prevented from making any special provision for women and children.

Art. 29(2) does not prevent the state from making any special provisions for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Provisions contained in Arts.15 and 16 are merely enabling provisions. No citizen of India can claim reservation as a matter of right and accordingly no writ of mandamus can be issued. (a) ART. 15(1) Article 15(1) prohibits differentiation on certain grounds mentioned above

Under Art. 15(4), the State can make special provisions for certain sections of the society as stated above. But for any section of population not falling under Art. 15(4), special provisions can be made if there is reasonable classification. The word 'discrimination' in Art. 15(1) involves an element of unfavourable bias.

15 is narrower than that of Art. 14 in several respects. One, while Art. 14 is general in nature in the sense that it applies both to citizens as well as non-citizens, Art. 15(1) covers only the Indian citizens, and does not apply to non-citizens. No non-citizen can claim any right under Art. 15, though he can do so under Art. 14. Two, while Art. 14 permits any reasonable classification on the basis of any rational criterion, under Art. 15(1), certain grounds mentioned therein can never

form the basis of classification. The residents of Madhya Bharat were exempted from payment of a capitation fee for admission to the State medical college, while the non-residents were required to pay the same.

The Supreme Court negatived the plea of discrimination by the non-residents under Art. 15(1) because the ground of exemption was 'residence' and not 'place of birth'. Residence and place of birth are two distinct concepts with different connotations. Art. 15(1) prohibits discrimination on the basis of place of birth but not residence. And, in the instant case, classification on the basis of 'residence' was held to be reasonable. Education is a State subject. A State spends money on the upkeep of educational institutions. There is, therefore, nothing wrong in the State if it so orders the educational system that some advantage ensures for the benefit of the State. Some of the resident students after securing their degree may settle in the State as doctors and serve the community. Thus, the justification for the classification on the basis of residence rested on the assumption that the residents of the State would after becoming doctors settle down and serve the needs of the people of the State.

Art. 15(3) : Women and Children : Articles 15(3) and 15(4) constitute exceptions to Arts. 15(1) and 15(2). According to Art. 15(3), the state is not prevented from making any "special provision" for women and children. Articles 15(1) and 15(2) prevent the state from making any discriminatory law on the ground of gender alone. The Constitution is thus characterised by gender equality. The Constitution insists on equality of status and it negates gender bias. Nevertheless, by virtue of Art. 15(3), the state is permitted, despite Art. 15(1), to make any special provision for women, thus carving out a permissible departure from the rigours of Art. 15(1). Articles 15 and 16 do not prohibit special treatment of women.

SOCIALLY AND EDUCATIONALLY BACKWARD CLASSES

A major difficulty raised by Art. 15(4) is regarding the determination of who are 'socially and educationally backward classes.' This is not a simple matter as sociological and economic considerations come into play in evolving proper criteria for its determination. Art. 15(4) lays down no criteria to designate 'backward classes'; it leaves the matter to the state to specify backward classes, but the courts can go into the question whether the criteria used by the state for the purpose are relevant or not.

The question of defining backward classes has been considered by the Supreme Court in a number of cases. On the whole, the Supreme Court's approach has been that state resources are limited; protection to one group affects the constitutional rights of other citizens to demand equal opportunity, and efficiency and public interest have to be maintained in public services because it is implicit in the very idea of reservation that a less meritorious person is being preferred to a more meritorious person. The Court also seeks to guard against the perpetuation of the caste system in India and the inclusion of advance classes within the term backward classes. From the several judicial pronouncements concerning the definition of backward classes, several propositions emerge. First, the backwardness envisaged by Art. 15(4) is both social and educational and not either social or educational. This means that a class to be identified as backward should be both socially and educationally backward.

In Balaji case, the Court equated the "social and educational backwardness" to that of the "Scheduled Castes and Scheduled Tribes". The Court observed: "It was realised that in the Indian society there were other classes of citizens who were equally, or may be somewhat less, backward than the Scheduled Castes and Scheduled Tribes and it was thought that some special provision ought to be made even for them." Secondly, poverty alone cannot be the test of backwardness in India because by and large people are poor and, therefore, large sections of population would fall under the backward category and thus the whole object of reservation would be frustrated.

In Narayan Sharma v. Pankaj Kumar Lehkar, the Supreme Court considered the validity of the following scheme of reservation made by the Assam Government for seats in the post-graduate medical courses in its medical colleges: (i) 25% All India quota; (ii) 4 seats for North Eastern Council; (iii) 6 seats for teachers in medical colleges, (iv) 20 seats for doctors who had worked for five years in a health centre outside the municipal limits; (v) 7% for Scheduled Caste candidates and (vi) 15% OBC candidates. An entrance examination was to be conducted but candidates in categories (i), (ii), (iii) and (iv) were not required to appear at such an examination. The Supreme Court upheld reservation for category (ii) as these seats were meant for the five Eastern States having no medical college of their own. The students of these States being handicapped in getting medical education formed a separate class and reserving a few seats for them did not violate Art. 14. But the provision exempting them from appearing at an entrance

examination was quashed as selection ought to be based on merit and could not be left to the arbitrary discretion of any administrative body. Reservation for category (iii) was also upheld. It was mandatory for teachers in medical colleges to have a postgraduate degree for their future promotions. The classification was based on an intelligible differentia having rational nexus to the object of the rule. The teachers being constantly in touch with medical subjects could be validly exempted from the entrance examination.

Equality of Status and Opportunity in Public Employment

Article16(1) is a facet of Art. 14. Arts. 14 and 16(1) are closely interconnected. Art. 16(1) takes its roots from Art. 14. Art. 16(1) particularizes the generality of Art. 14 and identifies, in a constitutional sense, "equality of opportunity" in matters of employment under the state. An important point of distinction between Arts. 14 and 16 is that while Art. 14 applies to all persons, citizens as well as non-citizens, Art. 16 applies only to citizens and not to non-citizens. Article16(1) guarantees equality of opportunity to all citizens "in matters relating to employment" or "appointment to any office" under the state. According to Art. 16(2), no citizen can be discriminated against, or be ineligible for any employment or office under the state, on the grounds only of religion, race, caste, sex, descent, place of birth or residence or any of them. Adherence to the rule of equality in public employment is a being feature of our constitution and the rule of law is its core, the Court cannot disable itself from making an order inconsistent with Articles 14 and 16 of the Constitution.

Article16(2) is also an elaboration of a facet of Art. 16(1). These two clauses thus postulate the universality of Indian citizenship. As there is common citizenship, residence qualification is not required for service in any State. Public employment is a facet of right to equality envisaged under Article 16 of the Constitution of India. The State although is a model employer, its right to create posts and recruit people there for emanates from the statutes or statutory rules and/or rules framed under the proviso appended to Article 309 of the Constitution of India. The recruitment rules are to be framed with a view to give equal opportunity to all the citizens of India entitled for being considered for recruitment in the vacant posts.

Article 16(1) is much wider in scope than Art. 16(2) and the grounds of discrimination expressly mentioned in Art. 16(2) are not exhaustive. Art. 16(2) brings out emphatically, in a negative form, what is guaranteed affirmatively by Art. 16(1). Discrimination is a double edged weapon; it would operate in favour of some persons but against some others. Art. 16(2) prohibits discrimination and, thus, assures the effective enforcement of the Fundamental Right guaranteed in Art. 16(1)

Educational qualifications can be made the basis for classification of employees in State service in the matter of pay scales, promotion, etc. Higher pay scale can be prescribed for employees possessing higher qualifications. Similarly, in the matter of promotion, classification on the basis of educational qualification so as to deny eligibility to a higher post to an employer possessing lesser qualifications is valid. Educational qualifications can justifiably be made the basis for qualification for the purpose of promotion to the higher post.

Articles 16 and 14 do not forbid the government from creating different cadres or categories of posts carrying different emoluments. Also, there is no bar in the way of the state integrating different cadres into one cadre. “It is entirely a matter for the state to decide whether to have several different cadres or one integrated cadre in its services. That is a matter of policy which does not attract the applicability of the equality clause.

The Supreme Court has deduced the principle of “equal pay for equal work” from Arts. 14, 16 and 39(d) and the Preamble to the Constitution. No such principle is expressly embodied in the Constitution but the principle has now matured in a Fundamental Right.

As the Supreme Court has explained in State of Madhya Pradesh v. Pramod Bhartiya, the doctrine of “equal pay for equal work” is implicit in the doctrine of equality enshrined in Art. 14, and flows from it. The rule is as much a part of Art. 14 as it is of Art. 16(1). The doctrine is also stated in Art. 39(d), a directive principle, which ordains the State to direct its policy towards securing equal pay for equal work for both men and women.

In Purshottam v. Union of India, implementation of revised pay scales as recommended by the Pay Commission for certain categories of servants but nonimplementation thereof for certain other categories was held to be discriminatory. The Government had made a reference to the Commission in respect of all its employees, and when it accepted its recommendations it should

implement them in respect of all employees. Not to implement the recommendations with respect to some employees only violated Arts. 14 and 16.

EXCEPTIONS TO ARTS. 16(1) & 16(2): The right of equality guaranteed by Arts. 16(1) and (2) are subject to a few exceptions.

1. ART. 16(3) First, under Art. 16(3), Parliament may make a law to prescribe a requirement as to residence within a State or Union Territory for eligibility to be appointed with respect to specified classes of appointments or posts. Thus, Art. 16(2) which bans discrimination of citizens on the ground of 'residence' only in respect of any office or employment under the state, can be qualified as regards residence, and a 'residential qualification' imposed on the right of appointment in the State for specified appointments. This provision, therefore, introduces some flexibility, and takes cognisance of the fact that there may be some very good reasons for restricting certain posts in a State for its residents.
2. Art. 16(5) provides that a law may prescribe that the incumbent of an office in connection with the affairs of a religious or denominational institution, or a member of the governing body thereof, shall belong to the particular religion or denomination.
3. ART. 16(4) constitutes a very significant exception to the principle of equality embodied in Art. 16(1) and, therefore, needs to be discussed in some detail.

In Balaji case, the Court attempted to impose a constitutional limit on the extent of preference, not on the "narrower ground of reservation," but on the broader grounds of policy. The Court spoke of adjusting the interests of the weaker sections of society with the interests of the community as a whole. The Court declared that a formula must be evolved which would strike a reasonable balance between the several relevant considerations.

While striking down as unconstitutional a government order by which 68% of the seats in educational institutions were reserved for Scheduled Castes, Scheduled Tribes and other Backward Classes on the ground of excessive reservation and as a fraud on the Constitution, the Court observed: "Speaking generally and in a broad way, a special provision should be less than 50 per cent; how much less than 50 per cent would depend upon the relevant prevailing circumstances in each case.

Immediately thereafter came the Devadasan case before the Supreme Court in which the Court was required to adjudge the validity of the 'carry forward' rule. The 'carry forward' rule envisaged that in a year, 17½ per cent posts were to be reserved for Scheduled Castes/Tribes; if all the reserved posts were not filled in a year for want of suitable candidates from those classes, then the shortfall was to be carried forward to the next year and added to the reserved quota for that year, and this could be done for the next two years. The result of the rule was that in a year out of 45 vacancies in the cadre of section officers, 29 went to the reserved quota and only 16 posts were left for others. This meant reservation upto 65% in the third year, and while candidates with low marks from the Scheduled Castes and Scheduled Tribes were appointed, candidates with higher marks from other classes were not taken.

In State of Kerala v. N.M. Thomas. the Supreme Court held that it was permissible to give preferential treatment to Scheduled Castes/Tribes under Art. 16(1) outside Art. 16(4). In Devadasan, the majority had taken the view that Art. 16(4) was an exception to Arts. 16(1) an 16(2). This was the view expressed also in Balaji and Rangachari. On the other hand, in Devadasan, in a dissenting opinion, SUBBA RAO, J., had expressed the opinion that Art. 16(4) was not an exception to Art. 16(1), but was a legislative device by which the framers of the Constitution had sought to preserve a power untrammelled by the other provisions of the Article. It was a facet of Art. 16(1) as "it fosters and furthers the idea of equality of opportunity with special reference to under privileged and deprived classes of citizens.

In A.B.S.K. Sangh (Rly.) v. Union of India, the Supreme Court again went into the question of reservation in public services vis-a-vis Art. 16. The Court upheld reservation of posts at various levels and making of various concessions in favour of the members of the Scheduled Castes and Scheduled Tribes.

G Indra Sawhney v. Union of India, known as the Mandal Commission case, is a very significant pronouncement of the Supreme Court on the question of reser vation of posts for backward classes. The Court has dealt with this question in a very exhaustive manner. The Mandal Commission was appointed by the Government of India in terms of Art. 340 of the Constitution in 1979 to investigate the conditions of socially and educationally backward classes. One of the major recommendations made by the Commission was that, besides the Scheduled Castes (SCs) and Scheduled Tribes (STs), for Other Backward Classes (OBCs) which constitute nearly 52%

component of the population, 27% government jobs be reserved so that the total reservation for all, SCs, STs and OBCs, amounts to 50%. No action was taken on the basis of the Mandal Report for long after it was submitted, except that it was discussed in the Houses of Parliament twice, once in 1982 and again in 1983. On Aug. 13, 1990, the V.P. Singh Government at the centre issued an office memorandum accepting the Mandal Commission recommendation and announcing 27% reservation for the socially and educationally backward classes in vacancies in civil posts and services under the Government of India. This memorandum led to widespread disturbances in the country.

In 1991, the Narasimha Rao Government modified the above memorandum in two respects: one, the poorer sections among the backward classes would get preference over the other sections; two, 10% vacancies would be reserved for other "economically backward sections" of the people who were not covered by any existing reservation scheme. Ultimately, the constitutional validity of the memorandum came to be questioned in the Supreme Court through several writ petitions. The question of constitutional validity of the memorandum was considered by a Bench of 9 Judges. Six opinions were delivered. The leading opinion was delivered by JEEVAN REDDY, J., on behalf of himself, KANIA, C.J., VENKATACHALIAH, and AHMADI, JJ. Two judges, PANDIAN and SAWANT, JJ., in separate opinions concurred with REDDY, J. Three judges, THOMMEN, KULDIP SINGH and SAHAI, JJ., in separate opinions dissented from REDDY, J., on several points. After referring to the previous decisions of the Supreme Court on Arts. 15 and 16, and also after taking note of some of the decisions of the U.S. Supreme Court on racial discrimination, REDDY, J., in his elaborate judgment answered the several questions which emerged in the instant case. Some of the significant points emerging from REDDY, J.'s opinion are noted below:

1. A measure of the nature contemplated by Art. 16(4) can be provided not only by the Parliament/Legislature but also by the executive through administrative instructions in respect of Central/State services and by the local bodies and 'other authorities' as contemplated by Art. 12, in respect of their services.

2. The provision made by the executive under Art. 16(4) becomes effective and enforceable by itself without its being enacted into a law made by a legislature.

3. The Court has reiterated the view, expressed by it earlier in Thomas, 55 that Art. 16(1) permits classification for ensuring attainment of equality of opportunity assured by Art. 16(1) itself. Art. 16(1) is a facet of Art. 14. Just as Art. 14 permits reasonable classification so does Art. 16(1). A classification may involve reservation of seats or vacancies, as the case may be. In other words, under Art. 16(1), appointments and/or posts can be reserved in favour of a class. Article 16(4) is not an exception to Art. 16(1), but only an instance of classification implicit and permitted by Art. 16(1). Even without Art. 16(4), the State could have classified "backward class of citizens" in a separate category for special treatment in the nature of reservation of posts/appointments in government services. Art. 16(4) merely puts the matter beyond any shadow of doubt in specific terms.

4 Art. 16(4) permits reservation in favour of any "backward classes of citizens". Backward classes having been classified by the Constitution itself as a class deserving special treatment, and the Constitution having itself specified the nature of special treatment, it should be presumed that no further classification or special treatment is permissible in their favour apart from or outside of Art. 16(4). Article 16(4) is exhaustive of the provisions that can be made in favour of the backward classes in the matter of employment. No reservations can be provided outside Art. 16(4) in favour of backward classes though it may not be exhaustive of the very concept of reservation.

4. Even under Art. 16(1), reservations cannot be made on the basis of economic criterion alone.

5. What is the meaning of the expression "backward class of citizens" used in Art. 16(4)? What does the expression signify and how should such classes be identified? The accent of Art. 16(4) is on social backwardness. From a review of the previous case-law in the area, the Court has concluded that the judicial opinions emphasize the integral connection between caste, occupation, poverty and social backwardness. Social, educational and economic backwardness are closely intertwined in the Indian context. As regards identification of backward classes, caste may be used as a criterion because caste often is a social class in India. But caste cannot be the sole criterion for reservation. Reservation is not being made under Art. 16(4) in favour of a caste but a backward class. Once a caste satisfies the criteria of backwardness, it becomes a backward class for purposes of Art. 16(4). "Besides castes

(whether found among the Hindus or others) there may be other communities, groups, classes and denominations which may qualify as backward class of citizens. REDDY, J., has observed in this connection:

> "..... the classification is not on the basis of the caste but on the ground that that caste is found to be a backward class not adequately represented in the services of the State." Among the non-Hindus, there are several occupational groups, sects and denominations which, for historical reasons, are socially backward. They too represent backward social collectivities for the purposes of Art. 16(4).

7. Backwardness under Art. 16(4) need not be social as well as educational as is the case under Art. 15(4). Art. 16(4) does not contain the qualifying words "socially and educationally" as does Art. 15(4). It is not correct to say that "backward class of citizens" in Art. 16(4) are the same as the "socially and educationally backward classes" in Art. 15(4). "Saying so would mean and imply reading a limitation into a beneficial provision like Art. 16(4)." Backwardness contemplated by Art. 16(4) is mainly social backwardness. A backward class cannot be identified only and exclusively with reference to economic criterion. A backward class may, however, be identified on the basis of occupation-cum-income without any reference to caste.

8. The Court has left the task of actually identifying backward classes to the commission/authority to be appointed by the Government. This body would evolve a proper and relevant criteria and test the several groups, castes, classes and sections of people against that criteria.

9. A very important recommendation made by the Court is that the "creamy layer", the socially advanced members of a backward class, should be excluded from the benefit of reservation. Such exclusion would benefit the truly backward people and, thus, more appropriately serve the purpose of Art. 16(4). But the real difficulty is how and where to draw the line? "For, while drawing the line, it should be ensured that it does not result in taking away with one hand what is given by the other." REDDY, J., has opined that the basis of exclusion should not merely be economic, unless, of course, "the economic advancement is so high that it necessarily means social advancement".

10. Not only should a class be a backward class for meriting reservations, it should also be inadequately represented in the services under the state. This matter lies within the subjective satisfaction of the State under Art. 16(4). However, there must be some material upon the basis of which the opinion is formed by the state.

11. The total reservation cannot exceed 50% in any one year. Art. 16(4) speaks of 'adequate representation' and not 'proportional representation'. The power under Art. 16(4) must be exercised in a fair manner and within reasonable limits. Therefore, reservation under Art. 16(4) should not exceed 50% of the appointments or posts "barring certain extraordinary situations" as explained hereafter. Accordingly, 27% reservation in favour of backward classes together with reservation in favour of Scheduled Castes and Scheduled Tribes, comes to a total of 49.5%.

12. The extraordinary situations meriting exceptions from the 50% rule have been explained thus by REDDY, J. "While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people. It might happen that in far-flung and remote areas the population inhabiting those areas might, on account of their being out of the mainstream of national life and in view of conditions peculiar to and characteristical to them, need to be treated in a different way, some relaxation in this strict rule may become imperative. In doing so, extreme caution is to be exercised and a special case made out."

13. Further, if a member belonging to, say, a Scheduled Caste gets selected in the open competition on the basis of his own merit, he will not be counted against the quota reserved for the Scheduled Castes; he will be treated as open competition candidate.

14. The Court has divided the total reservation of 50% into "vertical" and "horizontal" reservations. The reservation in favour of S/C, S/T and other backward classes (OBC) under Art. 16(4) may be called vertical reservation whereas reservation made in favour of physically handicapped [under Art. 16(1)] can be referred to as horizontal reservation. Horizontal reservations cut across the vertical reservations what is called interlocking reservations.

5. A year is to be taken as a unit for the purposes of applying the 50% rule. The Court has now overruled the Devadasan case64 which ruled out the 'carry forward' rule. Thus, reserved posts

remaining unfilled in one year may be carried forward to the next year but subject to the over-all limit that over-all reservation in any one year ought not to be more than 50%.

16. A significant point made by the Court is not to apply the rule of reservation to promotions. Under Art. 16(4), reservation is permissible only at the stage of entry into the State service, i.e. only at the initial stage of direct recruitment and not at the subsequent promotional stage.

17. For the reserved category in service, minimum standards can be prescribed. In fact, Art. 335 demands that some such standards be prescribed. In the words of REDDY, J. "It may be permissible for the Government to prescribe a reasonable lower standard for Scheduled Castes/Scheduled Tribes/Backward Classes—consistent with the requirements of efficiency of administration—it would not be permissible not to prescribe any such minimum standard at all. While prescribing the lower minimum standard for reserved category, the nature of duties attached to the post and the interest of the general public also should be kept in mind."

18. For certain services and certain posts, it may not be advisable to apply the rule of reservation. These are posts where merit alone counts. The Court has included the following posts in this category:

(i) Defence services including all technical posts therein but excluding civil posts;

(ii) All technical posts in establishments engaged in Research and Development including those connected with atomic energy and space and establishments engaged in production of defence equipment;

(iii) Teaching posts of Professors—and above, if any;

(iv) Posts in super-specialities in Medicine, engineering and other scientific and technical subjects;

(v) Posts of pilots (and co-pilots) in Indian Airlines and Air India.

(a) AFTER INDRA SAWHNEY

The Court has not been able to completely eliminate the caste factor in identifying the backward classes. However, the Court has sought to keep the caste factor within limits. Caste can be one

of the factors, but not the sole factor, to assess backwardness. Reservation has become the bane of the contemporary Indian life. More and more sections of the society are demanding reservation for themselves in government services. The politicians are also vying among themselves for demanding reservations to all and sundry groups whether deserved or not. Needless to say, reservation is inequitable insofar as a meritorious candidate may have to be passed over in favour of a much less meritorious candidate in the reserved category.

(b) CREAMY LAYER

In the Mandal case, the Supreme Court has clearly and authoritatively laid down that the "socially" advanced members of a backward class, the "creamy layer", has to be excluded from the backward class and the benefit of reservation under Art. 16(4) can only be given to the "class" which remains after the exclusion of the 'creamy layer'. This would more appropriately serve the purpose and object of Art. 16(4).

After Indra Sawhny, two Constitutional Amendments have been incorporated in Art. 16(4) to somewhat tone down the impact of the Supreme Court pronouncement. (a) ART. 16(4A) In Rangachari, the Supreme Court by majority had held that Art. 16(4) permitted reservation of posts not only at the initial stage of appointment but also included promotion to selection posts. This proposition was reiterated in several subsequent pronouncements by the Supreme Court. The Supreme Court had thus interpreted the term 'appointment' in Art. 16 liberally as including initial appointment as well as promotion. This position continued till the Indra Sawhney pronouncement.

ART. 16(4B) The Constitution (Eighty-First Amendment) Act, 2000, has added Art. 16(4B) to the Constitution. Art. 16(4B) runs as follows: "Nothing in this Article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty percent reservation on total number of vacancies of that year."

ABOLITION OF UNTOUCHABILITY

Article 17 abolishes untouchability and forbids its practice in any form. The enforcement of any disability arising out of "untouchability" is to be an offence punishable in accordance with law. Abolition of untouchability in itself is complete and its effect is all pervading applicable to state action as well as acts or omissions by individuals, institutions or juristic body of persons. The main object of Art. 17 is to ban the practice of untouchability in any form.

To give effect to Art. 17, Parliament enacted the Untouchability (Offences) Act, 1955, prescribing punishments for practising untouchability in various forms. In 1976, the Act was renamed as the "Protection of Civil Rights Act, 1955". The word "untouchability" has not been defined either in the Constitution or in the Act, because it is not capable of any precise definition. It has however been held that the subject-mater of Art. 17 is not untouchability in its literal or grammatical sense but the "practice as it had developed historically in this country". Therefore, treating of persons as untouchables either temporarily or otherwise for various reasons, e.g., suffering from an epidemic or a contagious disease, or social observances associated with birth or death, or social boycott resulting from caste or other disputes do not come within the purview of Art. 17. Art. 17 is concerned with those regarded untouchables in the course of historic development. Thus, instigation of a social boycott of a few individuals, or their exclusion from worship, religious services or food, etc., is not within the contemplation of Art. 17.

It is not clear whether Art. 17 would prohibit outcasting or ex-communication of a person of a higher caste from his caste. The State Legislature passed a law to improve the conditions of living of untouchables. Accordingly, the Act provided for acquisition of land for constructing a colony for them. It was argued against the validity of the law that the construction of a colony would not be in conformity with Art. 17. The Madras High Court rejected the argument. The Court stated that what Art. 17 prohibits is singling out the Harijan community for hostile treatment as a socially backward community. By no process of reasoning, could Art. 17 be held to prohibit the State from introducing a scheme for improving the condition of living of such persons. The Court also referred to Art. 15(4) in this connection.

The Supreme Court has stated that whenever any Fundamental Right like Art. 17 is violated by a private individual, it is the constitutional obligation of the state to take the necessary steps for the purpose of interdicting such violation and ensuring observance of the Fundamental Right by the private individual who is transgressing the same. The state is under a constitutional obligation to see that there is no violation of the Fundamental Right of such person. Reference may also be made in this connection to Arts. 14, 21, 23, 25 and 29, discussed later. The Directive Principles, especially Arts. 38 and 46, obligate the state to render socio-economic and political justice to Dalits and improve the quality of their life. "The abolition of untouchability is the arch of the Constitution to make its preamble meaningful and to integrate the Dalits in the national mainstream".

ABOLITION OF TITLES

Article 18(1) prohibits the state from conferring any 'title' except a military or academic distinction. Art. 18(2) prohibits citizens of India from accepting any title from a foreign government. A foreigner holding any office of profit or trust under the state cannot accept any title from any foreign state without the consent of the President [Art. 18(3)]. No person holding any office of profit under the state is to accept, without the consent of the President, any present, emolument, or office of any kind from or under any foreign state [Art. 18(4)].

