Constitutional Law-II : Notes for B.A. LL.B fourth semester
Paper Code: 204

Unit-1: - Introduction:

a. Definition of 'State' for enforcement of fundamental rights – Justifiability of fundamental rights
Doctrine of eclipse, severability, waiver.
b. Right to equality – Doctrine of Reasonable classification and the principle of absence of arbitrariness
Legitimate Expectation
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Professional Skill Development Activity (PSDA):

Drafting of a Writ Petition

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a. Nature and justiciability of the Directive Principles
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Unit-I
Fundamental Rights-Part 1:

State- Article 12:

The Constitution of India, Article 12: "In this part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India."
Tests to decide which "other authorities" could be considered as agencies or instrumentalities of state. The cumulative effect of all the following factors has to be seen:
1. "If the entire share capital of the corporation is held by government, it would go a long way towards indicating that the corporation is an instrumentality or agency of government."
2. The existence of "deep and pervasive State control may afford an indication that the Corporation is a State agency or instrumentality."
3. "It may also be a relevant factor…whether the corporation enjoys monopoly status which is State conferred or State protected."
4. "If the functions of the corporation are of public importance and closely related to governmental functions, it would be a relevant factor in classifying the corporation as an instrumentality or agency of government."
5. "Specifically, if a department of government is transferred to a corporation, it would be a strong factor supportive of this inference" of the corporation being an instrumentality or agency of government.

SomPrakashRekhi v. Union of India AIR 1981 SC 212: (1981) 1 SCC 449 Page 3 of 72 The petitioner was a clerk in the Burmah Shell Oil Storage Ltd. He retired at the age of 50 after qualifying for a pension, on April 1, 1973. He was also covered by a scheme under the Employees' Provident Funds and Family Pension Fund Act, 1952. The employer undertaking was statutorily taken over by the Bharat Petroleum Corporation Ltd. under the Burmah Shell (Acquisition of Undertakings in India) Act, 1976, and the Corporation became the statutory successor of the petitioner employer. His pensionary rights, such as he had, therefore, became claimable from the second respondent. The pensionary provision for the Burmah Shell employees depended on the terms of a Trust Deed of 1950 under which a Pension Fund was set up and regulations were made for its administration.

By virtue of Regulation 13, the petitioner was entitled to a pension of Rs. 165.99 subject to certain deductions that formed the controversy in this case. He was also being paid Supplementary Retirement Benefit of Rs. 86/- per month for a period of 13 months after his Retirement, which was stopped thereafter. By a letter dated September 25, 1974, the employer (Burmah Shell) explained that from out of the pension of Rs. 165.99 Regulation 16 authorized two deductions. One such deduction was based on Regulation 16(1) because of Employees' Provident Fund payment to the pensioner and the other rested on Regulation 16(3) on account of payment of gratuity. Resultantly, the 'pension payable' was shown as Rs 40.05. Further, the petitioner

claimed and received his provident fund amount under the PF Act and recovered a gratuity amount due under the Payment of Gratuity Act, 1972. The Burmah Shell that consequent on his drawal of provident fund intimated the petitioner and gratuity benefits; the quantum of his pension would suffer a protanto shrinkage, leaving a monthly pension of Rs 40/-. Since no superannuated soul can survive on Rs. 40/- per month, the petitioner moved the court challenging the deductions from his original pension as illegal and inhuman and demanding restoration of the full sum, which he was originally drawing.

According to the petitioner, his right to property under Article 19 had been violated. The first issue before the Supreme Court was whether a writ could be issued under Article 32 of the Constitution against the BPCL, a government company.

The expression "other authorities" in Article 12 has been held by this Court in the Rajasthan State Electricity Board case [Rajasthan Electricity Board v. Mohan Lal, AIR 1967 SC 1857] to be wide enough to include within it every authority created by a statute and functioning within Page 4 of 72 the territory of India, or under the control of the Government of India. This Court further said referring to earlier decisions that the expression "other authorities" in Article 12 will include all constitutional or statutory authorities on whom powers are conferred by law. The State itself is envisaged under Article 298 as having the right to carry on trade and business. The State as defined in Article 12 is comprehended to include bodies created for the purpose of promoting economic interests of the people. The circumstance that the statutory body is required to carry on some activities of the nature of trade or commerce does not indicate that the Board must be excluded from the scope of the word 'State'. The Electricity Supply Act showed that the Board had power to give directions, the disobedience of which is punishable as a criminal offence. The power to issue directions and to enforce compliance is an important aspect, Mathew, J. is more positive in his conception of 'State' under Article 12:

The concept of State has undergone drastic changes in recent years. Today State cannot be conceived of simply as coercive machinery wielding the thunderbolt of authority. It has to be viewed mainly as a service corporation:

If we clearly grasp the character of the state as a social agent, understanding it rationally as a form of service and not mystically as an ultimate power, we shall differ only in respect of the limits of its ability to render service. A state is an abstract entity. It can only act through the instrumentality or agency of natural or judicial persons. Therefore, there is nothing strange in the notion of the State acting through a corporation and making it an agency or instrumentality of the State

The tasks of government multiplied with the advent of the welfare State and consequently, the framework of civil service administration became increasingly insufficient for handling the new tasks which were often of a specialized and highly technical character. At the same time, 'bureaucracy' came under a cloud. The distrust of government by civil service, justified or not, was a powerful factor in the development of a policy of public administration through separate corporations which would operate largely according to business principles and be separately accountable.

The Rajasthan Electricity Board case (the majority judgment of Bhargava, J.) is perfectly compatible with the view we take of Article 12 or has been expressed in Sukhdev and Page 5 of 72 the Airport Authority. The short question that fell for decision was as to whether the Electricity Board was 'State'. There was no debate, no discussion and no decision on the issue of excluding from the area of State under Article 12, units incorporated under a statute as against those created by a statute. On the other hand, the controversy was over the exclusion from the definition of State in Article 12 corporations engaged in commercial activities. This plea for a narrow meaning was negative by Bhargava, J. and in that context the learned Judge explained the signification of "other authorities" in Article 12

The meaning of the word "authority" given in WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY, which can be applicable, is "a public administrative agency or corporation having quasi-governmental powers authorized to administer a revenue-producing public enterprise". This dictionary meaning of the word "authority" is clearly wide enough to include all bodies created by a statute on which powers are conferred to carry out governmental or quasi-governmental functions. The expression "other authorities" is wide enough to include within it every authority created by a statute and functioning within the territory of India, or Under the control of the Government of India; and we do not see any reason to narrow down this meaning in the context in which the words "other authorities" are used in Article 12 of the Constitution

These decisions of the court support our view that the expression "other authorities" in Article 12 will include all constitutional or statutory authorities on whom powers conferred may be for the purpose of carrying on commercial activities. Under the Constitution, the State is itself envisaged as having the right to carry on trade or business as mentioned in Article 19(1)(g). In Part IV, the State has been given the same meaning as in Article 12 and one of the directive principles laid down in Article 46 is that the State shall promote with special care the educational and economic interests of the weaker sections of the people. The State, as defined in Article 12, is thus comprehended to include bodies created for the purpose of promoting the educational and economic interests of the people. The State, as constituted by our Constitution, is further specifically empowered under Article 298 to carry on any trade or business. The circumstance that the Board under the Electricity Supply Act, is required to carry on some activities of the nature of trade or commerce does not, therefore, give any indication that the Board must be excluded from the scope of the word "State" as used in Article 12.

The decision in Central Inland Water Transport Corpn. Ltd. v. BrojoNathGanguly Page 6 of 72 [(1986) 3 SCC 156] held that the appellant Company was covered by Article 12 because it is financed entirely by three Governments and is completely under the control of the Central Government and is managed by the Chairman and Board of Directors appointed by the Central Government and removable by it and also that the activities carried on by the Corporation are of vital national importance.

However, the tests propounded in Ajay Hasia were not applied in TekrajVasandi v. Union of India [(1988) 1 SCC 236] where the Institute of Constitutional and Parliamentary Studies (ICPS), a society registered under the Societies Registration

Act, 1860 was held not be an "other authority" within the meaning of Article 12. The reasoning is not very clear. All that was said was:

"Having given our anxious consideration to the facts of this case, we are not in a position to hold that ICPS is either an agency or instrumentality of the State so as to come within the purview of 'other authorities' in Article 12 of the Constitution."

Justifiability of fundamental rights:

The Fundamental Rights are considered as one of the integral part of Indian Constitution. The Fundamental Rights are defined as the basic human freedoms which every individual has a right to enjoy for a proper and harmonious development of personality. Although many rights are considered as human rights a specific legal test is used by courts to determine the limitations which can be imposed on them. These rights find their origin in many places such as England Bill of Rights, United States Bill of Rights and France Declaration of Bill of Rights of Man.

The framing of Indian Constitution can be best known by browsing transcripts of Constituent Assembly debate. The Constituent Assembly was composed of members elected from various British Indian Provinces and nominated by the princely states. The framers if Indian Constitution had three things in mind – ensuring unity, democracy and creating social revolution. The Constitution of India took nearly three years in its formation and finally came into force on 26th January 1950.

The biggest challenge before the Constituent Assembly was to evolve a document that would address the diversity amongst the population, create accountable governance and an independent Page 7 of 72 republic. The development of fundamental human rights in India was due to exposure of students to the ideas of democracy, working of parliamentary democracy and British political parties and was also inspired by the:-

- England Bill of Rights
- Us Bill of Rights
- France Declaration of the Rights of Man
- Development of Irish Constitution.

The Nehru Committee observed that the first care should be to have Fundamental Rights guaranteed in such a manner, which will not permit its withdrawal under any circumstances. The Indian Statutory Commission refused to enumerate and guarantee the demand of Fundamental Rights in the Constitution Act. Their refusal was based on Simons Commission argument that abstract definition of such rights is useless unless there existed the will and means to make them effective. The Indian National Congress at its Karachi session in 1931 again demanded for a written guarantee for Fundamental Rights in any future Constitutional setup in India. This demand was also emphasized at the round table conference at London. A memorandum circulated by the Mahatma Gandhi at the second session of round table conference demanded that the new constitution should include a guarantee to the communities concerned to the protection of their cultures, language, scripts, profession, education and practice of religion and religious endowments and protect personal laws and protection of other rights of minority communities. The Joint Select Committee of the British Parliament

did not accept the demand for the constitutional guarantee of Fundamental Rights to British subjects in India. The Committee observed that: -

There are also strong practical arguments against the proposal which may be put in the form of a dilemma: for either the declaration of rights is of so abstract a nature that it has no legal effect of any kind or its legal effect will be to impose an embarrassing restrictions on the powers of the legislatures and to create a grave risk that a large number of laws will be declared invalid or inconsistent with one or other of the rights so declared. There is this further objection that the state has made it abundantly clear that no declaration of fundamental rights is to apply to state Page 8 of 72 territories and it would be anomalous if such a declaration had legal force in part only of the area of the federation.

