BA LLB (H)
CONSTITUTIONAL LAW – II

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UNIT-I

'STATE'

ARTICLE 12

The Constitution of India, *Article 12* : ñIn this part, unless the context otherwise requires, ñ*the State*ò 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.ò

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. ñIf 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.ò

2. The existence of ñdeep and pervasive State **contro**l may afford an indication that the Corporation is a State agency or instrumentality.ò

3. ñIt may also be a relevant factoré whether the corporation enjoys **monopoly** status which is State conferred or State protected.ò

4. ñIf 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.ò

5. ñSpecifically, if a department of government is transferred to a corporation, it would be a strong factor supportive of this inferenceò of the corporation being an **instrumentality or agency** of government.

Som Prakash Rekhi* v. *Union of India AIR 1981 SC 212 : (1981) 1 SCC 449

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 Employeesô 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 which 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 two deductions were authorized by Regulation 16. One such deduction was based on Regulation 16(1) because of Employeesô Provident Fund payment to the pensioner and the other rested on Regulation 16(3) on account of payment of gratuity. Resultantly, the ópension payableô 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 petitioner was intimated by the Burmah Shell that consequent on his drawal of provident fund and gratuity benefits, the quantum of his pension would suffer a *pro tanto* 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 ñother authoritiesò 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

the territory of India, or under the control of the Government of India. This Court further said referring to earlier decisions that the expression ñother authoritiesò 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 óStateô. 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 óStateô 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, óbureaucracyô 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

the ***Airport Authority***. The short question that fell for decision was as to whether the Electricity Board was óStateô. 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 ñother authoritiesò in Article 12:

The meaning of the word ñauthorityò given in *WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY,* which can be applicable, is ña public administrative agency or corporation having quasi-governmental powers authorized to administer a revenue-producing public enterpriseò. This dictionary meaning of the word ñauthorityò 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 ñother authoritiesò 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 ñother authoritiesò are used in Article 12 of the Constitution.

These decisions of the court support our view that the expression ñother authoritiesò 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 ñStateò as used in Article 12.

The decision in ***Central Inland Water Transport Corpn. Ltd.* v. *Brojo Nath Ganguly***

[(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 ***Tekraj Vasandi* 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 ñother authorityò within the meaning of Article 12. The reasoning is not very clear. All that was said was:

ñHaving 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 ótother authoritiesô in Article 12 of the Constitution.ò

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 ï 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

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:-

ÅEngland Bill of Rights

ÅUs Bill of Rights

ÅFrance Declaration of the Rights of Man and

ÅDevelopment 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:-

é .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 declaredé .There is this further objection that the state has made it abundantly clear that no declaration of fundamental rights is to apply to state

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 which 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 ñshall 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 moralityò 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 turn 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 sdtages 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

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 ï 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

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 comments and suggestions received from all quarters were again considered by the drafting committee 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.

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 effecuating 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 re-enacted 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 THE 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 *Keshavan Madhava Menon 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 analysed 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 *Keshavanand Bharti 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 *Bhikaji Narain Dhakras 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

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 postConstitutional 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 post-Constitutional 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.

In *Deep Chand v. State of U.P.,* A.I.R. 1959 S.C. 648, it was held that there is a clear distinction between the two clauses of Article 13. Under clause (1) a pre-Constitutional law subsists except to the extent of its inconsistency with the provisions of Part III, whereas as per clause (2), no post-Constitutional law can be made contravening the provisions of Part III and therefore the law to that extent, though made, is a nullity from its inception.

Mahendra Lal Jaini v. State of U.P., A.I.R. 1963 S.C. 1019, is the most authoritative decision forthe impossibility of reviving post-Constitutional laws by a Constitutional amendment. The Court based its finding on the two grounds. First, the language and scope of Article 13(1) and 13(2) are different. Clause (1) clearly recognizes the existence of pre-Constitutional laws which were valid when enacted, and therefore could be revived by the Doctrine. Clause (2) on the other hand begins with an injunction to the State not to make a law which takes away or abridges the rights conferred by Part III. The legislative power of Parliament and State Legislatures under Article 245 is subject to the other provisions of the Constitution and therefore, subject to Article 13(2). Second, "contravention" takes place only once the law is made. This is because the contravention is of the prohibition to make any law, which takes away or abridges the fundamental rights. It is no argument to say that simply because the Amendment removes any subsequent scope for contravention, the law is no longer in conflict with the Constitution.

However, the scope of the principles established above stands drastically curtailed in view of the Supreme Court decision in *State of Gujarat v. Shree Ambica Mills,* A.I.R. 1974 S.C. 1300, wherein Matthew, J. held that like a pre-Constitutional law, a post-Constitutional law contravening a fundamental right could also be valid in relation to those, whose rights were not infringed upon. For instance, when a post-Constitutional law violates a fundamental right like Article 19 which is granted to citizens alone, it would remain valid in relation to non-citizens. Thus the term "void" in both the clauses of Article 13 makes a law only relatively void, and not absolutely void.

From this arises the final question: When a post-Constitutional law is held inconsistent with a fundamental right, can it be revived by amending the Act in question so as to remove the blemish, or will it have to be re-enacted as a whole?

The Delhi High Court in *P.L. Mehra v. D.R. Khanna,* A.I.R. 1971 Del. 1, has held that the legislation will have to be re-enacted and that it cannot be revived by mere amendment. This view appears to the author to emanate logically from the position adopted by the Supreme Court in treating such a law as void *ab initio.* There is, therefore, no need to apply the Doctrine of Eclipse to post-Constitutional laws, as discussed above.