RIGHT TO FREEDOM

Clauses (a) to (g) of Art. 19(1) guarantee to the citizens of India six freedoms, viz., of 'speech and expression', 'peaceable assembly' 'association', 'free movement', 'residence', and 'practising any profession and carrying on any business'. These various freedoms are necessary not only to promote certain basic rights of the citizens but also certain democratic values in, and the oneness and unity of, the country. Art. 19 guarantees some of the basic, valued and natural rights inherent in a person.

ARTICLE 19(1)(A) OF THE CONSTITUTION

Out of the several rights enumerated in clause (1) of Article 19, the right in sub-clause (a) is not merely a right of speech and expression but a right to freedom of speech and expression. The enumeration of other rights is not by reference to freedom. Article 19(1)(a) guarantees to all citizens the right to 'freedom of speech and expression'. Under Art. 19(2), 'reasonable restrictions can be imposed on the exercise of this right for certain purposes. Any limitation on the exercise of the right under Art. 19(1)(a) not falling within the four corners of Art. 19(2) cannot be valid. The freedom of speech under Art. 19(1)(a) includes the right to express one's views and opinions at any issue through any medium, e.g., by words of mouth, writing, printing, picture, film, movie, etc. It thus includes the freedom of communication and the right to propagate or publish opinion. But this right is subject to reasonable restrictions being imposed under Art. 19(2).

DIFFERENT DIMENSIONS OF RIGHT TO FREEDOM OF SPEECH AND EXPRESSION

RIGHT TO SILENCE

The right to speech implies the right to silence. It implies freedom, not to listen, and not to be forced to listen. The right comprehends the freedom to be free from what one desires to be free from. A loudspeaker forces a person to hear what he wishes not to hear. The use of a loudspeaker may be incidental to the exercise of the right but, its use is not a matter of right, or part of the rights guaranteed by Article 19(1).

RIGHT TO RECEIVE INFORMATION

The expression "freedom of speech and expression" in Art. 19(1)(a) has been held to include the right to acquire information and disseminate the same. It includes the right to communicate it through any available media whether print or electronic or audio-visual, such as, advertisement, movie, article or speech, etc. This freedom includes the freedom to communicate or circulate one's opinion without interference to as large a population in the country, as well as abroad, as is possible to reach. In **People's Union for Civil Liberties**, the Supreme Court dealt with this aspect of the freedom elaborately. The right of the citizens to obtain information on matters relating to public acts flows from the Fundamental Right enshrined in Art. 19(1)(a). Securing information on the basic details concerning the candidates contesting for elections to Parliament

or the State Legislature promotes freedom of expression and therefore the right to information forms an integral part of Article 19(1)(a).

FREEDOM OF THE PRESS

In India, freedom of the press is implied from the freedom of speech and expression guaranteed by Art. 19(1)(a). There is no specific provision ensuring freedom of the press as such. The freedom of the press is regarded as a "species of which freedom of expression is a genus." Thus, being only a right flowing from the freedom of speech, the freedom of the press in India stands on no higher footing than the freedom of speech of a citizen, and the press enjoys no privilege as such distinct from the freedom of the citizen.

In **Romesh Thapar v/s State of Madras**, Patanjali Shastri,CJ, observed that "Freedom of speech & of the press lay at the foundation of all democratic organization, for without free political discussion no public education, so essential for the proper functioning of the process of popular government, is possible." In this case, entry and circulation of the English journal "Cross Road", printed and published in Bombay, was banned by the Government of Madras. The same was held to be violative of the freedom of speech and expression, as "without liberty of circulation, publication would be of little value".

In **Printers (Mysore) Ltd. v. Assistant Commercial Tax Officer**, the Supreme Court has reiterated that though freedom of the press is not expressly guaranteed as a Fundamental Right, it is implicit in the freedom of speech and expression. Freedom of the press has always been a cherished right in all democratic countries and the press has rightly been described as the fourth estate. The democratic credentials of a state are judged by the extent of freedom the press enjoys in that state.

SAKAL PAPERS an Act and a government order there under sought to regulate the number of pages according to the price charged, prescribed the number of supplements to be published, and regulate the size and area of advertisements in relation to other matter contained in a newspaper. Thus, the number of pages published by a newspaper depended upon the price charged to the readers.

CENSORSHIP OF FILMS

In K.A. Abbas v. Union of India, the Supreme Court has upheld censorship of films under Art. 19(1)(a) on the ground that films have to be treated separately from other forms of art and expression because a motion picture is able to stir up emotions more deeply than any other product of art. A film can therefore be censored on the grounds mentioned in Art. 19(2).

TELECASTING

In Cricket Association,89 the Supreme Court has considered the significant question of freedom of telecasting vis-a-vis Art. 19(1)(a) In this case, the right of the Cricket Association to telecast the cricket match came up for consideration before the Supreme Court. Telecasting is a system of communication either audio or visual or both. Organisation of an event in India is an aspect of the freedom of speech and expression protected by Art. 19(1)(a) and reasonable restrictions can be imposed thereon under Art. 19(2). It therefore follows that organisation, production and recording of an event cannot be prevented except by a law permitted by Art. 19(2). Similarly, the publication or communication of the recorded event through the cassettes cannot be restricted or prevented except under a law made under Art. 19(2). The freedom to receive and communicate information and ideas without interference is an important aspect of the freedom of speech and expression under Art. 19(1)(a).

Freedom of speech includes the right to propagate one's views through print media or through any other communication channel, e.g., radio and television. The right to impart and receive information is a species of freedom of speech. No monopoly of electronic media is permissible as Art. 19(2) does not permit state monopoly. Unlike the print media, there are certain built-in limitations on the use of electronic media, viz.: (i) the airwaves or frequencies are a public property and they have to be used for the benefit of the society at large; (ii) the frequencies are limited; (iii) the airwaves are owned or controlled by the Government or a central national authority; (iv) they are not available on account of the scarcity, costs and competition. Broadcasting is a means of communication, and, therefore, a medium of speech and expression. Hence, in a democratic society, neither any private body nor any governmental organisation can claim any monopoly over it.

The Indian Constitution also forbids monopoly either in the print or electronic media. The Constitution only permits state monopoly in respect of a trade or business. The Government can however claim regulatory powers over broadcasting so as to utilize the public resources in the form of the limited frequencies available for the benefit of the society at large and to prevent concentration of the frequencies in the hands of the rich few who can then monopolise the dissemination of views and information to suit their interests. In democratic countries, this regulatory function is discharged by an independent autonomous broadcasting authority which is representative of all sections of the society and is free from state control. In this case, the Court has laid down the following three propositions:

(1) The airwaves or frequencies are a public property. Their use has to be controlled and regulated by a public authority in the interest of the public and to prevent the invasion of their rights. Since the electronic media involves the use of the airwaves, this factor creates an in-built restriction on its use as in the case of any other public property.

(2) The right to impart and receive information is a species of the right of freedom of speech and expression guaranteed by Art. 19(1)(a). A citizen has a Fundamental Right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. However, this right to have an access to telecasting has limitations on account of the use of the public property, viz., the airwaves, involved in the exercise of the right and can be controlled and regulated by the public authority. This limitation imposed by the nature of the public property involved in the use of the electronic media is in addition to the restrictions imposed on the right to freedom of speech and expression under Art. 19(2) of the Constitution.

(3) The broadcasting media should be under the control of the public as distinct from the Government. The Central Government shall, therefore, take immediate steps to establish an independent autonomous public authority representative of all sections and interests in the society to control and regulate the use of the airwaves.

The Supreme Court has also emphasized in the instant case that freedom of speech and expression involves not merely freedom to communicate information and ideas without interference but also the freedom to receive the same. The right to freedom of speech and expression includes the right to educate, to inform and to entertain and also the right to be

educated, informed and entertained. The right to telecast a sporting event therefore includes the right to educate and inform the present and the prospective sportsmen interested in the particular game and also to inform and entertain the lovers of the game. The right to information and right to acquire knowledge about the game of cricket through electronic media is a right guaranteed under Art. 19(1)(a).

The Board of Cricket Control or the Cricket Association function on the basis of "no profit no loss". Their main aim is to promote the game of cricket. Therefore, telecast by such a body of a cricket match can hardly be regarded as a commercial activity. Because of its educational and entertainment values, this activity falls more appropriately under Art. 19(1)(a).

It can thus be seen that the Supreme Court has interpreted Art. 19(1)(a) broadly so as to bring broadcasting and telecasting within its coverage. Also, the Court has taken a very significant step by way of freeing these activities from governmental monopolistic control. Also, the function of regulating airwaves will henceforth be performed by an autonomous body rather than the Government itself.

VOTING

Voting at an election is a form of expression. A citizen as a voter is the master of his vote. He must have necessary information so that he can intelligently decide in favour of a candidate who satisfies his criterion of being elected as an MP or MLA.

RESTRICTIONS UNDER ART. 19(2)

GROUNDS OF RESTRICTIONS

While it is necessary to maintain and preserve freedom of speech and expression in a democracy, so also it is necessary to place some curbs on this freedom for the maintenance of social order. No freedom can be absolute or completely unrestricted. Accordingly, under Art. 19(2), the state may make a law imposing 'reasonable restrictions' on the exercise of the right to freedom of speech and expression 'in the interests of' the security of the State, friendly relations with foreign States, public order, decency, morality, sovereignty and integrity of India, or 'in relation to contempt of Court, defamation or incitement to an offence'.

The expression used in Art. 19(2) "in the interests of" give a wide amplitude to the permissible law which can be enacted to impose reasonable restrictions on the right guaranteed by Art. 19(1)(a) under one of the heads mentioned in Art. 19(2). No restriction can be placed on the right to freedom of speech and expression on any ground other than those specified in Art. 19(2).

The burden is on the authority to justify the restrictions imposed.

A look at the grounds contained in Art. 19(2) goes to show that they are all conceived in the national interest or in the interest of the society. The first set of grounds, viz., the sovereignty and integrity of India, the security of the State, friendly relations with foreign States and public order—are all grounds referable to national interest; whereas, the second set of grounds, viz., decency, morality, contempt of Court, defamation and incitement to offence are all conceived in the interest of the society. Some of the grounds for which restrictions can be imposed are explained below.

SECURITY OF STATE AND PUBLIC ORDER

Article 19(2) uses two concepts: 'public order' and 'security of state'. The concept of 'public order' is wider than 'security of state'. As the Supreme Court points out, in Art. 19(2), there exist two expressions 'public order' and 'security of state'. Thus, 'security of state' having been specifically and expressly provided for, "public order cannot include the security of state, though in its widest sense it may be capable of including the said concept. Therefore, in cl. (2), public order is virtually synonymous with public peace, safety and tranquility."

The term 'public order' covers a small riot, an affray, breaches of peace, or acts disturbing public tranquility. But 'public order' and 'public tranquility' may not always be synonymous. For example, a man playing loud music in his home at night may disturb public tranquility, but not public order. Therefore, such acts as disturb only the serenity of others may not fall within the term 'public order'.

Section 124A, I.P.C., punishes any person who by words, spoken or written, attempts to bring into hatred or contempt, or excites disaffection towards the government established by law. In the pre-Independence era, this section had been interpreted very broadly, and exciting or

attempting to incite bad feelings towards the government was held punishable whether or not it resulted in public disorder.12 Obviously, the section in such a broad form could not be sustained under Art. 19(2). In Kedar Nath v. State of Bihar, the Supreme Court upheld S. 124A by interpreting it restrictively—as rendering penal only such activities as would be intended, or have a tendency, to create disorder.

SOVEREIGNTY AND INTEGRITY OF INDIA

Section 2 of the Criminal Law Amendment Act, 1961, makes penal the questioning of the "territorial integrity or frontiers of India" in a manner which is, or is likely to be, prejudicial to the interests of the safety or security of India.

FRIENDLY RELATIONS WITH FOREIGN STATES

The idea behind imposing restrictions on the freedom of speech in the interests of friendly relations with a foreign country is that persistent and malicious propaganda against a foreign power having friendly relations with India may cause considerable embarrassment to India, and, accordingly, indulging in such a propaganda may be prohibited. The ground, however, is of broad import and is susceptible of supporting legislation which may even restrict legitimate criticism of the foreign policy of the Government of India.

INCITEMENT TO AN OFFENCE

According to the general theories of criminal law, incitement and abutment of a crime is punishable. Incitement to serious and aggravated offences, like murder, may be punished as involving the security of the State. Incitement to many other offences may be made punishable as affecting the public order. But there may still be some offences like bribery, forgery, cheating, etc., having no public order aspect, and incitement to which could not be made punishable as an aspect of public order. So. Art. 19(2) has the words 'incitement to an offence'.

The word 'offence' has not been defined in the Constitution but according to the General Clauses Act it means any act or omission made punishable by law. This is a broad concept and so it is possible for the Legislature to create an offence and make incitement thereto punishable. In this way, the freedom of speech can be effectively circumscribed as any subject can be precluded from public discussion by making it an offence.

CONTEMPT OF COURT

In a democratic society, freedom of speech and expression is a prized privilege and a salutary right of the people. But, at the same time, no less important is the maintenance of independence and integrity of the judiciary and public confidence in the administration of justice. It thus becomes necessary to draw a balance between the two values.

Power has been specifically conferred on the Supreme Court [Art. 129] as well as each High Court [Art. 215] to punish its contempt. The freedom of speech and expression guaranteed by Art. 19(1)(a) is thus subject to Arts. 19(2), 129 and 215.

Contempt of other Courts can be punished by the High Courts under the Contempt of Courts Act, 1952. A challenge to the Act as imposing an unreasonable restriction on the right under Art. 19(1)(a), because it provides no definition of the expression 'contempt of Court', has been rejected on the ground that the expression has a well-recognised judicial interpretation.

DEFAMATION

Defamation is both a crime as well as a tort. According to Winfield: "Defamation is the publication of a statement which reflects on a person's reputation and tends to lower him in the estimation of right-thinking members of society generally or tends to make them shun or avoid him." As a crime, Defamation is defined in S. 49, I.P.C. The law seeks to protect a person in his reputation as in his person or property.

DECENCY OR MORALITY

These are terms of variable content having no fixed meaning for ideas about decency or morality vary from society to society and time to time depending on the standards of morals prevailing in the contemporary society.

The Indian Penal Code in Ss. 292 to 294 lists some of the offences like selling obscene books, selling obscene things to young persons, committing an obscene act, or singing an obscene song in a public place. S. 292, I.P.C., has been held valid because the law against obscenity seeks no more than to promote public decency and morality.

FREEDOM TO ASSEMBLE: ARTS. 19(1)(b) AND 19(3)

Article 19(1)(b) guarantees to the citizens of India the right to assemble peaceably and without arms. Under Art. 19(3), however, the state can make any law imposing reasonable restrictions on the exercise of this right in the interests of public order, and sovereignty and integrity of India. To some extent, there is common ground between Arts. 19(1)(a) and 19(1)(b). For example, demonstrations, processions and meetings considered under Art. 19(1)(a) also fall under Art. 19(1)(b) for a demonstration also amounts to an assembly and, therefore, the same principles apply under both Articles. The right to strike is not available under either of these Articles.

Article 19(1)(b) does not confer on any one a right to hold meetings in government premises. Therefore, Railways can validly prohibit holding of meetings in their premises either within or outside office hours. The right of assembly cannot be exercised on the property of somebody. Railways are entitled to enjoy their properties in the same manner as any private individual subject to such restrictions as may be placed on them by law or usage. But a right to hold public meetings on government property (like a maidan) can be created by usage.

It is not valid to confer uncontrolled discretion on administrative officers to regulate the freedom of assembly. A rule banning holding of public meetings on public streets without police permission has been held bad **in Himmat Lal v. Police Commissioner**. In India, citizens had a right to hold meetings on public streets before the Constitution, subject to the control of appropriate authority regarding the time and place of the meeting and considerations of public order. The rule in question gave no guidance as to the circumstances in which permission to hold a meeting could be refused and, therefore, gave arbitrary powers.

FREEDOM TO FORM ASSOCIATION : ARTS. (19)(1)(c) AND 19(4) (a) ARTICLE 19(1)(C)

Article 19(1)(c) guarantees to the citizens of India the right to form associations or unions. Under Art. 19(4), reasonable restrictions in the interests of public order or morality or sovereignty and integrity of India may be imposed on this right by law.

The right to form associations is the very lifeblood of democracy. Without such a right, political parties cannot be formed, and without such parties a democratic form of government, especially that of the parliamentary type, cannot be run properly. Hence the Constitution guarantees the right to form associations subject to such restrictions as can be imposed under Art. 19(4).

Recognising the importance of the right of forming associations in a democratic society, the Courts have not favoured the vesting of absolute discretion in the executive to interfere with this Fundamental Right. A discretion vested in a government official to prohibit formation of an association, without proper safeguards, has been held to be unconstitutional.

A law empowered the State Government to declare an association unlawful on the ground that such association constituted a danger to the public peace, or interfered with the maintenance of public order, or the administration of the law. The government notification had to specify the grounds for making the order and fix a reasonable period to make a representation against the order. The State Government was, however, authorised not to disclose any facts which it regarded as being against public interest. The government had to place the notification and the representation against it before an advisory board. If the board, after considering the material, found that there was no sufficient cause for declaring the association unlawful, the government was bound to cancel the order.

The Unlawful Activities (Prevention) Act, 1967

The Act authorises the Central Government to declare by notification in official gazette an association as unlawful on certain grounds mentioned in S. 2(f) of the Act. To keep control over the government power, provision has been made for appointment of a tribunal consisting of a sitting High Court Judge. A notification declaring an association unlawful is not to be effective until it is confirmed by the tribunal. The tribunal is to decide whether or not there is sufficient cause for declaring the association as unlawful.

RIGHT NOT TO FORM ASSOCIATION

A question not yet free from doubt is whether the Fundamental Right to form association also envisages the right to refuse to form an association. In Tikaramji v. State of Uttar Pradesh, the Supreme Court observed that assuming that the right to form an association "implies a right not

to form an association, it does not follow that the negative right must also be regarded as a Fundamental Right". It has been already seen that while the constitution guarantees a right to form an association or unions the association or union cannot claim as a further Fundamental Right to achieve the particular purpose for which such association has been established and that such a right even if concomitant to the Fundamental Right is not a Fundamental Right in itself unless the same is justified Article 19(4).

A co-operative society of canegrowers was formed to supply sugarcane to the sugar mills. The membership of the co-operative was voluntary. The canegrowers were free to join or not to join the society. The members were free to resign their membership except when indebted to the society. The Court held that the society did not fall foul of Art. 19(1)(c).

A High Court has held that the right to form an association necessarily implies that a person is free to refuse to be a member of an association if he so desires, and, therefore, a rule making it compulsory for every teacher to become a member of a government sponsored association at the risk of suffering disciplinary action in case a teacher absents from two consecutive meetings infringes Art. 19(1)(c).

FREEDOM OF MOVEMENT AND RESIDENCE: ARTS. 19(1)(d), (19)(1)(e) AND 19(5)

19(1)(d) guarantees to every citizen the right to move freely throughout the territory of India. Art. 19(1)(e) guarantees to a citizen the right to reside and settle in any part of India. According to Art. 19(5), however, the State may impose reasonable restrictions on these rights by law in the interests of general public or for the protection of the interests of any Scheduled Tribe.

These constitutional provisions guarantee to the Indian citizens the right to go or to reside wherever they like within the Indian territory. A citizen can move freely from one State to another, or from one place to another within a State. These rights underline the concept that India is one unit so far as the citizens are concerned.

Wearing Helmets

A rule was made under the Motor Vehicles Act requiring compulsory wearing of helmet by a person driving a scooter or a motor cycle. The rule was challenged as infringing the free movement of the driver of a two wheeler guaranteed under Art. 19(1)(d), but the Court refused to

accept the argument. The Court maintained that the rule has been framed for the benefit and welfare of, and safe journey by, a person driving a two wheeler vehicle. The rule is made to prevent accidents not to curtail freedom of movement. Even if it be assumed that the rule does put some restriction on the freedom of movement, it is justifiable under Art. 19(5) as a reasonable restriction in the interest of the general public.

FREEDOM TO CARRY ON TRADE AND COMMERCE: ARTS. 19(1)(g) AND 19(6) (a)

ARTICLE 19(1)(G)

Article 19(1)(g) guarantees to all citizens the right to practise any profession, or to carry on any occupation, trade or business. Under Art. 19(6), however, the state is not prevented from making a law imposing, in the interests of the general public, reasonable restrictions on the exercise of the above right. Nor is the state prevented from making—

(i) a law relating to professional or technical qualifications necessary for practising a profession or carrying on any occupation, trade or business; or

(ii) a law relating to the carrying on by the state, or by corporation owned or controlled by it, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

State Monopoly

Article 19(6)(ii) enables the state to make laws for creating state monoplies either partially or complete in respect of any trade or business or industry or service. The state may enter into any trade like any other person either for administrative reasons, or with the object of mitigating the evils in the trade, or even for the purpose of making profits in order to enrich the exchequer.

RESTRICTIONS ON TRADE AND COMMERCE

In several cases, the Courts have upheld measures affecting trade and commerce to some extent, on the ground that they do not constitute restrictions on the Fundamental Right concerned.

In Ram Jawaya v. State of Punjab,the government scheme to nationalise school text books was held valid under Art. 19(1)(g) because the private publishers' right to print and publish any book

they liked and offer the same for sale, was not curtailed. The choice of text books for the recognised schools lay with the government and the publishers had no Fundamental Right to have any of their books prescribed as a text book by the school authorities.

In Bombay Hawkers' Union v. Bombay Municipal Corporation, the Supreme Court ruled, in answer to the claim of the hawkers that under Art. 19(1)(g) they have a Fundamental Right to carry on their trade on public streets, that no one has a right to do business so as to cause annoyance or inconvenience to members of the public. Public streets are meant for use by the general public; they are not meant to facilitate the carrying on of private trade or business. But the hawkers ought not to be completely deprived of their right to carry on trade. So, the Court directed that there should be hawking zones in the city where licenses should not be refused to the hawkers except for good reasons.

In Excel Wear v. Union of India, the Supreme Court declared this provision to be unconstitutional. Commenting on the above provision, the Court said that the reasons given by the employer for closure of the undertaking might be correct yet permission could still be refused if the government thought them to be "not adequate and sufficient". No provision has been made for review of the order, or for appeal from it. No reasons need be given in the government order granting or refusing the permission. So, the order could be whimsical and capricious. Government is enjoined to pass the order within the 90 days' period. The right to close down a business is "an integral part" of the right to carry it on.

The Court rejected the contention that "an employer has no right to close down a business once he starts it." The right to close is itself a Fundamental Right embedded in the right to carry on any business guaranteed under Art. 19(1)(g). But as no right is absolute in scope, this right could also be restricted, regulated or controlled by law in the interest of the general public. The restrictions imposed on this right by the impugned provision in question were held to be unreasonable as there was no higher body to scrutinize the government order negativing employer's request to close down. The Court also rejected the contention of the employers that the right to close down business was at par with the right not to start a business at all. The Court said that while no one can be compelled to start a business, it is different from closing down a business. The two rights cannot be equated.

Thereafter, S. 25-N was enacted. This provision says that an employer cannot retrench any worker who has been in service for a year without the consent of the government. If the government fails to communicate its decision within two months, the permission shall be deemed to have been granted.

UNIT - IV

- **Rights of the Accused: Expost facto Law, Double jeopardy- Right against self incrimination (Article-20)**
- **Right to Life and Personal Liberty, Various facets of Life and Liberty (Article 21)**
- **Rights of arrested person, Preventive Detention Laws (Article 22)**
- **Right against Exploitation,**
- **Secularism - Freedom of Religion, Judicial interpretation, Restrictions on freedom of religion.**

Rights of the Accused: Expost facto Law, Double jeopardy- Right against self incrimination (Article-20)

Under Art. 20, the Constitution of India has taken care to safeguard the rights of persons accused of crimes (citizens or non-citizens, including a corporation). This Article cannot be suspended even during an emergency by an order under Art. 359. Art. 20 constitutes a limitation on the legislative powers of the Union and State Legislatures. Art. 20 has three clauses. Each of these clauses gives protection in respect of conviction for offences:

(a) Ex-post facto laws [Art. 20(1)].

(b) Double jeopardy [Art. 20(2)].

(c) Self-incrimination [Art. 20(3)].

Art. 20 (1): Ex-Post Facto Law According to Art. 20(1), "no person shall be convicted of any offence except for violation of law in force at the time of commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of offence". Thus, the legislature is prohibited to make criminal laws having retrospective effect. Art. 20(1) is not applicable to a trial or a civil liability or preventive detention case or disciplinary proceedings.

Prohibition against enacting ex post facto penal law. In other words, if an act or omission was innocent when done the legislature cannot make a law which declares such act or omission a crime. The legislature cannot make law which provides for punishment of acts or omissions

which were committed prior to the date when the Act came into force. If bringing gold into India was never an offence and a law is made in 1970 making import of gold into India an offence and applying the law from 1960 onwards then such law is a retrospective criminal law not permitted by the Constitution.

Thus, something would be an offence only if that thing is made punishable by a 'law in force'. That also means that it is the knowledge of only those laws, which are in force, at the time at which a person does some act, which is made punishable by the law. The 'knowledge of the future laws' cannot be imputed to any person. The principle that 'ignorance of law is no excuse' is not applicable to such situations.

In Transmission Corpn., A.P. v Ch. Prabhakar, a Division Bench of the Supreme Court referred the following question for the decision of the larger Bench: Whether constitutional guarantee enshrined in Art. 20(1)... also prohibits legislation which aggravates the degree of crime or makes it possible for the accused to receive greater punishment even though it is also possible for him to receive the same punishment under the new law as could have been imposed under the prior law or deprives the accused of any substantial right or immunity possessed at the time of the commission of the offence charged .