The committee conceded that there were some legal principles that could approximately be incorporated in the new constitution. Accordingly sections 295, 297-300 of Government of India Act 1935 conferred certain rights and forms of protection on British subjects in India.

By the Objective Resolution adopted on January 22, 1947 the constituent assembly solemnly pledged itself to draw up for future governance a constitution wherein "shall be guaranteed and secure to all the people of India justice, social, economical and political, equality of status, of opportunity and before the law : freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality" and wherein adequate safeguards would be provided for minorities, backward and tribal areas and depressed and other classes. Two days after the adoption of the resolution the assembly elected Advisory Committee for reporting on minorities fundamental rights and on the tribal and excluded areas. The advisory committee in turns constituted on Feb27, 1947 five sub-committees which would deal with fundamental rights.

The sub committee on Fundamental Rights at its first meeting on February 27, 1942 had before it proposal of B.N.Rau to divide Fundamental Rights into two classes i.e. justifiable and non-justifiable.

An important question that faced the sub committee was that of distributing such rights between the Provincial, the Group and the Union Constitution. In the early stages of its deliberation the subcommittee proceeded on the assumption of this distribution and adopted certain rights as having reference only to union and certain rights as having reference both to the union and to the constitutional units. However later it was felt that if Fundamental Rights differed from group to group and from unit to unit or were for that reason not uniformly enforceable, it was felt the Fundamental Rights of citizens of the union had no value. This reorganization leads to the realization that certain Fundamental Rights must be guaranteed to every resident. The sub committee recommended that all the rights incorporated must be binding upon all the authorities whether of the union or of the units. This was thought to be achieved by providing definition in the first clause. The expression the state included the legislature, the government of the union Page 9 of 72 and the units of all local or other authorities within the territories of the union that the law of union included any law

made by the union legislature and any existing Indian law as in force within the union or any part thereof.

The subcommittee fully discussed various drafts submitted by its members and others before formulating the list of Fundamental Rights. Dr. Ambedkar pointed out that the rights incorporated in the draft were borrowed from constitution of various countries where the conditions are more or less analogous to those existing in India.

The draft submitted on April 3, 1947 was circulated to its members with the explanatory notes on various clauses. The clauses contained in the draft report were thereafter discussed in the subcommittee in the light of the comments offered by the members and the final report was submitted to the chairman of the advisory committee on April 16, 1947. Three days later the subcommittee on the minority examined the draft clauses prepared by the fundamental rights subcommittee and reported on the subject of such rights from the point of view of the minorities. The advisory committee deliberated on the recommendations made by the two subcommittee and accepted the recommendations for
(1) Classification of rights into justifiable or non-justifiable. (2) Certain rights being guaranteed to all persons and certain other only to citizens (3) All such rights being made uniformly applicable to the union and the units.

The committee also accepted the drafts of clauses 1 and 2 – the former providing the definition of the state, the unit and the law of the union and latter for the laws or usages inconsistent with the fundamental rights being void in the form recommended by the sub committee also the word constitution was replaced by the word this part of the constitution. The advisory committee incorporated these recommendations in its interim report to the constituent assembly submitted on April 23, 1947. The interim report dealt only with justifiable rights i.e fundamental rights. Later on August 25, 1947 the advisory committee submitted a supplementary report mainly dealing with non-justifiable rights i.e. the Directive Principles of State Policy or the Fundamental Principles of Governance. A notable development took place on 10 December 1948 when the Page 10 of 72 United Nations General Assembly adopted the Universal Declaration of Human Rights and called upon all member states to adopt these rights in their respective constitutions.
The various stages through which the various clauses on fundamental rights passed were similar to other parts of the constitution. Firstly- the constitutional adviser prepared a draft embodying a decision of the constituent assembly. This draft was considered exhaustively and in detail by the drafting committee, which prepared a revised draft and published it in February 1948. The revised draft was then widely circulated. The drafting committee again considered the comments and suggestions received from all quarters and in light of these the committee proposed certain amendments. Discussions in constituent assembly of the draft provisions took place in November and December 1948 and August, September and October 1949. During these meetings the committee considered the various suggestions for amendment made on behalf of Drafting Committee as well as those proposed by the individual members of the assembly. The provisions as passed by the assembly were again scrutinized by the Drafting Committee and incorporated by the drafting changes wherever necessary in the revised draft constitution. The revised draft was again placed before the assembly at its final session held in November 1949. The

fundamental rights were included in the First Draft Constitution (February 1948), the Second Draft Constitution (17 October 1948) and final Third Draft Constitution (26 November 1949) prepared by the Drafting Committee.

Doctrine of Eclipse:

"Judicial Review" is defined as the interposition of judicial restraint on the legislative and executive organs of the Government.! It is the "overseeing by the judiciary of the exercise of powers by other co-ordinate organs of government with a view to ensuring that they remain confined to the limits drawn upon their powers by the Constitution." The concept has its origins in the theory of limited Government and the theory of two laws - the ordinary and the Supreme (i.e., the Constitution) - which entails that any act of the ordinary law-making bodies that contravenes the provisions of the Supreme Law must be void, and there must be some organ possessing the power or authority to pronounce such legislative acts void. Page 11 of 72

With the adoption of a written Constitution and the incorporation of Part III conferring Fundamental Rights therein, it was inevitable that the validity of all laws in India would be tested on the touchstone of the Constitution. Nevertheless, the Constitution-makers included an explicit guarantee of the justiciability of fundamental rights in Article 13, which has been invoked on numerous occasions for declaring laws contravening them void. Courts have evolved various doctrines like the doctrines of severability, prospective overruling, and acquiescence, for the purposes of effectuating this Article. The Doctrine of Eclipse ("the Doctrine") is one such principle, based on the premise that fundamental rights are prospective in nature. As a result of its operation, "an existing law inconsistent with a fundamental right, though it becomes inoperative from the date of commencement of the Constitution, is not dead altogether." Hence, in essence, the Doctrine seeks to address the following quandary: If a law is declared null and void for infringing on a fundamental right, and then that fundamental right is itself amended such that the law is purged of any inconsistency with it, does the law necessarily have to be reenacted afresh, or can it revive automatically from the date of the amendment? In other words, what is the precise nature of the operation of the Doctrine in the face of the general rule that a Statute void for unconstitutionality is non-est and "notionally obliterated" from the Statute Book?

Inherent in the application of the Doctrine to such questions is the predicament of conflicting priorities. What is to be determined here is whether, for the purpose of avoiding the administrative difficulties and expenditure involved in re-enacting a law, a law which was held void on the very sensitive and potent ground of violation of fundamental rights should, under special circumstances be permitted to revive automatically. This also raises some profound questions about legislative competence and the interference of courts in law making. An extremely vital aspect of the Doctrine - which, in India, has thus far been largely overlooked by legal theorists and practitioners alike - is its crucial role in the federal framework. A survey of the principal federations in the Anglo-American world shows that the Doctrine has been used primarily in cases where the enacting legislature undoubtedly had the power to enact a law, but the law was rendered in operative because of supervening impossibilities, arising in the form of other incompatible laws enacted by legislatures

having superior powers to enact such laws. A complete demarcation of powers between the federal and state spheres is neither feasible nor desirable in a federal polity

Evolution of Doctrine of Eclipse:

In India, the Doctrine of Eclipse has been referred to, most frequently, in cases involving alleged violations of fundamental rights. Questions regarding the retrospectivity of these rights and the import of the word "void" in Article 13(1) of the Constitution, came up for deliberation in the leading case of KeshavanMadhavaMenon v. State of Bombay, A.I.R. 1951 S.C. 128, wherein a prosecution proceeding was initiated against the appellant under the Indian Press (Emergency Powers) Act, 1931, in respect of a pamphlet published in 1949. The present Constitution came into force during the pendency of the proceedings. The appellant pleaded that the impugned section of the 1931 Act was in contravention of Article 19(1)(a) of the Constitution, and by virtue of Article 13(1), was void. Hence, it was argued that the proceedings against him could not be continued. This case raised several challenging issues with respect to the Doctrine, as analyzed below.

It is now well settled that the Constitution has no retrospective effect. However, one of the basic questions related to the origin of the Doctrine of Eclipse that was raised in KeshavanandBharti Case, was whether fundamental rights are retrospective in operation. Article 13(1) provides that all pre-Constitutional laws, in so far as they are inconsistent with fundamental rights, are void. If fundamental rights are retrospective, then all pre-Constitutional laws inconsistent with fundamental rights must be void ab initio.

On this point, in Keshavanand, both Das and Mahajan, JJ, maintained that fundamental rights, including the freedom of speech and expression, were granted for the first time by the Constitution and that in September 1949, when proceedings were initiated, the appellant did not enjoy these rights. Hence, it was established that, as fundamental rights became operative only on, and from the date of the Constitution coming into force, the question of inconsistency of the existing laws with those rights must necessarily arise only on and from such date. Turning specifically to Article 13(1), the Court further held that every statute is prima facie prospective unless it is expressly or by necessary implication made retrospective. According to him, there was nothing in the language of Article 13(1), to suggest that there was an intention to give it retrospective operation. In fact, the Court was of the opinion that the language clearly points the other way.

