

NOTES ON

# The Constitutional Law of India

(Part -1)



by

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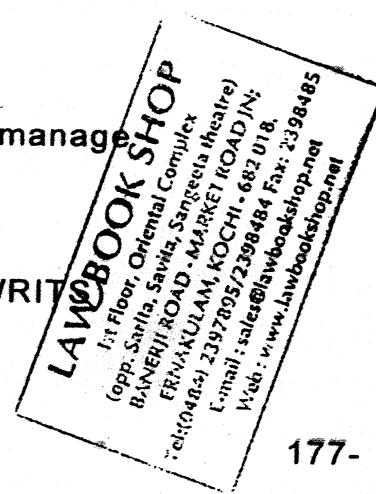
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# **CONSTITUTIONAL LAW- I**

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## **Topic - I**

### **Discuss the Salient features of the Constitution of India**

A great land-mark in the annals of the history of India is 26<sup>th</sup> January 1950, for on that day the republic of India was born and the Constitution of free India came into force. The Constitution of India, a long and detailed document is the fundamental law of the land. It describes the functions and inter-relations of the major governmental institutions. It also defines the political philosophy of our people and their socio-economic ideals and aspirations.

The Indian Constitution was adopted by the Constituent Assembly on 26<sup>th</sup> November 1949 and signed by the President, Dr.Rajendra Prasad. The Constitution of India came into force on 26<sup>th</sup> January 1950, which is the date of commencement of the Constitution.

In **B.R. Kapur v. State of T.N.** (2001) 7 SCC 231, the Supreme Court held that the Constitution is a document having a special legal sanctity which sets out the framework and the principal functions of the organs of the Government within the State and declares the principles by which those organs must operate. The Constitution refers to the whole

system of the governance of a country and the collection of rules which establish and regulate or govern the government. India is a country with a written constitution. The people of the country, the organs of the Government, Legislature, Executive and Judiciary are all bound by the Constitution.

In **State of West Bengal v. Committee for Protection of Democratic Rights** (2010) 3 SCC 571, it was held that in a democratic country governed by a written constitution, it is the Constitution which is supreme and sovereign. The Constitution is a living and organic document. It cannot remain static and must grow with the nation. The constitutional provisions have to be construed broadly and liberally having regard to the changed circumstances and the needs of time and polity.

The Constitution of India is the lengthiest and the most detailed of all the written constitutions of the world. The Constitution of India originally consisted of only 395 Articles divided into 22 parts and 8 Schedules. But after the Constitution (Ninty-ninth Amendment) Act, 2014, there are 465 Articles in operation. The Constitution has now been divided into 25 Parts (Part VII was repealed) and 12 Schedules. It is to be noted that even now the last article is 395, and we arrive at the figure 465 only when we count all the articles one by one, taking into account the newly inserted articles and repealed articles.

The following are the salient features of the Constitution of India.

(1) Cream of several Constitutions of the World

The framers of the Indian constitution have gained experience from the working of all the known Constitutions of the world. They framed the chapter on the Fundamental Rights on the model of the American Constitution, and adopted the parliamentary system of Government from the United Kingdom. They took the idea of the Directive Principles of State Policy from the Constitution of Ireland which had copied it from the Spanish Constitution. The Constitution of India contains elaborate

provisions relating to Emergency.) The Emergency provisions are included in the light of the Constitution of the German Reich and the Government of India Act 1935. Thus the Indian Constitution contains cream of various Constitutions of the World.

#### (2) The Lengthiest of all Written Constitutions

(The Constitution of India is the lengthiest and the most detailed of all the written Constitutions of the world. The Indian Constitution originally consisted of 395 Articles divided into 22 parts and 8 schedules.) But after the Constitution (Ninty-ninth Amendment) Act, 2014, there are 465 Articles in operation. The Constitution has now been divided into 25 Parts (Part VII was repealed) and 12 Schedules. It is to be noted that even now the last article is 395, and we arrive at the figure 465 only when we count all the articles one by one, taking into account the newly inserted articles and repealed articles.

#### (3) Lays down Structure of Central and State Governments

(The Indian Constitution lays down the structure of the Central Government and of the State Governments.) The American Constitution allows the States to draw up their own Constitutions. It provides only for the Central Government.

#### (4) Providing for Single Citizenship

Though the Indian Constitution provides for dual polity i.e., centre and states, it does not provide for dual citizenship. (The Indian Constitution provides for a single citizenship for the whole of India.) The American Constitution provides for dual citizenship i.e., the citizenship of America and a state citizenship. (In India there is no state citizenship.) Every Indian is the citizen of India and enjoys the same right of citizenship no matter in what state he resides.