Prohibition against conviction - Art. 20(1) not only prohibits the legislature from enacting ex post facto laws depriving a person of the protection given by this article but it also lays down that no person shall be convicted of an offence. This indicates that the courts too are forbidden to pronounce conviction on the basis of a law violating the two protections set out in Art. 20(1)

Benefit of reduction in punishment - Art. 20(1) does not bar the accused from taking benefit of the reduction in punishment (i.e. modifications of the rigour of a criminal law). The rule of beneficial construction required that an ex-post facto law could be applied to reduce the punishment.

where a boy of 16 years of age was undergoing rigorous imprisonment for six months for house trespass and outraging the modesty of a girl, and meanwhile the Probation of Offenders Act, 1958 was passed which provided that a person below the age of 21 years should not ordinarily be sentenced to imprisonment, it was held' that the ex-post facto law, which was beneficial to the accused did not fall within the prohibition of Art. 20(1) (Ratan Lal v State of Punjab AIR 1965

SC 444) It may be noted that the Probation of Offenders Act was not a penal statute; it was a social welfare legislation aiming to reform the offenders. It is the penal laws which have a prospective operation. In that case, the accused boy could not have the benefit of the legislation.

Art. 20(2): Double Jeopardy33 Art. 20(2) provides that "no person shall be prosecuted and punished for the same offence more than once." The principle of double jeopardy has been already recognized in the Sec. 26, General Clauses Act and Sec. 300, Cr. PC The object is to avoid the harassment, which must be caused to a person for successive criminal proceedings where only one crime has been committed by him

This embodies the common law (English) maxim nemo debet bis vexari- 'no man shall be put twice in peril for the same offence.' The U.S. Constitution also contains this provision- 'no person shall be twice put in jeopardy of life or limb.' This is commonly called 'double jeopardy.' Double jeopardy has two aspects: (a) autrefois convict and (b) autrefois acquit.

The plea of autrefois convict avers that the defendant has been previously convicted in respect of the same offence and autrefois acquit is the plea that the accused has been acquitted on a charge for the same offence for which he is being prosecuted. Under the U.S. law, the protection is available not only against a second punishment but even against the second trial for the same offence, irrespective of whether the accused was acquitted or convicted in the first trial.

The Constitution of India protects a person from being prosecuted and convicted more than once for the same offence. Both prosecution and punishment must co-exist for the operation of Art. 20(2). Where a person having been prosecuted is acquitted, he can be prosecuted for the same offence again. In other words, Art. 20(2) contains the principle of autrefois convict only and does not include autrefois acquit. It is narrower than the American and English doctrine of double jeopardy.

Administrative and Departmental Proceedings - The protection afforded by Art. 20(2) is attracted only in respect of punishment inflicted by court of law or judicial tribunal. In other words, the term "prosecution", in the context of Art 20(2), means initiation or starting of any proceeding, criminal in nature, before a court/judicial tribunal. Thus, if the proceedings are held under any revenue authorities, Art. 20(2) has no application.

Thus, a Government servant prosecuted and convicted by a court of law can be punished under departmental proceedings for the same offence, A person who has been fined under the Customs Act can still be prosecuted under the Foreign Exchange Regulation Act because the customs authority is not a court (Maqbool Hussain v State of Bombay AIR 1953 SC 325). An inquiry and subsequent dismissal of a government servant is no bar to prosecution for an offence under the Indian Penal Code and Prevention of Corruption Act. The inquiry is not prosecution in a court and disciplinary action is not a punishment given by a court (S. A. Venkataraman v UOI AIR 1954 SC 375).

Double Jeopardy and Res Judicata/Issue Estoppel - Res judicata means the thing has already been decided'. The principle is embodied in Sec. 11 of the Code of Civil Procedure. Res judicata rests on the principle that where an issue of fact has been tried by a court on. a former occasion the finding is final and binding on both the parties and cannot be raised again. The principle is applicable to both Civil and Criminal trials Since the doctrine rests on the identity of issues at the two trials it is known as the ‘doctrine of Issue Estoppel.’ It precludes evidence being led to prove a fact in issue as regards which evidence has already been led and a specific finding recorded at an earlier criminal trial.

Art. 20(2) bars 'double punishment’, the rule of Issue Estoppel bars 'reception of evidence’ on an issue on which the finding was in the favour of the accused at a previous trial. Art. 20(2) has no direct bearing on the question at issue: it would be attracted only if the “offence” is the same in both the prosecutions.

Art. 20(3): Protection against Self-Incrimination

Art. 20(3) lays down that “no person accused of any offence shall be compelled to be a witness against himself. In other words, the accused person is protected against incriminating himself under compulsion e g. 'making a statement which makes the case against the accused person at least probable considered by itself. It can be claimed by natural persons as well as by corporations, etc

This clause is based on the maxim nemo tenetur prodere accussare seipsum, which means that 'no man is bound to accuse himself. The accused is presumed to be innocent till his guilt is

proved and it is the duty of the prosecution to establish his guilt. Thus, the accused need not make any admission or statement against his free will.

Clause (3) of Art. 20 is an attempt to prevent torture of the accused by investigating agencies for the purpose of extracting confession from him. In the 18th century in England and even in the 20fh century in communist Russia, Nazi Germany and many other countries torture was a legal procedure. The Universal Declaration of Human Rights proclaims: 'No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment' (Art. 5).

Person accused of an offence - This immunity is available only to a person who is 'accused of an offence' (M R Sharma v Satish Chandra AIR 1954 SC 300) A person cannot claim the protection if at the time he made the statement, he was not an accused but becomes an accused thereafter. Further, unlike USA and England, the protection in India is confined to 'accused' only and not other witnesses.

In Nandini Sathpathy v PL Dani (AIR 1978 SC 1025), during the course of the investigation, the accused was interrogated with reference to a long list of questions given to her in writing. She refused to answer those questions claiming the protection of Art. 20(3). It was held that the protection contained in 20(3) extends back to the stage of police investigation not commencing in court only, since such inquiry was of an accusatory nature Further, the ban on self-accusation and the 'right to silence' extends beyond that case and protects the accused in regard to other offences, pending or imminent, which might deter him or her from voluntary disclosure of incriminatory nature.

Article 20(3) provides that no person accused of any offence shall be compelled to be a witness against himself. The 'right to remain silent' is an extension of the rule of civil liberty enjoined by our Constitution. Considering the guarantee under Art. 20(3) and also humanizing standards under Art 21, court is required to tread cautiously while construing retracted confession. To withdraw from what has been said previously needs to be interpreted in vein of right to remain silent as an extension of this civil liberty [Aloke Nath Dutta v State of W B. (2007) 12 SCC 230]

Protection of Life and Personal Liberty (ARTICLE 21)

"No person shall be deprived of his life or personal liberty except according to the procedure established by law' (Art. 21).

Article 21 is one article which has been so transformed by the Supreme Court that it now encompasses all conceivable human rights within its ambit. On a plain reading it is a directive to the State to refrain from infringing the right to life or personal liberty of a person. The courts have taken a very liberal view and transformed the negative injunction to a positive mandate to do aii things which will make life worth living. It is now well-settled that Art. 21 has both negative and affirmative dimension. After the Maneka Gandhi's decision, Art. 21 now protects the right of life and personal liberty not only from the executive action but from the legislative action also. Prior to it, the State could interfere with the liberty of citizens if it could support its action by a valid law. The right guaranteed in Art. 21 is available to citizens as well as non-citizens (Chairman, Railway Board v Chandrima Das AIR 2000 SC 988).

Personal Liberty: Meaning and Scope

In A.K. Gopalan v State of Madras (AIR 1950 SC 27), the petitioner challenged the validity of his detention under the Preventive Detention Act, 1950, on the ground that it was violative of his right to freedom of movement under Art. 19(1)(d) which is the very essence of personal liberty guaranteed by Art, 21 The court took the view that since the word 'liberty' is qualified by the word 'personal', which is a narrower concept and so it does not include all that is implied in the term 'liberty' (i.e. all the freedoms). Thus, personal liberty' only means 'liberty relating to or concerning the person or body of the individual.'

Fazal Ali, J., however, in his dissenting opinion, gave a wide and comprehensive meaning to the words 'personal liberty' as consisting of freedom of movement and locomotion. Thus, any law which deprives a person of his personal liberty must satisfy the requirements of Arts 19 and 21 both.

But, in Kharak Singh v State of Punjab (AIR 1963 SC 1295), the term 'personal liberty' was interpreted to be a compendious term including within itself all the varieties of rights which go to make up the personal liberty of man other than those dealt with in Art. 19(1) While Art. 19(1) deals with particular species or attributes of that freedom, 'personal liberty' in Art. 21 takes in and comprises the residue. It is true that in Art. 21, the word 'liberty' is qualified by a word

‘personal’, but this qualification is employed in order to avoid overlapping between those incidents of liberty which are mentioned in Art. 19(1).

In that case. Police regulations authorising domiciliary visits (i.e. visits in the night to a private house to make sure whether the suspect is staying at home or not) against bad characters, were held to be violation of Art 21. By the term ‘life’ as used here, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limits and faculties by which life is enjoyed.

in Maneka Gandhi case, the Supreme Court has given the widest possible interpretation to the word personal liberty'. A valid law interfering with personal liberty must satisfy a ‘triple test

(i) It must prescribe a procedure
(ii) the procedure must withstand the test prescribed in Art. 19
(iii) it must not infringe Art. 14. Thus, the procedure must be just, fair and reasonable.

Scope of ‘Personal Liberty’

Leading Case: Facts - Maneka Gandhi V Union Of India, In this case, the petitioner’s passport was impounded by the Central Government under Sec. 10(3)(c) of the Passport Act, 1967. The Act authorised the Government to do so if it was ‘necessary in the interest of general public’. Though sub clause (5) of this section required the passport authority to record reasons for impounding passport and furnish to the holder of the passport a copy of the same; but this sub sec, further provides that if passport authority is of the opinion that it will not be in the interest of sovereignty and integrity of or security of India, or in the interest of general public, it may decline to furnish a copy, and which was done so in the present case.

The petitioner challenged the validity of the said order on the following grounds:

(i) Sec. 10(3)(c) was violative of Art. 14 as conferring an arbitrary power, since it did not provide for a hearing of passport holder before impounding passport.
(ii) Sec. 10(3)(c) was violative of Art. 19(1)(a) and (g) since it permitted imposition of restrictions not provided in clause (2) or (6) of Art. 19.
(iii) Sec. 10 (3)(c) was violation of Art. 21, since it did not prescribe ’procedure’within the meaning of the Art. 21. The reason for the order were, however, disclosed in the

affidavit filed on behalf of the Government which stated that the petitioner's presence was likely to be required in connection with the proceedings before a Commission of Inquiry.

Issues and Observations - Various issues considered in the present case, were as follows: (a) Inter-relation of Arts. 14, 19 and 21 - In Gopalan's case, the Supreme Court held that the Art. 19 had no application to laws depriving a person of his life and personal liberty enacted under Art. 21. It was held that Arts. 19 and 21 dealt with different subjects. Thus, so long as a saw of preventive detention satisfied the requirements of Art. 22, it would not be required to meet the challenges of Art. 19. This view proceeded on the assumption that certain articles in the Constitution exclusively deal with specific matters. Thus, Art. 22 is a self-contained code.

In R.C. Cooper v Union of India (AIR 1970 SC 564), the doctrine of exclusiveness was seriously questioned. It was held that each freedom has different dimensions and there may be overlapping between different fundamental rights and therefore it is not a valid argument to say that the expression 'personal liberty' in Art. 21 must be so interpreted as to avoid overlapping between that Article and Art. 19(1).

In the present case, the Court overruled Gopalan's view, and held that Art. 21 is controlled by Art. 19 i.e. it must satisfy the Art. 19 requirements also. Art. 21 does not exclude Art. 19, and even when there is 'no infringement of fundamental rights under Art, 21, such a law in so far as it abridges or takes away any right under Art. 19, would have to meet the challenges of Art. 19, and ex-hypothesi of Art. 14.

In Francis Coralie v Delhi Administration (AIR 1981 SC 746), the validity of the provisions of the COFEPOSA which provided that a detenu (a person placed under preventive detention) can have interview with his lawyer only after obtaining permission of the District Magistrate, and that too, in the presence of the custom officer, and, permitted interview of the family members only once in the month, were challenged on the ground that they are arbitrary, unreasonable and violative of Arts.

14 and 21. The Supreme Court held that the detenu's right to have interview with his lawyer and family member is part of his 'personal liberty guaranteed by Art. 21, and cannot be interfered with except in accordance with reasonable and just procedure established by law

The word ‘personal liberty' in Art. 21 is of the widest amplitude and it includes the “right to socialize" with members of family and friends, subject of course, to any valid reasonable prison regulations.

The right of detenu to consult a legal advisor of his choice for any purpose including securing release from preventive detention is included in the right to live with human dignity and is also part of personal liberty. Right to 'live' is not merely confined to physical existence but it includes within its ambit the right to live with human dignity (vide Maneka Gandhi case), and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing, and shelter, and facilities for reading, writing, education and expressing ourselves in diverse forms, freely moving about and mixing and commingling with fellow human beings.

In Bandhua Mukti Morcha v UOI (AIR 1984 SC 802), an organisation dedicated to the cause of release of bonded labours informed the Supreme Court about a large number of labourers working in some stone-quarries under “inhuman and intolerable conditions”. The court observed that right to live with human dignity, derives its life breath from the Directive Principles of State Policy, and therefore, it must include protection of health and strength of workers, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, just and humane conditions of work. Since the Directive Principles are not enforceable in a court of law, it may not be possible to compel the State through the judicial process.

IMPLIED FUNDAMENTAL RIGHTS (UNDER ART. 21)

A new judicial trend has emerged from the cases of Maneka Gandhi, Sunil Batra, Hoskot and Hussainara Khatoon, in which the Supreme Court has taken the view that the provisions of Part III of the Constitution of India should be given widest possible interpretation. In Maneka Gandhi’s case, Bhagwati J., said, the correct way of interpreting the provisions of Part III is that attempt of the court should be to expand the reach and ambit of the fundamental rights rather than to attenuate their meaning and content.

By an activist interpretation most of the fundamental rights, especially the right to equality (Art. 14) freedom of speech and expression [Art. 19(1)(a)] and right to life and personal liberty (Art. 21) have been converted into a regime of positive human rights unknown in

previous constitutional diction. By an affirmative action the courts are trying to force the government to create favourable conditions for effective realisation of the new individual, collective, diffuse rights.

The Supreme Court held that to be a fundamental right it is not necessary that a right must be specifically mentioned in a particular Article. Even if it is not mentioned in any of the Articles specifically, it may be a fundamental right if it is an integral part of a named fundamental right or partakes of the same basic nature and character as that fundamental right. Every activity which facilitates the exercise of the named fundamental right may be considered integral part of that right and hence be a fundamental right.

The discoveries of egalitarian goals in the fundamental rights have resulted in the explosion of rights Thus, Art. 21 of the Constitution has sprung up a whole lot of human rights jurisprudence. For example, it has been held that these are fundamental rights under Art. 21, though not specifically mentioned

i) Right to speedy trial (M.H. Hoskot v State of Maharashtra, AIR 1978 SC 1548, Hussainara Khatoon v State of Bihar, AIR 1980 SC 1819; Raj Deo Sharma v State of Bihar (1998) 7 SCC 507)),
ii) Right to travel abroad (Maneka Gandhi's case),
iii) Right to dignity (Maneka Gandhi, Francis Coraiie cases),
iv) Right to privacy (Govind v State of M.P.) ,
v) Right to clean environment (MC. Mehta v Union of India),
vi) Right to livelihood (Olega Teilis case),
vii) Right to education (Mohini Jain and Unni Krishnan cases),
viii) Right to marriage (Lata Singh v State of U.P. AIR 2006 SC 2522),
ix) Right against torture (Sunil Batra v Delhi Admn., AIR 1950 SC 1979; Jolly Varghese v Bank of Cochin, AIR 1950 SC 470; Khatri v State of Bihar (1951) 1 SCC 623;,
x) Right against bondage (Bandhua Mukti Morcha case), People's Union For Democratic Rights v Union of India, (1952) 2 SCC 235; Neeraja Chaudhary v State of M.P (1954) 3 SCC 243),
xi) Right to legal aid (Sheela Barse v Union of India, (1956) 3 SCC 632; Suk Das v V.T. of Ar. Pradesh, (1956) 2 SCC 401, (

xii) Right to food [PUCL v UOI 2000 (5) SCALE],

Similarly the freedom of speech and expression guaranteed under Art. 19(1)(a) includes the right to know, right to information, right to reply etc. Freedom of press is inferred from the freedom of speech and expression. Some of these unspecified or implied fundamental rights are discussed below.

Right to Dignity

In Maneka Gandhi case, the court held that the right to iive is not merely confined to physical existence but it includes within its ambit the right to live with human dignity. In Francis Coralie case, held that the right to live includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life, such as adequate nutrition, clothing and shelter, and facilities for reading and writing, freely moving about and mixing with fellow human being.

In P.U.D.R. v UOI (AIR 1982 SC 1473), held that non-payment of minimum wages to workers employed in various Asiad Projects in Delhi was a denial to them of their right to live with basic human dignity and violative of Art. 21. Rights and benefits conferred on the workmen under various labour laws are “clearly intended to ensure basic human dignity to workmen and if they are deprived of these rights and benefits that would clearly be a violation of Art. 21." Thus, nonimplementation by the private contractors and non-enforcement by the State authorities of the provisions of various labour laws violate the fundamental right of workers to “live with human dignity”.

In Vishaka v State of Rajasthan (AIR 1997 SC 3011), the Apex Court’s attention was focussed towards prevention of sexual harassment of working women in all work-places. Held that it resulted in violation of the fundamental rights of “Gender Equality” and the “Right to Life and Liberty" enshrined in Arts. 14, 15 and 21. It was also held to be violation of the victim's fundamental right under Art. 19(1)(g) to practise any profession or to carry on any occupation, etc. as a “safe” working environment is needed for that. The court observed: “Gender equality includes protection from sexual harassment and right to work with dignity, which is a universally accepted basic human right. In the absence of suitable domestic legislation in this sphere, international conventions/norms, so far as they are consistent with

the constitutional spirit, can be relied on, viz. Convention on the Elimination of All Forms of Discrimination against Women."

The court laid down some guidelines/ norms to be strictly observed by the employers/responsible persons in work places and other institutions, until a suitable legislation were enacted to occupy the field. The guidelines are to be applicable to both public and private sector.

Right to Privacy

In Kharak Singh v State of U.P (AIR 1963 SC 1295) the court held that the term life as used in Art. 21 meant something more than mere animal existence. The inhibition against its deprivation extends to all those limits and faculties by which life is enjoyed. An unauthorised intrusion into a person's home (by way of domiciliary visits of policemen) and the disturbance caused to him is the violation of personal liberty of the individual. But, in Govind v State ofM.P. (AIR 1975 SC 1379), the court held that Police Regulations authorising domiciliary visits were constitutional. As regards the right of privacy, the court said that right to privacy would necessarily have to go through a process of case by case development.

In Malak Singh v State of Punjab (AIR 1981 SC 760), the right of privacy of a citizen as a fundamental right was emphasised by the court. In State of Maharashtra v Madhulkar Narain (AIR 1991 SC 207), held that the right to privacy is available even to a woman of easy virtue and no one can invade her privacy.

In a landmark judgment (The Hindustan Times, 3.12.93), the Madras High Court held that a minor girl had the right to bear a child. In this case, a 16-year old minor girl became pregnant and wanted to have the child against the opposition from her father. The public prosecutor, on behalf of the girl, argued that she had the right to bear the child under the broader right to privacy. Even a minor had a right to privacy under Art. 21. The Constitution does not make any distinction between minor and major in so far as fundamental rights are concerned. The court held that in the case of a mature and understanding minor, the opinion of parent/guardian was not relevant

In R. Rajagopal v State of T.N. (1994) 6 SCC 632, held that the right to privacy or the right to be let alone is included in Art. 21 and a “citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters”. None can publish anything concerning the above matters without the person’s consent, whether truthful or otherwise and whether laudatory or critical. If he does so he would be violating the right of privacy of the person concerned and would be liable for action for damages However, this principle would not apply if the citizen were a busy body vvith a penchant for throwing himself into controversies. Moreover, whatever is on public records can be published. And the right to privacy or the remedy of action for damage is simply not available to public official as long as the criticism concerns the discharge of their public duties.

In Mr. 'X' v Hospital ‘Z’ (Dr. Tokugha Yepthomi v Apollo Hospital) (AIR 1999 SC 495), the appellant (Mr. ‘X’, a doctor) was to marry a girl, but the marriage was called off on the ground of blood test conducted at the respondent's hospital (‘Z’) in which the appellant was found to be HIV positive. The appellant moved the Supreme Court for violation of his ‘right of privacy’. The court rejected the appellant’s contentions by holding that right to privacy is not absolute. It may be lawfully restricted for the prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others In the instant case, another person (appellant’s would-be-bride) was saved in time by the disclosure (‘right to be informed’). Moreover, where there is a clash of two fundamental rights, namely, the appellant’s right to privacy as part of right to life and his fiancee’s right to lead a healthy life which is her fundamental right under Art. 21, the right which would advance the public morality or public interest, would alone be enforced through the Process of court, for the reason that moral considerations cannot be kept at bay and the Judges are not expected to sit as mute structures of clay in the hall known as courtroom, but have to be sensitive, “in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day.”

Right to Food

In PUCL v Union of India [2000 (5) SCALE], the Supreme Court recognizing the right to food’ has held that the people who are starving because of their inability to purchase food

grains have right to get food under Art. 21 and therefore they ought to be provided the same free of cost by the States out of surplus stock lying with the States The people entitled in such situation are those who are aged, infirm, disabled, destitute women/men, pregnant and lactating women and destitute children.

Right to Livelihood (Right to Work)

In Olega Tellis v Bombay Municipal Corpn. (AIR 1986 SC 180), (also known as pavement dwellers' case), the petitioners challenged the validity of Bombay Municipal Corporation Act, 1888, which empowered municipal authorities to remove their huts from pavement and public places on the ground that their removal amounted to depriving them of their right to livelihood, and hence it was violative of Art. 21. The court held that the world life in Art. 21 includes the right to livelihood also, because no person can live without the means of livelihood. If it is not so, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood. The court, however, held that right to livelihood can be curbed or curtailed by following just and fair procedure. The restrictions placed on the right of livelihood of slum dwellers are reasonable because it is in the interest of general public. Public streets are not meant for carrying on trade or business.

Right to Shelter

In Chameli Singh v State of U.P. (1996) 2 SCC 549, it was held that the right to shelter is a fundamental right under Art. 21. Right to live guaranteed in any civilized society implies the right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilized society.

Right to Legal Aid

Art. 22(1) of the Constitution provides that no person who is arrested shall be denied the right to consult a legal practitioner of his choice. Further, the State is under a constitutional mandate (as implicit in Art. 21) to provide free 'legal-aid' to an indigent or poor person (a detainee or an accused person). The right of the arrested person to have a counsel of his choice is fundamental and essential to fair trial.

In Hussainara Khatoon v Home Secy., State of Bihar (1980) 1 SCC 98, the Supreme Court observed: “The right to free services is dearly an essential ingredient of ‘reasonable, fair and just' procedure for a person accused of an offence and it must be held implicit in the guarantee of Art. 21.”

Right to Clean Environment

In recent times, the judiciary in India has extended to new dimensions, the concepts 'right to life’ and 'procedure established by law’ in Art. 21. The Supreme Court, in several cases, interpreted the right to life and personal liberty to include the right to a wholesome environment. The High Courts of the States like Rajasthan, Himachal Pradesh and Kerala too, have observed that environmental degradation violates the fundamental right to life.

Similarly, while interpreting Art. 21, in Ganga Pollution (Tanneries) Case (AIR 1988 SC 1037), Justice Singh justifying the closure of polluting tanneries observed:' “We are conscious that closure of tanneries may bring unemployment, loss of revenue, but life, health and ecology have greater importance to the people"

Also in Shriram Gas Leak Case (AIR 1987 SC 1086), the court evolved the principle of absolute liability of compensation through interpretation of the constitutional, provisions relating to right to live and to the remedy under Art. 32 for violation of fundamental rights. The premises on which the decision is rendered is clear and unambiguous - the fundamental right to a clean and healthy environment The court said that the State had power to restrict hazardous industrial activities for the purpose of protecting the right of the people to live in a healthy environment. Further, the right to live contains the right to claim compensation for the victims of pollution hazards.

While the apex court was reluctant for a short period to confer specifically a right to a clean and humane environment under Art. 21 of the Constitution, various High Courts in the country went ahead and enthusiastically declared that the right to environment was included in the right to life concept in Art 21. In comprehending the right to environment, the High Courts were more specific and direct.

Right to Education [Art. 21A]

The following Article has been added by the Constitution 86th Amendment Act, 2002 in the Constitution of India (taking into consideration the 165th Report of the Law Commission of India and the recommendations made by the Standing Committee of the parliament.

“Art. 21-A: The State shall provide free and compulsory education to all children between the age of 6 and 14 years in such manner as the State may, bylaw, determine” (Fundamental Right).

It casts a duty on the State to provide free and compulsory education to all children between the age of 6 to 14 years. To implement this right the State will enact appropriate laws. Education being a concurrent subject laws may be enacted either by the Union or the States.

In Mohini Jain v State of Karnataka (AIR 1992 SC 1858), the two-judge bench of the Supreme Court held that every citizen has a ‘right to education’ under the constitution. The framers of the Constitution made it obligatory for State to provide education for its citizens. The right to education is concomitant to the fundamental rights. Thus, right to freedom of speech and expression cannot be fully enjoyed unless a citizen is educated and conscious of individualistic dignity. Without education, dignity of the individual can’t be assured. Art. 21 includes the right to live with human dignity and all that goes along with it. The 'right to education’ flows directly from the right to life because of its inherent fundamental importance (in the life of an individual).

The court further observed: The State is under a constitutional mandate to provide education at all levels and thus establish educational institutions at all levels (including professional education like medicine, engineering) for citizens (either State owned or State-recognised). The ‘Capitation fee' (charging amount beyond what is permitted by law i.e. in excess of prescribed fee) brings to the fore a clear class basis, and makes the availability of education beyond the reach of poor. Admission of non-meritorious students by charging capitation fee strikes at the very root of the Constitutional scheme and our educational system. Education in India has never been a commodity for sale.