It was therefore held that Article 13(1) can have no retrospective effect, but is wholly prospective in operation." This interpretation has been upheld in subsequent cases.' The prospective nature of Article 13(1), and the limited connotation accorded to the word "void" in Keshavan, which was expounded by Das, J. in Behram, necessitated the enunciation of the Doctrine of Eclipse in the leading case of BhikajiNarainDhakras v. State of Madhya Pradesh, AI.R. 1955 S.C. 781. In this case, the impugned provision allowed for the creation of a Government monopoly in the private transport business. After the coming into force of the Constitution, this provision became void for violating Article 19(1)(g) of the Constitution. However,

Article 19(6) was amended in 1951, so as to permit State monopoly in business. It was argued on behalf of the petitioners that the impugned Act, being void under Article 13(1), was dead and could not be revived by any subsequent amendment of the Constitution, but had to be re-enacted. This contention was rejected by a unanimous decision of the Supreme Court, which laid down that after the amendment of Article 19(6) in 1951, the constitutional impediment was removed. The Act, therefore, ceased to be unconstitutional, and became revivified and enforceable.

The crux of the decision was the observation that an existing law inconsistent with a fundamental right, though inoperative from the date of commencement of the Constitution, is not dead altogether. According to some authors, it "is a good law if a question arises for determination of rights and obligations incurred before the commencement of the Constitution, and also for the determination of rights of persons who have not been given fundamental rights by the Constitution." In this context, Das, C.J., held: “The true position is that the impugned law became, as it were, eclipsed, for the time being, by the fundamental right. The effect of the Constitution (First Amendment) Act, 1951 was to remove the shadow and to make the impugned Act free from all blemish or infirmity”.

He reiterated that such laws remained in force qua non-citizens, and it was only against the citizens that they remained in a dormant or moribund condition. This case was thus the Page 14 of 72 foundation of the Doctrine, which has since been the subject of judicial contemplation in numerous decisions.

Can the Doctrine be applied to Post-Constitutional Laws? In the author's opinion, three questions must be answered, in order to gauge the applicability of the Doctrine to post-Constitutional laws. First, can a post-Constitutional law be revived by a subsequent Constitutional amendment removing the Constitutional bar to its enforceability? Second, if a post Constitutional law violates rights conferred on citizens alone, (and thus becomes void qua them), does it remain valid and operative qua non-citizens like foreigners and companies? Finally, can amending the Act in question so as to remove the blemish revive the law in question, or will it have to be re-enacted as a whole?

In Saghir Ahmed v. State of U.P.; A.I.R. 1954 S.C.728, a Constitution Bench of the Apex Court unanimously stated that the Doctrine could not applied to the impugned postConstitutional law. A legislation that contravened Article 19(1)(g) and was not protected by clause (6) ofthe Article, when it was enacted after the commencement of the Constitution, could not be validated even by subsequent Constitutional amendment.

However, the following observation of Das, C.J. in Bhikaji, has generated much perplexity on the issue: But apart from this distinction between pre-Constitution and post-Constitution laws on which, however, we need not rest our decision, it must be held that these American authorities can have no application to our Constitution. All laws, existing or future, which are inconsistent with the provisions of Part III of our Constitution are, by the express provision of Article 13, rendered void 'to the extent of such inconsistency.' Such laws were not dead for all purposes. They existed for the

purpose of pre-Constitution rights and liabilities and they remained operative, even after the Constitution, as against non-citizens.

Doctrine of Waiver:

The Fundamental rights (F.R) under Part III Under Art 12 to 35 of the constitution are conferred to every citizen of India by the constitution. These constitutional rights are not absolute. There are reasonable restriction impose by the constitution. The primary objectives of this F.R are based on public policy. Therefore no individual can waive off such FRs. The doctrine of waiver of right is based on the premise that a person is his best judge and that he has the liberty to waive the enjoyment of such right as are conferred on him by the state. However the person must have the knowledge of his rights and that the waiver should be voluntary.

In BasheshrNath vs. Income Tax commissioner AIR 1959 SC 149, Held that In this case the petitioner whose matter had been referred to the Investigation commissioner u/s 5(1) of the Taxation of Income Act 1947 was found to have concealed a settlement u/s 8 A to pay Rs 3 Lakhs in monthly installments, by way of arrears of tax and penalty. In the meanwhile the SC in another case held that section 5(1) is ultra vires the constitution, as it was inconsistence with Art 14. So the appellant cannot waive off his FR.

Conclusion- It means "a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth, either by the acts of Page 17 of 72 judicial or legislative officers, or by his own deed, acts, or representations, either express or implied.

Doctrines of Severability:

Art 13 provides that Act is void which is inconsistent with the Part III of the constitution. Art 13 is having a flexible nature; it does not make the whole Act inoperative. It makes inoperative only such provisions of it as are inconsistent with or violative of fundamental right. Sometimes valid and invalid portion of the Act are so intertwined that they cannot be separated from one another. In such cases, the invalidity of the portion must result in the invalidity of the Act in its entirety, the reason is that the valid part cannot survive independently. In determining whether the valid parts of a statue are severable from the invalid parts. In intention of the Legislature is the determining factor. In other words it should be asked whether the legislature would have enacted at all that which survive without the part found ultra virus

The rule of severability applies as such clause (2) as to Clause (1) of Art 13 in JiaLal v/s Delhi Administration AIR 1962, The appellant was prosecuted for an office u/s 19 (f) of the Arm Act 1878. In fact, section 29 of this Act provides that in certain area in which the petitioner did not obtain any license in which the petitioner was residing, it was not necessary to obtain the said license for possession firearm. Section 29 was challenged as ultra virus and unconstitutional as offending Art 14 and also section 19(f) of the Arms Act 1878 on the ground that two sections were not severable, on the

question of severability the SC held that the section 29 of the Arms Act 1878 was ultra virus.

RIGHT TO EQUALITY

ARTICLE 14

Article 14 declares "the State shall not deny to any person equality before the law or equal protection of the laws within the territory of India". The phrase "equality before the law" occurs in almost all written constitutions that guarantee fundamental rights. Equality before the law is an expression of English Common Law while "equal protection of laws" owes its origin to the American Constitution. Both the phrases aim to establish what is called the "equality to status and of opportunity" as embodied in the Preamble of the Constitution. While equality before the law is a somewhat negative concept implying the absence of any special privilege in favour of any individual and the equal subjection of all classes to the ordinary law, equal protection of laws is a more positive concept employing equality of treatment under equal circumstances. Thus, Article 14 stands for the establishment of a situation under which there is complete absence of any arbitrary discrimination by the laws themselves or in their administration.

Interpreting the scope of the Article, the Supreme Court of India held in Charanjit Lai Choudhury vs. The Union of India that: (a) Equal protection means equal protection under equal circumstances; (b) The state can make reasonable classification for purposes of legislation; (c) Presumption of reasonableness is in favour of legislation; (d) The burden of proof is on those who challenge the legislation. Explaining the scope of reasonable classification, the Court held that "even one corporation or a group of persons can be taken to be a class by itself for the purpose of legislation provided there is sufficient basis or reason for it. The onus of proving that there were also other companies similarly situated and this company alone has been discriminated against, was on the petitioner".

In its struggle for social and political freedom mankind has always tried to move towards the ideal of equality for all. The urge for equality and liberty has been the motive force of many revolutions. The charter of the United Nations records the determination of the member nations to reaffirm their faith in the equal rights of men and women. Page 20 of 72 Indeed, real and effective democracy cannot be achieved unless equality in all spheres is realised in a full measure. However, complete equality among men and women in all spheres of life is a distant ideal to be realised only by the march of humanity along the long and difficult path of economic, social and political progress.

The Constitution and laws of a country can at best assure to its citizens only a limited measure of equality. The framers of the Indian Constitution were fully conscious of this. This is why while they gave political and legal equality the status of a fundamental right, economic and social equality was largely left within the scope of Directive Principles of State Policy. The Right to Equality affords protection not only against discriminatory laws passed by legislatures but also prevents arbitrary discretion being vested in the executive. In the modern State, the executive is armed with vast powers, in the matter of enforcing by-laws, rules and regulations as well as in the performance of a number of other functions

The equality clause prevents such power being exercised in a discriminatory manner. For example, the issue of licenses regulating various trades and business activities cannot be left to the unqualified discretion of the licensing authority. The law regulating such activities should lay down the principles under which the licensing authority has to act in the grant of these licenses. Article 14 prevents discriminatory practices only by the State and not by individuals. For instance, if a private employer like the owner of a private business concern discriminates in choosing his employees or treats his employees unequally, the person discriminated against will have no judicial remedy. One might ask here, why the Constitution should not extend the scope of these right to private individuals also. There is good reason for not doing so. For, such extension to individual action may result in serious interference with the liberty of the individual and, in the process; fundamental rights themselves may become meaningless.

After all, real democracy can be achieved only by a proper balance between the freedom of the individual and the restrictions imposed on him in the interests of the community. Yet, even individual action in certain spheres has been restricted by the Constitution, as for example, the Page 21 of 72 abolition of untouchability, and its practice in any form by any one being made an offence. Altogether, Article 14 lays down an important fundamental right which has to be closely and vigilantly guarded. There is a related matter that deserves consideration here. The right to equality and equal protection of laws loses its reality if all the citizens do not have equal facilities of access to the courts for the protection of their fundamental rights.

The fact that these rights are guaranteed in the Constitution does not make them real unless legal assistance is available for all on reasonable terms. There cannot be any real equality in the right "to sue and be sued" unless the poorer sections of the community have equal access to courts as the richer sections. There is evidence that this point is widely appreciated in the country as a whole and the Government of India in particular and that is why steps are now being taken to establish a system of legal aid to those who cannot afford the prohibitive legal cost that prevails in all parts of the country.

Doctrine of Reasonable classification:

Article 14 says that State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. Equality before law as provided in the Article 14 of our constitution provides that no one is above the law of the land. Rule of the Law is an inference derived from Article 14 of the constitution. The article 14 aims to establish the "Equality of Status and Opportunity" as embodied in the Preamble of the Constitution.