There is no direct Supreme Court ruling on this point. The closest authority on this issue is *Shama Rao v. State of Maharashtra,* A.I.R. 1967 S.C. 480, wherein an Act was challenged on

the ground of excessive delegation, and pending the decision, the Legislature passed an Amendment Act seeking to remove the defect. The Supreme Court ruled by a majority that when an Act suffers from excessive delegation, it is stillborn and void *ab initio.* It cannot be revived by an amending Act seeking to remove the vice, and must be re-enacted as a whole. It is submitted that this ruling supports the proposition that an Act held invalid under Article 13(2) would not be revived merely by amending it, but would have to be re-enacted. Hence, we may safely infer that *Ambica Mills* does not destroy the force of the judicial pronouncements in *Deep Chand* and *Mahindra Jaini,* but merely limits the scope of their operation, and that the Doctrine, as of now, *cannot* be extended to post-Constitutional laws.

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 Basheshr Nath 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

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 *Jia Lal 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 fire arm. 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.

	Pre–Constitutional law	**Post–constitutional law**

Void ab initio - legislative incompetence	**Not void ab initio – Doctrine of eclipse** - Article 13(1) is prospective in nature. All laws continue remain in force after the commencement of constitution of India. All acts before it are valid. If pre ï constitutional law violates fundamental rights after the commencement of constitution of India, such law and violation is eclipsed by fundamental rights. - If fundamental rights are amended, then such eclipsed is removed and pre-constitution law becomes operative again. - **Bhikaji Narayan 1955** SC pre-constitution law of nationalization ï violated Article 19(1) (g) ï Doctrine of Eclipse ï 1st Amendment 1951 ï Article (19) (1) (6) inserted ï After this Amendment Act, the challenged ï failed	**Post – constitutional law : -** - Doctrine of eclipse is not applicable. If fundamental right or constitution of India is violated, such laws are void ab ignition. If legislature wants this law, law must be reenacted. **Deep Chand 1959 SC** - But, if a law is declared unconstitutional, and it is inserted in 9th Schedule, such law revives. This amendment (1951) is retrospective. **L. Jagannath 1972** ï SC- Act declared invalid ï 17th Amendment 1964 ï 9th Schedule and Article 31B ï Act inserted in 9th schedule ï Act valid now ï just like document of eclipse.

RIGHT TO EQUALITY

ARTICLE 14

Article 14 declares that "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.

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

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

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 ñ*intelligible differentia*ò 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. óArticle 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.ô *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

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.

Article 14 Permits *Classification But Prohibits Class Legislation*

The equal protection of laws guaranteed by Article 14 does not mean that all laws must be general in character. It does not mean that the same laws should apply to all persons. It does not attainment or circumstances in the same position. The varying need of different classes of persons often requires separate treatment. From the very nature of society there should be different laws in different places and the legitimate controls the policy and enacts laws in the best interest of the safety and security of the state. In fact identical treatment in unequal circumstances would amount to inequality. So a reasonable classification is only not permitted but is necessary if society is to progress.

Thus what Article 14 forbids is *class-legislation* but it does *not forbid reasonable classification*. The classification however must not be ñarbitrary, artificial or evasiveò but must be based on some real and substantial bearing a just and reasonable relation to the object sought to be achieved by the legislation. Article 14 applies where equals are treated differently without any reasonable basis. But where equals and unequal are treated differently, Article 14 does not apply. Class legislation is that which makes an improper discrimination by conferring particular privileges upon a class of persons arbitrarily selected from a large number of persons all of whom stand in the same relation to the privilege granted that between whom and the persons not so favored no reasonable distinction or substantial difference can be found justifying the inclusion of one and the exclusion of the other from such privilege.

Test of Reasonable Classification While Article 14 forbids class legislation it does not forbid reasonable classification of persons, objects, and transactions by the legislature for the purpose of achieving specific ends. But classification must not be ñarbitrary, artificial or evasiveò. It must always rest upon some real upon some real and substantial distinction bearing a just and reasonable relation to the object sought to be achieved by the legislation. Classification to be reasonable must fulfill the following two conditions:

Firstly the classification must be founded on the intelligible differentia which distinguishes persons or thing that are grouped together from others left out of the group

Secondly the differentia must have a rational relation to the object sought to be achieved by the act.

The differentia which is the basis of the classification and the object of the act are two distinct things. What is necessary is that there must be nexus between the basis of classification and the object of the act which makes the classification. It is only when there is no reasonable basis for a classification that legislation making such classification may be declared discriminatory. Thus the legislature may fix the age at which persons shall be deemed competent to contract between themselves but no one will claim that competency. No contract can be made to depend upon the stature or colour of the hair. Such a classification will be arbitrary.

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

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

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

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

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

5. In order to sustain the presumption of constitutionality the court may take into consideration maters of common knowledge, matters of report, and the history of the times and may assume every state of facts which can be conceived existing at the time of the legislation.
6. Thus the legislation is free to recognize degrees of harm and may confine its restriction to those cases where the need is deemed to be the clearest.

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

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

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

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

PRINCIPLE OFABSENCE 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

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 youû 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] 2 SCR 703, at p.7 18-19, indicated the test of arbitrariness and the pitfalls to be avoided in all State actions to prevent that vice, in a passage as under:òIn 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. (Diceyï òLaw of the Constitutionò-Tenth Edn., Introduction cx).*In Shrilekha Vidyarthi Vs Union of India*

ñLaw has reached its finest momentsò, stated Douglas, J. in United States v. Wunderlick, (*), ñwhen it has freed man from the unlimited discretion of some ruler é Where discretion is absolute, man has always sufferedò. It is in this sense that the rule of law may be said to be the sworn enemy of caprice. Discretion, as Lord Mansfield stated it in classic terms in the case of John Wilker (*), ñmeans sound discretion guided by law. It must be governed by rule, not humour: it must not be arbitrary, vague and fanciful.ò After Jaisinghaniôs case (supra), long strides have been taken in several well-known decisions of this Court expanding the scope of judicial review in such matters. It has been emphasized time and again that arbitrariness is anathema to State action in every sphere and wherever the vice percolates, this Court would not be impeded by technicalities to trace it and strike it down. This is the surest way to ensure the majesty of rule of law guaranteed by the Constitution of India.