In Unni Krishnan v State of A.P. (“Capitation Fee Case”) (AIR 1993 SC 2178), the five-judge bench, by 3-2 majority held that admission to all recognised private educational institutions particularly medical and engineering, shall be based on merit, but 50% of seats in

all professional colleges be filled by candidates prepared to pay a higher fee. The system devised by us, the court said, would mean correspondingly more financial burden on affluent students; whereas in the system prevalent in Andhra Pradesh, the financial burden is equally distributed among all the students, as a result of which a poor meritorious student often unable to pay the enhanced fee prescribed by the government for such colleges. This is unjust and violation of Art. 14.

RIGHTS OF ACCUSED (Art. 22)

As Indian constitution is wedded to Democracy and Rule of Law, the concept of free and fair trial is a constitutional commitment for which the cardinal principle of Criminal Law revolves around the Natural Justice wherein, even the accused or guilty person is treated with a human treatment. The law of the land requires the prosecution to stand at its own legs and to prove the guilt of the accused beyond the shadow of a reasonable doubt.

The accused persons are also granted certain rights, the most basic of which are found in the Indian Constitution. An accused has certain rights during the course of any investigation; enquiry or trial of offence with which he is charged, and he should be protected against arbitrary or illegal arrest.

Our constitution is based on fundamental that Let Hundreds Go Unpunished, But Never Punish An Innocent Person Right to get a fair representation in a criminal procedure is a facet of Right to Equality (Article 14). Article 20 says that "no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. Thus, accused is given fair equality as par with other citizen.

Also by the judicial voice, a wider ambit has been given to right to life and liberty and thus accused are given a human treatment in jails fulfilling reformative approach (Article 21). Article 22 talks that No person shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult and to be defended by, legal practitioner of his choice. The exception to the right is that it is not to be applied on alien. Thereby, these rights under constitution are inherent rights and cannot be altered or changed.

Cases

In, Nandini Sathpathy v. P.L.Dani 1978 SCR (3) 608,wherein it was held that no one can forcibly extract statements from the accused and that the accused has the right to keep silent during the course of interrogation (investigation).

In, D.K. Basu v. State of W.B (1997) 1 SCC 416,the Supreme Court, in this case, issued some guidelines which were required to be mandatorily followed in all cases of arrest or detention which include, the arresting authority should bear accurate, visible, and clear identification along with their name tags with their designation, the memo be signed by the arrestee and family member, the family or the friend must be told about the arrest of the accused, The arrestee may be permitted to meet his lawyer during interrogation, though not throughout the interrogation and many other.

PREVENTIVE DETENTION LAWS (Art. 22)

Preventive detention means to detain a person so that to prevent that person from commenting on any possible crime or in other words preventive detention is an action taken by the administration on the grounds of the suspicion that some wrong actions may be done by the person concerned which will be prejudicial to the state. Preventive Detention is the most contentious part of the scheme fundamental rights in the Indian constitutions Article 22(3) provides that if the person who has been arrested or detained under preventive detention laws then the protection against arrest and detention provided under article22 (1) and22 (2) shall not be available to that person.

History of The Preventive Detention Law And Position In Other Countries

India became free in 1947 and the Constitution was adopted in 1950. It is extraordinary that the framers of the Indian Constitution, who suffered most because of the Preventive Detention Laws, did not hesitate to give Constitutional sanctity to the Preventive Detention Laws and that too in the Fundamental Rights chapter of the Constitution. Some parts of Article 22 are not Fundamental Rights but are Fundamental Dangers to the citizens of India for whom and allegedly by whom the Constitution was framed, to usher in a new society, with freedom of expression and freedom of association available to all. In 1950 itself, a Prevention Detention Act

was piloted by Sardar Patel, who said that he had several '"sleepless nights"' before he could decide that it was necessary to introduce such a Bill The first Preventive Detention Act was enacted by the Parliament on 26th February 1950. And in 1950, under this Act, ordinary disturbers of order and peace were not arrested, but a political leader of A.K. Gopalan's eminence was arrested. Even from that initial action, it was evident that these Acts were meant to curb political dissent, and that legacy has been and is being followed.

From the time the country secured its Independence till 1977, except for a period of nearly two years from 1969-1971, free India had the dubious distinction of having these extraordinary, mischievous and 'unlawful' laws throughout. It is worth bearing in mind that no other civilized country, including Britain which brought Preventive Detention laws here, felt compelled to introduce such laws during peace time. Even during the last World War, most European countries and the USA, who were all directly involved in the war, had no such law. During the War, England introduced a Preventive Detention Law to the effect that a person could be detained only on the subjective satisfaction of the Home Minister of Great Britain and not on the subjective satisfaction of a puny magistrate, as it the case here. Further only one person.

Sir Osward Mosley, a rabid Nazi, was detained under this Act. In1971, because of tremendous political turmoil which resulted in assassinations and destruction all over Ireland, the British Government introduced preventive Detention Act for Ireland. But it immediately formed a committee headed by Lord Gardiner to probe and to find out if it was necessary to have such an Act even in Ireland. The Gardiner Committee Report reads: '"Preventive Detention can only be tolerated in any democratic society in the most extreme circumstances. It must be used with the utmost restraint and retained only so long as it is strictly necessary. Our Constitution, since its enactment, has had a peculiar feature the fundamental rights guaranteed under it allow preventive detention without trial. Article 22 after providing that any person arrested must be produced before a court within 24 hours of arrest tenders this almost nugatory by permitting the state to preventively detain persons without any judicial scrutiny. The debates in the Constituent Assembly show that the need to provide for preventive detention was generally accepted.

The observations of Alladi Krishnaswamy Ayyar, a distinguished jurist is typical: he described preventive detention a necessary evil because in his view there were people detained to undermine the sanctity of the Constitution, the security of the State and even individual liberty. What the members tried to do was not to prohibit preventive detention but to incorporate safeguards against its abuse in the Constitution by limiting the period, by giving effective powers to the advisory board to review detention orders, etc. This they failed to get. It was left to Parliament to prescribe the period and even that limit was flouted in spirit by the device, often adopted, of serving a fresh detention order a few hours after releasing the detenu, advisory boards had no power to go into the merits of the detention. The solution is simple; scrap all laws of preventive detention. It is, however, difficult to see that happening in the near future.

I would suggest a first step which would remove some of the more undesirable features of preventive detention. The only justification for preventive detention is to safeguard society from persons who are out to destroy it. If that is the justification and that is the only justification officially given, let it be provided that all those detained under any detention law be kept either in the ordinary jails or in special detention centerâ€™s run by the jail authorities. Such a change does not require fresh legislation. Both the National Security Act and Cofeposa authorize the State to specify the place and conditions of detention. The state must be directed to ensure that detenus must be taken to ordinary jails within 24 hour of detention and be kept there. In the past, that was the pattern of preventive detention. Thousands of nationalists rounded up by the British during the Independence movement were so detained. NO order of detention can be passed to aid the police or other authorities to investigate the crime or other offences; what justifies to investigate the crime or other offences what justifies detention is the satisfaction of the appropriate authority that the detention of a particular person is necessary.

Once a detention order is passed, that is the end of the matter as far as the detaining authorities are concerned that being so the detaining authority must have no access to the detenus. Even after such a change since the laws will enable the detaining authorities to detain without trial persons believed to be indulging in grave anti-social activities the object, and ostensibly at least, the only object of such laws can still be achieved. The state cannot have any rational objection to such a change. Both the National Security Act and Cofeposa merely authorize the detention of persons who see. It is argued, a danger to society if free. If the state does object to such changes

it will expose its true motive and also the manner in which detention laws are being abused persons are detained so as to extract information from them.

Object of The Preventive Detention:

The object of Preventive Detention is not to Punish but to prevent the detenu from doing something which is prejudicial to the State. The satisfaction of the concerned authority is a subjective satisfaction in such a manner. It comes within any of the grounds specified like

Security of the State,

Public Order,

Foreign affairs,

Services essential to the community.

Mariappan vs The District Collector And others

It was held that object of detention and the detention laws, is not to punish, but, to prevent the commission of certain offences.

Grounds For Preventive Detention:

Preventive detention can, however, be made only on four grounds.

The grounds for Preventive detention are:

Security of state, maintenance of public order,

maintenance of supplies and essential services and defense,

foreign affairs or security of India.

A person may be detained without trial only on any or some of the above grounds. A detainee under preventive detention can have no right of personal liberty guaranteed by Article 19 or Article 21.

Safeguards Provided In Constitution:

To prevent reckless use of Preventive Detention, certain safeguards are provided in the constitution.

Firstly, a person may be taken to preventive custody only for 3 months at the first instance. If the period of detention is extended beyond 3 months, the case must be referred to an Advisory Board consisting of persons with qualifications for appointment as judges of High Courts. It is implicit, that the period of detention may be extended beyond 3 months, only on approval by the Advisory Board.

Secondly, the detainee is entitled to know the grounds of his detention. The state, however, may refuse to divulge the grounds of detention if it is in the public interest to do so. Needless to say, this power conferred on the state leaves scope for arbitrary action on the part of the authorities.

Thirdly, the detaining authorities must give the detainee earliest opportunities for making representation against the detention.

These safeguards are designed to minimize the misuse of preventive detention. It is because of these safeguards that preventive detention, basically a denial of liberty, finds a place on the chapter on fundamental rights. These safeguards are not available to enemy aliens.

Preventive Detention in India is a Constitutional Tyranny

India is one of the few countries in the world whose Constitution allows for preventive detention during peacetime without safeguards that elsewhere are understood to be basic requirements for protecting fundamental human rights. For example, the European Court of Human Rights have long held that preventive detention, as contemplated in the Indian Constitution is illegal under the European Convention on Human Rights regardless of the safeguards embodied in the law. South Asia Human Rights Documentation Centre (SAHRDC), in its submission to the NCRWC in August 2000, recommended deleting those provisions of the Constitution of India that explicitly permit preventive detention. Specifically, under Article 22, preventive detention may be implemented and infinitum - whether in peacetime, non-emergency situations or otherwise. The Constitution expressly allows an individual to be detained - without charge or trial for up to

three months and denies detainees the rights to legal representation, cross-examination, timely or periodic review, access to the courts or compensation for unlawful arrest or detention.

In short, preventive detention as enshrined under Article 22 strikes a devastating blow to personal liberties. It also runs afoul of international standards. Article 4 of the International Covenant on Civil and Political Rights (ICCPR) - which India has ratified admittedly permits derogation from guaranteeing certain personal liberties during a state of emergency. The Government, however, has not invoked this privilege, nor could it, as the current situation in India does not satisfy with standards set forth in Article 4.

If preventive detention is to remain a part of India's Constitution, it is imperative that its use is confined to specified, limited circumstances and include adequate safeguards to protect the fundamental rights of detainees. Particular procedural protections are urgently needed:

(i) to reduce detainees' vulnerability to torture and discriminatory treatment

(ii) to prevent officials misusing preventive detention to punish dissent from Government or from majority practices; and

(iii) to prevent overzealous government prosecutors from subverting the criminal process.

In pursuit of these goals, SAHRDC made the following recommendations in its submission to the NCRWC. First, Entry 3 of List III of the Constitution of India, which allows Parliament and state legislatures to pass preventive detention laws in times of peace for "the maintenance of public order or maintenance of supply and services essential to the community", should be deleted. Assuming that preventive detention could be justified in the interest of national security as identified in Entry 9 of List I of the Constitution, there is still no compelling reason to allow this extraordinary measure in the circumstances identified in Entry 3 of List III.

Second, lacking clear guidance from the Constitution, courts have appeared vague and toothless standards - such as the subjective "satisfaction" of the detaining authority test - to govern the implementation of preventive detention laws. If preventive detention is to remain in the Constitution, constitutional provisions must include well-defined criteria specifying limited

circumstances in which preventive detention powers may be exercised - and these standards must be designed to allow meaningful judicial review of the official's actions.

Third, under Article 22 (2) every arrested person must be produced before a magistrate within 24 hours after arrest. However, Article 22 (3) (b) excepts preventive detention detainees from Clause (2) and, as a consequence, it should be repealed in the interest of human rights. AT present, detainees held under preventive detention laws may be kept in detention without any form of review for up to three months, an unconscionably long period in custody especially given the real threat of torture. At the very least, the Government should finally bring Section 3 of the Forty-fourth Amendment Act, 1978 into effect, thereby reducing the permitted period of detention to two months. Though still a violation of international human rights law, this step would at least reduce the incidents of torture significantly.

Fourth, the Advisory Board review procedure prescribed by the Constitution involved an executive review of executive decision-making. The absence of judicial involvement violates detainees' right to appear before an "independent and impartial tribunal", in direct contravention of international human rights law including the ICCPR (Article 14 (1) and the Universal Declaration of Human Rights (Article 10). The Constitution must be amended to include clear criteria for officials to follow, and subject compliance with those standards to judicial review.

Fifth, the Constitution provides that the detaining authority must refer to the Advisory Board where detention is intended to continue beyond three months. No provision exists for the consideration of a detainee's case by the Advisory Board more than once. Yet, periodic review is indispensable protection to ensure that detention is "strictly required" and fairly administered. Hence, the constitution should mandate periodic review of the conditions and terms of detention.

Sixth, detainees must receive detailed and prompt information about the grounds of their arrest. Currently, the detaining authority is required only to communicate the grounds of detention to the detainee "as soon as may be" after the arrest. Article 9 (2) of the ICCPR provides that "[a] anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him". Detainees must be guaranteed a minimum period in which the grounds are promptly communicated to them, and be given information sufficient to permit the detainee to challenge the legality of his or her detention.

Seventh, individuals held under preventive detention must be given the right to legal counsel and other basic procedural rights provided by Articles 21 22 (1) and 22 (2) of the Constitution. Article 22 (1) of the Constitution, for example, guarantees the right to legal counsel, but Article 22 (3) (b) strips this right from persons arrested or detained under preventive detention law. Relying on these provisions, the Supreme Court stated, in A.K. Roy v. Union of India, that detainees do not have the right to legal representation or cross-examination in Advisory Board hearings. Contrary to India's constitutional practice, the U.N. Human Rights Committee has stated that any persons arrested must have immediate access to counsel". Article 22 (3) (b) of the Constitution - denying detainees virtually all procedural rights during Advisory Board hearings - must be repealed.

Eighth, Article 9 (5) of the ICCPR provides the right to compensation for unlawful detention, except during public emergencies. A similar provision creating a right to compensation is included in section 38 of the Prevention of Terrorism Bill of 2000 (though the bill is otherwise effectively a reconstitution of the lapsed Terrorist and Disruptive Activities Prevention Act (TADA). The Law Commission charged with reshaping the antiterrorism legislation observed that Supreme Court orders have held that people are effectively entitled to compensation, in practice superseding India's reservation to Article 9 (5) of the ICCPR. In this light, the Government of India should promptly withdraw its reservation of Article 9 (5) of the ICCPR and Include a Constitutional provision guaranteeing the right to compensation.

In keeping with the overriding spirit of the Constitution and with minimum standards of international human rights law, it is essential that the Constitutional reforms discussed above be adopted. The process set in motion by establishing the NCRWC provides a unique opportunity for such an important realignment of India's Constitution with prevailing international human rights standards. The key will be political willpower and the commitment to seeing justice done.

Constitutional Validity Of Preventive Detention Law:

A three-Judge Bench of the Supreme Court in

Ahmed Noor Mohamad Bhatti V. State of Gujarat, AIR 2005

while upholding the validity of the power of the Police under section 151 of the Criminal Procedure Code 1973 to arrest and detention of a person without a warrant to prevent the commission of a Cognizable offense ruled that a provision could not be held to be unreasonable as arbitrary and therefore unconstitutional merely because the Police official might abuse his authority.

This preventive detention act is a necessary tool in the hands of the executive which authorizes them to arrest any person from whom reasonable suspicious arises that he can commit any cognizable offense or his activities are prejudicial to law and order to state and the police can arrest that person without warrant.

A.K. Gopalan Vs. The State of Madras

The preventive Detention Act, 1950, with the exception of section 14 thereof did not contravene any of the Articles of the Constitution and even though section 14 was ultra vires inasmuch as it contravened the provisions of Article 22 of the Constitution, as this section was severable from the remaining sections of the Act, the invalidity of Section 14 did not affect the validity of the Act as a whole and the detention of the petitioner was not illegal.

ARTICLES 23-24 [RIGHTS AGAINST EXPLOITATION]

Articles 23 and 24 constitute a group under the head ‘Right against Exploitation.' Exploitation is opposed to the dignity of the individual proclaimed in the Preamble and to the provisions of Art. 39(e) and (f).

The two rights guaranteed under this head seem to supplement the 'right to freedom', as the real object of these two rights is nothing more than to protect the personal freedom of the citizens. One may partially agree with the view of Prof. K.V. Rao' “Indeed, the Makers had displayed considerable ingenuity in coining a name for them (Rights against Exploitation), for they confer no right on any one, nor an enforceable punishment. They ought to have been in Part IV, for the Parliament has to make a law prescribing a punishment which it could have done under Arts. 15 and 19(6).

Article 23: Traffic in Human Beings, Begar, Forced Labour Art. 23(1) says: “Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

(2) Nothing in this article shall prevent the State from imposing compulsory service for public purposes, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them."

Article 23(1) prohibits “traffic in human beings and begar and other forced labour". Traffic in human beings and forced labour militates against human dignity.

Art. 23 protects the individual not only against the State but also private citizens. Under Art. 35, the Pariiament is authorized to make laws for punishing acts prohibited by this article.

'Traffic in human beings' - It means to deal in men and women like goods such as to sell or let out or otherwise dispose them off. It includes immoral traffic in women or girls or subjecting children to immoral or such like practices. For this sake, the Suppression of Immoral Traffic in Women and Girls Act, 1956 had been put in operation. The validity of this Act has been upheld by laying down that it is not inconsistent with the fundamental right to carry on a business, trade or profession (Shama v State of UP. AIR 1959 All. 57).

Devadasis are also covered under the term “traffic in human beings”. Though 'slavery' is not expressly mentioned, there is no doubt that the expression ‘traffic in human beings’ would cover it (Dubarv Union of India MR 1952 Cal. 496). It may be noted that under Sec. 370, IPC, whoever imports, exports, removes, buys, sells or disposes off any person as a slave shall be punished with imprisonment.

‘Begar and other forced labour' - ‘Begar means forcing a person to do some work against his will and that on the basis of non-payment or grossly inadequate payment. However, this condition shall not apply to a case where forced labour is a part of punishment as in a prison house or some such work forms part of the service conditions or agreement.

‘Bonded labour1 is a form of forced labour that is forbidden. In the ‘Asiad case' (,P.U.D.R v UOI AIR 1982 SC 1473), the Supreme Court gave a wide meaning to the word ‘force.’ Force is not mere physical or legal force but also force arising from the compulsion of economic

circumstances. The person in want has no choice. He may be compelled to work for a wage less than the minimum. He may even agree to pay a part of his wages to a middleman.

It may be noted that, as a result of Art. 23, as many as 12 Acts sanctioning forced labour, under certain circumstances, became void on the enactment of the Constitution. The Bonded Labour System (Abolition) Act, 1976, has brought freedom within the reach of many persons who were being forced to work, along with their family in some cases, by contractors.

Even when the State undertakes famine relief work it cannot pay less than the minimum wage. The State cannot take advantage of their helplessness. If it does so it would be violative of Art. 23 (Sanjit Roy v State of Rajasthan AIR 1983 SC 328).

Article 24: Prohibition on Employment of Children

Art. 24 of the Constitution provides that “No child below the age of 14 years shall be employed to work in any factory or mine or engaged in any other hazardous employment”. This provision read with Art. 39(e) and (f) (directive principles), provides for the protection of the health and strength of children below the age of 14 years. Several Acts also give effect to the provisions of the Constitution e.g. the Employment of Children Act, 1938, the Factories Act, 1948, the Mines Act, 1953, the Child Labour (Prohibition and Regulation) Act, 1986, etc. This is in keeping with the human rights concepts and United Nations/I.L.O. norms, international Convention on the Rights of the Child was ratified by India on 20-11-1989.

In P.U.D.R. v UOi (AIR 1983 SC 1473), held that under Art. 24 no child below the age of 14 years can be employed in the construction work even if construction industry is not specified in the Schedule to the Employment of Children Act, 1938.

In M.C. Mehta v State of T.N. (AIR 1997 SC 609), held that children below the age of 14 years cannot be employed in any hazardous industry, mines or other works and has laid down exhaustive guidelines how the State authorities should protect economic, social and humanitarian rights of millions of working children. The matter was brought before the Court by way of PIL, regarding the plight of the children engaged in Sivakasi cracker factories.

of the children engaged in Sivakasi cracker factories. The Supreme Court directed setting up of 'Child Labour Rehabilitation Welfare Fund’ and asked the offending employer to pay for each

child a compensation of Rs.20,000 to be deposited in the Fund. The Court made it clear that employer's liability would not cease even if he would desire to disengage the child presently employed, and asked the Government to ensure that an adult member of the child's family get a job in a factory or anywhere in lieu of the child, in those cases where it would not be possible to provide jobs, the appropriate Government would deposit Rs.25,000 in the Fund for each child engaged in factory/mine or any other hazardous employment. The case of getting employment for an adult, the parent/guardian shall have to withdraw the child from the job. Even if no employment would be provided, the parent shall have to see that his child is spared from the requirement of the job as an alternative source of income - interest income from deposit of Rs.25,000 - would become available to the child's family till he continues his studies up to the age of 14 years. All the above benefit would cease if the child is not sent for education by parents.

The Court identified nine industries where the work could be taken up, namely - match industry in Sivakasi (T.N.); diamond-polishing industry in Surat (Gujarat); precious stone polishing industry in Jaipur (Rajasthan); glass industry in Firozabad, prass-ware industry in Moradabad, hand-made carpet industry in Mirzapur, lock- making industry in Aligarh (U.R); slate-industry in Mankaour (Andhra Pradesh); and slate-industry in Mandsaur (M.P), for priority action. In so far as the non-hazardous jobs are concerned, the Inspector shall have to see that working hours of child are not more than 4-6 hours a day and it receives education at least for two hours each day. The cost of education shall be borne by the employer.

In Bandhua Mukti Morcha v Union of India (AIR 1997 SC 2218), the court observed: "The basic cause for child labour being poverty, instead of its total abolition which will have adverse effect, it should be banned progressively in a planned manner starling from the most hazardous and intolerable activities like slavery, bonded labour, trafficking, prostitution, pornography and dangerous forms of labour, etc. Thus, other simultaneous alternatives to the child should be evolved including providing compulsory education, health care, nutrient food, shelter and other means of livelihood with self-respect and dignity of person'', in this case, a PIL alleged employment of children aged below 14 years in Carpet Industry in U.P.

The Supreme Court observed: "The child of today cannot develop to be a responsible and productive member of tomorrow's society unless an environment which is conducive to his social

and physical health is assured to him. Neglecting the children means loss to the society as a whole. Their employment - either forced or voluntary - is occasioned due to poverty; exploitation of their childhood thus (in particular the poor/deprived sections) is detrimental to democracy and social stability, unity and integrity of the nation".

The Court further observed: "Various welfare measurers made by Parliament/ State Legislatures are only teasing illusions and a promise of unreality unless they are effectively implemented and the 'right to life' to the child driven to labour is made a reality, meaningful and happy. Child labour must be eradicated, through well- planned, poverty-focused alleviation, development and imposition of trade actions in employment of the children, etc.

Secularism - Freedom of Religion, Judicial interpretation, Restrictions on freedom of religion.

India is a country of religions. There exist multifarious religious groups in the country but, in spite of this, the Constitution stands for a secular state of India. Secularism has been inserted in the Preamble by reason of the Constitution (Forty-second Amendment) Act, 1976. Secularism is the basic structure of the Constitution. Thus, there is no official religion in India. Several fundamental rights guarantee freedom of worship, belief, faith and religion[1]. The state does not identify itself with, or favour, any particular religion. The state is enjoined to treat all religions and religious sects equally. No one is disabled to hold any office on the ground of religion. Religion is a matter of belief or faith. The Constitution of India recognizes the fact, how important religion is in the life of people of India and hence, provides for the right to freedom of religion under Articles 25 to Article 28. In a State, all are equal and should be treated equally. Religion has no place in the matters of State. Freedom of religion as a fundamental right is guaranteed to all persons in India.

Secularism

"Secularism is neither anti-God nor pro-God. It eliminates God from the matters of State and ensures that no one shall be discriminated on the grounds of religion."'Secularism' means

that the State shall observe an attitude of neutrality and impartiality towards all religions. Articles 25 and 26 embody the principles of religious tolerance that has been the characteristic feature of Indian civilization from the start of history. Besides they serve to emphasize the secular nature of Indian democracy i.e. equal respect to all religions. A secular State does not mean an irreligious State, it only means that in matters of religion it is neutral, the State can have no religion of its own, and the State protects all religions but interferes with none. In a secular State, the State is only concerned with the relation between man and man; it is not concerned with the relation of man with God. It is left to the individual's conscience.

D.E. Smith opinion that a secular state is a state which guarantees individual and corporate freedom of religion, deals, with the individual as a citizen irrespective of religion, is not constitutionally connected to a particular religion nor does it seek either to promote or interfere with it.

What is religion?

Milton Yinger, American sociologist defines religion as "a system of beliefs and practices by means of which a group of people struggles with the ultimate problems of human life".

The constitution does not define the term 'religion' and 'matters of religion'. Hence, it is left to the Supreme Court to determine the judicial meaning of these terms.

Constitutional Provisions relating Freedom of Religion

The decision of the Constituent Assembly to keep out God from the Constitution will doubtless please the atheists, who regard the existence of God as a metaphysical myth. But this is by no means the opinion of the bulk of the Indian people. In fact, one of the essential features of Indian culture is its deep concern with the super- natural, and the whole of the Indian cultural tradition is embedded in the belief in and the worship of the Supreme Being in diverse ways. All persons are equally entitled to freedom of religion guaranteed under part III of Constitution.

Article -25, Freedom of conscience and free profession, practice and propagation of religion.—(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. (2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law— (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I.—The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II.—In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Article-26. Freedom to manage religious affairs.—Subject to public order, morality and health, every religious denomination or any section thereof shall have the right—

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.