Article 14 of the Indian Constitution (intelligible differentia and the object sought to be achieved It is now accepted that persons may be classified into groups and such groups may be treated differently if there is a reasonable basis for such difference. Article 14 forbids class legislation; it Page 22 of 72 does not forbid classification or differentiation which rests upon reasonable grounds of distinction. The principle of equality does not mean that every law must have universal application to all the

persons who are not by nature, attainment or circumstances in the same position. The varying needs of different classes of persons require different treatment. In order to pass the test for permissible classification two conditions must be fulfilled, namely: (1) the classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group, and (2) the differentia must have a rational nexus with the object sought to be achieved by the statute in question. What is however necessary is that there must be a substantial basis for making the classification and the there should be a nexus between the basis of classification and the object of the statute under consideration. In other words, there must be some rational nexus between the basis of classification and the object intended to achieve. The expression "intelligible differentia" means difference capable of being understood. A factor that distinguishes or in different state or class from another which is capable of being understood. The impugned act deals with users of social networking websites Test laid down in State of West Bengal v. Anwar Ali Sarkar i.e. the differentia or classification must have a rational nexus with the object sought to be achieved by the statute in question Supreme Court in many of its judgment has clearly indicated about such kinds of classifications as vague and inoperative. The Supreme Court in landmark judgment of Maneka Gandhi v. Union of India clearly ruled out the room for arbitrariness. 'Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. The principle of reasonableness, which logically as well as philosophically, is an essential element of equality or non-arbitrariness, pervades Article 14 like a brooding omnipresence.' Rule of law, which permeates the entire fabric of the Indian Constitution, excludes arbitrariness. Wherever we find arbitrariness or unreasonableness there is denial there is denial of rule of law. This new dimension of Art.14 transcends the classificatory principle. Art.14 is no longer to be equated with the principle of classification. It is primarily a guarantee against arbitrariness in state action and the doctrine of classification has been evolved only as a subsidiary rule for testing whether a particular state action is arbitrary or not. If a law is arbitrary or irrational it Page 23 of 72 would fall foul of Art.14. As an example, it has been held that any penalty disproportionate to the gravity of the misconduct would be violative of Art.14. So the impugned act should be tested at the touchstone of Art. 13(2) and should be declared invalid.

Principle of Absence Arbitrariness:

It is now too well-settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux of Article 14 of the Constitution and basic to the rule Page 26 of 72 of law, the system which governs us. Arbitrariness is the very negation of the rule of law. Satisfaction of this basic test in every State action is sine qua lion to its validity and in this respect; the State cannot claim comparison with a private individual even in the field of contract. This distinction between the State and a private individual in the field of contract has to be borne in the mind.

The meaning and true import of arbitrariness is more easily visualized than precisely stated or defined. The question, whether an impugned act is arbitrary or not, is ultimately to be answered on the facts and in the circumstances of a given case. An

obvious test to apply is to see whether there is any discernible principle emerging from the impugned act and if so, does it satisfy the test of reasonableness. Where a mode is prescribed for doing an act and there is no impediment in following that procedure, performance of the act otherwise and in a manner, which does not disclose any discernible principle, which is reasonable, may itself attract the vice of arbitrariness. Every State action must be informed by reason and it follows that an act uninformed by reason, is arbitrary. Rule of law contemplates governance by laws and not by humour, whims or caprices of the men to whom the governance is entrusted for the time being. It is trite that be you ever so high, the laws are above you'. This is what men in power must remember, always.

Almost a quarter century back, this Court in S.G. Jaisinghani v. Union of India and Ors., [1967], indicated the test of arbitrariness and the pitfalls to be avoided in all State actions to prevent that vice, in a passage as under:"In this context it is important to emphasize that the absence of arbitrary power is the first essential of the rule of law upon which our whole constitutional system is based. In a system governed by rule of law, discretion, when conferred upon executive authorities, must be confined within clearly defined limits. The rule of law from this point of view means that decisions should be made by the application of known principles and rules and, in general, such decisions should be predictable and the citizen should know where he is. If a decision is taken without any principle or without any rule it is unpredictable and such a decision is the antithesis of a decision taken in accordance with the rule of law. (Dicey–"Law of the Constitution"-Tenth Edn., Introduction cx).In ShrilekhaVidyarthiVs Union of India

"Law has reached its finest moments", stated Douglas, J. in United States v. Wunderlick, (*),"when it has freed man from the unlimited discretion of some ruler … Where discretion isabsolute, man has always suffered". It is in this sense that the rule of law may be said to be thesworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of, "means sound discretion guided by law. It must be governed by rule, nothumour: it must not be arbitrary, vague and fanciful." After Jaisinghani's case (supra), longstrides have been taken in several well-known decisions of this Court expanding the scope ofjudicial review in such matters. It has been emphasized time and again that arbitrariness isanathema to State action in every sphere and wherever the vice percolates, this Court would notbe impeded by technicalities to trace it and strike it down. This is the surest way to ensure themajesty of rule of law guaranteed by the Constitution of India.Every discretionary power vested in the executive should be exercised in a just, reasonable andfair way. That is the essence of the rule of law. In United States V Wunderlich (1951), Law has reached its first finest moments when it has freed man from the unlimited discretion ofsome ruler, some civil or military official, some bureaucrat. Where discretion is absolute, manhas always suffered .At times it has been his property that has been invaded, at times his privacy; at times his liberty of movement; at times his freedom of thought; at times his life.

Absolute discretion is a ruthless master It is more destructive of freedom than any of mans other invention. Discretion means sound discretion guided by law it must be governed by rule not humor; it must not be arbitrary, vague or fanciful. In a state of governed by the rule of Law, discretion must be confined within clearly defined

limits. A decision taken without any principle or rule is the antithesis of a decision of a decision taken in accordance with the rule of Law.In a State governed by the rule of law, discretion can never be absolute. Its exercise has always to be in conformity with rules; in contradistinction to being whimsical and should not stand smack of an attitude of " so let it be written, so let it be done". It is important to emphasize that the absence of arbitrary powers is the first essential of the Rule of Law upon which our whole constitutional system is based. In a system governed by the rule of law, discretion when conferred by upon executive authorities must be confined within clearly defined limits. Aeltemesh Rein, Advocate, Supreme Court Of IndiaVs Union Of India And Others.

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. State Policy : The sweep of Article 14 covers all state action .Non arbitrariness and fairness are the two immobile and unalterable cornerstone of a legal behaviour baseline. Every action even a change of policy in any relam of state activity has to be informed fair and non arbitrary. In E. P. ROYAPPA Vs.STATE OF TAMIL NADU & ANR. An authority, however, has to act properly for the purpose for which the power is conferred. He must take a decision in accordance with the provisions of the Act and the statutes. He must not be guided by extraneous or irrelevant consideration. He must not act illegally, irrationally or arbitrarily. Any such illegal, irrational or arbitrary action or decision, whether in the nature of legislative, administrative or quasi-judicial exercise of power is liable to be quashed being violative of Article 14 of the Constitution. In NeelimaMisraVsHarinderKaurPaintal And Others (AIR 1990 SC 1402)

Freedom of Speech and Expression:

The freedom of speech is regarded as the first condition of liberty. It occupies a preferred and important position in the hierarchy of the liberty, it is truly said about the freedom of speech that it is the mother of all other liberties. Freedom of Speech and expression means the right to express one's own convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode. In modern time it is widely accepted that the right to freedom of speech is the essence of free society and it must be safeguarded at all time. The first principle of a free society is an untrammeled flow of words in an open forum. Liberty to express opinions and ideas without hindrance, and especially without fear of punishment plays significant role in the development of that particular society and ultimately for that state. It is one of the most important fundamental liberties guaranteed against state suppression or regulation. Freedom of speech is guaranteed not only by the constitution or statutes of various states but also by various international conventions like Universal Declaration of Human Rights, European convention on Human Rights and fundamental freedoms, International Covenant on Civil and Political Rights etc. These declarations expressly talk about protection of freedom of speech and expression. Why to protect freedom of speech? Freedom of speech offers human being to express his feelings to other, but this is not the only reason; purpose to protect the freedom of speech. There could be more reasons to protect these essential liberties.

There are four important justifications for freedom of speech – 1) For the discovery of truth by open discussion - According to it, if restrictions on speech are tolerated, society prevents the ascertainment and publication of accurate facts and valuable opinion. That is to say, it assists in the discovery of truth. 2) Free speech as an aspect of self- fulfillment and development – freedom of speech is an integral aspect of each individual's right to self-development and self-fulfillment. Restriction on what we are allowed to say and write or to hear and read will hamper our personality and its growth. It helps an individual to attain self-fulfillment. 3) For expressing belief and political attitudes - freedom of speech provides opportunity to express one's belief and show political attitudes. It ultimately results in the welfare of the society and state. Thus, freedom of speech provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change. 4) For active participation in democracy – democracy is most important feature of today's world. Freedom of speech is there to protect the right of all citizens to understand political issues so that they can participate in smooth working of democracy. That is to say, freedom of speech strengthens the capacity of an individual in participating in decision-making. Thus we find that protection of freedom of speech is very much essential.

Protection of freedom of speech is important for the discovery of truth by open discussion, for self- fulfillment and development, for expressing belief and political attitudes, and for active participation in democracy. The present study is intended to present the provisions of the American and Indian Constitution, which recognize the freedom of speech and expression, the basic fundamental rights of human being. It is also to be examined that what is judicial trend in interpreting the freedom of speech and expression provisions. The study also covers the comparison between the approaches of both countries as far as freedom of speech is concerned.

Freedom of Association:

All citizens have the right to form associations and unions. It includes the right to form political parties, companies, partnership firms, societies, clubs, organizations, trade unions etc. It not only includes the right to start an association or union but also to continue with the association or union. Further, it covers the negative right of not to form or join an association or union.
The right to obtain recognition of the association is not a fundamental right.
Restrictions on Freedom of Association:
The state can impose reasonable restrictions on the following grounds:
1. Sovereignty and integrity of India,
2. Public order and morality

The Supreme Court held that the trade unions have no guaranteed right to effective bargaining or the right to strike or right to declare a lockout. The right to strike can be controlled by an appropriate industrial law.

Freedom of Movement:

This freedom entitles every citizen to move freely throughout the territory of the country. This right underlines the idea that the India is one unit so far as the citizens

are concerned. Thus the purpose is to promote national feeling. Restrictions on Freedom of Movement: The state can impose reasonable restrictions on the following grounds: 1. The interests of general public 2. The protection of interests of any scheduled tribes. The entry of outsiders in tribal areas is restricted to protect the distinctive culture, language, customs and manners of schedule tribes and to safeguard their traditional vocation and properties against exploitation.

Reasonable Restrictions:

The Fundamental Rights guaranteed by the Constitution of India are not absolute. There are certain restrictions, which can be imposed by the state according to the procedure, established by law. However, these restrictions must be reasonable and not arbitrary. Article 19 covers these fundamental freedoms as well as the restrictions, which can be imposed on these rights. In this paper, all the six freedoms defined in Article 19 and the restrictions are highlighted. Also, all the landmark cases are covered in this paper while dealing with the concept of Reasonable Restrictions. The main focus of this paper is to throw some light on the test to determine the reasonabilility in the restrictions mentioned in Article 19 of the Constitution of India. Further, in this paper, some light is also thrown as to what constitutes "unreasonable restrictions."