Every discretionary power vested in the executive should be exercised in a just, reasonable and fair way. That is the essence of the rule of law. In United States V Wunderlich (1951) 342 US 98 Law has reached its first finest moments when it has freed man from the unlimited discretion of some ruler, some civil or military official, some bureaucrat. Where discretion is absolute, man has 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. John Wilkes (1770) 4 Burr 2528 . 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 ñ so let it be written, so let it be doneò. 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 India Vs Union Of India And Others (AIR 1988 SC 1768)*

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 Neelima Misra Vs Harinder Kaur Paintal 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 ï
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 ï freedom of speech is an integral aspect of each individualôs 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 oneôs 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 ï democracy is most important feature of todayôs 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.

FREEDOM OF RESIDE AND SETTLE

Every citizen has the right to reside and settle in any part of the territory. This article provides the right to reside any part of the country for a temporary period and to settle in any part of the country, which means to set up a home or domicile at any place permanently.
Restrictions on freedom of Residence:
The state can impose reasonable restrictions on the following grounds:

1. The interests of general public
2. The protection of interests of Scheduled Tribes. The right of outsiders to reside and settle in tribal areas is restricted to protect the distinctive culture, language and customs of

Scheduled Tribes and to safeguard their traditional vocations and properties against exploitation.

FREEDOM OF TRADE, OCCUPATION & 1PROFESSION:

All citizens are given the right to practice any profession or to carry on any occupation, trade or business. This right is very wide as it covers all the means of earning one's livelihood.

Restrictions on Freedom of Profession2:

The State can impose reasonable restrictions on the exercise of this right in the interest of the general public. Further, the state is empowered to:

1. Prescribe professional or technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business:
2. Carry on by itself any trade, business, industry or service whether to the exclusion (complete or partial) of citizens or otherwise:

Thus, no objection can be made when the state carries on a trade, business, industry or service either as a monopoly (complete or partial) to the exclusion of citizens (all or some only) or in competition with any citizens. The state is not required to justify its monopoly. In other words if the government decides to start the business of anything and it declares that only government can do this business, then nobody can claim its right to freedom of profession3.

This right does not include the right to carry on a profession or business or trade or occupation that is immoral (trafficking in women or children) or dangerous (harmful drugs or explosive, etc.). The State can absolutely prohibit these or regulate them through licensing.

Reasonable Restrictions

1 Maneka Gandhi vs Union Of India
2 Bachan Singh Etc. vs State Of Punjab Etc.
3 N.P. Nathwani vs The Commissioner Of Police

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 ñunreasonable restrictions.ò

UNIT - II

RIGHT TO LIFE AND LIBERTY

ARTICLE 21

scope and content

The Constitution of India provides Fundamental Rights under Chapter III. These rights are guaranteed by the constitution. One of these rights is provided under article 21 which reads as follows:-

Article 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.

Though the phraseology of Article 21 starts with negative word but the word No has been used in relation to the word deprived. The object of the fundamental right under Article 21 is to prevent encroachment upon personal liberty and deprivation of life except according to procedure established by law. It clearly means that this fundamental right has been provided against state only. If an act of private individual amounts to encroachment upon the personal

liberty or deprivation of life of other person. Such violation would not fall under the parameters set for the Article 21. in such a case the remedy for aggrieved person would be either under Article 226 of the constitution or under general law. But, where an act of private individual supported by the state infringes the personal liberty or life of another person, the act will certainly come under the ambit of Article 21. Article 21 of the Constitution deals with prevention of encroachment upon personal liberty or deprivation of life of a person.

The state cannot be defined in a restricted sense. It includes Government Departments, Legislature, Administration, Local Authorities exercising statutory powers and so on so forth, but it does not include non-statutory or private bodies having no statutory powers. For example: company, autonomous body and others. Therefore, the fundamental right guaranteed under Article 21 relates only to the acts of State or acts under the authority of the State which are not according to procedure established by law. The main object of Article 21 is that before a person is deprived of his life or personal liberty by the State, the procedure established by law must be strictly followed. Right to Life means the right to lead meaningful, complete and dignified life. It does not have restricted meaning. It is something more than surviving or animal existence. The meaning of the word life cannot be narrowed down and it will be available not only to every citizen of the country . As far as Personal Liberty is concerned, it means freedom from physical restraint of the person by personal incarceration or otherwise and it includes all the varieties of rights other than those provided under Article 19 of the Constitution. Procedure established by Law means the law enacted by the State. Deprived has also wide range of meaning under the Constitution. These ingredients are the soul of this provision. The fundamental right under Article 21 is one of the most important rights provided under the Constitution which has been described as heart of fundamental rights by the Apex Court.

The scope of Article 21 was a bit narrow till 50s as it was held by the Apex Court in Gopalans case that the contents and subject matter of Article 21 and 19 (1) (d) are not identical and they proceed on total principles. In this case the word deprivation was construed in a narrow sense and it was held that the deprivation does not restrict upon the right to move freely which came under Article 19 (1) (d). at that time Gopalans case was the leading case in respect of Article 21 along with some other Articles of the Constitution, but post Gopalan case the scenario in respect

of scope of Article 21 has been expanded or modified gradually through different decisions of the Apex Court and it was held that interference with the freedom of a person at home or restriction imposed on a person while in jail would require authority of law.