Article-27. Freedom as to payment of taxes for promotion of any particular religion.—No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated

in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

Article-28. Freedom as to attendance at religious instruction or religious worship in certain educational institutions.—

(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

(2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.

(3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

Judicial trends on Right to Freedom of Religion

To 'profess' a religion means to declare freely and openly one's faith and belief. He has right to practice his belief by practical expression in any manner he likes. To 'practice' religion is to perform the prescribed religious duties, rites and rituals. To 'propagate' means to spread and publicize his religious views for the edification of others. In other words, it means the right to communicate a person's beliefs to another person or to expose the tenets of that faith. The right to propagate one's religion does not give a right to convert another person to one's own religion, as that would impinge on the "freedom of conscience" guaranteed to all persons. Our judiciary played an important role in balancing the freedoms and restrictions. In various cases court upheld the importance secularism and also the right to religion.

In S.R Bommai v Union of India J.T. 1994(2) SC 215, held that the dismissal of the BJP Government in M.P., Rajasthan and H P. in the wake of the Ayodhya incident of Dec. 6, 1992 was valid and imposition of the President's rule in these States was not unconstitutional. The court held that 'secularism' is a basic feature of the Constitution and any State Government which acts against that ideal can be dismissed by the President.

The National Anthem Case

***Bijoe Emmanuel v. State of Kerala*, (Popularly known as the national anthem case.)**

The facts of this case were that three children belonging to a sect (Jehovah's witness) worshipped only Jehovah (the creator) and refused to sing the national anthem "Jana Gana Mana". According to these, children singing Jana Gana Mana was against the tenets of their religious faith which did not allow them to sing the national anthem. These children stood up respectfully in silence daily for the national anthem but refused to sing because of their honest belief. A Commission was appointed to enquire about the matter. In the report, the Commission stated that these children were 'law-abiding' and did not show any disrespect. However, the headmistress under the instruction of the Dy. Inspector of Schools expelled the students.

The Supreme Court held that the action of the headmistress of expelling the children from school for not singing the national anthem was violation of their freedom of religion. The fundamental rights guaranteed under Article 19(1)(a) and Article 25(1) has been infringed. It further held that there is no provision of law which compels or obligates anyone to sing the national anthem, it is also not disrespectful if a person respectfully stands but does not sing the national anthem.

Appointment of Non-Brahmins as Pujari: N. Aditya v. Travancore Devaswom Board

The issue, in this case was whether the appointment of a non-Malayala Brahmin as 'Santhikaran' (Priest or Pujari) of the Kongorpilly Neerikode Siva Temple at Kerala is violation of the provisions of the constitution.

The court held as long as a person is well versed, properly qualified and trained to perform the puja in an appropriate manner for the worship of the deity, such a person can be appointed as 'Santhikaran' despite his caste. In the present case, it was also observed that the temple is not a denomination where there is a specific form of worship is required.

Acquisition of place of worship by State

The Supreme Court in the case of *M Ismail Faruqi v. Union of India* held that the mosque is not an essential part of Islam. Namaz (Prayer) can be offered by the Muslims anywhere, in the open as well and it is not necessary to be offered only in a mosque.

In *M Siddiq (D) Thr. Lrs v. Mahant Suresh Das* Supreme Court held that the State has the sovereign or prerogative power to acquire the property. The state also has the power to acquire places of worship such as mosque, church, temple, etc and the acquisition of places of worship per se is not violation of Articles 25 and 26. However, the acquisition of place of worship which is significant and essential for the religion and if the extinction of such place breaches their (persons belonging to that religion) right to practice religion then the acquisition of such places cannot be permitted.

Triple Talaq: Shayara Bano v. Union of India

Talaq-e-biddat known as triple talaq, a kind of divorce through which a Muslim man could divorce his wife by uttering the words talaq talaq talaq. A 5 judges bench of the Supreme Court heard the controversial Triple Talaq case. The main issue, in this case, was whether the practice of Talaq-e-biddat (triple talaq) is a matter of faith to the Muslims and whether it is constituent to their personal law. By a 3:2 majority, the court ruled that the practice of Talaq-e-biddat is illegal and unconstitutional. The court also held that, an injunction would continue to bar the Muslim male from practicing triple talaq till a legislation is enacted for that purpose.

To which the government formulated the Muslim Women (Protection of Rights on Marriage) Bill, 2017. Later, Muslim Women (Protection of Rights on Marriage) Ordinance, 2018 was passed. As the 2018 ordinance was about to expire, the government formulated a fresh bill in

2019 and an ordinance was passed for the same in 2019 which was approved by the President and finally the *Muslim Women (Protection of Rights on Marriage) Act, 2019* came into force on July 31st, 2019 with an objective "to protect the rights of the married Muslim women and prohibit the Muslim male to divorce the wife by pronouncing talaq".

Noise pollution in the name of religion

The Supreme Court in *Church of God (Full Gospel) v K.K.R. Majestic Colony Welfare Association* held that nowhere in any religion, it is mentioned that prayers should be performed through the beating of drums or through voice amplifiers which disturbs the peace and tranquility of others. If there is any such practice, it should be done without adversely affecting the rights of others as well as that of not being disturbed in their activities.

Article 25, Clause (1) - In the name of religion no act can be done against public order, morality and health of the public. For example, in the name of religion 'untouchability or traffic in human beings' e.g. system of devadasis cannot be tolerated.

Article 26-Religious denomination

The word 'religious denomination' is not defined in the constitution. The word 'denomination' came to be considered by the Supreme Court in the case of *Commissioner, Hindu Religious endowment Madras v. Shri Laxmindra Thirtha Swamiar of Shri Shirur Mutt.* In this case, the meaning of 'Denomination' was called out from the Oxford dictionary, "*A collection of individuals classed together under the same name, a religious sect or body having a common faith and organization designated by a distinctive name".*

Bramchari Sidheshwar Bhai v. State of West Bengal

In this case, The Ram Krishna Mission wanted to declare itself as a non- Hindu minority where its members were to be treated as Hindus in the matter of marriage and inheritance but in the religious sense to be recognized as non-Hindus. This would certainly mean that they are given the status of legal Hindus but religious non- Hindus, similar to Sikhs and Buddhists. To this, the

Supreme Court ruled that it cannot be claimed by the followers of Ram Krishna that they belong to the minority of the Ram Krishna Religion. Ram Krishna Religion is not distinct and separate from the Hindu religion. It is not a minority based upon religion. Hence, it cannot claim the fundamental right under Article 30 (1) to establish and administer institutions of education by Ram Krishna Mission.

Right to establish and maintain-institutions for religious and charitable purposes: Azeez Basha v. Union of India

In this case, certain amendments were made in the year 1951 and 1965 to the Aligarh Muslim University Act, 1920. These amendments were challenged by the petitioner on the ground that:

1. They infringe on the fundamental right under Article 30 to establish and administer educational institutions.
2. Rights of the Muslim minority under Article 25, 26, 29 were violated.

It was held by the Supreme Court that prior to 1920 there was nothing that could prevent Muslim minorities from establishing universities. The Aligarh Muslim University was established under the legislation (Aligarh Muslim University Act,1920) and therefore cannot claim that the university was established by the Muslim Community as it was brought into existence by the central legislation and not by the Muslim minority.

Breaking of coconuts and performing Pooja, chanting Mantras and Sutras in State functions: Atheist Society of India v. Government of A.P., AIR 1992 AP 310

The petitioner (Atheist Society of India), in this case prayed for the issuance of writ of Mandamus to direct the Government of Andhra Pradesh to give instruction to all the concerned departments to forbid the performance of religious practices such as breaking of coconuts, chanting mantras, etc at the State function on the ground that the performing of these practices is against secular policy of the constitution. The petitioner’s prayers were rejected by the court on the grounds that it infringes upon the right to religion and if permitted it will be against the

principle of secularism, which is the basic structure of our Constitution. It would lead to depriving of the right to freedom of thought, faith, worship.

Limitations of the Right

The right to religion under Article 26 is subject to certain limitations and not absolute and unfettered. If any religious practice is in contravention to any public order, morality or health then such religious practice cannot claim the protection of the state.

Freedom from taxes for promotion of any particular religion (Art. 27)

Article 27 of the Constitution prevents a person from being compelled to pay any taxes which are meant for the payment of the costs incurred for the promotion or maintenance of any religion or religious denomination.

In the case of *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt,* the Madras legislature enacted the Madras Hindu Religious and Charita Endowment Act, 1951 and contributions were levied under the Act. It was contended by the petitioner that the contributions levied are taxes and not a fee and the state of madras is not competent to enact such a provision. It was held by the Supreme Court that though the contribution levied was tax but the object of it was for the proper administration of the religious institution.

Prohibition of religious instruction in the State-aided Institutions (Art. 28)

Article 28 prohibits:

- Providing religious instructions in any educational institutions that are maintained wholly out of the state funds.
- The above shall not apply to those educational institutions administered by the states but established under endowment or trust requiring religious instruction to be imparted in such institution.

- Any person attending state recognized or state-funded educational institution is not required to take part in religious instruction or attend any workshop conducted in such an institution or premises of such educational institution.

Teaching of Guru-Nanak: D.A.V. College v. State of Punjab, (1971) 2 SCC 368

In this case Section 4 of the Guru Nanak University (Amritsar) Act, 1969 which provided that the state shall make provisions for the study of life and teachings of Guru Nanak Devji was questioned as being violation of Article 28 of the Constitution. The question that arose was that the Guru Nanak University is wholly maintained out of state funds and Section 4 infringes Article 28. The court rejecting this held that Section 4 provides for the academic study of the life and teachings of Guru Nanak and this cannot be considered as religious instruction.

Education for value development based on all religions: Aruna Roy v. Union of India, (2002) 7 SCC 368.

In this case PIL was filed under Article 32 wherein it was contended by the petitioner that the National Curriculum Framework for School Education (NCFSE) which was published by the National Council of Educational Research and Training is violative of the provisions of the constitution. It was also contended that it was anti-secular and was also without the consultation of the Central Advisory Board of Education and hence it should be set aside. NCFSE provided education for value development relating to basic human values, social justice, non-violence, self-discipline, compassion, etc. The court ruled that there is no violation of Article 28 and there is also no prohibition to study religious philosophy for having value-based life in a society.

UNIT- V

- **Cultural and Educational Rights of minorities**
- **Right to Constitutional Remedies: Article 32 and 226 — kinds of writs**
- **Right to property (prior to 1978 and the present position)**
- **Directive Principles of State Policy and Fundamental Duties**
- **inter relation between fundamental rights and directive principles.**

Cultural and Educational Rights: Articles 29-30 Under Indian Constitution

Who is a minority?

Article 30 of the Constitution talks about two types of minority communities – Linguistic and Religious. But while it defines the categories of minority communities, there is no official definition of the word by the government.

One can derive certain pointers from the various articles in our Constitution and reports from the government. Article 29(1) that safeguards the rights of minority communities states that anyone with "a distinct language, script or culture of its own" has the right to conserve it.

From the language of the text, we may understand that communities with distinct language, script or culture fall under minority communities. But in later cases such as Bal Patil v. Union of India and the Islamic Academy of Education v. State of Karnataka, we see that courts rely on other factors such as economic welfare to decide whether a community is a minority or not.

In terms of religious minority communities, Section 2(c) of the Minorities Act recognizes 5 religions as minority communities namely Muslims, Sikhs, Christians, Buddhists, and Zoroastrians (NCMA).

S.P. Mittal v. Union of India, AIR 1983 SC 1

Facts

Sri Aurobindo was not only an excellent academist and administrator, but he was also engaged in political work. Later on, he gave it all up for a life of meditation and moved to Pondicherry, Tamil Nadu. It was there where he met Madam M. Alfassa, who would, later on, be known as

Mother, who became his disciple. Later on, his disciples and the Mother established The Sri Aurobindo Society to propagate and practice the ideals and beliefs of Sri Aurobindo.

Through this society, the founding president, the Mother, set up a township called Auroville which was meant for people to come and engage in various pursuits. Later on, The United Nations Education, Scientific, and Cultural Organization (UNESCO) took it upon themselves to fund provisions to help with the development of Auroville.

When the mother passed away, many problems such as mismanagement of the project and misuse of the funds cropped up which made it impossible for the townships functioning and growth. Thus, keeping in mind the international character of Auroville due to the agreement with UNESCO, the government of Tamil Nadu took management in their own hands and filed a presidential ordinance which later on became The Auroville (Emergency Provisions) Act, 1980.

Seeing that the government took control of a 'religious' enterprise, the Constitutional validity of the Act was challenged on 4 grounds. One of the grounds was that it was violative of Article 29 and 30.

Issue Raised

Does the Act violate Article 29 and 30?

Decision

It was held by the bench that the forsaid Act does not violate Article 29 and 30. The court held that it, in no way curtailed their right or prevented any citizen from conserving its own language, script or culture and thus was not violative of Article 29.

Also in this case, in order to seek protection under Article 30, one must prove that they are a linguistic or religious minority and the institution in question was established by them. Considering that Auroville was not religious and was founded on the ideology of Sri Aurobindo, they could not seek protection under these articles.

Rights of minorities

Certain rights are laid down to safeguard the right of minority communities. Article 29 ensures that anyone residing in India has the right to preserve a distinct language, script or culture and no

State educational institute or any institute receiving aid from the state shall discriminate against anyone based on race, caste, creed, etc. Article 30 ensures the right of minority communities in educational institutions and prohibits discrimination against them.

With regard to the reservation and special provisions for minority communities, many have brought up the argument that such provisions are 'cushioning'. But in the case of The Ahmedabad St. Xaviers College vs State Of Gujarat & Anr, Khanna J. stated that such provisions are necessary so that "none might have the feeling that any section of the population consisted of first-class citizens and the other of second class citizens". He also stated that a majority of the Fundamental Rights of the Constitution protect majority rights as it protects minority rights.

In the TMA Pai case, the judge considered the opinion of thePermanent Court of International Justic e in the case of Minority Schools in Albania, advisory opinion was that there is a need for provisions that help minority groups preserve the uniqueness of their distinct culture and script and minority religions to uphold the uniqueness of their culture. Khana J. stated that "the object of protection is to enable minority communities to preserve the characteristics which distinguish themselves from the minority".

In the Kerala Education Bill case, with regards to institutions handled by minority communities, Hidayatullah C.J stated that while Article 30 (1) might be general protection over distinct languages and scripts, it is also right to establish educational questions of choice. Thus this Act is not diminished if the institution's primary function is not protecting minority culture, its also for institutions that are established and managed by minority communities and they accept other students as well.

The distinction between Article 29(2) and Article 15(1)

Article 29 (2) and Article 15 (1) are very similar due to the fact they both prevent discrimination on the basis of caste, race sex, etc and are sometimes seen as mutually exclusive. However, there is a big difference. While Article 15 provides a broader ambit against discrimination on the basis of caste, race sex, etc, Article 29 provides specific restitution for those who have faced discrimination from state-run educational institutions at the time of entry or admission.

Why did the fathers of the Constitution take an extra step to prevent discrimination by educational institutions? Education is important for a certain community to flourish and grow.

When properly and efficiently educated, one becomes equipt to enter public services and search for jobs. Without the tools of education, the community shall be culturally but economically dominated. Thus, it is imperative that any minority community gets access to education and receives relief against discrimination.

Right of Minorities to establish and manage Educational Institutions

Under Article 30, the Constitution provides provisions for minority communities to establish and manage educational institutions and protect themselves from discrimination of granting aid by the government. Article 29 (1) gives any citizen the right to conserve a distinct language, script or culture of its own. While Article 29(2) also protects them, it is more for every citizen and is not specially tailored for minority groups.

One of the biggest debates in judicial history has been whether minority communities have the right to have autonomy while managing these institutions. Such questions gave birth to the famous T.M.A. Pai Foundation v. State of Karnataka case which had a massive 11 Judge Bench. In present times, the common consensus is that governments are allowed to regulate such institutes so long as such regulation is in pursuit of ensuring academic excellence and it does not harm the character of the minority institute.

The Constitutional (44th Amendment) Act, 1978

The Constitutional (44th Amendment) Act removed the right to property as a Fundamental Right under Article 19. However, it ensured that “the removal of property from the list of Fundamental rights would not affect the right of minority communities to establish and administer educational institutions of their choice”.

Relationship between Articles 29(1) and 30(1)

Article 29(1) states protect the rights of members of communities who have distinct language, culture, and script.

Article 30(1) protects minority rights with regard to establishing and managing educational institutions.

Thus both Acts facilitate minority rights to establish and manage their own educational institutions. The only difference is that 29(1) makes an attempt to define who minority

communities are. Due to the articles being almost identical, many might believe that when seeking protection, you can only seek protection under one. But in St. Xaviers College v. the State of Gujarat, it was stated that Article 29(1) and 30(1) were not mutually exclusive.

Power of Government to regulate minority-run Educational Institutions

St. Xaviers College v. the State of Gujarat, AIR 1974 SC 1389

Facts

St. Xaviers College, a religious denomination affiliated under the Gujarat University Act, 1949, provided education to not only Christians but students of other religions and creeds. They had challenged sections 35-A, 40, 41, 51-A and 52-A of the Gujarat University Act, 1972 which dealt with the appointment of teachers and students of minority communities. They stated that the Act encroached on the autonomy of the universities.

Contention of the Parties

Article 29 (1) of the Constitution safeguards a citizen's right to preserve his or her own language, script or culture, and Article 30 (1) states that minority communities have the right to establish and manage their own institutions.

Article 30(2) also states that the government should not discriminate against any institution under minority management.

Under Article 32, they had a right to not only establish and administer institutes of their choice but they also had the right to affiliation(to operate independently, but also has a formal collaborative agreement with the state).

The opposition stated that Article 29 and 30 were mutually exclusive and protection under these Acts can not be brought up at the same time. They also stated that affiliation was not a Fundamental Right and that a minority institution must abide by the provision if they wished to be affiliated. Another argument was unless the law was an absolute violation of minority rights under Article 30(1), then there was no reason for the Act to be struck down. They pleaded that the court wait until statutes and ordinances are issued in pursuit of the disputed sections.

Issue Raised

- Are Article 29 and 30 mutually exclusive?
- Is affiliation a Fundamental Right?
- Does section 35-A, 40, 41, 51-A, and 52-A of the Act tamper with the institutes Fundamental Right? Decision

It was held that

Article 29 and 30 were not mutually exclusive.

While affiliation is not a Fundamental Right, it is necessary for the meaningful management and establishment of such institutes Section 35-A, 40, 41, 51-A and 52-A of the Act would not apply to minority institutions as they tamper with their Fundamental Right to establish and manage educational institutions of their choice.

Ray C.J. and Palekar, J. stated that it would be wrong to limit their rights to only institutes that administer language, script, and culture. This would make the Act redundant. It is also wrong to believe that Article 29 and 30 are mutually exclusive because while Article 29 is for all citizens, Article 30 was placed to safeguard the rights of minority communities. Thus Article 30 must be treated as an extension of Article 29.

Jaganmohan Reddy, J. stated that while affiliation is not a Fundamental Right, the state cannot use it as a tool to force an institution to abide by certain rules. The institution has the right to "establish their institutions, lay down their own syllabi, provide instructions in the subjects of their choice, conduct examinations and award degrees or diplomas, seek recognition to their degrees and diplomas and ask for aid where aid is given to other educational institutions". The state can only discriminate on the basis of the excellence of the institution.

With regard to the various disputed sections of the Act, the general consensus of the bench was that minority managed institutions had the right to function without government intrusion of such nature.

Re Kerala Education Bill, AIR 1958 SC 956

Facts

The President under Article 143 of the Constitution approached the Supreme Court regarding the Kerala Education Act 1958. Out of many of his inquiries, the President questioned Sub-Clause

(5) of Clause 3 which stated 'any new school or any higher class opened in any private school that did not live up to the standards of government regulation would not be recognized by the Government'.

The President's question was whether giving such power to the government would be violative of Art 30 as minority communities had the right to manage and establish their own institutions.

Issues Raised

While minority communities had the right to administer, do they have the right to maladminister?

Decision

It was held that minority groups did not have the right to maladminister. Das, C.J. stated, "Reasonable regulations may certainly be imposed by the state as a condition for aid or even for recognition".

It also stated that while opening up educational institutes was essential for minority communities to exercise their right under Article 30, all educational institutes are subjected to Article 29(2) which states that all citizens in state or state-aided institutions must not be discriminated during the time of admission on the basis of race, sex, creed, etc.

Importance

The court's opinion on government regulation on educational institutes and Article 29(2) have been used as persuasive precedents for landmark cases. An example is T.M.A. Pai Foundation v. State of Karnataka.

Sidhrajbhai v. State of Gujarat, AIR 1963 SC 540

Facts

The petitioners (Sidhrajbhai) are members of a society that has established many educational institutions, including a training school for teachers. The Bombay government issued an order that 80% of teaching seat in non- government training schools would be reserved for candidates chosen by the government. The government also ordered the principal of that training school to

not admit private students more than 20% of the class's strength without the permission of the Educational inspector.

The principal expressed his inability to comply with orders and the government threatened them with disciplinary action. The society moved to the Supreme Court stating that this order violated several of their Fundamental Rights, including Article 30.

Issue Raised

Did the government orders violate Article 30?

Decision

The orders violated Article 30. Article 30 is an absolute right and unlike Article 19, it cannot be subjected to 'reasonable restrictions'. It was stated that such a right is for the protection of minority communities and their right to manage their own educational institutions. If it is diminished in the name if reasonable restrictions then it shall merely be an illusion and shall have no impact. The Kerala Education Bill case was quoted as in that case it was held that the State can impose legislation on educational institutions only if such restrictions are not detrimental to the "character of the minority institution". Thus, unless these legislative restrictions aid the institution towards educational excellence while helping them retain its minority character, the court shall not take them into consideration.

Right of recognition or affiliation, not a Fundamental Right

When the right of minority communities to establish and manage educational institutions is a Fundamental Right, it makes you wonder if affiliation or recognition is a Fundamental Right as well? At the end of the day, in order for an institution to achieve sufficient excellence, it is imperative that they have some sort of recognition or affiliation from the state.

This exact query was brought up in Sidhraj Bhai v. State of Gujarat. While the court recognized the importance of affiliation, they denied that it was a Fundamental Right. In later on cases like T.M.A. Pai Foundation v. State of Karnataka and P.A. Inamdar v. State of Maharashtra, it was held that the government is allowed to set up rules and regulations that institutes must follow in order to get affiliation.

These regulations must be in pursuit of educational excellence.

Admissions of students and qualification of teachers in unaided minority institutions

Through the cases of T.M.A. Pai Foundation v. the State of Karnataka and P.A. Inamdar v. the State of Maharashtra, the general consensus of courts is that while such institutes have autonomy over management, such institutes must make sure that during admission they adhere to Article 29(2)- majority community students and employers should be admitted as well.

Admissions in aided minority institutions

The government has the right to regulate the management of such institutions including fee structure, admission of students and employment of teachers. They shall have fixed quotas depending on the local need.

Right of non-minorities to run educational institutions

The two rights are Art 19(1)(g) which is right to the profession (subject to restrictions inArt 19(6)) and Article 26 which is the right of all religious denominations to maintain and establish educational institutions.

T.M.A. Pai Foundation v. the State of Karnataka, AIR 2003 SC 355

Facts

The St Stephen's College v University of Delh icase that was previously reviewed by a 5 Judge Bench, was transferred to a 6 Judge Bench and then a massive 11 Judge Bench to decide the status of minority rights.

Issue Raised

Kirpal, CJI framed 5 main questions, those that are relevant to the article have been stated below-

1. "Is there a Fundamental Right to set up educational institutions and if so, under which provision?"

2. To what extent can private universities be regulated?

3. "In order to determine the existence of a religious minority in relation to Article 30, what is to be the unit?"

4. "To what extent can the rights of aided private minority institutions be regulated?"

Decision

1. For non-minority groups, the two rights are Article 19(1)(g) [the right to a profession which is subjected to restrictions of Article 19(6)] and Article 26 which gives the right to "all citizens and religious denominations to establish and maintain educational institutions". For minority communities, Article 29(1) and Article 30(1) is provided by the Constitution.

The right of minority communities with regards to setting up educational institutes also includes the right to decide the method by which the students and teachers are selected. It should be fair, transparent and most importantly, based on merit. The same goes for un-aided schools.

But it is important for such authorities to abide by Article 29(2) during admission. They must not discriminate against students on the basis of sex, race, creed, etc at the time of admission, especially students from the majority community.

2. Private institutions are divided into three categories to answer this question-

Private Unaided Non-Minority Educational Institutions- While the government can lay down rules and regulations (based on academic excellence) for affiliation, but the management of the institute should be autonomous.

Private Unaided Professional Colleges- They have autonomy with regard to aspects such as fee structure and admission. But such colleges should not forgo the principle of merit and should reserve a few seats. These seats shall be reserved at the discretion of the management to those who have passed the entrance exam. The rest of the seats should go to people based on counseling by the state. For affiliation, the rules and regulations to achieve it should not be cohesive in nature.

Private Aided Professional Institutions (non-minority)- Since the government is giving aid, they can lay down certain rules and regulations for management. They may also put guidelines for fee structure, admission for students and appointment of teachers.

Other Aided Institutions- For such institutes, the government can lay down rules and regulations.

3. Linguistic and religious minority communities are covered by the expression "minority" under Article 30 of the Constitution. With regards to both Central and State law, the state shall be taken as the unit to decide whether a certain community is a minority or not. What happens

when a community that is a minority in the country, is a majority in a certain state was left unanswered.

4. Article 30(1) does not override the law or government regulations, keeping in mind such regulations does not destroy the character of minority educational institutions. Laws pertaining to subjects such as health and morality still apply to them. This is despite the nature of the wording of Article 30. Regulations that ensure academic excellence and are for the welfare of teachers and students still apply.

When aid is given to such institutions, it must not come with certain conditions or regulations that harm the management and nature of the institution. But if such regulations are not detrimental to its management and character, then it is not violative of Article 30.

Islamic Academy of Education v. the State of Karnataka, AIR 2003 SC 3724

Facts

Several queries from the TMA Pai case were addressed. The importance of this case is that shows the various loopholes in the TMA Pai Foundation case, especially with regards to reservation of seats and autonomy of institutions with regards to management.