Unit 2: Fundamental Rights-Part 2

Protection in respect of conviction for offences

(1) No person shall be convicted of any offence except for violation of the 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
(2) No person shall be prosecuted and punished for the same offence more than once
(3) No person accused of any offence shall be compelled to be a witness against himself
According to Article 20, no one can be awarded punishment which is more than what the law of the land prescribes at that time. This legal axiom is based on the principle that no criminal law can be made retrospective, that is, for an act to become an offence, the essential condition is that it should have been an offence legally at the time of committing it. Moreover, no person accused of any offence shall be compelled to be a witness against himself. "Compulsion" in this article refers to what in law is called "Duress" (injury, beating or unlawful imprisonment to make a person do something that he does not want to do). This article is known as a safeguard against self incrimination. The other principle enshrined in this article is known as the principle of double jeopardy, that is, no person can be convicted twice for the same offence, which has been derived from Anglo Saxon law. This principle was first established in the Magna Carta.

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

Protection of life and personal liberty is also stated under right to life and personal liberty. Article 21 declares that no citizen can be denied his life and liberty except by law. This means that a person's life and personal liberty can only be disputed if that person has committed a crime. However, the right to life does not include the right to die, and hence, suicide or an attempt thereof, is an offence. (Attempted suicide being interpreted as a crime has seen many debates. The Supreme Court of India gave a landmark ruling in 1994. The court repealed section 309 of the Indian penal code, under which people attempting suicide could face prosecution and prison terms of up to one year. In 1996 however another Supreme Court ruling nullified the earlier one.) "Personal liberty" includes all the freedoms which are not included in Article 19 (that is, the six freedoms). The right to travel abroad is also covered under "personal liberty" in Article 21.

In 2002, through the 86th Amendment Act, Article 21(A) was incorporated. It made the right to primary education part of the right to freedom, stating that the State would provide free and compulsory education to children from six to fourteen years of age. Six years after an amendment was made in the Indian Constitution, the union cabinet cleared the Right to Education Bill in 2008. It is now soon to be tabled in Parliament for approval before it makes a fundamental right of every child to get free and compulsory education.

The constitution also imposes restrictions on these rights. The government restricts these freedoms in the interest of the independence, sovereignty and integrity of India. In the interest of morality and public order, the government can also impose restrictions. However, the right to life and personal liberty cannot be suspended. The six freedoms are also automatically suspended or have restrictions imposed on them during a state of emergency.

Article 21 of the Constitution

Article 21 states that "No person shall be deprived of his life or personal liberty except according to procedure established by law". After reading the Article 21, it has been interpreted that the term 'life' includes all those aspects of life, which go to make a man's life meaningful, complete, and worth living.

Like everything mankind has ever achieved, there has been a positive and a negative side to it. Technology has invaded every part of our lives whether the invasion was desired or not, we cannot be sure whether what we say has been heard by a third party as well whether that was desired or not. The proverbial Hindi saying of even walls having ears has never rung truer. The principle of the world today can be: whatever you may do, the world will get to know before you realize, ask a certain Tiger Woods about it.

In the earlier times in India, the law would give protection only from physical dangers such as trespass from which the Right to Property emerged to secure his house and cattle. This was considered to be the Right to Life. As the ever changing common law grew to accommodate the problems faced by the people, it was realized that not only was physical security required, but also security of the spiritual self as well as of his feelings, intellect was required. Now the Right to Life has expanded in its scope and

comprises the right to be let alone the right to liberty secures the exercise of extensive civil privileges; and the term "property" has grown to comprise every form of possession — intangible, as well as tangible.

The strategy adopted by the Supreme Court with a view to expand the ambit of Art. 21 and to imply certain right there from, has been to interpret Art.21 along with international charters on Human Rights.

The Court has implied the right of privacy from Art.21 by interpreting it in conformity with Art.12 of the Universal Declaration on Human Rights and Art.17 of the International Covenant on Civil and Political Rights, 1966. Both of these international documents provide for the right of privacy.

Right to privacy is not enumerated as a Fundamental Right in the Constitution of India. The scope of this right first came up for consideration in Kharak Singh's Case which was concerned with the validity of certain regulations that permitted surveillance of suspects. The minority decision of SUBBA RAO J. deals with this light. In the context of Article19(1) (d), the right to privacy was again considered by the Supreme Court in 1975. In a detailed decision, JEEVAN REDDY J. held that the right to privacy is implicit under Article 21. This right is the right to be let alone. In the context of surveillance, it has been held that surveillance, if intrusive and seriously encroaches on the privacy of citizen, can infringe the freedom of movement, guaranteed by Articles 19(1)(d) and 21. Surveillance must be to prevent crime and on the basis of material provided in the history sheet. In the context of an anti-terrorism enactment, it was held that the right to privacy was subservient to the security of the State and withholding information relevant for the detention of crime can't be nullified on the grounds of right to privacy. The right to privacy in terms of Article 21 has been discussed in various cases.

International Concepts of Privacy

Article 12 of Universal Declaration of Human Rights (1948) states that "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attack upon his honour and reputation. Everyone has the right to protection of the law against such interference or attacks."

Article 17 of International Covenant of Civil and Political Rights (to which India is a party) states "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence nor to unlawful attacks on his honour and reputation.

Article 8 of European Convention on Human Rights states "Everyone has the right to respect for his private and family life, his home and his correspondence; there shall be no interference by a public authority except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals or for the protection of the rights and freedoms of others."

Right To Privacy In India

As already discussed Article 21 of the Constitution of India states that "No person shall be deprived of his life or personal liberty except according to procedure

established by law". The right to life enshrined in Article 21 has been liberally interpreted so as to mean something more than mere survival and mere existence or animal existence. It therefore includes all those aspects of life which makes a man's life more meaningful, complete and worth living and right to privacy is one such right. The first time this topic was ever raised was in the case of Kharak Singh v. State of UP where the Supreme Court held that Regulation 236 of UP Police regulation was unconstitutional as it clashed withArticle 21 of the Constitution. It was held by the Court that the right to privacy is a part of right to protection of life and personal liberty. Here, the Court had equated privacy to personal liberty.

In **Govind v. State of Madhya Pradesh** , Mathew, J. accepted the right to privacy as an emanation from Art. 19(a), (d) and 21, but right to privacy is not absolute right. "Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, the fundamental right must be subject to restriction on the basis of compelling public interest". Surveillance by domiciliary visits need not always be an unreasonable encroachment on the privacy of a person owing to the character and antecedents of the person subjected to surveillance as also the objects and the limitation under which the surveillance is made. The right to privacy deals with 'persons not places'.

In **Smt. Maneka Gandhi v. Union of India &An**r.,(1978) in this case SC 7 Judge Bench said 'personal liberty' in article 21 covers a variety of rights & some have status of fundamental rights and given additional protection u/a 19. Triple Test for any law interfering with personal liberty: (1) It must prescribe a procedure; (2) the procedure must withstand the test of one or more of the fundamental rights conferred u/a 19 which may be applicable in a given situation and (3) It must withstand test of Article 14. The law and procedure authorising interference with personal liberty and right of privacy must also be right just and fair and not arbitrary, fanciful or oppressive.

In **Naz Foundation Case** (2009) Delhi HC gave the landmark decision on consensual homosexuality. In this case S. 377 IPC and Articles 14, 19 & 21 were examined. Right to privacy held to protect a "private space in which man may become and remain himself". It was said individuals need a place of sanctuary where they can be free from societal control- where individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may reflect the values of their peers rather than the realities of their nature.

It is now a settled position that right to life and liberty under article 21 includes right to privacy. Right to privacy is 'a right to be let alone'. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. Any person publishing anything concerning the above matters except with the consent of the person would be liable in action for damages. Position however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

Right To Privacy-Permissible Restriction
Intrusion into privacy may be by- (1) Legislative Provision (2) Administrative/Executive order (3) Judicial Orders. Legislative intrusion must be

tested on the touchstone of reasonableness as guaranteed by the Constitution and for that purpose the Court can go into proportionality of the intrusion vis-à-vis the purpose sought to be achieved. (2) So far as administrative or executive action is concerned it has to be reasonable having regard to the facts and circumstances of the case. (3) As to judicial warrants, the Court must have sufficient reason to believe that the search or seizure is warranted and it must keep in mind the extent of search or seizure necessary for protection of the particular State interest. In addition, as stated earlier, common law did recognise rare exceptions for conduct of warrantless searches could be conducted but these had to be in good faith, intended to preserve evidence or intended to prevent sudden anger to person or property.

The Privacy Bill, 2011

The bill says, "every individual shall have a right to his privacy — confidentiality of communication made to, or, by him — including his personal correspondence, telephone conversations, telegraph messages, postal, electronic mail and other modes of communication; confidentiality of his private or his family life; protection of his honour and good name; protection from search, detention or exposure of lawful communication between and among individuals; privacy from surveillance; confidentiality of his banking and financial transactions, medical and legal information and protection of data relating to individual."

The bill gives protection from a citizen's identity theft, including criminal identity theft (posing as another person when apprehended for a crime), financial identifies theft (using another's identity to obtain credit, goods and services), etc.

The bill prohibits interception of communications except in certain cases with approval of Secretary-level officer. It mandates destruction of interception of the material within two months of discontinuance of interception.

The bill provides for constitution of a Central Communication Interception Review Committee to examine and review the interception orders passed and is empowered to render a finding that such interception contravened Section 5 of the Indian Telegraphs Act and that the intercepted material should be destroyed forthwith. It also prohibits surveillance either by following a person or closed circuit television or other electronic or by any other mode, except in certain cases as per the specified procedure.

As per the bill, no person who has a place of business in India but has data using equipment located in India, shall collect or processor use or disclose any data relating to individual to any person without consent of such individual.

The bill mandates the establishment of a Data Protection Authority of India, whose function is to monitor development in data processing and computer technology; to examine law and to evaluate its effect on data protection and to give recommendations and to receive representations from members of the public on any matter generally affecting data protection.