#### (5) Establishing Parliamentary Form of Government

The Constitution of India establishes a parliamentary form of Government both at the Centre and the States. The parliamentary form

envisioned in the Indian Constitution is drafted on the basis of British model in toto.

In a parliamentary form of government, the government will be responsible to the legislature. In India the President of India is the Constitutional head. The real executive power will be rested in Council of Ministers and they will be collectively responsible to the House of the People (Lok Sabha). The members of the House of the People are elected directly by the people for five years. The Ministers should be members of the legislature. This government is, therefore, called a responsible government.

In **S.R.Choudhury v. State of Punjab** (2001) 7 SCC 126), the Supreme Court of India observed : " Parliamentary democracy generally envisages (i) representatives of the people, (ii) responsible government and (iii) accountability of the Council of Ministers to the legislature. The essence of this is to draw a direct line of authority from the people through the legislature to the executive. The character and content of parliamentary democracy, in the ultimate analysis, depends upon the quality of persons who man the legislature as representatives of the people. The members of the legislature, thus owe their power directly or indirectly to the people. The Council of Ministers of which the Chief Minister is the head in the State and on whose aid and advice the Governor has to act, must, therefore, owe their power to the people directly or indirectly.

The American Constitution provides for presidential type of Government. There the president is the real executive head and he will be elected by the people for 4 years. All executive powers are vested in him. He is not responsible to the Congress, the lower House. The members of his cabinet are not members of the Legislature.. They are appointed by the President and, therefore, responsible only to the President.

#### (6) Fundamental Rights

Part III of the Constitution gives a long list of Fundamental Rights. It is deemed to be a distinguishing feature of a democratic state. These rights are prohibitions against the State. The State cannot make a law which takes away or abridges any of the rights of the citizens guaranteed in the Part III. If a law violates any of the Fundamental Rights, the Supreme Court and the High Courts can declare it as unconstitutional.

#### (7) Directive Principles of State Policy

The Directive principles lay down certain economic and social policies to be followed by the various governments in India. They impose certain obligations on the State to take positive action in certain directions in order to promote the welfare of the people and achieve economic democracy.

#### (8) An Independent Judiciary

The Indian Constitution provides for the establishment of an independent and impartial judiciary with the power of 'judicial review'. The courts are the custodian of the rights of citizens.

#### (9) Fundamental Duties

Article 51A of the Constitution deals with Fundamental Duties. The duties are incorporated in the Constitution by 42nd Amendment Act 1976. Originally there were only ten fundamental duties. After the Constitution ( 86 th Amendment) Act, 2002, the Constitution of India now contains a Code of Eleven 'Fundamental Duties' for citizens. These duties require the citizen to observe certain basic norms of democratic conduct and democratic behaviours.

## **Topic - II**

**"The Constitution of India is neither purely Federal nor purely Unitary but a combination of both". Comment.**

(A Constitution is a document having special sanctity.) It sets out the structure and the main functions of the principal organs of the Government of a State. It also regulates the relationship of principal organs of the Government of a State.

Political scientists classifies Constitutions into the two categories. They are :

- (1) Unitary.
- (2) Federal.

In a Unitary Constitution, the powers of the government are centralised in one Government viz. the Central Government. The provinces will be subordinate to the centre.

In a Federal Constitution there will be division of powers between the Central and State Governments. They will be independent in their own sphere.

A Federal Constitution has the following features:-

**(1) Distribution of Powers**

(A purely federal constitution will distribute the powers of the state among the central and state governments.) The basis of distribution of power is that in matters of national importance the union will be entrusted with the authority and in matters of local concern the power will be entrusted to the states.

**(2) Supremacy of Constitution**

A federal state comes into existence by virtue of the Constitution.

Every power (legislative, executive and judicial) of the Union and States will be controlled by the Constitution. The Constitution will be supreme law of the land in a federal state. A supreme constitution is an essential institution of a federal government.

(3) Written Constitution

The foundation of a federal State are complicated contracts. These terms of complicated contracts are contained in the Constitution. Only when these terms are reduced into writing, the supremacy of the constitution can be maintained.

(4) Rigidity

A federal constitution must be a written one. A Constitution which is the supreme law of the land must also be rigid. The amendment of the Constitution should be complicated and difficult. The supremacy of the Constitution can be maintained only when the method of amendment is made rigid.

(5) Authority of the Court

There should be an independent and impartial judiciary to interpret the Constitution and guard the entrenched provisions of the Constitution.