Decision

Educational institutes that are not given aid by the State are entitled to autonomy should not disregard the principle of merit.

Management of unaided non-minority institutes could reserve a certain number of seats for students who had passed the entrance exam but the rest of the students should pass through counseling regulated by the state

These unaided colleges should also provide provisions for the underprivileged.

The percentage of the seat should be fixed according to the locality and the needs of such an area. Different percentages can be fixed for minority and non-minority groups.

The bench considered Article 19 as the right to manage educational institutions for non-minority communities and Article 30 (1) as the right to manage educational institutions for minority communities.

Appropriation of seats can not be held as a 'reasonable regulation' or a regulation in the interests of minority communities.

The bench also stated that they would set up committees to monitor the fee structure and admission process in private universities.

P.A. Inamdar v. the State of Maharashtra : Reservation in Private Educational Institution violative of Articles 30 and 19(1)(g)

Facts

Several more queries from the T.M.A Pai verdict were addressed and the Islamic Educational Academy case was reviewed as well. This verdict goes against the Islamic Academy of Education verdict and reverts back to Pai.

Decision

In correlation with the Kerala Education Bill case, Lohoti, C.J divides the amount of protection educational institutions (both minority and non-minority) can seek from Article 30 into three categories.

1. Unaided or unrecognized institutions that can enjoy protection under this Article to their "heart's content".

2. Institutions asking for affiliation or recognition from the State must abide by the rules and regulations enforced by the government. This is only if the nature of such regulations is for the benefit of the institution.

3. Institutions receiving state aid must abide by regulations with regards to the management of funds. Article 29(2) will also apply as they would be required to admit students from non-minority communities.

The bench also puts a stop on policies that require unaided private colleges to reserve seats for citizens from backward classes. They believe such policies will cause the 'nationalizing' of seats. They believe such policies violated Article 30 of minority communities to set up and manage educational institutes autonomously and violated 19(1)(g) of non-minority colleges to practice

any trade or profession. Instead, they let the state control the quota of seat-sharing between management.

Interestingly, they do allow for the reservation of seats for non-resident Indians or NRIs. The reason they give behind this is that the high fees charged from such students could help students belonging to weaker parts of society.

In regards to admission procedure in unaided education institutes, the Bench decided that merit for admission in various levels of education is crucial but its level of importance increases with the rising level of education. Merit might not have much of a role to play in kindergarten admission but had a crucial role to play in college admission.

The bench also decides that every institute is allowed to set up its own fee structure but it shall be subjected to regulations to prevent excessive profiteering.

And the last, but the most controversial, the bench stated that the Islamic Academy of Education case shall not exceed TMA Pai.

Committees to monitor the fee structure and admission process of private universities shall not happen.

Right to constitutional remedies – Analysis of Article 32 of the Indian Constitution

Right to constitutional remedies

Article 32 is known as the "spirit of the constitution and exceptionally heart of it" by Dr. Ambedkar. Preeminent Court has included it in fundamental structure regulation. Further, it is clarified that privilege to move to Supreme Court can't be suspended with the exception of generally given by the Constitution. This suggests this privilege suspended amid a national crisis under article 359. Article 32 makes the Supreme Court the safeguard and underwriter of the major rights. Further, the capacity to issue writs goes under the original jurisdiction of the Apex Court. This implies an individual may approach SC straightforwardly for a cure as opposed to by appeal.

Article 32 can be used only to get a remedy for fundamental rights enshrined in Article 12-35. It isn't there for some other legal right for which diverse laws are accessible.

What is WRIT?

A precept in writing, couched in the form of a letter, running in the name of the king, president, or state, issuing from a court of justice, and sealed with its seal, addressed to a sheriff or other officer of the law, or directly to the person whose action the court desires to command, either as the commencement of a suit or other proceeding or as incidental to Its progress, and requiring the performance of a specified act, or giving authority and commission to have it done. For the names and description of various particular writs, see the following titles.

In old English law. An Instrument In the form of a letter; a letter or letters of attorney. This is a very ancient sense of the word.

In the old books, "writ" is used as equivalent to "action;" hence writs are sometimes divided into real, personal, and mixed.

In Scotish law. Writing; an instrument in writing, as a deed, bond, contract, etc.

Constitutional Philosophy of Writ Jurisdiction

An individual whose privilege (Fundamental Right) is encroached by an arbitrary administrative action may approach the Court for a suitable remedy. Article 32(2) of the Constitution of India gives: "The Supreme Court will have the capacity to issue bearings or requests or writs, incorporating writs in the idea of habeas corpus, mandamus, prohibition, quo warranto, and certiorari, whichever might be suitable, for the requirement of any of rights given by this Part." Article 32 is a basic Right directly under Part – III of the Constitution. Under this Article, the Supreme Court is enabled to loosen up the customary standard of Locus Standi and permit general society to intrigue case in the name of public interest litigation (PIL).

Comparative Analysis of Article 32 & 226

Article 32 isn't to be conjured for encroachment of an individual right of the agreement (contract), nor is to be summoned for unsettling questions which are fit for transfer under other laws. Article 226(1) of the Constitution of India, on the other hand says," Notwithstanding anything in Article 32, every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the

nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose."

As is obvious from the uncovered dialect, this Article ensures a person to move the High Court for implementation of the fundamental rights and also for implementation of some other lawful right. Article 226 gives wide powers on the High Courts. It fills in as a major repository of legal capacity to control organization. Its capacity under Article 226 can't be diminished by enactment. In this manner, forces of High Courts gave under Article 226 are more extensive when contrasted with forces presented on the Supreme Court under Article 32 of the Constitution of India.

Types of WRITS

Habeas Corpus:

Meaning: This writ is in the nature of an order calling upon the person who has detained another to produce the latter before the Court, in order to let the Court, know on what ground he has been confined and to set him free if there is no legal justification for the confinement. In Rudul Sah v. State of Bihar added a new dimension to judicial activism and raised a set of vital questions, such as, liability of State to compensate for unlawful detention, feasibility of claiming compensation from the State under Article 32 for wrongful deprivation of fundamental rights, propriety of the Supreme Court passing an order for compensation on a habeas corpus petition for enforcing the right to personal liberty.

The General Principle: The principle on which Habeas Corpus function is that a person illegally detained in confinement without legal proceedings is entitled to seek the remedy of habeas corpus.

Nature of Writs: While deciding whether Habeas Corpus writs are civil or criminal in nature, it was held in Narayan v. Ishwarlal that the court would rely on the way of the procedures in which the locale has been executed.

How a Writ of Habeas Corpus is filed?

1. An application for habeas corpus can be made by any person on the behalf of the prisoner/detenu as well as the prisoner/detenu himself.

2. Even a letter to the judge mentioning illegalities committed on prisoners in jail can be admitted. In Sunil Batra v. Delhi Administration., a convict had written a letter to one of the Judges of the Supreme Court alleging inhuman torture to a fellow convict. The late justice Krishna Iyer treated this letter as a petition of habeas corpus and passed appropriate orders.

3. Courts can also act Suo motu in the interests of justice on any information received by it from any quarter/source.

Habeas Corpus is not issued in certain cases

1. Where the person who is detained or against whom the writ is issued is not within the jurisdiction of the Court.

2. To save the release of a person who has been imprisoned by a Court for a criminal charge.

3. To interfere with a proceeding for contempt by a Court of record or by Parliament.

Implication in Emergency: In the Landmark case of ADM Jabalpur v. Shivakant Shukla which is also known as the Habeas Corpus case, it was held that the writ of Habeas Corpus cannot be suspended even during the emergency (Article 359).

Damages: The Court may also award exemplary damages. In Bhim Singh v. State of Jammu & Kashmir , the Hon'ble Apex Court awarded the exemplary damages of Rs.50,000/- (At that time this was a very significant amount.

Thus, writ of habeas corpus is a bulwark of personal liberty. It has been described as "a great constitutional privilege" or first security o" f civil liberty". The most quintessential element is a speedy and effective remedy.

Notable Cases for Writ of Habeas Corpus:

In Kanu Sanyal v. District Magistrate, while enunciating the real scope of writ of habeas corpus, the Supreme Court opined that while dealing with a petition for writ of habeas corpus,the court may examine the legality of the detention without requiring the person detained to be produced before it.

In Nilabati Behera v. State of Orissa, the Orissa police took away the son of the petitioner for the purposes of interrogation & he could not be traced. During the pendency of the petition, his dead body was found on railway track The petitioner was awarded compensation of Rs. 1, 50,000.

Mandamus

Meaning: "A writ issued by a court to compel performance of a particular act by lower court or a governmental officer or body, to correct a prior action or failure to act." It is used for enforcement of various rights of the public or to compel the public statutory authorities to discharge their duties and to act within the bounds. It may be used to do justice when there is wrongful exercise of power or a refusal to perform duties.

The rule of Locus Standi: is strictly followed in while issuing writ of mandamus. The petitioner has to prove that he has a right to enforce public duty in his favour. The mandamus is "neither a writ of course nor a writ of right but that it will be granted if the duty is in nature of public duty and it especially affects the right of an individual, provided there is no more appropriate remedy."

Conditions for Issue of Writ of Mandamus

1. Their ought to be a legal right of the applicant for the performance of the legal duty.

2. The nature of the duty must be public. In The Praga Tools Corporation v. C.V. Imanual, and Sohanlal v. Union of India,the Supreme Court stated that mandamus might under certain circumstances lie against a private individual if it is established that he has colluded with a public authority.

3. On the date of the petition, the right which is sought to be enforced must be subsisting.

4. The writ of Mandamus is not issued for anticipatory injury. But Anybody who is likely to be affected by the order of a public officer is entitled to bring an application for mandamus if the officer acts in contravention of his statutory duty

Exceptions & Limitations (Mandamus)

In India, mandamus will lie not only against officers who are bound to do a public duty but also against the Government itself as Article 226 and 361 provided that appropriate proceedings may be brought against the Government concerned.

Further, Mandamus will not be granted against the following persons:

1. The President or the Governor of a State, for the exercise and performance of the powers and duties of his Office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties. In India, it will not lie upon the President and the Governor of a State in their personal capacities.

2. Mandamus does not lie against a private individual or body whether incorporated or not except where the State is in collusion with such private party, in the matter of contravention of any provision of the Constitution or a Statute or a Statutory Instrument.

3. It will not lie against the State legislature to prevent from considering enacting a law alleged to be violative of constitutional provisions.

4. It will not lie against an inferior or ministerial officer who is bound to obey the orders of his superiors.

Inferior Courts: This writ is also available against inferior Courts or other Judicial bodies when they have refused to exercise their jurisdiction and thus to perform their duty.

Alternate Remedy: Mandamus is not refused on the ground that there is an adequate alternative remedy where the petitioner complains that his fundamental right is infringed. In Rashid Ahmad v. Municipal Board , it was held that in relation to Fundamental Rights the availability of alternative remedy cannot be an absolute bar for the issue of writ though the fact may be taken into consideration.

Hence the writ of mandamus is to protect the interest of the public from the powers given to them to affect the rights and liabilities of the people. This writ makes sure that the power or the duties are not misused by the executive or administration and are duly fulfilled. It safeguards the public from the misuse of authority by the administrative bodies. Thus, Writ of Mandamus is a general remedy whenever justice has been denied to any person.

Landmark Cases for Writ of Mandamus

The courts are unwilling to issue writ of mandamus against high dignitaries like the President and the Governors. In the case of S.P. Gupta v. Union of India, judges were of the view that writ cannot be issued against the President of India for fixing the number of judges in High Courts and filling vacancies.

In C.G. Govindan v. State of Gujarat, it was refused by the court to issue the writ of mandamus against the governor to approve the fixation of salaries of the court staff by the Chief Justice of High Court under Article 229. Hence, it is submitted that the Governor or the President means the state or the Union and therefore issuance of mandamus cannot take place.

Prohibition

Meaning: A writ of prohibition, also known as a 'stay order', is issued to a lower court or a body to stop acting beyond its powers. The Purpose: The basic purpose is to secure that the jurisdiction of an inferior court or tribunal is properly exercised and that it does not usurp the jurisdiction which it does not possess. Thus, writ of prohibition is available during the pendency of the proceedings and before the order is made.

The Principle: Prohibition is a writ of preventive nature. The principle of this is 'Prevention is better than cure'.

The writ of prohibition can be issued on the following grounds:

1. Absence or Excess of jurisdiction
2. Violation of the principles of natural justice
3. Unconstitutionality of a Statute
4. Infraction of Fundamental Rights.

Landmark Case Laws for Writ of Prohibition

In the case of East India Commercial Co. Ltd v. Collector of Customs a writ of prohibition was passed directing an inferior Tribunal prohibiting it from continuing with the proceeding on the ground that the proceeding is without or in excess of jurisdiction or in contradiction with the laws of the land, statutes or otherwise.

Also, it was held in the case of Bengal Immunity Co. Ltd , the Supreme Court pointed out that where an inferior tribunal is shown to have seized jurisdiction which does not belong to it than that consideration is irrelevant and the writ of Prohibition has to be issued as a right.

Certiorari

Meaning: The writ of certiorari issued to quash a decision after the decision is taken by a lower tribunal while prohibition is issuable before the proceedings are completed. The law has always been, that a writ of certiorari is issued against the acts or proceedings of a judicial or quasi-judicial body conferred with power to determine question affecting the rights of subjects and obliged to act judicially.

The Purpose: of the writ of certiorari is not only negative in the sense that it is used to quash an action but it contains affirmative action as well. It is preventive as well as curative in nature. The power of judicial review is not restricted where glaring injustice demands affirmative action.

Ways in Which a Writ of Certiorari is Issued?

Certiorari is not issued against purely administrative or ministerial orders and that it can only be issued against judicial or quasi-judicial orders.

1. Either without any jurisdiction or in excess
2. In violation of the principles of Natural Justice.
3. In opposition to the procedure established by law.
4. If there is an error in judgement on the face of it

The conditions necessary for the issue of the writ of certiorari are:

1. Anybody of persons.
2. Having legal authority
3. To determine questions affecting the rights of subjects
4. Having the duty to act judicially.
5. Act in excess of legal authority

Landmark Cases On Writ of Certiorari

In Naresh S. Mirajkar v. State of Maharashtra , it was said that High Court's judicial orders are open to being corrected by certiorari and that writ is not available against the High Court.

In the case of T.C. Basappa v. T. Nagappa & Anr., it was held by the constitution bench that certiorari maybe and is generally granted when a court has acted (i) without jurisdiction or (ii) in excess of its jurisdiction.

In Surya Dev Rai v. Ram Chander Rai & Ors., the Supreme Court has explained the meaning, ambit and scope of the writ of Certiorari. It was held that Certiorari is always available against inferior courts and not against equal or higher court.

In A.K. Kripak v. Union of India, it was held that the Supreme Court should issue the writ of certiorari to quash the selection list of the Indian Forest Service on the ground that one of the selected candidates was the ex-officio member of the selection committee.

Quo Warranto

Meaning: The writ of Quo Warranto (by what warrant) is issued to inquire about the legality of a claim by a person or authority to act in a public office, which he or she is not entitled to. The writ of Quo Warranto is a mode of judicial control in the sense that the proceedings review the actions of the administrative authority which appointed the person.

The writ is issued to the person ousting him from holding a public post to which he has no right. It is used to try the civil right to a public post. Accordingly, the use of the writ is made in cases of usurpation of a public office and removal of such usurper. Conversely, it protects citizen from being deprived of public office to which he may have a right. A petition for the writ of Quo Warranto can be filed by any person though he is not an aggrieved person.

The conditions necessary for the issue of a writ of Quo Warranto are:

1. The office must be public and it must be created by a statute or by the constitution itself. In the case of Jamalpur Arya Samaj v. Dr D. Ram , the writ was denied on the ground that writ of quo warranto cannot lie against an office of a private nature. And also, it is necessary that office must be of substantive character.

2. The office must be a substantive one and not merely the function or employment of a servant at the will and during the pleasure of another.

3. There has been a contravention of the Constitution or a statute or statutory instrument, in appointing such person to that office.

4. The claim should be asserted on the office by the public servant i.e. respondent.

The court issues the Writ of Quo Warranto in the following cases:

1. When the public office is in question and it is of a substantive nature. A petition against a private corporation cannot be filed.

2. The office is created by the State or the Constitution.

In the hands of the Supreme Court PIL in India has taken a multidimensional character. The deep-rooted ill-disposed framework has been given a pass by. With the coming of legal activism, letters, paper reports, dissensions by open lively people, social activity bunches conveying to the notice of the Court in regards to infringement of major rights were managed regarding them as writ petitions and the alleviation of pay was additionally allowed through writ jurisdiction.

Article 32 gave to the subjects are the incredible powers with prompt impact. Furthermore, the writs are generally summoned against the state and are issued when PILs are recorded. The Writ Jurisdictions which are presented by the Constitution, however, have privilege controls and are optional in nature but then they are unbounded in its breaking points. The carefulness, in any case, is practiced on legitimate standards.

Hence, obviously immense forces are vested with the Judiciary to control a managerial activity when it encroaches fundamental privileges of the subjects or when it goes past the soul of Grundnorm of our nation i.e Constitution of India. It guarantees the Rule of Law and appropriate check and equalizations between the three organs of our vote-based framework. The rationality of writs is very much synchronized in our Constitutional arrangements to guarantee that privileges of nationals are not smothered by a self-assertive authoritative or Judicial activity.

Right to property prior to 1978 and the present position:

The Indian Constitution does not recognize property right as a fundamental right. In the year 1977, the 44th amendment eliminated the right to acquire, hold and dispose of property as a fundamental right. However, in another part of the Constitution, Article 300 (A) was inserted to affirm that no person shall be deprived of his property save by authority of law. The result is that the right to property as a fundamental right is now substituted as a statutory right. The

amendment expanded the power of the state to appropriate property for social welfare purposes. In other words, the amendment bestowed upon the Indian socialist state a licence to indulge in what Fredric Bastiat termed legal plunder. This is one of the classic examples when the law has been perverted in order to make plunder look just and sacred to many consciences.

Indian experiences and conception of property and wealth have a very different historical basis than that of western countries. The fact the present system of property as we know arises out of the peculiar developments in Europe in the 17th to 18thcentury and therefore its experiences were universally not applicable. A still more economic area in which the answer is both difficult and important is the definition of property rights. The notion of property as it has developed over centuries and it has embodies in our legal codes, has become so much a part of us that we tend to take it for granted, and fail to recognize the extent to which just what constitutes property and what rights the ownership of property confers are complex social creations rather than self evident propositions. This also seems to be the hidden reason why the right to property is suddenly much contested throughout India today and why the state is coming up unexpectedly against huge resistance from unexpected quarters in attempting to acquire land in India. The action of the state to assert the Eminent Domain over subsidiary claims on property and the clash which resulted there from Singur, Nandigram and other parts of India is precisely a manifestation of a clash of cultures. To put in Samuel Huntingtons words, the ideas of the west of development and liberalization propagated by the present ruling elite and the old Indic ideas which shape the views of the majority of the people.

The right to property under the Indian constitution tried to approach the question of how to handle property and pressures relating to it by trying to balance the right to property with the right to compensation for its acquisition through an absolute fundamental right to property and then balancing the same with reasonable restrictions and adding a further fundamental right o compensation in case the properties are acquired by the state. This was exemplified by Article 19(1)(f) balanced by Article 19(5) and the compensation article in Article 31. This was an interesting development influenced by the British of the idea Eminent Domain but overall it struck an interesting balance whereby it recognized the power of the state to acquire property, but for the first time in the history of India for a thousand years or more, it recognized the individuals right to property against the state.

However, when the state realized that an absolute property and the aspirations of the people were not the same the legislature was subsequently forced to make the said right to property subject to social welfare amid amendments to the constitution. Articles 31-A, 31-B and 31-C are the indicators of the change and the counter pressure of the state when it realized the inherent problems in granting a clear western style absolute fundamental right to property (even though it was balanced by reasonable restrictions in the interest of the public), specially Article 31-C, which for the first time brought out the social nature of property. It is another matter that the said provisions were misused, and what we are discussing today, but the abuse of the socialist state in India is not the scope of the present article and the articles are considered on their face value only. Doctrine of Eminent Domain

HISTORY

Few hundred years old and first used when an English king needed salt petre (form of Potassium Nitrate, used in the manufacturing of fire work) to make gun powder and when he was not able to find any land, he grabbed hold of a private mine. The owner of the private mine approached the House of Lords, the House of Lords held that, the sovereign can do anything, if the act of sovereign involves public interest.

WHAT IS THE POWER BESTOWED BY THE DOCTRINE TO THE STATE???

Basically this doctrine entitles sovereign to acquire private land for a public use, provided the public-ness of the usage can be demonstrated beyond doubt.

PRESENTLY THE DOCTRINE DOES THE DUTY OF:

In the present context this doctrine raises the classic debate of powers of State v. Individual Rights. Here comes the DIDDevelopment Induced Displacement which means, The forcing of communities even out of their homes, often from their home lands for the purpose of economic development, which is viewed as a Human Right violation in the International level.

ESSENTIAL INGREDIENTS OF THIS DOCTRINE

1. Property is taken for public use
2. Compensation is paid for the property taken.

The above said are the two limitations imposed on the power of Eminent Domain by the repealed A.31 . Whereas the new A.300 A imposes only one limitation on this power (i.e.,)Authority of Law

MAXIMS

The doctrine is based on the following two Latin maxims

i. Salus Populi est Suprema Lex Welfare Of The People Of The Public Is The Paramount Law;

ii. Necessita Public Major est Quam Public Necessity Is Greater Than Private Necessity.

Every government has an inherent right to take and appropriate the private property belonging to individual citizen for public use. This power is known as Eminent Domain. It is the offspring of political necessity. This right rests upon the above said two maxims. Thus property may be needed and acquired under this power for government office, libraries, slum clearance projects, public schools, parks, hospitals, highways, telephone lines, colleges , universities, dams, drainages etc. The exercise of such power has been recognized in the jurisprudence of all civilized countries as conditioned by public necessity and payment of compensation. But this power is subject to restrictions provided in the constitution. In the United States of America, there are limitations on the power of Eminent Domain--1. There must be a law authorizing the taking of property

2. Property is taken for public use

3. Compensation should be paid for the property taken.

Meaning of Property

The word property as used in Article 31 the Supreme Court has said should be given liberal meaning and should be extended to all those well recognized types of interest which have the insignia or characteristic of property right. It includes both corporeal and incorporeal right. It includes money, Contract, interest in property e.g., interest of an allottee, licensees, mortgages or

lessees of property. The Mahantship of a Hindu Temple, and shareholders of Interests in the company are recognizable interest in property. The right to receive pension is property.

Supreme Court Approach to the Right to Property

The Supreme Courts approach to the right to property can be divided into two phases:-

THE TIME TILL THE RIGHT TO PROPERTY WAS A FUNDAMENTAL RIGHT (PRE 1978)

THE TIME AFTER THE CONVERSION OF RIGHT TO PROPERTY AS A CONSTITUTIONAL RIGHT (POST 1978)

Pre 1978 The Fundamental Right to Property

The Ninth Schedule was inserted in the constitution by the Constitution (First Amendment) Act, 1951 along with two new Articles 31 A & 31 B so as to make laws acquiring zamindaris unchallengeable in the courts. Thirteen State Acts named in this schedule were put beyond any challenge in courts for contravention of fundamental rights. These steps were felt necessary to carry out land reforms in accordance with the economic philosophy of the state to distribute the land among the land workers, after taking away such land from the land lords.

By the Fourth Amendment Act, 1955, Art 31 relating to right to property was amended in several respects. The purpose of these amendments related to the power of the state o compulsory acquisition and requisitioning of private property. The amount of compensation payable for this purpose was made unjustifiable to overcome the effect of the Supreme Court judgement in the decision of State of West Bengal v. Bella Banerjee. By the constitution (Seventeenth Amendment) Act, 1964, article 31 A was amended with respect to meaning of expression estate and the Ninth Schedule was amended by including therein certain state enactments.

During this period the Supreme Court was generally of the view that land reforms need to be upheld even if they did strictly clash against the right to property, though the Supreme Court was itself skeptical about the way the government went about exercising its administrative power in this regard. The Supreme Court was insistent that the administrative discretion to appropriate or infringe property rights should be in accordance with law and cannot be by mere fact. The court however really clashed with the socialist executive during the period of nationalization, when the

court admirably stood up for the right to property in however a limited manner against the over reaches of the socialist state.

In this juncture the court in this Bank Nationalisation case has clearly pointed out the following two points:

a. The constitution guarantees the right to compensation which is equivalent in money to the value of the property has been compulsorily acquired. This is thebasic guarantee. The law must therefore provide compensation and for determining compensation relevant principles must be specified: if the principles are not relevant the ultimate value determined is not compensation.

b. The constitution guarantees that the expropriate owner must be given the value of his property (the reasonable compensation for the loss of the property).

That reasonable compensation must not be illusionary and not reached by the application of an undertaking as a unit after awarding compensation for some items which go to make up the undertaking and omitting important items amounts to adopting an irrelevant principle in the determination of the value of the undertaking and does not furnish compensation to the expropriated owner.

Post 1978 The Constitutional Right to Property

It was at this period the Supreme Court had gone out of its way to hold against the right to property and the right to accumulate wealth and also held that with regard to Article 39, the distribution of material resources to better serve the common good and the restriction on the concentration of wealth. The court however is also responsible in toning down the excesses on the right to property and wealth by the socialist state. During the period of Liberalisation, the Supreme Court has attempted to get back to reinterpret the provisions which give protection to the right to property so as to make the protection real and not illusory and dilute the claim of distribution of wealth. However, this has been an incremental approach and much more needs to be done to shift the balance back to the original in the constitution. This means that the acquisition of property is not merely temporal but to be accepted as valid it must conform to spiritual guidelines as well as the Indian conceptions recognize quite clearly that though property can be enjoyed which has not been acquired strictly in terms of the law, it cannot be called real property of the person concerned. Property therefore is not merely an individual right but a

construction and part of social and spiritual order. The basis of conception of property in the societies of India is not a rigid and clear demarcation of claims belonging to an individual but is a sum total of societal and individual claims all of which need not be based on clear individual legal demarcation.