The Authority can investigate any data security breach and issue orders to safeguard the security interests of affected individuals in the personal data that has or is likely to

have been compromised by such breach.

The bill makes contravention of the provisions on interception an offence punishable with imprisonment for a term that may extend up to five years or with fine, which may extend to Rs. 1 lakh or with both for each such interception. Similarly, disclosure of such information is a punishable offence with imprisonment up to three years and a fine of up to Rs. 50,000, or both.

Further, it says any persons who obtain any record of information concerning an individual from any officer of the government or agency under false pretext shall be punishable with a fine of up to Rs. 5 Lacs.

Judicial Review:

The Constitution of India contains specific provisions under Articles 32, 226 and 227 enabling the Supreme Court and the High Courts to grant any writs named therein for the enforcement of the fundamental rights or for any other purpose. Indian Constitution is one of the few constitutions in the world that had given the power of judicial review to the higher courts by making specific provisions with so much of clarity and in unambiguous and express terms. Even in the written Constitution of the United States, where the power of judicial review of both executive and legislative acts had grown to disproportionate dimensions, there is no express provision for the power of judicial review of the higher courts. When compared to England and the United States, in India the growth and development of judicial review as a formidable constitutional doctrine was a natural consequence flowing from the written Constitution with specific provisions of judicial review. In India the doctrine has been accepted and approved as one of the basic features of the Constitutional. How far the framers of the Constitution have envisaged the scope and ambit of this power, when they engraved it in the Constitution, is not evident from the discussions and debate in the Constituent Assembly. But, it has to be noted that the developments on this line in the public law in U.S., that has already established the institution of judicial review as a powerful tool to control maladministration and abuse of public power, must not have missed the attention of our constitution makers, who had scanned the other constitutions of the world to follow and included their better features in the Indian Constitution. Therefore, it is hard to believe that the Indian constitution makers did not envisage the possible future conflicts between judiciary and the other two limbs of the State in a growing pluralistic democracy like India. It is surprising that when some other Articles which are comparatively of lesser importance had attracted elaborate debates in the Constituent Assembly, Articles 226, 227 and 32 have drawn only very little attention in the debates despite their vast potential for judicial supremacy over the other two organs of the state in future. It may be presumed that the framers of the constitution have not either applied their mind so deep as to forecast possible or eventual conflicts between the judiciary and the other two organs of the state, or that the constitution makers themselves wanted and envisaged the judiciary to be the final arbiter of all disputes of whatever nature arising in the Republic. It is worthwhile to note the observation of the Parliamentary Joint Committee in their report in this connection. They observed: “The success of a constitution depends, indeed far more upon the manner and sprit in which it is worked than upon its formal provisions. It is

impossible to foresee, so strange and perplexing are the conditions of the problem, the exact lines which constitutional developments will eventually follow, and it is, therefore, more desirable that those upon whom responsibility will rest should have all reasonable scope for working out there own salvation by the method oftrial and error"?

The Right Against Exploitation:

The Rights against Exploitation is provided under Articles 23 and 24 of the Constitution of India. Right to personal liberty is never real if others expose some people to exploitation. Arts. 23 and 24 of the constitution are designed to prevent exploitation of men by men. Thus rights ensured by these two articles may be considered as complimentary to the individual rights secured by Arts. 19 and 21 of the constitution. Article 23 of the Indian Constitution reads as follows:i. "Traffic in human beings and beggar and similar other forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law." ii. "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 of class or any of them." Ever since the dawn of civilization in every society, the stronger exploited the weak. Slavery was the most prevalent and perhaps the cruelest form of human exploitation. Our constitution does Page 41 of 72 not explicitly forbid slavery. The scope of Article 23 is far wide. Any form of exploitation is forbidden. Thus forcing the landless labour to render free service by the land-owner is unconstitutional. Equally, forcing helpless women into prostitution is a crime. The intention of the constitution is that whatever a person does must be voluntary. There must not be any element of coercion involved behind a man's action. The state however may call upon citizens to render national service in defence of the country. Thus conscription is not unconstitutional. But in compelling people to render national service, the state must not discriminate on grounds of race, sex, caste or religion. Art. 24 forbids employment of child-labour in factories or in hazardous works. The art. reads "No child below the age of fourteen years, shall be employed to work in any factory or mine or, engaged in any other hazardous employment." In an environment of all pervading poverty, children are often forced to seek employment to earn a living. Employers often find it less costly to engage child labour at a cheap price. But children so employed do not get opportunities for development. Thus, employment of child labor is a form of traffic in human beings. Hence it is justifiably - forbidden. But employment of child labor cannot be effectively checked unless there is overall improvement of economic conditions of the poorer sections of the society. This provision of the constitution remains a pious wish even today

Human Trafficking and Forced Labor The first provision in the Article that mentions the Right against exploitation, states the 'eradication of human trafficking and forced labor (beggar)'. Article 23 declares slave trade, prostitution and human trafficking a punishable offence. There is, however, an exception here in the form of employment without payment for compulsory services for public purposes. Compulsory military conscription is covered by this provision.

Child Labor:

Article 24 of the Indian Constitution prohibits abolition of employment of children below the age of 14 years in dangerous jobs like factories and mines. Child labour is considered gross violation of the spirit and provisions of the constitution. The parliament has also passed the Child Labor act of 1986, by providing penalties for employers and relief and rehabilitation amenities for those affected. Although Articles 23 and 24 lay down definite provisions against trafficking and child labor, the weaker sections of the society are still faced by such grave problems. Punishable by law, these acts are now legitimately bound by legal actions of the Parliament in the form of Bonded Labor Abolition Act of 1976 and the Child Labor Act of 1986, along with the ground rules and provisions stated in the Right against Exploitation act.

Freedom of Religion:

Religious freedom as an individual's right is guaranteed by the Constitution to 'all persons' within the following parameters: 1. All persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion – Article 25(1). 2. There shall be freedom as to payment of taxes for promotion of any particular religion by virtue of which 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 religious denomination - Article 27. 3. No religious instruction is to be provided in the schools wholly maintained by State funding; and those attending any State recognized or State-aided school cannot be required to take part in any religious instruction or services without their (or if they are minor their guardian's) consent - Article 28.

Right to Religious Freedom:

Interpreting the constitutional provisions relating to freedom of religion the Supreme Court has observed: The right to religion guaranteed under Articles 25 & 26 is not an absolute or unfettered right; they are subject to reform on social welfare by appropriate legislation by the state. The Court therefore while interpreting Article 25 and 26 strikes a careful balance between matters which are essential and integral part and those which are not and the need for the State to regulate or control in the interests of the community — AS NarayanaDeeshitalyu v State of Andhrn Pradesh (1996) 9 SCC 548.

The right to religion guaranteed under Article 25 or 26 is not an absolute or unfettered right; they are subject to reform on social welfare by appropriate legislation by the State. The Court therefore while interpreting Article There have been numerous other rulings explaining the scope and connotation of the religious liberty provisions in the Constitution. Given below is a summary of the major rulings: a. Articles 25-30 embody the principles of religious tolerance that has been the characteristic feature of Indian civilization from the start of history. They serve to emphasize the secular nature of Indian democracy which the founding fathers considered should be the very basis of the Constitution - SardarSuednaTaiiirSaifiiddin v State of Bombay AIR 1962 SC 853. Page 44 of 72 b. Freedom of conscience connotes a person's right to entertain beliefs and doctrines concerning matters which are regarded by him to be conducive to his spiritual well being - RatilalPanachand Gandhi v State of Bombay AIR 1954

SC 388. c. To profess a religion means the right to declare freely and openly one's faith - Punjab Rao v DP Meshram AIR 1965 SC 1179. d. Religious practices or performances of acts in pursuance of religious beliefs are as much a part of religion as faith or belief in particular doctrines - RatilalPanachand Gandhi v State of Bombay AIR 1954 SC 388. e. What constitutes an integral or essential part of a religion or religious practice is to be decided by the courts with reference to the doctrine of a particular religion and includes practices regarded by the community as parts of its religion - Seshammal v State of Tamil Nadu AIR 1972 SC 1586. f. The right to profess, practise and propagate religion does not extend to the right of worship at any or every place of worship so that any hindrance to worship at a particular place per se will infringe religious freedom - Ismail Paruqi v Union of India (1994) 6 SCC 360. g. Under Article 25 to 'propagate' religion means 'to propagate or disseminate his ideas for the edification of others' and for the purpose of this right it is immaterial 'whether propagation takes place in a church or monastery or in a temple or parlour meeting' - Commissioner, Hindu Religious Endowments, Madras v LakshmindraThirthaSwamiar of Sri Shirur Mutt AIR 1954 SC 282. h. To claim to be a religious denomination a group has to satisfy three conditions: common faith, common organization and designation by a distinctive name - SK Mittal v Union of India AIR 1983 SC 1.

Main Features of Right to Education (RTE) Act, 2009:

Free and compulsory education to all children of India in the 6 to 14 age group.
No child shall be held back, expelled or required to pass a board examination until the completion of elementary education.

If a child above 6 years of age has not been admitted in any school or could not complete his or her elementary education, then he or she shall be admitted in a class appropriate to his or her age. However, if a case may be where a child is directly admitted in the class appropriate to his or her age, then, in order to be at par with others, he or she shall have a right to receive special training within such time limits as may be prescribed. Provided further that a child so admitted to elementary education shall be entitled to free education till the completion of elementary education even after 14 years.

Proof of age for admission**:** For the purpose of admission to elementary education, the age of a child shall be determined on the basis of the birth certificate issued in accordance with the Provisions of Birth. Deaths and Marriages Registration Act 1856, or on the basis of such other document as may be prescribed.No child shall be denied admission in a school for lack of age proof
A child who completes elementary education shall be awarded a certificate.
Call need to be taken for a fixed student–teacher ratio.

Twenty-five per cent reservation for economically disadvantaged communities in admission to Class I in all private schools is to be done.
Improvement in the quality of education is important.

School teachers will need adequate professional degree within five years or else will lose job.

School infrastructure (where there is a problem) need to be improved in every 3 years, else recognition will be cancelled.

Financial burden will be shared between the state and the central government.
The Supreme Court upheld the constitutional validity of Right of Children to Free and Compulsory Education Act, 2009, on April 12, 2012 and directed every school, including privately-run ones, to give immediately free education to students from socially and economically backward classes from class-I till they reach the age of 14 years.