Whether the reasonableness of a penal law can be examined with reference to Article 19, was the point in issue after Gopalans case in the case of Maneka Gandhi v. Union of India , the Apex Court opened up a new dimension and laid down that the procedure cannot be arbitrary, unfair or unreasonable one. Article 21 imposed a restriction upon the state where it prescribed a procedure for depriving a person of his life or personal liberty. This view has been further relied upon in a case of Francis Coralie Mullin v. The Administrator, Union Territory of Delhi and others as follows: Article 21 requires that no one shall be deprived of his life or personal liberty except by procedure established by law and this procedure must be reasonable, fair and just and not arbitrary, whimsical or fanciful. The law of preventive detention has therefore now to pass the test not only for Article 22, but also of Article 21 and if the constitutional validity of any such law is challenged, the court would have to decide whether the procedure laid down by such law for depriving a person of his personal liberty is reasonable, fair and just. In another case of Olga Tellis and others v. Bombay Municipal Corporation and others, it was further observed : Just as a mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right must conform the norms of justice and fair play. Procedure, which is just or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it.As stated earlier, the protection of Article 21 is wide enough and it was further widened in the case of Bandhua Mukti Morcha v. Union of India and others in respect of bonded labour and weaker section of the society. It lays down as follows:

Article 21 assures the right to live with human dignity, free from exploitation. The state is under a constitutional obligation to see that there is no violation of the fundamental right of any person, particularly when he belongs to the weaker section of the community and is unable to wage a legal battle against a strong and powerful opponent who is exploiting him. Both the Central Government and the State Government are therefore bound to ensure observance of the various

social welfare and labour laws enacted by Parliament for the purpose of securing to the workmen a life of basic human dignity in compliance with the directive principles of the state policy.

The meaning of the word life includes the right to live in fair and reasonable conditions, right to rehabilitation after release, right to live hood by legal means and decent environment. The expanded scope of Article 21 has been explained by the Apex Court in the case of Unni Krishnan v. State of A.P. and the Apex Court itself provided the list of some of the rights covered under Article 21 on the basis of earlier pronouncements and some of them are listed below:

(1) The right to go abroad.
(2) The right to privacy.
(3) The right against solitary confinement.
(4) The right against hand cuffing.
(5) The right against delayed execution.
(6) The right to shelter.
(7) The right against custodial death.
(8) The right against public hanging.
(9) Doctors assistance.

PREVENTIVE DETENTION

ARTICLE 22

Article 22 makes the minimum procedural requirements which must be included in any law enacted by legislature in accordance of which a person is deprived of his personal liberty. Article 22(1) and (2) are also called Rights of an arrested person.

Policy and safeguards

Rights of an Arrested Person (Article 22(1) and 22(2):

- A person cannot be arrested and detained without being informed why he is being arrested.
- A person who is arrested cannot be denied to be defended by a legal practitioner of his choice. This means that the arrested person has right to hire a legal practitioner to defend himself/ herself.
- Every person who has been arrested would be produced before the nearest magistrate within 24 hours.
- The custody of the detained person cannot be beyond the said period by the authority of magistrate.

The Article 22(1) and 22(2) make the above provisions. However, Article 22(3) says that the above safeguards are not available to the following:

- If the person is at the time being an enemy alien.
- If the person is arrested under certain law made for the purpose of "Preventive Detention"

The first condition above is justified, because when India is in war, the citizen of the enemy country may be arrested. But the second clause was not easy to justify by the constituent assembly. This was one of the few provisions which resulted in stormy and acrimonious discussions.

Preventive Detention Laws

A person can be put in jail / custody for two reasons. One is that he has committed a crime. Another is that he is potential to commit a crime in future. The custody arising out of the later is preventive detention and in this, a person is deemed likely to commit a crime. Thus Preventive Detention is done before the crime has been committed.

The definition of Preventive detention itself is so confusing. For example:

- How one can say that a person will do a crime in future?
- What are the implications of arresting a person without having committed a crime?
- Why Preventive Detention in peacetime. Isn't it against the safeguards of our own citizens as provided by Article 22?

The preventive detention laws are repugnant to modern democratic constitutions. They are not found in any of the democratic countries. In England, the preventive detention law was resorted to only during the time of war. Of the provisions of the "Preventive Detention" are unlawful in most countries like USA & UK, then why we India has such thing?

The answer of above question is as follows:

India is a country having multi-ethnic, mutli-religious and multilingual society. Caste and communal violence is very common in India. Apart from that the circumstances at the time , when our constitution came in force demanded such provisions. This is evident from following statement of Dr. Bhimrao Ambedkar:

"....in the present circumstances of the country, it may be necessary for the executive to detain a person who is tempering either with the public order or with the defense services of the country. In such case, I don't think that the exigency of the liberty of an individual shall be above the interests of the state" Dr. B R Ambedkar.

However, the provisions of the constitution seem to be ambiguous and this ambiguity has been tried to do away with some provisions. These provisions are mentioned in Article 22 (1), 22(5), 22 (6).

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: ñThe 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 errorò?

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 some people are exposed to exploitation by others. 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

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 manôs 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 ò*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.*ò

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 œradication of human trafficking and forced labor (beggar)â 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 ï 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.

Group Rights

Freedom of religion is guaranteed by the Constitution of India as a group right in the following ways:

1. Every religious denomination or any section thereof has the right to manage its religious affairs; establish and maintain institutions for religious and charitable purposes; and own, acquire and administer properties of all kinds - Article 26.
2. Any section of the citizens having a distinct language, script or culture of its own shall have the right to conserve the same - Article 29.
3. Religious and linguistic minorities are free to establish and administer educational institutions of their choice, which shall not be discriminated against by the State in the matter of giving aid or compensation in the event of acquisition - Article 30.

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 ð AS Narayana Deeshitalyu 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 -

Sardar Suedna Taiiir Saifiiddin v State of Bombay AIR 1962 SC 853.

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 - Ratilal Panachand 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 - *Ratilal Panachand 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 ópropagateô religion means ôto 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 Lakshmindra Thirtha Swamiar 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.