44th Amendment to the Constitution & the present scenario

The outburst against the Right to Property as a Fundamental Right in Articles 19 (1) (f) and 31 started immediately after the enforcement of the Constitution in 1950. Land reforms, zamindari abolition laws, disputes relating to compensation, several rounds of constitutional amendments, litigations and adjudications ultimately culminated first in the insertion of the word socialist in the Preamble by the 42nd Amendment in 1977 and later in the omission of the Right to Property as a FR and its reincarnation as a bare constitutional right in Article 300-A by the 44th Amendment in 1978.

Today, the times have changed radically. India is no more seen through the eyes of only political leaders with a socialist bias. It is India Shining seen through the corporate lenses of financial giants like the Tatas, Ambanis and Mahindras, with an unfathomable zeal for capitalism, money and markets. There is another angle. There is a scramble by industrialists and developers for land all over the country for establishment of Special Economic Zones. Violent protests by poor agriculturists have taken place to defend their meager land-holdings against compulsory acquisition by the State. In particular, the riots and killings in Singur, Nandigram etc. in a State (of West Bengal) ruled by communists has turned the wheel full circle. Socialism has become a bad word and the Right to Property has become a necessity to assure and assuage the feelings of the poor more than those of the rich. Soon after the abolition of the Fundamental Right to property, in Bhim Singh v. UOI, the Supreme

Court realised the worth of the Right to Property as a Fundamental Right. In the absence of this Fundamental Right to property, it took recourse to the other

Fundamental Right of Equality which is absolutely the concept of Reasonableness under Article 14 for invalidating certain aspects of the urban land ceiling legislation. Today, the need is felt to restore the right to property as a Fundamental Right for protecting at least the elementary and

basic proprietary rights of the poor Indian citizens against compulsory land acquisition. Very recently, the Supreme Court, while disapproving the age-old Doctrine of Adverse Possession, as against the rights of the real owner, observed that The right to property is now considered to be not only a constitutional right or statutory right but also a human right. Thus, the trend is unmistakable. By 2050, if the Constitution of India is to be credited with a sense of sensibility and flexibility in keeping with the times, the bad word socialist inserted in the Preamble in 1977 shall stand omitted and the Right to Property shall stand resurrected to its original position as a Fundamental Right.

Recent Approach by the Supreme Court

In a very recent PIL filed in the Supreme Court which was still pending in the Honble Court, it was held that the very purpose for which the right to property relegated to a mere statutory right in the late 1970s is not no longer relevant. It was argued by Harish Salve, the learned counsel for the petitioners that:

The right to property is made a statutory right in 1978 to abolish large land holdings with zamindars and rich and their distribution among landless peasants;

Having achieved the very purpose behind the legislative action in the late 1970s, the government should now initiate fresh measures to put right to property back in the fundamental rights.

Earlier, the apex court in its famous Keshavanandan Bharti case of 1973 had first termed some basic and unalterable parameters and features of the Indian state and its constitution like the country's democratic form of government, as its basic structure, which could not be changed at all even by constitutional amendment. But, in the judgement of the case, Justice H.R. Khanna had made a passing observation to the effect that fundamental rights accorded to the citizens' might not be a basic structure of the Constitution. This had left the scope open for changing or diluting the fundamental right of the citizens. Though later in 1975, while adjudicating another famous lawsuit between erstwhile Prime Minister Indira Gandhi and prominent political leader of his times Raj Narain, Justice Khanna had tried to clarify that his observation had been misconstrued. Despite that clarification, the Janata Party government, under the advice of then

law minister Shanti Bhushan, had changed the Constitution, removing the right to property from the list of fundamental rights.

Judiciary vs Legislature: The Tussle Begins

The saga of legislative manipulation of the right to property began with the First Amendment Act, 1951 by which the Articles 31-A and 31-B were inserted into the Constitution. Article 31-A was introduced by the Constitution First Amendment Act, 1951 wherein the Parliament defined ″Estate″ and continued by further amendments to extend its meaning so as to comprehend practically the entire agricultural land in the rural area including waste lands, forest lands, lands for pasture or sites of buildings. Under the said amendment, no law providing for acquisition by the state of an estate so defined or any rights therein of the extinguishment or modification of such rights could be questioned on the ground that it was inconsistent with or took away or abridged any of the rights conferred by Articles 14, 19 or 31. Article 31-B and Schedule Nine introduced by the subsequent amendments was another attempt to usurp judicial power. It was an innovation introduced in our Constitution unheard of in any other part of democratic world. The legislature made void laws offending fundamental rights and they were included in Schedule Nine and later on the list was extended from time to time. Article 31-B declared that none of the acts or regulations specified in neither the Ninth Schedule nor any of the provisions thereof shall be deemed to be void on the ground that they are inconsistent with Part III, notwithstanding any judgments, decree or order of any court or tribunal to the contrary. By further amendment, the list was extended. This amendment discloses a cynical attitude to the rule of law and the philosophy underlying our Constitution. Autocratic power was sustained by democratic processes. The amendments in the realm of property substituted the Constitutional philosophy by totalitarian ideology. This totalitarian ideology is articulated by the deliberate use of amendments to add more and more laws to the Ninth Schedule. Originally 64 laws were added to the Ninth Schedule and more acts were added by the 4th, 17th and 29th Amendment Acts; 34th Amendment added 17 more Acts; 39thAmendment added 38 Acts; 42nd

Amendment added 64 Acts; the 47th Amendment added 14 more Acts and by the end of this amendment the number of Acts in the Ninth Schedule had risen to 202; The 66th Amendment added 55 Acts raising the total to 257. The 75th Amendment Act, 1994 has been passed by the parliament, which includes Tamil Nadu Act providing for 69 percent reservation for backward

classes under the Ninth Schedule. This is a clear misuse of the Ninth Schedule for political gains as the object of the

Ninth Schedule of the Constitution is to protect only land reform laws from being challenged in court. After the addition of 27 more Acts to the Schedule by the 78th Amendment Act of 1995 the total number of Acts protected by the Schedule has risen to 284. The saga did not end here, the hornets nest had been stirred up already, the state made a consistent attempt by the process of amendment to the Constitution to remove the judicial check on the exercise of its power in a large area, and to clothe itself with arbitrary power in that regard. The history of the amendments of Article 31(1) and (2) and the adding of Articles 31(A) and (B) and the Ninth Schedule reveal the pattern. Article 31 in its first two clauses deals with the deprivation of property and acquisition of property. The Supreme Court held in a series of decisions viz. State of West Bengal v. Mrs. Bella Banerjee, State of W.B v. Subodh Gopal, State of Madras v. Namasivaya Muralidar, that Article 31, clauses (1) and (2) provided for the doctrine of eminent domain and under clause (2) a person must be deemed to be deprived of his property if he was substantially dispossessed or his right to use and enjoy the property was seriously impaired by the impugned law. According to this interpretation, the two clauses of Article 31 dealt only with acquisition of property in the sense explained by the court, and that under Article 31(1) the state could not make a law depriving a person of his property without complying with the provisions of Article 31(2). It is worth mentioning in this context that it was the decision in the Bella Banerjees case that actually induced the government to resort to the Fourth Amendment. In this case the Apex court through this landmark decision had insisted for payment of compensation in every case of compulsory deprivation of property by the state. It was held that clause (1) and (2) of Article 31 deal with the same subject, that is, deprivation of private property. Further the court held that the word compensation meant just compensation i.e. just equivalent of what the owner had been deprived of. It is also worthwhile to note here that this amendment also amended Article 305 and empowered the state to nationalize any trade. The Parliament instead of accepting the decision, by its Fourth Amendment Act, 1955 amended clause (2) and inserted clause (2-A) to Article 31. The effect of the amendment is that clause (2) deals with acquisition or requisition as defined in clause (2-A) and clause (1) covers deprivation of a person′s property by the state otherwise than by acquisition or requisition. This amendment enables the state to deprive a person of his property in an appropriate case by a law. This places an arbitrary power in the hands of the state

to confiscate a citizen′s property. This is a deviation from the ideals of the rule of law envisaged in the Constitution. The amendment to clause (2) of Article 31 was an attempt to usurp the judicial power. Under amended clause (2), the property of a citizen could be acquired or requisitioned by law which provides for compensation for the property so acquired or requisitioned, and either fixes the amount of compensation or specifies the principles on which and the manner in which the compensation is to be determined. It was further provided that no such law could be called in question in any court on the ground that the compensation provided by that law is not adequate. This amendment made the state the final arbiter on the question of compensation. This amendment conferred an arbitrary power on the state to fix at its discretion the amount of compensation for the property acquired or requisitioned. The non-justiciability of compensation enables the state to fix any compensation it chooses and the result is, by abuse of power, confiscation may be effected in the form of acquisition.

Then came the Seventeenth Amendment Act, 1964 by which the state extended the scope of Article 31-A and Ninth Schedule to protect certain agrarian reforms enacted by the Kerala and Madras states. The word estate in Article 31-A now included anyjagir or inam, mauf, or any other grant and janmam right in state of Kerala, Madras and also Ryotwari lands. It also added consequentially, the second proviso to clause (1) to protect a person of being deprived of land less than the relevant land ceiling limits held by him for personal cultivation,4 except on payment of full market value thereof by way of compensation. It also added 44 more Acts to the Ninth Schedule. The Supreme Court by various judgments considered the said amendments and restricted their scope within reasonable confines. The Supreme Court in Kocchuni vs State of Madras, did not accept the plea of the state that Article 31(1) after amendments gave an unrestricted power to the state to deprive a person of his property. It held that Article 31(1) and (2) are different fundamental rights and that the expression ″law″ in Article 31(1) shall be valid law and that it cannot be valid law unless it amounts to a reasonable restriction in public interest within the meaning of Article 19(5). While this decision conceded to the state the power to deprive a person of his property by law in an appropriate case, it was made subject to the condition that the said law should operate as reasonable restriction in public interest and be justiciable. The Court construed the amended provision reasonably in such a way as to salvage to some extent the philosophy of the Constitution. This became necessary as the definition of estate

was simultaneously expanded to cover Ryotwari settlements in order to make agrarian reforms more effective.

But the Supreme Court in Srimathi Sitabai Devi v. State of West Bengal[31] held that Article 31(2) i.e., the provision relating to the acquisition or requisition of land was not subject to Article 19(5). It would have been logical if the expression ″law″ in Article 31(2) was given the same meaning as in Article 31(1). In that event, the law of acquisition or requisition should not only comply with the requirements of Article 31(2) and (2-A), but should also satisfy those of Article 19(5). That is to say, such a law should be for a public purpose, provide for compensation and also satisfy the double test of ″reasonable restriction″ and ″public interest″ provided by Article 19(5). The reasonableness of such a law should be tested from substantive and procedural standpoints. There may be a public purpose, but the compensation fixed may be so illusory that it is unreasonable. The procedure prescribed for acquisition may be so arbitrary and therefore unreasonable. There may be many other defects transgressing the standard of reasonableness, both substantial and procedural. But from a practical standpoint, the present dichotomy between the two decisionsKochunni and Sithabathi Devidid not bring about any appreciable hardship to the people, for a law of acquisition or requisition which strictly complies with the ingredients of clause (2) may ordinarily also be ″reasonable restriction″ in public interest. Substantive deviations from the principles of natural justice may be hit by Article 14. Provision for an illusory compensation may be struck down on the ground that it does not comply with the requirement of Article 31(2) itself. That is if the courts make it mandatory to bring 31(2) in conformity with 31(1).

The Supreme Court in P Vajravelu Mudalier v. Special Deputy Collector and also in the Union of India v. Metal Corporation of India considered Article 31(2) in the context of compensation and held that if the compensation fixed was illusory or the principles prescribed were irrelevant to the value of the property at or about the time of acquisition, it could be said that the Legislature had committed a fraud on power and therefore the law was inadequate. The Supreme Court in three other decisions confined the bar of Article 31-A only to agrarian reforms. In Kochunni case the Court held that requirement of Article 31-A bars an attack on the ground of infringement of fundamental right only in the case of agrarian reforms, pertaining to an estate. In Ranjith Singh v. State of Punjab, it was held that the expression ″agrarian reform″ was wide

enough to take in consolidation of holdings as it was nothing more than a proper planning of rural areas. In Vajravelu decision the Supreme Court explained that there is no conflict between the said two decisions and pointed out that the latter decision includes in the expression of agrarian reforms, the slum clearance and other beneficial utilisation of vacant and waste lands. In a Ghulabhai v. Union of India, the Supreme Court did not accept the contention of the state that the expression ″Estate″ takes in all waste lands, forest lands, lands for pastures or sites of buildings in a village whether they were connected with agriculture or not but ruled that the said enumerated lands would come under the said definition only if they were used for the purpose of agriculture or for purposes ancillary thereto. The result of the brief survey of the provisions of the Constitution and the case law thereon as it stood then may be stated in the form of the following propositions:

(1) Every citizen has a fundamental right to acquire, hold and dispose of the property.

(2) The state can make a law imposing reasonable restrictions on the said right in public interest.

(3) The said restrictions, under certain circumstances, may amount to deprivation of the said right.

(4) Whether a restriction imposed by law on a fundamental right is reasonable and in public interest or not, is a justiciable issue.

(5) The state can by law, deprive a person of his property if the said law of deprivation amounts to reasonable restriction in public interest within the meaning of Article19(5).

(6) The state can acquire or requisition the property of a person for a public purpose after paying compensation.

(7) The adequacy of the compensation is not justiciable.

(8) If the compensation fixed by law is illusory or is contrary to the principles relevant to the fixation of compensation, it would be a fraud on power and therefore thevalidity of such a law becomes justiciable.

(9) Laws of agrarian reform depriving or restricting the rights in an″estate″the said expression has been defined to include practically every agricultural land in a villagecannot be questioned on the ground that they have infringed fundamental rights.

Amending Power of the Parliament

Another path breaking development, which is till today being considered as the most trivial phase faced by the judiciary and legislature in entire Constitutional history of our nation was triggered off by the issue of right to property. As explained herein before there was an ongoing tussle between the judiciary and the legislature regarding the Constitutional provisions of right to property. The theory was simple. The judiciary was invalidating legislative action curbing property rights in order to uphold the sanctity of the Constitution. And whenever the judiciary invalidated a law by terming it as unconstitutional the legislature would conveniently amend the Constitution in order to uphold its supremacy over the judiciary. When this saga was going on, there emerged another set of litigations which actually intended to put an end to the legislative manipulation by questioning the amending power of the Constitution itself. These litigations were based on the relevance of Article 13(2) of the Constitution which provides that

the state shall not make any law which takes away or abridges the fundamental rights and any law made in contravention of fundamental right shall to the extent of contravention, be void. So the line of argument that was put forward by the litigants in the cases to be discussed hereinafter was questioning the validity of amending power of the parliament with regard to fundamental rights. It all began when the question whether fundamental rights can be amended under Article 368 came for consideration of the Supreme Court in Shankari Prasad v. Union of India. In this case the validity of the Constitution (1st Amendment) Act, 1951, which inserted inter alia, Articles 31-A and 31-B of the Constitution was challenged. The Amendment was challenged on the ground that it purported to take away or abridge the rights conferred by Part III, which fell within the prohibition of Article 13 (2) and hence was void. It was argued that the state in Article 12 included parliament and the word law in Article 13 (2), therefore, must include Constitution amendment. The Supreme Court, however, rejected the above argument and held that the power to amend the Constitution including the fundamental rights is contained in Article 368, and that the word law in Article 13 (8) includes only an ordinary law made in exercise of the legislative powers and does not include Constitutional amendment which is made in exercise of constituent

power. Therefore, a Constitutional amendment will be valid even if it abridges or takes any of the fundamental rights. In Sajjan Singh v. State of Rajasthan, the validity of the Constitution (17th Amendment) Act, 1964 was challenged. The Supreme Court approved the majority judgement given in Shankari Prasads case and held that the words amendment of the Constitution means amendment of all the provisions of the Constitution. Gajendragadkar, C J said that if the Constitution-makers intended to exclude the fundamental rights from the scope of the amending power they would have made a clear provision in that behalf. The challenge to the Seven Essential Features of the Constitution by Article 31 C

Article 31C sought to challenge seven essential features of the Constitution.

1. Vital Distinction between Two Cases of Constitutional amendment:

(1) Where the fundamental rights are amended to permit laws to be validly pass which would have been void before amendment; and

(2) Where the fundamental rights remain unamended but the laws, which are void, as offending those rights are validated by a legal fiction that they shall not be deemedvoid.

The question is not merely of legislative device. In the first case the law is Constitutional in reality, because the fundamental rights themselves stand abridged.

2. Unconstitutional in reality but fictional

In the second case the law is unconstitutional in reality but is deemed by a fiction of law not to be so; with the result that Constitution breaking law is validated and there is a repudiation of the Constitution pro tanto. If the second case is permissible as a proper exercise of the amending power, the Constitution could be reduced to a scrap of paper. If 31C is valid, it would be equally permissible to parliament to so amend the Constitution as to declare all laws to be valid which are passed by the parliament or state legislatures in excess of their legislative competence, or which violate any of the basic human rights in Part III or the freedom of inter-state trade in Article 301. It would be equally permissible to have an omnibus article that not withstanding anything in the Constitution, no law passed by the Parliament or any state legislature shall be deemed to be void on any ground whatsoever. The insertion of one such article would toll the death-knell of the Constitution. (The fact that under the Supreme Courts judgement in the

fundamental rights case the Constitution cannot be so amended so as to alter the basic structure, is relevant to the point considered here, viz. that a quietus is given to the supremacy of the Constitution by the omnibus protection of Constitutionbreaking laws.) Thus Article 31C clearly damages or destroys the supremacy of the Constitution, which is one of the essential features. It gives a blank charter to the parliament and to all the state legislatures to defy and ignore the Constitutional mandate regarding human rights. Second, Article 31C subordinates the fundamental rights to the Directive principles of state policy and in effect abrogated the rights as regards laws, which the legislature intends or declares to be for giving effect to the directive

principles. The fundamental rights are paramount and are enforceable in the courts (Article 32 and 226), in contrast to the directive principles, which are not so enforceable (Article 37). To abrogate fundamental rights when giving effect to directive principles is to destroy another basic element of the Constitution. Ignorance and arbitrariness, injustice and unfairness, was thereafter not to be upon challenge on the touchstone of the invaluable basic rights.

1. Form & Manner Amenability of the Fundamental Principle

Third, it is a fundamental principle of the Constitution that it can be amended only in form and

manner laid down in Article 368 and according to that Articles basic scheme. This principle was repudiated by Article 31C. That Article had the effect of virtually authorising the abrogation of the fundamental rights while they still remain ostensibly in the statute book. Criticism and debate, within and outside parliament, which would be evoked by a proposal to abridge a particular fundamental right are avoided, while various fundamental rights are effectively silenced. The absurd situation was that, whereas amendment of a single fundamental right would require a two-thirds majority (Article 368), a law falling within 31C which overrides and violates several fundamental rights could be passed by a simple majority.

2. Role of Fundamental Rights as The Essential Feature of the Constitution

Fourth, the fundamental rights constitute an essential feature of the Constitution. Within its field Article 31C completely took away:

The right to acquire, hold and dispose of property [Article 19(1)(f)];

The right not to be deprived of property save by authority of law [Article 31(1)];

The right to assert that property can be acquired or requisitioned by the state only for a

public purpose [Article 31(2)]; and

The right to receive an amount, however small, when the state seizes the property [Article 31(2)]. In short, Article 31C expressly authorised outright confiscation of any property, large or small,

belonging to anyone, poor or rich, citizen or non-citizen. Further, Article 31C provides for the wholesale smothering of various rights which were all together distinct from right to property and are totally irrelevant to the Directive principles of state policy laid down in Article 39(b) and (c). Even the rights to equality before law, to freedom of speech and expression, to assemble peaceably and without arms, to form associations and unions, to move freely throughout the territory of India, to reside and settle in any part of the territory of India, and to practice any profession or to carry on any occupation, trade or business which are so vital for the survival of the democracy, the rule of law, and the integrity and unity of the republic, can be violated under Article 31C under the cloak of improving the economic system.

3. The Directive Principle Of State Policy

Fifth, it was not even permitted to raise the question whether the proposed law will result, or is

reasonably calculated to result, in securing the directive principle laid down in Article 39(b) and (c). The wrong done to the people who are deprived of their basic freedoms is worsened by protection to those laws, which may not be at all calculated to give effect to the directive principles. The right to move the Supreme Court to enforce other fundamental rights is itself a fundamental right (Article 32) and is a basic feature of the Constitution. This right is destroyed when a fundamental right is made unenforceable against a law purporting to give effect to the directive principles and at the same time the court is precluded from considering whether the law is such that it can possibly secure any directive principle.

4. What is the basic principle of the constitution???

Sixth, the basic principle of the Constitution is that no state legislature can amend the fundamental rights or any other part of the Constitution. This essential feature is repudiated by 31C, which empowers even state legislatures to pass laws, which virtually involve a repeal of the

fundamental rights. The wholly irrational consequence is that whereas state legislatures cannot abridge a single fundamental right, it was now open to them to supercede a whole series of such rights. In substance, the power of amending or overriding the Constitution is delegated to all state legislatures, which is not permissible under Article 368.

N. A. Palkhivala rightly remarked in this regard Hereafter liberty may survive in some states and not in others, depending on the complexion of the political party in power. The state of Meghalaya has already passed a law prohibiting the residents of other parts of India staying in Meghalaya for more than six months without permit.

Due protection to minorities

One of the essential features of the Constitution is to provide for due protection to minorities and their cultural and educational rights. The fundamental rights under Article 14,19 and 31, which were sought to be superseded by Article 31C are necessary to make meaningful rights of the minorities, which are, guaranteed by Articles 25 to 30. Under the guise of giving effect to the directive principles, a number of steps may be taken which may seriously undermine the position of regional linguistic, cultural and other minorities. The proviso inserted by the 25th amendment is a very tall tale. It expressly provides that where the property of an educational institution established and administered by a minority is acquired, the amount fixed for the acquisition should be such as not to restrict or abrogate the right guaranteed under 30(1). The clear implication is that when property is acquired in any other cases, an amount can be fixed which abrogates or restricts any other fundamental rights, for instance, the right to freedom of speech and expression [Article 19(1)(a)], to form associations or unions [Article 19(1)(c)], or to practice any profession or carry out any occupation, trade or business [Article 1991)(g)], or the right of an religious community to establish and maintain institutions for religious or charitable purposes (Article 26). Further, if a law violates the rights of the minorities under Articles 25 to 30, such law, being invalid, would be no law at all and therefore deprivation of property under such a law would violate Article 31(1) which provides that no person shall be deprived of his property save by authority of law, i.e. a valid law. But since 31(1) is one of the articles abrogated by Article 31C, minorities can be deprived of their properties held privately or upon public charitable or religious trust, by a law which is invalid. In sum, Article 31C is a monstrous outrage on the Constitution. In the entire history of liberty, never were so many millions of people deprived of

so many fundamental rights in one sweep as by the insertion of Article 31C. De Tocqueville remarked that nothing is more arduous than the apprenticeship of liberty. N A Palkhivala rightly remarks with grief in this context that It is a measure of our immaturity as a democracy and the utter apathy of our people that the betrayal of our basic freedoms excited hardly any public debate.

7. The Four Attributes of a Totalitarian State The four attributes of a totalitarian state are:

(1) Constitutional to the ruling party to favour its own members,

(2) Denial of the right to dissent or to oppose,

(3) Denial of various personal freedoms, and

(4) The states right to confiscate anyones property.

All these four attributes were implicit in Article 31C. The Article had a built in mechanism for the dissolution of the true democracy that India had been so far, cession of rule of law and possible disintegration of the nation. The governments argument was that though the power of amending the Constitution must be held to be limitless after the 24th amendment and it can destroy human freedoms under Article 31C, the legislature will not use the power. The answer to this is contained in the words of W

B Yeats No Government has the right, whether to flatter fanatics or in mere vagueness of mind, to forge an instrument of tyranny and say that it will never be used. Moreover, laws characterized by stringent injustice have in fact been passed in pursuance of the amended Article 31(2) and 31C. General insurance companies have been nationalized under a law, which provided for fixed amounts payable on the acquisition of all their assets and liabilities, the amounts having been fixed on a basis which was not officially disclosed either to parliament or to the public but which transpired to be positively absurd. Some companies found that the amounts they received were less than the value of their government securities and the amounts of their bank balance and of their currency notes after providing for all their liabilities; in other words, there was a blatant repudiation of national debt. One insurance company was paid Rs 10, 000 for acquisition of its net assets worth more than Rs 23,00,000. Laws for acquisition of coal mines were also passed, under which all assets of the nationalised companies were taken over but none of their liabilities;

and further, all the creditors of the companies are statutorily deprived of every charge or security which had been created on the companys assets. The net result was that the banks, which had advanced money to the companies, lost their principal, interest and security; debenture holders lost their entire capital; ex-employees of the companies who retired before nationalisation lost their right to pension and other dues; and traders lost the price of the goods they had given on credit. Thus innumerable innocent citizens found their property virtually confiscated outright as a side effect of the law expropriating the colliery companies. Those companies could not discharge their liabilities because all their assets are gone and also the derisory amounts due to them on nationalisation was to be paid to the Commissioner of Claims who would not be appointed at all for years. Similar nationalisation laws were passed for confiscation of all assets of sick textile mills, with statutory abrogation of all mortgages and other securities in favour of creditors, with the same disastrous consequences for innocent third parties. Article 31C had damaged the very heart of the Constitution. N A Palkhivala remarked This poisonous weed has been planted where it will trouble us a hundred years, each age will have to reconsider it.

The Fundamental Rights Case and its attitude towards the right to property

This decision which changed the entire scenario of the Indian Constitution did the three following important changes

1. Through Article 31 C took away the right to acquire, hold and dispose off the property under Article 19(1) (f)

2. Right to property under Article 19(1) (f) did not pertain to the basic structure of the constitution (Honble Justice. H.R.Khanna)

3. Article 19(1) (f) conferred citizens the right to acquire, hold and dispose off the property under Article 19(1) (f) which formed a part of group of articles under theheading Right to Freedom

4. There is no necessity for an elaborate argument to demonstrate that property is intimately connected with the Right to Freedom.