The court threw out the challenge by private unaided schools to Section 12(1)(c) of the Act that says every recognized school imparting elementary education, even if it is an unaided school not receiving any kind of aid or grant to meet its expenses, is obliged to admit disadvantaged boys and girls from their neighbourhood.

The Right to Education Act promises much but ensures the delivery of very little. It does not ensure any significant change in the condition of the government school system. On the other hand it seems to enlist the support of private schools to fulfil its task, by forcing them to take poor and deprived children and subsidising this process. As we have seen it also seeks to control the justiciability of the right to education by outlining a complicated process. One may yet consider it a wedge in the edifice of education; as an exercise by the state to accommodate and control the fallouts of the Unnikrishnan Judgement. In many respects this can be compared to the NREGA, which seeks to ensure the right to life of the poor in this era of jobless growth. The NREGA seems to have been able to make a much more radical break, thanks to the role of strong grass roots movements and NGOs. The RTEA falls far short of this mark probably due to the weakness of the civil society organisations and movements for mass education. It is to this that we must now turn. The extent to which these organisations and movements use the foothold provided by the Act and mount an offensive and mobilise the mass of the deprived will determine the direction in which the implications of the act go. It can serve the dream of the bureaucracy to control the implications of the Right to Education or it can open up radical possibilities to bring about equality of opportunities promised by the Constitution.

Unit-III
Right to Constitutional Remedies:

A declaration of fundamental rights is meaningless unless there is effective machinery for the enforcement of the rights. Hence the framers of the Constitution were in favour of adopting special provisions guaranteeing the right to constitutional remedies. This, again, is in tune with the nature in general of the various provisions embodied in the chapter on Fundamental Rights. Article 32 has four sections. The first section is general in scope and says "the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed". The second section deals, in more specific terms, with the power of the Supreme Court to issue writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari for the enforcement of any of the rights. The third section empowers Parliament to confer the power of issuing writs or

orders on any other court without prejudice to the power of the Supreme Court in this respect. So far, Parliament has not passed any law conferring the power of issuing writs on any courts. The last section deals with the conditions under which this right can be suspended. The first three sections of the Article, taken together, make fundamental rights under the Constitution real and, as such, they form the crowning part of the entire chapter. Adverting to the special importance of this Article, Ambedkar declared in the Assembly: "If I was asked to name the particular Article in this Constitution as the most important without which this Constitution would be a nullity, I could not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realised its importance.

Hereafter, it would not be possible for any legislature to take away the writs, which are mentioned in this Article. It is not that the Supreme Court is left to be invested with the power to issue these writs by a law to be made by the legislature at its sweet will. The Constitution has invested the Supreme Court with these writs and these writs could not be taken away unless and until the Constitution itself is amended by means left open to the legislatures. This in my judgment is one of the greatest safeguards that can be provided for the safety and security of the individual." The Court itself has reaffirmed this opinion of the Chairman of the Drafting Committee on several occasions. In RomeshThappar vs. the State of Madras the Court held: "Article 32 provides a guaranteed remedy for the enforcement of the rights conferred by Part III (of the Constitution) and this remedial right is itself made a fundamental right by being included in Part III.

The Court is thus constituted the protector and guarantor of fundamental rights and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights." However, the Court will not entertain any application under Article 32 unless the matter falls within the scope of any of the fundamental rights guaranteed in Part III of the Constitution. As the guardian of fundamental rights the Supreme Court has two types of jurisdiction, original and appellate. Under its original jurisdiction, any person who complains that his fundamental rights have been violated within the territory of India may move the Supreme Court seeking an appropriate remedy. The fact that he may have a remedy in any of the High Courts does not preclude him from going directly to the Supreme Court. We have already seen under Article 32(4) that the Right to Constitutional Remedies may be suspended under certain circumstances. These circumstances are dealt with in detail in the chapter on Emergency Provisions of the Constitution. Chiefly, these emergencies are three: External aggression, internal disturbance and breakdown of constitutional machinery in the States

Under such conditions the President of India is empowered to proclaim an emergency. During the period of emergency he may by order declare that the right to move any Court for the enforcement of any fundamental right shall remain suspended up to a maximum period of the existence of the emergency (Art. 359). Every such order should be placed before each House of Parliament as soon as possible. Until 1976 the Supreme Court had power to consider the constitutional validity of any State law in any proceedings initiated under Article 32. But this power was taken away by the Fortysecond Amendment (1976).

As a result the Supreme Court could consider the constitutional validity of any State law only if the constitutional validity of any Central law was also an issue in such proceedings. The Fortythird Amendment (1978) however has restored the original position.

Judicial Review:

The power of Judiciary to review and determine validity of a law or an order may be described as the power of "Judicial Review." It means that the constitution is the Supreme law of the land and any law in consistent there with is void. The term refers to "the power of a court to inquire whether a law executive order or other official action conflicts with the written constitution and if the court concludes that it does, to declare it unconstitutional and void."

Judicial Review has two prime functions: (1) Legitimizing government action; and (2) to protect the constitution against any undue encroachment by the government. Page 48 of 72 The most distinctive feature of the work of United States Supreme Court is its power of judicial review. As guardian of the constitution, the Supreme Court has to review the laws and executive orders to ensure that they do not violate the constitution of the country and the valid laws passed by the congress. The Supreme Court in Marbury vs. Madison case first acquired the power of judicial review. 1803. The constitution of India, in this respect, is more a kin to the U.S. Constitution than the British. In Britain, the doctrine of parliamentary supremacy still holds goods. No court of law there can declare a parliamentary enactment invalid. On the contrary every court is constrained to enforce every provision" of the law of parliament.

Under the constitution of India parliament is not supreme. Its powers are limited in the two ways. First, there is the division of powers between the union and the states. Parliament is competent to pass laws only with respect to those subjects, which are guaranteed, to the citizens against every form of legislative encroachment. Being the guardian Fundamental Rights and the arbiter of-constitutional conflicts between the union and the states with respect to the division of powers between them, the Supreme Court stands in a unique position where from it is competent to exercise the power of reviewing legislative enactments both of parliament and the state legislatures. This is what makes the court a powerful instrument of judicial review under the constitution. As Dr. M.P. Jain has rightly observed: "The doctrine of judicial review is thus firmly rooted in India, and has the explicit sanction of the constitution." In the framework of a constitution that guarantees individual Fundamental Rights, divides power between the union and the states and clearly defines and delimits the powers and functions of every organ of the state including the parliament, judiciary plays a very important role under their powers of judicial review.

The power of judicial review of legislation is given to the judiciary both by the political theory and text of the constitution. There are several specific provisions in the Indian constitution, judicial review of legislation such as Act 13, 32, 131-136, 143, 226, 145, 246, 251, 254 and 372. Article 372 (1) establishes the judicial review of the pre-constitutional legislation similarly. Article 13 specifically declares that any law, which contravenes any of the provision of the part of Fundamental Rights, shall be void. Even our Supreme Court has observed, even without the specific provisions

in Article 13. The court would have the power to declare any enactment that transgresses a Fundamental Right as invalid. The Supreme and high courts are constituted the protector and guarantor of Fundamental Rights under Articles 32 and 226. Articles 251 and 254 say that in case of in consistent if between union and state laws, the state law shall be void.

The basic function of the courts is to adjudicate disputed between individuals and the state, between the states and the union and while so adjudicating, the courts may be required to interpret the provisions of the constitution and the laws, and the interpretation given by the Supreme Court becomes the law honoured by all courts of the land. There is no appeal against the judgement of the Supreme Court. In Shankari Prasad vs. Union of India (1951) the first Amendment Act of 1951 was challenged before the Supreme Court on the ground that the said Act abridged the right to property and that it could not be done as there was a restriction on the amendment of Fundamental Rights under Article 13 (2). The Supreme Court rejected the contention and unanimously held. "The terms of Article 368 are perfectly general and empower parliament to amend the constitution without any exception whatever. In the context of Article 13 law must be taken to mean rules or regulations made in exercise of ordinary legislative power and amendments to the constitution made in exercise of constituent power, with the result that Article 13 (2) does not affect amendments made under Article 368."

In Sajan Singh's case (1964), the corupetence of parliament to enact 17th amendment was challenged before the constitution. Bench comprising of five judges on the ground that it violated the Fundamental Rights under Article 31 (A). Supreme court reiterated its earlier stand taken in Shankari Prasad case case and held, "when article 368 confers on parliament the right to amend the constitution the power in question can be exercised over all the provisions of the constitution, it would be unreason about to hold that the word law' in article 13 (2) takes in amendment Acts passed under article 368. Thus, until 1967 the Supreme Court held that the Amendment Acts were not ordinary laws, and could not be struck down by the application of article 13 (2)

The historic case of GolakNath vs. The state of Punjab (1967) was heard by a special bench of 11 judges as the validity of three constitutional amendments (1st, 4th and 17th) was challenged. The Supreme Court by a majority of 6 to 5 reversed its earlier decision and declared that parliament under article 368 has no power to take away or abridge the Fundamental Rights contained in chapter II of the constitution the court observed. (1) Article 368 only provides a procedure to be followed regarding amendment of the constitution. (2) Article 368 does not contain the actual power to amend the constitution. (3) The power to amend the constitution is derived from Article 245, 246 and 248 and entry 97 of the union list. (4) The expression 'law' as defined in Article 13 (3) includes not only the law made by the parliament in exercise of its ordinary legislative power but also an amendment of the constitution made in exercise of its constitution power. , (5) The amendment of the constitution being a law within the meaning of Article 13 (3) would be void under Article 13 (2) of it takes away or abridges the rights conferred by part III of the constitution. (6) The First Amendment Act 1951, the fourth Amendment Act 1955 and the seventeenth Amendment Act. 1964 abridge the scope of Fundamental Rights and, therefore, void

under Article 13 (2) of the constitution. (7) Parliament will have no power from the days of the decision to amend any of the provisions of part III of the constitution so as to take away or abridge the Fundamental Rights enshrined there in.

The constitutional validity of the 14th, 25th, and 29th Amendments was challenged in the Fundamental Rights case. The Govt. of India claimed that it had the right as a matter of law to change or destroy the entire fabric of the constitution through the instrumentality of parliament's amending power.