UNIT-III

RIGHT TO CONSTITUTIONAL REMIDIES

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 that "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."

This opinion of the Chairman of the Drafting Committee has been reaffirmed by the Court itself on several occasions. In Romesh Thappar 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 Forty-second 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 Forty-third 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.

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 power of judicial review was first acquired by the Supreme Court in *Marbury vs. Madison* case. 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 which 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 which 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 *Golak Nath 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 ñ for any other purposeò (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. The writ of prohibition is issued by any High Court or the Supreme Court 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.

Difference between Prohibition and Certiorari:

1. While the writ of prohibition is available during the pendency of proceedings, the writ of certiorari can be resorted to only after the order or decision has been announced.

2. Prohibition can be issued only against judicial and quasi judicial authorities whereas Certiorari can be issued even against administrative authorities affecting rights of individuals.

- ## 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 Forty-second Amendment's provision that Directive Principles take precedence over Fundamental Rights and also curbed Parliament's power to legislate against "antinational activities.ò

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, ñThe directive principles have to conform to and run subsidiary to the chapter on fundamental rights.ò[5] 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: ñIn building up a just social order it is sometimes imperative that the fundamental rights should be subordinated to directive principles.ò[6] This view, that the fundamental rights and DPSP are complementary, ñneither part being superior to the other,ò has held the field since.[7]

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).[8] 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.[9] 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. ñA 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 ócomposite cultureô, órich heritageô óhumanismô, or óexcellence in all spheres of individual and collective activitiesô. 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 justiciable.

SOCIAL JUSTICE UNDER CONSTITUTION OF INDIA

The constitution of India was adopted on November 26, 1949. Some provision of the constitution came into force on same day but the remaining provisions of the constitution came into force on January 26, 1950. This day is referred to the constitution as the ñdate of its commencementò, and celebrated as the Republic Day.

The Indian Constitution is unique in its contents and spirit. Through borrowed from almost every constitution of the world, the constitution of India has several salient features that distinguish it from the constitutions of other countries.

Dr. Bhimrao Ambedkar, was chairman of the drafting committee. He was the first Law Minister of the India. He continued the crusade for social revaluation until the end of his life on the 6th December 1956. He was honoured with the highest national honour,ô Bharat Ratnaô in April 1990. B.R. Ambedkar was affectionately called Baba Saheb Ambedkar.

Dr. Ambedkar is the man of millennium for social justice, since he was the first man in history to successfully lead a tirade of securing social to the vast sections of Indian humanity, with the help of a law. Dr. Ambedkar was the man who tried to turn the Wheel of the Law toward social justice for all. He has strong fervor to attain social justice among the Indian Communities for this purpose he began his vocation.

At the time of independence, the constitution makers were highly influenced by the feeling of social equality and social justice. For the same reason, they incorporated such provisions in the constitution of India. These are as follows ï

The words, ñSocialistò, ñsecularò, ñdemocraticò and ñrepublicò have been inserted in the preamble. Which reflects itôs from as a ñsocial welfare state.ò The expression ñsocialistò was intentionally introduced in the Preamble.

In *D. S. Nakara v. Union of India*, the Supreme Court has held that the principal aim of a socialist state is to eliminate inequality in income, status and standards of life. The basic frame work of socialism is to provide a proper standard of life to the people, especially, security from cradle to grave. Amongst there, it envisaged economic equality and equitable distribution of income. This is a blend of Marxism & Gandhism, leaning heavily on Gandhian socialism. From a wholly feudal exploited slave society to a vibrant, throbbing socialist welfare society reveals a long march, but, during this journey, every state action, whenever taken, must be so directed and interpreted so as to take the society one step towards the goal.

In *Excel Wear v Union of India*, the Supreme Court held that the addition of the word ósocialistô might enable the courts to learn more in favour of nationalisation and state ownership of an industry. But, so long as private ownership of industries is recognised which governs an overwhelming large principles of socialism and social justice can not be pushed to such an extent so as to ignore completely, or to a very large extant, the interest of another section of the public, namely the private owners of the undertaking.

The term ójusticeô in the Preamble embraces three distinct forms- social, economic and political, secured through various provisions of Fundamental Rights and Directive Principles. Social justice denotes the equal treatment of all citizens without any social distinction based on caste, colour, race, religion, sex and so on. It means absence of privileges being extended to any

particular section of the society, and improvement in the conditions of backward classes (SCs, STs, and OBCs) and women. Economic justice denotes on the non- discrimination between people on the basis of economic factors. It involves the elimination of glaring in equalities in wealth, income and property. A combination of social justice and economic justice denotes what is known as ódistributive justiceô Political justice implies that all citizens should have equal political rights, equal voice in the government. The ideal of justice- social, economic and political- has been taken from the Russian Revaluation (1917).

The term ôequalityô means the absence of special privileges to any section of the society, and provision of adequate opportunities for all individuals without any discrimination. The Preamble secures at all citizens of India equality of status an opportunity. This provision embraces three dimensions of equality- civic, political and economic.

The following provisions of the chapter on Fundamental Rights ensure civic equality:

a) Equality before the Law (Article 14).
b) Prohibition of discrimination on grounds of religion, race, caste, sex of place of birth (Article 15).
c) Equality of opportunity in matters of public employment (Article 16).
d) Abolition of untouchability (Article 17).
e) Abolition of titles (Article 18).

There are two provisions in the Constitution that seek to achieve political equality. One, no person is to be declared ineligible for inclusion in electoral rolls on grounds of religion, race, caste or sex (Article 325). Two, elections to the Lock Sabha and the state assemblies to be on the basis of adult suffrage (Article 326).