Article 300-A

Chapter IVRight to Property, 300A. Persons not to be deprived of property save by authority of lawno person shall be deprived of his property save by authority of law.

The 44th amendment act which deleted article 19(1) (f) and introduced this article brought out the following important changes:

1. In view of the special position sought to be given to fundamental rights, the right to property, which has been the occasion for more than one Amendment of theConstitution, would cease to be a fundamental right and become only a legal right. Necessary amendments for this purpose are being made to Article 19 and Article 31 is being deleted. It would however be ensured that the removal of property from the list of fundamental rights would not affect the rights of the minorities to establish and administer educational institutions of their choice.

2. Similarly, the right of persons holding land for personal cultivation and within ceiling limit to receive market compensation at the market value will not be affected.

3. Property, while ceasing to be a fundamental right, would, however, be given express recognition as a legal right, provision being made that no person shall bedeprived of his property save in accordance with law.

Problems Posed by the Removal of Right to Property from Fundamental Rights

The rights conferred by Article 19(1)(f) and Article 31 read with the undernoted entries were so closely interwoven with the whole fabric of our Constitution that those rights cannot be torn out without leaving a jagged hole and broken threads. The hole must be mended and the broken threads must be replaced so as to harmonise with the other parts of the Constitution. The task is not easy, and courts will be called upon to answer problems more formidable than those raised by the Article 31 after it was amended a number of times. However some of the problems which will arise and the probable lines of solution, are considered below:

(i) That Articles 19(1) (f) and 31(2) dealt with a different, but connected, aspects of the right to property is clear from several Supreme Court decisions whichdealt with the co relation of those two Articles.

(ii) The correct view was that the two Articles were mutually exclusive. But one judgement which was soon corrected and another judgement which was ajudgement per incuriam, to the

view that Articles 19(1)(f) and 31(2) were not mutually exclusive. This judicial conflict was resolved by 25th Amendment, which introduced in Article 31 a new clause (2-B) which provided that Nothing in Article 19(1)(f) shall effect any such law as is referred in clause (2). The validity of this Amendment as unanimously upheld in the Kesavananda case. The reason for this mutual exclusiveness was that when property is acquired for a public purpose on payment of compensation, the right of a citizen to hold property is gone and the question of his right to hold property subject to reasonable restrictions does not arise.

(iii) Further, Article 19(1)(f) that conferred citizens the right to acquire, hold and dispose of property formed part of a group of articles under the heading Right toFreedom. It requires no elaborate argument to demonstrate that property is intimately connected with the right to freedom. Article 31 appeared under the heading Right to Property; for the right to freedom conferred by Article 19(1)(f) would be worth little if the property when acquired could be taken away by law. Hence Article. 31 provided that private property could be acquired only for a public purpose and on payment of compensation (later amount). There is nothing in the Statement of Objects and Reasons to show that Parliament no longer looks upon the right to acquire, hold and dispose of property as a part of the Right to Freedom.

(iv) The retention of Article. 19(1)(a) to (e) and (g) is a clear indication to the contrary. That sub-clauses (d), (e) and (f) of Article. 19(1)(f)(1) were interlinked isclear from their provisions as well as from sub-Article (5) which governed each of those sub-clauses. The meaning of Article 19(1) (f) has been considered and it is being submitted that the Supreme Court correctly held that the right conferred by Article 19(1)(d) was not a right of free movement simpliciter, but a special right to move freely throughout the territory of India with a view to secure, among other things, the unity of India which a narrow provincialism would deny.

(v) This right of free movement was not limited to travelling throughout India, because it was accompanied by the further right conferred by Article 19(1) (e) toreside and settle in any part of India, as also the right conferred by Article 19(1)(f) to acquire, hold and dispose of property, in any part of India. But a right to settle in any part of India means not only a right to have a place to live in, but also a place to work in, for Article 19(1)(g) conferson every citizen the right to practise any profession, or to carry on any occupation, trade or business.

(vi) Further, Article 19(1)(a) confers on every citizen the right to the freedom of speech and expression, which right includes the freedom of the press a right which is basic to democracy. But a press needs a building or buildings to house it, and movable property to work it, so that without the right to acquire, hold and dispose of property, there can be no freedom of the press. And the same is broadly true of the fundamental right conferred by Article 19(1)(c)-the right to form associations or unions-for normally the working of associations and unions involves the right to acquire, hold and dispose of property. What then is the effect of deleting Article 19(1)(f), which conferred the right to acquire, hold and dispose of property, and of deleting Article 31 which provided for the acquisition of property for public purpose on payment of compensation (later called amount)?

To these questions the Statement of Objects and Reasons gives no answer-it is doubtful whether those who framed the property amendments were even aware of their effect on other fundamental rights retained in Article 19(1)(f)(1), and on the political unity of India which Article 19(1)(f)(1)(d), (e), (f) and (g) was intended, inter alia, to subserve, along with other provisions of our Constitution. At any rate, the framers on these amendments have provided no solutions for the problem, which the property amendments inevitably raise. One further complication must be noted here. Although Article 19(1)(f) and Article 31(2) had been made mutually exclusive by Article 31(2-

B), there was no such mutual exclusiveness between Article 31(2) and the right to practise a profession or to carry on any occupation, trade or business conferred by

Article 19(1)(g). This right was subject to restrictions mentioned in Article 19(1)(f)(6). But trade and business is capable of being acquired, as Section 299(2) of the Government of India Act, 1935, clearly showed. By what test is the validity of the law acquiring property, and a law acquiring trade or business, including industrial and commercial undertakings, to be judged? The 25th Amendment inserted in Article 31 a new sub clause (2) with the following proviso:

Provided that in making any law for the compulsory acquisition of any property of an educational institution established and administered by minority, referred to in clause (1) of Article 30, the State shall insure that e amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

This proviso recognised the fact that the valuable right conferred by Article 30(1) on minorities to establish educational institutions of their choice would be destroyed if adequate compensation was not made for acquisition of the property of such institutions. Political expediency may require that minorities should not be alienated by depriving them of their cherished rights, especially when minorities are as large as they are in India. Special rights are conferred on minorities because in a democratic country with adult universal suffrage, majorities by virtue of their numbers can protect themselves. But it does seem illogical and unjust to leave out majority educational institutions from the same protection, unless it was believed that majorities, deprived of their power to oppress minorities, would not wish to oppress themselves. Thus, in State of Kerala v. Mother Provincial, Counsel for the state told the Supreme Court that he had instructions to say that any provision held inapplicable to minority institutions would not be enforced against the majority instutitions also. Again, the 17th Amendment had introduced in Article. 31A(1)(e) the following proviso: Provided further that where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof. To take away land under personal cultivation without compensation would be unfair and unjust and the above proviso prevented such injustice being done. It would be equally unfair and unjust to take away from a person following a vocation, other than agriculture, the tools of his trade, or the property by which he earns his living. These observations have been made because the above provisos relating to property, which have been retained in the chapter on fundamental rights, recognise the injustice of confiscatory laws which impinge on fundamental rights. In the absence of any rational explanation in the Statement of Objects and Reasons for deleting the right to property from the category of fundamental rights, the relief against injustice provided by the 44th Amendment appears to have been guided by political expediency-large minorities and tillers of the soil have votes to give or withhold. Or it may be that the reason was more complex. The Janata Party having redeemed its pledge, it was left to the Supreme Court to determine, in the light of the provisions of our

Constitution, whether the pledge can be constitutionally redeemed, and if so to what extent. Likewise there are a lot many aspects and long term evils given rise by 44th Amendment. In short the above discussion shows that it is easy to make an electoral promise to delete right to property from the list of fundamental rights; it is not easy to work out the consequences of that promise and embody them in a Constitution Amendment Bill. Normally, amendment proposing far reaching changes in the Constitution are submitted to a Select Committee for scrutiny, and report. If that course was not followed, it is difficult to resist the conclusion that the sponsors of the property amendments realized that those amendments would not stand the scrutiny of a Select Committee with a power to examine witnesses. The course of first redeeming an electoral promise by amending the Constitution and then leaving it to the courts to work out the consequences of the amendments, must appear attractive. And that course was followed, in the confident belief that the court would not shirk their duty of interpreting the Constitution even if Parliament preferred silence to speech as to its real intentions.

Defects of the 44th Amendment Act

The amendment was brought out without realizing the following draw backs:

(1) The close relation of property with other fundamental rights, which the Janata Party was pledged to restore;

(2) The effect of this change on the legislative power to acquire and requisition property; and

(3) The correlation of fundamental rights to Directive principles of state policy.

Implications

(i) The Right to Property would now be a Constitutional Right and not a Fundamental Right. A legislation violating the constitutional right to property could now be challenged only in High Courts and not directly in the Supreme Court.

(ii)Due to the deletion of Article 31 the Government was no longer under an obligation to compensate persons whose land had been acquired as per a law passed by Parliament.

As of now, it is, beyond the scope of my research and understanding as to whether Proposition (ii) i.e. deprivation of property without compensation is still legally tenable especially in light of the Supreme Court's ruling, in the Maneka Gandhi case, which held that each and every

provision of the Constitution had to be interpreted in a just, fair and reasonable manner. Therefore any law depriving a person of his property shall have to do so in a reasonable manner. It could be argued that the only reasonable manner to deprive a person of his property would be to offer him, reasonable compensation for the same. This discussion however is not completely relevant for the purpose of this post. The only relevant point is the fact that under the Constitution no person can be deprived of their property without the authority of law.

The two relevant concepts that now require to be examined are 'property' & 'Authority by law'.

'Property' as understood in Article 300A:

The obvious first question is as to whether or not 'intellectual property' such as 'clinical trial data' would fall within the definition of 'property' as understood in Article 300A. There seems to be enough authority to support the proposition that 'property' as understood in Article 300A is wider than just 'immovable property'. One such authority in the context of 'intellectual property rights' is the judgment of the Supreme Court in the case of Entertainment Network India Ltd. (ENIL) v. Super Cassette Industries Ltd. (SCIL)[45]. In pertinent part the Court held the following: The ownership of any copyright like ownership of any other property must be considered having regard to the principles contained in Article 19(1) (g) read with Article 300A of the Constitution, besides, the human rights on property; The judgment goes on further to say that; But the right of property is no longer a fundamental right. It will be subject to reasonable restrictions. In terms of Article 300A of the Constitution, it may be subject to the conditions laid down therein, namely, it may be wholly or in part acquired in public interest and on payment of reasonable compensation. The fact that the Supreme Court recognizes 'copyright' to fall within Article 300A is indicative that even 'clinical trial data', collected after extensive experimenting, should in all likelihood fall within the definition of 'property' as understood in Article 300A.

'Authority by law' as understood in Article 300A: The term 'law' as defined in Article 300A is understood to mean only legislation or a statutory rule or order. The term 'law' as understood by Article 300A will not include executive fiats. The source of the 'law' depriving a person of his property has to be necessarily traced, through a statute, to the legislature.

While summarizing the entire concept of Right to Property..

Once upon a time, it was thought that the so called personal rights like the right to vote, right to freedom of speech or personal liberty occupied a higher status in the hierarchy of values than property right. As a result the courts were more astute to strike down legislations, which impinged upon these rights, than upon property rights. But Learned Hand, a great judge, felt that the distinction between the two was unreal and said that nobody seems to have bestowed any thought on the question why property rights are not personal rights. The Supreme Court of America which once gave hospitable quarter to the distinction between personal rights and property rights and accorded a preferred position to the former, has given a decent burial both to the distinction and the preferred status of the so called personal rights or liberties in 1972 by saying the dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, not less than the right to speak or the right to travel is in truth a personal right, whether the property in question be a welfare cheque, a home or a savings account. In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other.

That rights inproperty are basic civil rights has long been recognised. This again would show that if the fundamental right to freedom of speech or personal liberty pertains to basic structure, there is every reason that the fundamental right to property should also pertain to it, as the former set of rights could have no meaning without the latter. Protection of freedom depends ultimately upon the protection of independence, which can only be secured, if property is made secure. Learned Hand long ago spoke of the false hope of the courts protecting liberty if it dies in the hearts of men. One reason, which would induce its death in their hearts, is an atmosphere in which liberty derives no sustenance from a sense of security to property created by putting it beyond the outcome of the vote of shifting majorities. Our Constitution was framed by an extraordinary body of men, a body of men whose combined virtues and talents have seldom if ever been equaled in this country. They possessed that rare quality of mind, which unites theory and practice. They understood the unique conditions of the country and the enduring needs and aspirations of the people, and they adapted their principles to the character and genius of the nation. They visualised a society in which every citizen should be the owner of some property not only as a means of sustenance but also as a zone of security from tyranny and economic oppression and they put that right above the vote of transient majority. They enacted Article 39

and enjoined upon the state to break up the concentration of property in the hands of the few and its distribution among all. There is no reason today to think that the type of society they visualised is in any way unsuited to our present condition. Property is the most ambiguous of all categories. It covers a multitude of rights, which have nothing in common, except that they are exercised by persons and enforced by the state. It is therefore idle to present a case for or against private property without specifying the extent or value thereof. Arguments, which support or demolish certain kinds of property, have no application to others. Considerations, which are conclusive in one stage of economic development, may be irrelevant in the next. For things are not similar in quality merely because they are identical in name. If it be assumed that the fundamental right to property does not pertain to basic structure and can be amended by parliament without a referendum as proposed in the case of other fundamental rights regarding citizens; then there can be no doubt that property is durable and nondurable consumer goods, and in the means of production worked by their owners must be protected by the higher law on the same logic on which it is proposed to safeguard by that law the interest in land of small tenure holders and of agriculturists within ceiling limit. The owners of these properties must be paid compensation based on market value in the event of the state or a corporation owned by the state acquiring them for public purpose. While these types of property can be justified as a necessary condition of a free and purposeful life, no such considerations are available in respect of the property in the means of production not worked or directly managed by their owners as it is not an instrument of freedom since it gives power not only over things but through things over persons. It is precisely the concentration of this type of property which the framers of the Constitution wanted to break up under Article 39 and distribute among the have-nots and there is no injustice in determining the compensation payable to the deprived owners on principles of social justice. But this is where we have to really spare a thoughtJustice K K Mathew had the most eloquent and liberal view in support of property rights. However, at the end of his pursuit of defending property rights even he seems to have got misguided by the so-called conflict between directive principles and fundamental rights. Granting absolute right to property and also having to uphold the sanctity of a directive principle against concentration of wealth becomes almost an impossible thing to rationally achieve for any fair state which emerges and thrives on the foundation of rule of law. So let the Owl of Minerva take flight. Fundamental right to property is dead. But long live right to property.

Directive Principles of State Policy (DPSPs)

Unlike Fundamental Rights, the Directive Principles of State Policy (DPSP) are non-justiciable which means they are not enforceable by the courts for their violation. However, the Constitution itself declares that â€˜these principles are fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making lawsâ€™. Hence, they impose a moral obligation on the state authorities for their application.

List of DPSPs under Indian Constitution

Article 36: Defines State as same as Article 12 unless the context otherwise defines.

Article 37: Application of the Principles contained in this part.

Article 38: It authorizes the state to secure a social order for the promotion of the welfare of people.

Article 39: Certain principles of policies to be followed by the state.

Article 39A: Equal justice and free legal aid.

Article 40: Organization of village panchayats.

Article 41: Right to work, to education and to public assistance in certain cases.

Article 42: Provision for just and humane conditions of work and maternity leaves.

Article 43: Living wage etc. for workers.

Article 43-A: Participation of workers in management of industries.

Article 43-B: Promotion of cooperative societies.

Article 44: Uniform civil code for the citizens.

Article 45: Provision for early childhood care and education to children below the age of six years.

Article 46: Promotion of education and economic interests of SC, ST, and other weaker sections.

Article 47: Duty of the state to raise the level of nutrition and the standard of living and to improve public health.

Article 48: Organization of agriculture and animal husbandry.

Article 48-A: Protection and improvement of environment and safeguarding of forests and wildlife.

Article 49: Protection of monuments and places and objects of national importance.

Article 50: Separation of judiciary from the executive.

Article 51: Promotion of international peace and security.

DPSP Under Preamble

The Preamble of the Constitution is called the key to the mind of the drafters of the Constitution. It lays down the objectives that our Constitution seeks to achieve. Many scholars believe that DPSPs is the kernel of the Constitution. The Directive Principles of the State Policy (DPSPs) lay down the guidelines for the state and are reflections of the overall objectives laid down in the Preamble of Constitution.

The expression Justice- social, economic, political is sought to be achieved through DPSPs. DPSPs are incorporated to attain the ultimate ideals of preamble i.e. Justice, Liberty, Equality, and fraternity. Moreover, it also embodies the idea of the welfare state which India was deprived of under colonial rule.

Enforceability of DPSPs

Many times the question arises that whether an individual can sue the state government or the central government for not following the directive principles enumerated in Part IV. The answer to this question is in negative.

The reason for the same lies in Article 37 which states that:

The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.

Therefore by the virtue of this Article no provision of this part can be made enforceable in the court of law thus these principles cannot be used against the central government or the state government. This non-justiciability of DPSPs make the state government or the central government immune from any action against them for not following these directives.

Another question arises that whether the Supreme Court or High Court can issue the writ of mandamus if the state does not follow the directive principles. The literal meaning of mandamus is â€œto command.â€ It is a writ which is issued to any person or authority who has been prescribed a duty by the law. This writ compels the authority to do its duty.

The Writ of mandamus is generally issued in two situations. One is when a person files writ petition or when the Court issues it suo moto i.e. own motion. As per Constitutional Principles, a Court is not authorized to issue the writ of mandamus to the state when the Directive Principles are not followed because the Directive Principle is a yardstick in the hand of people to check the performance of government and not available for the courts. But the Court can take suo moto action when the matter is of utmost public importance and affect the large interest of the public.

Fundamental Rights are the legal obligation of the state to respect, whereas the DPSPs is the moral obligation of the state to follow. Article 38 lay down the broad ideals which a state should strive to achieve. Many of these Directive Principles have become enforceable by becoming a law. Some of the DPSPs have widened the scope of Fundamental Rights.

Relationship with Fundamental Rights

A major concern regarding the validity of the DPSPs is their compatibility with the Fundamental Rights contained in Part III of the Constitution, enforceable even in the High Courts and the Supreme Court through the manner of writs.

The following are the points of difference between the two:

1. The Fundamental Rights are a limitation on the powers of the government operating on an individual, whereas, the DPSPs are instructions to the government for achieving certain ends through their actions.

2. Anything contained in the DPSPs cannot be violated either by the individuals or the State, as long as there is no law made to that effect, while there are strict remedies against violation of an individualâ€™s Fundamental Right.

3. A law against the DPSPs cannot be declared as void by the courts, but this is not the case with Fundamental Rights.

Judicial Pronouncements

The question that whether Fundamental Rights precedes DPSPs or latter takes precedence over former has been the subject of debate for years. There are judicial pronouncements which settle this dispute of Madras vs. Champakan (AIR 1951 SC 226), the Apex Court was of the view that if a law contravenes a Fundamental right, it would be void but the same is not with the DPSPs. It shows that Fundamental rights are on a higher pedestal than DPSPs.

In I. C. Golaknath & Ors vs. State Of Punjab & Anr. (1967 AIR 1643), The Court was of the view that Fundamental rights cannot be curtailed by the law made by the parliament. In furtherance of the same the Court also said that if a law is made to give effect to Article 39(b) and Article 39(c) which come under the purview of DPSPs and in the process, the law violates Article 14, Article 19 or Article 31, the the law cannot be declared as unconstitutional and void merely on the ground of said contravention.

In Keshavnanda Bharati vs the State of Kerala (1973) 4 SCC 225), The Apex Court placed DPSPs on the higher pedestal than Fundamental Rights. Ultimately in the case of Minerva Mills vs. Union of India (AIR 1980 SC 1789), the question before the court was whether the directive principles of State policy enshrined in Art IV can have primacy over the fundamental rights conferred by Part III of the Constitution. The court held that the doctrine of harmonious construction should be applied because neither of the two has precedence to each other. Both are complementary therefore they are needed to be balanced.

New Provisions of Directive Principles after Amendment

Four new Directive Principles were added in the 42nd Amendment Act of 1976 to the original list. They are requiring the state:

1. An added clause in Article 39: To secure opportunities for the healthy development of children

2. An added clause in Article 39 as Article 39A: To promote equal justice and to provide free legal aid to the poor

3. An added clause in Article 43 as Article 43 A: To take steps to secure the participation of workers in the management of industries

4. An added clause in Article 48 as Article 48A: To protect and improve the environment and to safeguard forests and wildlife

DPSP and its Implementation

Although the implementation of the principles laid down in Part IV are not directly visible yet there are large and excessive of laws and government policies which reflect the application of the principle of Part IV. In the Judicial History of India, many laws and legal provisions were created by judicial reasoning. In such cases, DPSPs played a very vital role and the courts considered the directive principles very cautiously.

Policies like Mahatma Gandhi National Rural Employment Guarantee Act (MGNREGA) get their authority from Article 39(a) which talks about the right to adequate means of livelihood. Laws such as the Child Labour (Prohibition and Regulation) Act 1986 bolster the canons of Article 39(g) which deals with the protection of children.

Laws about the prohibition of slaughter of cows and bullocks get their sanctity from Article 48 which deals with the organization of agriculture and husbandry. Laws such as Workmen Compensation Act, Minimum Wages Act, Industrial Employment (Standing Orders) Act, The Factories Act, and Maternity Benefit Act depict the implementation of Article 41, Article 42 and Article 43A.

Importance of DPSPs for an Indian citizen

Regardless of the non-justifiable nature of DPSPs, a citizen should be aware of them. Article 37 describes these principles as fundamental in the governance of the country. The objective of the

DPSPs is to better the social and economic conditions of society so people can live a good life. Knowledge of DPSPs helps a citizen to keep a check on the government.

A citizen can use DPSPs as a measure of the performance of the government and can identify the scope where it lacks. A person should know these provisions because ultimately these principles act as a yardstick to judge the law that governs them. Moreover, it also constrains the power of the state to make a draconian law.

Through various judicial pronouncements, it is settled principle now that balancing DPSPs and Fundamental rights is as important as maintaining the sanctity of Fundamental Rights. Non-following a directive principle would directly or indirectly affect the Fundamental Right which is considered as one of the most essential parts of the Constitution.

Fundamental Duties

The 42nd Amendment Act, 1976 added a Chapter IV-A which consist of only one Article 51-A which dealt with a Code of Ten Fundamental Duties for citizens. Fundamental duties are intended to serve as a constant reminder to every citizen that while the constitution specifically conferred on them certain Fundamental Rights, it also requires citizens to observe certain basic norms of democratic conduct and democratic behaviour because rights and duties are co-relative.

Article 51-A Says that it shall be the duty of every citizen of India-

1. to abide by the constitution and respect its ideal and institutions;

2. to cherish and follow the noble ideals which inspired our national struggle for freedom;

3. to uphold and protect the sovereignty, unity and integrity of India;

4. to defend the country and render national service when called upon to do so;

5. to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional diversities, to renounce practices derogatory to the dignity of women;

6. to value and preserve the rich heritage of our composite culture;

7. to protect and improve the natural environment including forests, lakes, rivers, and wild-life and to have compassion for living creatures;

8. to develop the scientific temper, humanism and the spirit of inquiry and reform;

9. to safeguard public property and to abjure violence;

10. to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavor and achievement. Further, one more Fundamental duty has been added to the Indian Constitution by 86thÂ Amendment of the constitution in 2002.

11. who is a parent or guardian , to provide opportunities for education to his child, or as the case may be, ward between the age of six and fourteen years.

Need for Fundamental Duties

India is a country where people belonging to different castes, creed, religion, sects etc.Â live together and in order to maintain harmony and peace and to encourage the feeling of brotherhood and oneness among them following the Fundamental Duties on their part plays a vital role in upholding and protecting the sovereignty, unity and integrity of our country which is of inevitable importance. It reminds the citizens that rights and duties go hand in hand.

Sources of Fundamental Duties

It is significant to note that none of the Constitutions of Western Countries specifically provide for the duties and obligations of citizens . Among the Democratic Constitutions of the world we find mention of certain duties of the citizens in the Japanese Constitution. In Britain, Canada & Australia the rights and duties of citizens are governed largely by Common Law and Judicial Decisions. The French Constitution Makes only a passing reference to duties of citizens. The American Constitution provides only for fundamental rights and not duties of citizen.

But the Constitution of Socialist Countries, however, lay great emphasis on the citizen's duties like Article 32 of the Yugoslavian Constitution and Chapter VII of the Soviet Constitution lays down Fundamental Rights & Duties and also Chapter II of the Constitution of Republic Of China. All the aforesaid Constitutions specifically lay down duties of the people, they also guarantee the "Right to Work" to every citizen which the Indian Constitution does not provide still today. The "right to work" should, therefore, be guaranteed to every citizen who are expected to do certain to the nation.

Enforcement of duties

The fundamental duties are statutory duties and shall be enforceable by Law. Parliament , y law , will provide penalties to be imposed for failure to fulfil those duties and obligations. The success of this provision would , however, depend much upon the manner in which and the person against whom these duties would be enforced and for its proper enforcement it is necessary that it should be known to all. In AIIMS Students Union v. AIIMSÂ AIR (1983) 1 SCC 471 it has been held that Fundamental Duties though not enforceable by writ of the court, yet provide a valuable guide and aid to interpretation of constitutional and legal issues.

Criticism

Some of the duties are vague and terms used therein are complex which even a highly educated man would find difficult to grasp like it is difficult to identify the noble ideas that inspired our national struggle for freedom.

Some of the duties clash with religious principles of some religious sects in the country. In a Judgement the Supreme Court held that no person can be forced to join the singing of the National Anthem, if he has genuine religious obligations which place religious belief above the patriotism.

There is no specific provision nor any sanction as to implementation and enforcement of Fundamental Duties.

The Fundamental Duties inherit some of the ideals, thoughts, beliefs of great saints philosophers, social reformers and political leaders thus in spite of its vagueness the fundamental Duties fulfils a long standing need. It acts as a constant reminder that rights and duties go hand in hand. The Fundamental Duties are laid down to draw the attention of the citizens towards the duties they owe towards their Motherland. It clearly elaborates the thoughts of John .F. Kennedy ", Do not ask what the country can do for you, but ask what you can do for the country".