In Minerva Mills case (1980) the Supreme Court by A majority decision has trunk down section 4 of the 42nd Amendment Act which gave preponderance to the Directive Principles over Articles 24, 19 and 31 of part III of the constitution, on the ground that part III and part IV of the constitution are equally important and absolute primacy of one over the other is not permissible as that would disturb the harmony of the constitution. The Supreme Court was convinced that anything that destroys the balance between the two part will ipso facto destroy an essential element of the basic structure of our constitution.

Writs:

The Indian Constitution empowers the Supreme Court and High Courts to issue writs for enforcement of any of the fundamental rights conferred by Part III of Indian Constitution. The writ issued by Supreme Court and High Court differs mainly in three aspects: a) The Supreme Court can issue writs only for the enforcement of fundamental rights whereas a High Court can issue writs for enforcement of fundamental rights along with " for any other purpose" (refers to the enforcement of any legal right). b) SC can issue writ against a person or government throughout the territory whereas High Court can issue writs against a person residing or against a government located within its territorial jurisdiction or outside its jurisdiction only if the cause of action arises within the territorial jurisdiction. c) SC writs are under Article 32 which in itself is a fundamental right thus SC cannot refuse to exercise its writ jurisdiction. Whereas article 226 is discretionary thus HC can refuse to exercise its writ jurisdiction.

Types of writs:
Habeas Corpus:

Habeas corpus is a Latin term which literally means "You may have the body". The concept of writ of habeas corpus has originated from England. This is a writ or legal action which can be used by a person to seek relief from illegal detention. The writ is a direction of the Court to a person who is detaining another, commanding him to bring the body of the person in his custody at a specified time to a specified place for a specified purpose. A writ of habeas corpus has only one purpose: to set at liberty a person who is confined without legal justification; to secure release from confinement of a person unlawfully detained. The writ does not punish the wrong-doer. If the detention is proved unlawful, the person who secures liberty through the writ may proceed against the wrong - doer in any appropriate manner. The writ is issued not only against authorities of the State but also to private individuals or organizations if necessary.

Mandamus

The Latin word 'mandamus' means 'we command'. The writ of 'mandamus' is an order of the High Court or the Supreme Court commanding a person or a body to do its duty. Usually, it is an order directing the performance of ministerial acts. A ministerial act is one which a person or body is obliged by law to perform under given circumstances. For instance, a licensing officer is obliged to issue a license to an applicant if the latter fulfills all the conditions laid down for the issue of such license. Similarly, an appointing authority should issue a letter of appointment to a candidate if all the formalities of selection are over and if the candidate is declared fit for the appointment. But despite the fulfillment of such conditions, if the officer or the authority concerned refuses or fails to issue the appointment letter, the aggrieved person has a right to seek the remedy through a writ of 'mandamus'.

Certiorari

Literally, Certiorari means to be certified. It is issued by the higher court to the lower court either to transfer the case pending with the latter to itself or to squash the order already passed by an inferior court, tribunal or quasi judicial authority. The conditions necessary for the issue of writ of certiorari. a. There should be court, tribunal or an officer having legal authority to determine the question with a duty to act judicially. b. Such a court, tribunal or officer must have passed order acting without jurisdiction or in excess of the judicial authority vested by law in such court, tribunal or officer. c. The order could also be against the principles of natural justice or the order could contain an error of judgment in appreciating the facts of the case.

Prohibition

The Writ of prohibition means to forbid or to stop and it is popularly known as 'Stay Order'. This writ is issued when a lower court or a body tries to transgress the limits or powers vested in it. Any High Court or the Supreme Court issues the writ of prohibition to any inferior court, or quasi judicial body prohibiting the latter from continuing the proceedings in a particular case, where it has no jurisdiction to try. After the issue of this writ, proceedings in the lower court etc. come to a stop.

Quo Warranto

The word Quo-Warranto literally means "by what warrants?" or "what is your authority"? It is a writ issued with a view to restrain a person from holding a public office to which he is not entitled. The writ requires the concerned person to explain to the Court by what authority he holds the office. If a person has usurped a public office, the Court may direct him not to carry out any activities in the office or may announce the office to be vacant. Thus High Court may issue a writ of quo-warranto if a person holds an office beyond his retirement age.

Unit-IV

Directive Principles of State Policy:

The Directive Principles of State Policy (DPSP) are contained in part IV, articles 36 to 50, of the Indian Constitution. Many of the provisions correspond to the provisions of the ICPCR. For instance, Article 43 provides that the state shall endeavor to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities, and in particular the state shall endeavor to promote cottage industries on an individual or cooperative basis in rural areas.
An important feature of the constitution is the Directive Principles of State Policy. Although the
Directive Principles are asserted to be "fundamental in the governance of the country," they are not legally enforceable. Instead, they are guidelines for creating a social order characterized by social, economic, and political justice, liberty, equality, and fraternity as enunciated in the constitution's preamble.

Nature and justiciability of the Directive Principles:

The Forty-second Amendment, which came into force in January 1977, attempted to raise the status of the Directive Principles by stating that no law implementing any of the Directive Principles could be declared unconstitutional on the grounds that it violated any of the Fundamental Rights. The amendment simultaneously stated that laws prohibiting "antinational activities" or the formation of "antinational associations" could not be invalidated because they infringed on any of the Fundamental Rights. It added a new section to the constitution on "Fundamental Duties" that enjoined citizens "to promote harmony and the spirit of common brotherhood among all the people of India, transcending religious, linguistic and regional or sectional diversities." However, the amendment reflected a new emphasis in governing circles on order and discipline to counteract what some leaders had come to perceive as the excessively freewheeling style of Indian democracy. After the March 1977 general election ended the control of the Congress (Congress (R) from 1969) over the executive and legislature for the first time since independence in 1947, the new Janata-dominated Parliament passed the Forty-third Amendment (1977) and Forty-fourth Amendment (1978). These amendments revoked the Fortysecond Amendment's provision that Directive Principles take precedence over Fundamental Rights and also curbed Parliament's power to legislate against "antinational activities."

The Directive Principles of State DPSP are Policy (contained in part IV, articles 36 to 50,) of the Indian Constitution. Many of the provisions correspond to the provisions of the ICESCR. For instance, article 43 provides that the state shall endeavor to secure, by suitable legislation or economic organization or in any other way, to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities, and in particular the state shall endeavor to promote cottage industries on an individual or cooperative basis in rural areas. This corresponds more or less to articles 11 and 15 of the ICESCR. However, some of the ICESCR rights, for instance,

the right to health (art. 12), have been interpreted by the Indian Supreme Court to form part of the right to life under article 21 of the Constitution, thus making it directly enforceable and justiciable. As a party to the ICESCR, the Indian legislature has enacted laws giving effect to some of its treaty obligations and these laws are in turn enforceable in and by the courts.

Fundamental Rights versus DPSP When the tussle for primacy between fundamental rights and DPSP came up before the Supreme Court first, the court said, "The directive principles have to conform to and run subsidiary to the chapter on fundamental rights." Later, in the Fundamental Rights Case (referred to above), the majority opinions reflected the view that what is fundamental in the governance of the country cannot be less significant than what is significant in the life of the individual. Another judge constituting the majority in that case said: "In building up a just social order it is sometimes imperative that the fundamental rights should be subordinated to directive principles." This view, that the fundamental rights and DPSP are complementary, "neither part being superior to the other," has held the field since.

The DPSP have, through important constitutional amendments, become the benchmark to insulate legislation enacted to achieve social objectives, as enumerated in some of the DPSP, from attacks of invalidation by courts. This way, legislation for achieving agrarian reforms, and specifically for achieving the objectives of articles 39(b) and (c) of the Constitution, has been immunized from challenge as to its violation of the right to equality (art. 14) and freedoms of speech, expression, etc. (art. 19). However, even here the court has retained its power of judicial review to examine if, in fact, the legislation is intended to achieve the objective of articles 39(b) and (c), and where the legislation is an amendment to the Constitution, whether it violates the basic structure of the constitution. Likewise, courts have used DPSP to uphold the constitutional validity of statutes that apparently impose restrictions on the fundamental rights under article 19 (freedoms of speech, expression, association, residence, travel and to carry on a business, trade or profession), as long as they are stated to achieve the objective of the DPSP.

The DPSP are seen as aids to interpret the Constitution, and more specifically to provide the basis, scope and extent of the content of a fundamental right. To quote again from the Fundamental Rights case: Fundamental rights have themselves no fixed content; most of them are empty vessels into which each generation must pour its content in the light of its experience. Restrictions, abridgement, curtailment and even abrogation of these rights in circumstances not visualised by the constitution makers might become necessary; their claim to supremacy or priority is liable to be overborne at particular stages in the history of the nation by the moral claims embodied in Part IV.

The original Constitution enforced on 26th January, 1950 did not mention anything about the duties of the citizen. It was expected that the citizens of free India would perform their duties willingly. But things did not go as expected. Therefore, ten Fundamental Duties were added in Part-IV of the Constitution under Article 51-A in the year 1976 through the 42nd Constitutional Amendment. However, whereas Fundamental Rights are justiciable, the Fundamental Duties are non-justiciable. It means that the violation of fundamental duties, i.e. the non-performance of these

duties by citizens is not punishable. The following ten duties have been listed in the Constitution of India:

1. to abide by the Constitution and respect its ideals and institutions, the National Flag, National Anthem;
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;
5. to promote harmony and the spirit of common brotherhood amongst all the people of India and 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 environments including forests, lakes, rivers and wildlife;
8. to develop the scientific temper, humanism and the spirit of inquiry and reform;
9. to safeguard public property and not to use violence; and
10. to serve towards excellence in all spheres of individual and collective activity.

Besides, a new duty has been added after the passage of Right to Education Act, 2009. "A parent or guardian has to provide opportunities for the education of his child/ward between the age of six and fourteen years

Nature of Fundamental Duties:

These duties are in the nature of a code of conduct. Since they are unjusticiable, there is no legal sanction behind them. As you will find, a few of these duties are vague. For example, a common citizen may not understand what is meant by 'composite culture', 'rich heritage' 'humanism', or 'excellence in all spheres of individual and collective activities'. They will realize the importance of these duties only when these terms are simplified A demand has been made from time to time to revise the present list, simplify their language and make them more realistic and meaningful and add some urgently required more realistic duties. As far as possible, they should be made justifiable.

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