Article 36 to 51 incorporate certain directive principles of State policy which the State must keep in view while governing the nation, but by Article 37 these principle have been expressly made non-justiciable in a court of law. Although these principles are not judicially enforceable, yet they are not without purpose. The report of the Sub- Committee said:

ñThe principles of Policy set forth in this part are intended for the guidance of the State. While these principles shall not be cognizable by any Court they are nevertheless fundamental in

the governance of the country and their application in the making of laws shall be the duty of the State.ò

According to Dr. B.R. Ambedkar, the Directive Principles of State Policy is a ónovel featureô of the Indian Constitution. They are enumerated in Part IV of the Constitution. They can be classified into three broad categories- socialistic, Gandhian and liberal- intellectual. The directive principles are meant for promoting the ideal of social and economic democracy. They seek to establish a ówelfare stateô in India. However, unlike the Fundamental Right, the directives are non- justiciable in nature, that is, they are not enforceable by the courts for their violation. Yet, the Constitution itself declares that óthese principles are fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making lawsô. Hence, they impose a moral obligation on the state authorities for their application. But, the real force (sanction) behind them is political, that is, public opinion.

In Minerva Mills case4[9] (1980), the Supreme Court held that óthe Indian Constitution is founded on the bedrock of the balance between the Fundamental Rights and the Directive Principlesô.

Social Justice is the foundation stone of Indian Constitution. Indian Constitution makers were well known to the use and minimality of various principles of justice. They wanted to search such form of justice which could fulfill the expectations of whole revolution. Pt. Jawahar Lal Nehru put an idea before the Constituent Assembly

> ***"First work of this assembly is to make India independent by a new constitution through which starving people will get complete meal and cloths, and each Indian will get best option that he can progress himself."***

Social justice found useful for everyone in its kind and flexible form. Although social justice is not defined anywhere in the constitution but it is an ideal element of feeling which is a goal of

constitution. Feeling of social justice is a form of relative concept which is changeable by the time, circumstances, culture and ambitions of the people.

Social inequalities of India expect solution equally. Under Indian Constitution the use of social justice is accepted in wider sense which includes social and economical justice both. According to Chief Justice Gajendragadkar.

> ***"In this sense social justice holds the aims of equal opportunity to every citizen in the matter of social & economical activities and to prevent inequalities".***

The constitution of India does not completely dedicated to any traditional ideology as ï equalitarian, Utilitarian, Contractarian or Entitlement theory. Dedication of constitution is embedded in progressive concept of social justice and various rules of justice such as- Quality, Transaction, Necessity, Options etc are its helping organs. Infact dedication of the constitution is in such type of social justice which can fulfill the expectations of welfare state according to Indian conditions. So that in one way it has been told about the value of Equality which is known as the declaration of equal behavior of equals to Aristotil, directs the state "The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India" that is distributive justice. In the other way it has been told the protective discrimination by special provision for other backwards of the society such as ï SC, ST & Socially and educationally back ward classes, which is the attribute (symbol) of corrective and compensatory justice.

Original Principle of Equalitarian justice is propounded/derived by Aristotle that is equal behavior in equal matter. If there is unequal behavior between equal, there will be injustice.

In State of U.P. Vs. Pradeep Tandon, the Supreme Court accepted reasonable classification justiciable on the basis of unequal behavior between unequal people. In Chiranjeet Las Vs. Union Of India. and State of J.K. vs. Bhakshi Gulam Mohammad it is held by the Supreme Court that due to some special circumstances one person or one body can be treated as one class. But the question is how to determine inequality? In India it is not easy to determine inequality. In Air

India vs. Nergis Mirza the Supreme Court declared the rule of Air India unreasonable and discriminatory. But accepting justiciable element in equality, it is try to make equality more effective and progressive. In E.P. Royappa vs. State of Tamilnadu Justice Bhagwati has held that equality is movable concept which has many forms and aspects . It can not be tightened in traditional and principlized circle. Equality with equal behavior prohibits arbitrariness in action, inequality is surely be there.

To accept right to equality as an essential element of Justice, India Constitution prohibits unequal behavior on the grounds of religion, race, caste, sex. But constitution accepts that strict compliance of formal equality will make up equality. But the system of special provision for backward classes of society, it is to try to make the principle of equality more effective. Under Article 15(4) the state shall make any special provision for the advancement of any socially and educationally backward classes of citizen or for the scheduled castes, and the Scheduled tribes and in the same manner by accepting the opportunity of equality to employment under state in Article 16 (1), it has excepted the principle of equalization under Article 16(4). If it is in the opinion of the state that any class of the citizens has not adequately representation under state employment, state shall make any provision for the reservation of appointments. According to Art 46 the State shall promote with special care the educational and economic interests of weaker sections of the people, and in particular, of the scheduled castes and the scheduled tribes, and shall protect them from social injustice and all forms of exploitation.

In a very important case of Indra Shahani vs. Union of India5[20] the Supreme Court declared 27% reservation legal for socially and economically backward classes of the society under central services.

Basically protective discrimination is used to fulfill those lacks which arise due to a long time deprivation. It is a part of corrective and compensatory justice. It has been told that peoples of backward class of society have been bearing injustice for generation to generation. Some peoples of the society made supremacy on the benefits of the society and made deprived to others. So this

provision of protective discrimination has been made for those deprived people who are living in unbeneficial circumstances.

Through equal opportunity on the basis of quality the Supreme Court has tried to make a reasonable balance between distribution of benefits and distributive justice. In M.R. Balaji vs State of Mysure, the Supreme Court has held that for the object of compensatory justice, limit of reservation should not be more than 50%. In India Shahni vs. Union of India full bench of nine judges approved this balance between distributive justice through quality and compensatory justice.

There is a very wide planning of justice according to necessity in the constitution. It expects distribution of social benefits according to necessity by which more needy person can get benefits. It is expected to the state that the state shall in particular, direct its policy towards securing that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment. Under Article 41, it is expected to the state that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in case of unemployment, old age, sickness and disablement, and in other cases of underserved want. It is provided under Article 42 that the state shall make provision for securing just and humane conditions of work and for maternity relief. In Article 43 it is expected 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 co-operative basis in rural areas. In PUDR vs. Union of India, the Supreme Court has held that minimum wages must be given and not to pay minimum wages is the violation of human dignity and it is also known as exploitation.

In India, courts have performed a great role to make the Social justice successful. In the field of distributive Justice, Legislature and Judiciary both are playing great role but courts are playing more powerful role to deliver compensatory or corrective justice but these principles are known

as mutually relatives not mutually opposites. Ideals and goals are to deliver social justice. Medium may be distributive or compensatory justice. The adopted type may be of quality, Necessity, Equality, Freedom, Common interest or other. Although the Supreme Court has not found any possible definition of Social Justice but has accepted it as an essential and an organ of legal system.

The supreme court of India has given a principal and dynamic shape to the concept of social justice. Social justice has been guiding force of the judicial pronouncements. In Sadhuram v. Pulin, the Supreme Court ruled that as between two parties, if a deal is made with one party without serious detriment to the other Court would lean in favour of weaker section of the society. The judiciary has given practical shape to social justice through allowing affirmative governmental actions are held to include compensatory justice as well as distributive justice which ensure that community resources are more equitably and justly shared among all classes of citizens. The concept of social justice has brought revolutionary change in industrial society by charging the old contractual obligations. It is no more a narrow or one sided or pedantic concept. It is founded on the basic ideal of socio-economic equality and its aim is to assist the removal of socio- economic disparities and inequalities. In J.K. Cotton Spinning. And Wiving. Co. Ltd. V. Labour Appellate Tribunal, the Supreme Court of India pointed out that in industrial matters doctrinaire and abstract notions of social justice are avoided and realistic and pragmatic notions are applied so as to find a solution between the employer and the employees which is just and fair.

Despite the well intentioned commitment of ensuring social justice through equalization or protective discrimination policy, the governmental efforts have caused some tension in the society. In the name of social justice even such activities are performed which have nothing to do with social justice. The need of hour is to ensure the proper and balanced implementation of policies so as to make social justice an effective vehicle of social progress.

English quotation if you want to succeed as a Judge/ lawyer in our profession and that quotation is:

ñ*Work like a horse and live like a hermit*.ò

If you apply these standards in your daily lives you will be fulfilling the constitutional dharma and if each one of you live by the constitutional dharma our society shall be free of discrimination and each one of you will be the role model for others and all these religious and caste conflicts will end**.**

Compensatory discrimination for backward classes

The governmental power to designate backward classes and the scope of judicial review of its exercise will be examined from two viewpoints.

(A) What differentia may be used in selecting such a "class"? and

(B) What showing of backwardness is required? '

A. *"CLASS".* The Constitution designates as the permissible recipients of preferences not backward individuals or families, nor yet backward castes, religious communities, occupational or regional groups, but backward" classes". These ñ classes" are restricted neither to economic classes nor to classes in the sense familiar to modern social science. The term seems to be used in the broad connotation of any group of persons having certain common characteristic. In particular it would seem to include, though it is' not confined to, those'cIassifications otherwise forbidden in Articles 15, 16 and 29(2)-e.g., racial, religious groups. For Articles 15(4) and 16(4) are exceptionaly or provision to these articles, limiting the operation of their provisions. of the proviso that" nothing in this article" shall prevent the State from preferences for backward classes is not broad enough to use of the forbidden classifications, then it was' arguably unnessary to have any proviso at all since other classifications would be permissible without it. And the history of Articles 15(4) and 16(4) iIidicates they were included with this purpose.It seems generally accepted that the State may use caste as a classification in defining backward classes. The Constitution leaves no room for doubt that the President and Parliament may use caste as a criterion in defining Scheduled Castes. so But the caste criterion does not enjoy similar impunity when used to define backward classes. In the case of Scheduled Castes, the caste criterion is not only explicitly authorized by the Constitution, but its use is confined strictly to President and Parliament; in the case of backward classes it enjoys no such explicit constitutional

sanction, nor is its use similarly confined to the highest central authorities. While Scheduled Castes were to be designated only by the President after consultation with a Governor (and now by Act of Parliament), backward classes for the purpose of a particular measure may be defined not only by Central and state legislatures but by administrative departments as well Again, Scheduled Castes are comprised of untouchables, who traditionally suffered disabilities and restricted opportunities precisely on the ground of membership in a particular caste. It is not clear that caste in and of itself represents the same kind of barrier and source of disabilities to members of other backward groups.

Nevertheless, the courts along with government agencies and The Backward Classes Commission have accepted caste as a permissible basis of classification. In the *Venkataramana* 83 case reservations were upheld for" backward Hindus, " a list of castes designated as backward by the Madras Government. The Backward Classes Commission uses caste as the unit of designation of backwardness predominantly throughout its report.

The Mandal Commission case

The issue of OBC demand for reservation and the dilemmas of choosing correct criteria to measure ñbackwardnessò though remained on the backburner for quite sometime at the central level, some concrete efforts to find a way out emerged in the wake of the Janata Government coming to power in 1977. In pursuance of their electoral promise, the Janata Government in 1979 set up a Commission under the leadership of B.P. Mandal to look into the issues of Backward Classes and suggest measures to address their concerns. One of the major thrusts of the new commission was to determine the criteria for defining the socially and educationally backward classes. It was expected from the Commission to come out with more acceptable criteria than what its predecessors in Kalelkar Commission
had offered.

How did the Mandal Commission settle the issue of determining backwardness and in what measure was it different from Kalelkar Commission? Due to paucity of time and lack of requisite resources (including research and academic inputs), the Kalelkar Commission had relied heavily on country wide

tour to collect on-the-spot evidence to identify castes, classes and tribes as backward, whereas the Mandal made an effort to improve this gap by formulating a set of objective criteria to identify backward classes. The Commission took special care to tap a number of independent sources for the collection of primary data. Some of the important measures taken in this connection were: seminar of sociologists on social backwardness, issue of three set of questionnaires to state governments, central government and the public, extensive touring of the country by the commission, undertaking countrywide socioeducational survey, preparation of reports on some important issues by specialized agencies like Tata Institute of Social Sciences and analysis of census data. By adopting this multiple approach the Commission was able to cast its net far and wide.

To generate number of indicators for criteria to determine backwardness, the commission initiated a countrywide socioeducational survey, covering 405 out of 407 districts (two villages and one urban block in each district), with the help of the Bureau of Economics and Statistics of various states. The data gathered from the survey were computerized and 31 primary tables were generated from this data in respect of each state and union territory. Indicators for Backwardness were decided first by selecting a dozen of well known castes known for their educational and social backwardness from each state. These castes were treated as ñControlò to test the indicators and derive various cut off points for a particular state. Then, on the basis of analyzing several variables including caste as an independent variable, 11 indicators or criteria for social and educational backwardness were derived

under three heads; social, educational and economic.

Separate weightage was given to indicators of each group. A weightage of three points each was given to all the social indicators. The commission applied 11 indicators against various castes and communities that it enlisted through its socio-educational survey, state lists, public evidence and the personal knowledge gained through extensive touring and personal interviews. By using these criteria for both Hindus and non- Hindus, the Commission identified 3,743 caste groups as OBCs

comprising 52 percent of total population contrary to 32 percent as estimated by the Kalelkar Commission. The 52% figure was arrived at by subtracting from 100 the population percentages for the SCs, STs and non-Hindus (22.56 and 16.16

respectively) as per the 1971 Census, and the percentage for ñforward Hindusò (17.58) as extrapolated from the incomplete 1931 Census, and adding to this derived sum (43.7) about half of the population percentage for non-Hindus (8.4). So far as the recommendations were concerned, among others, the commission

called for 27 % reservation for the OBCs in public services and scientific, technical and professional institutions run by the Central and State governments.

The Mandal Report faced stormy protest and opposition both from the opponents and its architects.5 Besides, politically it received cold response as by the time the Commission submitted its report (December 31, 1980), the Janata Government had collapsed and the Congress Party had assumed power at the Centre. The Congress Government under Indira Gandhiôs leadership initiated very little to implement the recommendations made by the commission. After a series of protests and demands by Lok Dal led by Charan Singh, the Congress Government conceded to put the Report before the Lok SabhaJanata Dal, the distant heir of the Janata Party came to power.

Although the decision to implement the Mandal Report was taken in a hurry by V.P. Singh to unsettle the formidable political challenge posed by Devi Lal and the group, the issue had prominently figured in National Frontôs election manifesto and V.P. Singh Governmentôs First Inaugural Address to the Parliament.

It said loudly that ñthe recommendations of the Mandal Commission will be implemented expediouslyò. This sudden announcement of new quota of 27 per cent brought a violent nation wide agitations, public outcry ultimately leading to the fall of V.P. Singh government in 1990. The implementation of the recommendations of the Mandal Report was challenged and opposed not only by angry students belonging to the upper caste Hindus, but also by the Supreme Court Bar Association. A writ petition was filed in the name of Indra Sawhney, one of the practicing advocates of the Supreme Court. A nine members Bench of Supreme Court in Indra Sawhney v. Union of India (Mandal-I) judgment made far reaching announcements defining nature and relevance of OBC quota. The Bench rejected the quota proposal for ñeconomically backwardò as suggested by the Government and went on to uphold 27 per cent reservation for the OBCs subject to the exclusion of socially advanced persons/sections (creamy layer) from amongst the OBCs and directed the government to evolve criteria for identification of this creamy layer. Importantly, the Bench sought the Government to revisit the OBC lists and find out more

appropriate mechanisms than only the ócasteô to ascertain backwardness. In short, for the first time, the Highest Court recognized the legitimacy of OBC reservation in clear terms by clearing all ongoing doubts and controversies.

Protective discrimination doctrine

The Constitution of India is prefaced by a resolve" to secure to all of its citizens. EQUALITY of status and opportunity.. " Accordingly, it confers on all citizens a fundamental right to be free of discriminatory by the State on grounds of race, religion and caste In -specific contexts goverrilli.ent is further forbidden to discriminate on grounds of place of birth, residence, descent, class,s language and sex.s Additional provisions outlaw untouchability and protect the citizen from certain kinds of discrimination on the part of private persons and institutions.

It is envisaged that Government will not only refrain from discriminating but will actively undertake to remove existing discriminatory practices in 'the private sphere But this attack' 'on discrimination is only one facet 'of the constitutional scheme to secure equality.

The Constitution also directs and empowers the Government to under. take special measures for the advancement of backward groups. It is a " Directiye Principle of State Policy" that: economic interests of the weaker section's of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

Consonant with this directive, the general provsional forbidding discrimination by the State (Article 15) is qualified by Art. 15(4), which provides that the State may make .. any special provision for the advancement of any and educationally backward classes of citizens or Scheduled Castes and the Scheduled Tribes. Government employment, is qualified in Article 16(4) to permit the State to make. " any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinionof the State, is not adequately represented in the services under the State".

In authorizing preferential treatment for the backward on the basis of membership in backward groups, India is experimenting with a method of ameliorating group differences that has been little used (and is very possibly constitutionally prohibited) in dealing with minority problems in the United States. The American observer, though familiar with measures designed to outlaw discrimination, finds this principle of "protective discrimination" novel and strange.

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