All the essential characteristics of a federal Constitution is present in the case of Indian Constitution. The Indian Constitution establishes a dual polity, a Central Government and several State Governments. There is a division of powers between the Union and the State Governments. Each government is supreme in its own sphere. The Constitution is a written one and is the supreme law of the land. The amendment of the Constitution is rigid. The Constitution establish a Supreme Court to decide disputes between the Union and the States, or the States inter se. The Supreme Court interpret finally the provisions of the Constitution.

Even though all the essential features of a federal Constitution are

present in the Indian Constitution, some scholars hesitate to characterise the Indian Constitution as truly federal because of the following reasons:-

**(1) Appointment of Governors**

The Governors of the States are appointed by the President and they are answerable to him.

**(2) President's Power to Veto State Laws**

There are provisions in the Constitution which make it obligatory on the Governors to send certain State laws for the assent of the President. The President has power to veto those state laws (examples - Articles 200 & 288(2)). The Kerala Education Bill which was sent to the President for his assent was sent back to the State Legislature for suitable amendment is an example of the exercise of presidents power to veto state laws.

**(3) Parliament's Power to Form New State and Alter Boundaries of Existing States**

By virtue of Article 3 of the Constitution, the Parliament of India may form new States or it may increase or diminish the area of any existing State and it may alter the boundaries of any State. Thus the existence of a State depends upon the sweet-will of the Union Parliament.

**(4) Emergency Provisions**

When the proclamation of emergency is made under Article 352 of the Constitution, the Parliament can make laws with respect to any matter enumerated in the State List (List II of the VII th Schedule). The Centre can give directions to any State as to the manner in which the State's executive powers are to be exercised.

Under Article 356 of the Constitution, if the President is satisfied that the Government of a State cannot be carried on in accordance with the provisions of the Constitution, he can dismiss the State ministry and

dissolve the Legislature and assume all the functions of the State.

In short, though the view of the framers of the Constitution is that the Indian Constitution is a Federal Constitution, it is neither purely federal nor purely unitary but is a combination of both.

Jennings has characterised the Indian Constitution as a "federation with a strong centralising tendency"(Some Characteristics of the Indian Constitution). The Indian constitution is mainly federal with unique safeguards for enforcing national unity and growth.

Prof. K.C.Wheare has observed thus: "The Constitution establishes a system of Government which is almost quasi-federal - a unitary State with subsidiary federal features rather than a federal state with subsidiary unitary features".

In **State of West Bengal v. Union of India** (AIR 1963 SC 1241), the Supreme Court has held that the Constitution is not truly federal.

In **Ganga Ram Moolchanani v. State of Rajasthan** (2001) 6 SCC 89, the Supreme Court has observed : " Indian Constitution is basically federal in form and is marked by the traditional characteristics of a federal system, namely, supremacy of the Constitution, division of power between the Union and States and existence of an independent judiciary".

## **Topic - III**

### **Discuss the Importance of the PREAMBLE OF THE CONSTITUTION**

The Constitution of India begins with an introduction called 'Preamble'. The Preamble to the Constitution is a key to open the mind of the makers. It shows the general purpose for which several provisions are made in the Constitution. The fathers and mothers of the Constitution have given a 'place of pride' to the Preamble. Preamble reveals the mind of the authors of the Constitution. It contains the basic philosophy of the Constitution. It could be regarded as the 'soul of the Constitution'.

The Preamble to the Indian Constitution is exceptionally lucid and expressive. The preamble reads as follows:

"WE, THE PEOPLE OF INDIA having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, Social economic and political.  
LIBERTY of thought, expression, belief, faith and worship;  
EQUALITY of status and of opportunity;  
and to promote among them all;  
FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation.

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.

The Preamble serves the following purposes.

- (1) It indicates the source from which the Constitution has come viz., the people of India.
- (2) It declares the great rights and freedoms which the people of India intended to secure to all citizens.

(3) It declares the basic type of Government and polity which is to be established.

(4) It contains the enacting clause which brings into force the Constitution.

In **Re Berubari case** (AIR 1960 SC 845), the Supreme Court has laid down the following principles with regard to the preamble.

- (1) ✓ The Preamble is a key to open the mind of the makers of the Constitution.
- (2) ✓ It shows the general purpose for which the several provisions of the Constitution were made.
- (3) ✓ It is not a part of the Constitution.
- (4) ✓ It is not a source of substantive powers.
- (5) ✓ It is not a limitation upon the granted powers
- (6) ✓ If the terms used in any of the articles in the Constitution are ambiguous or are capable of two meanings, in interpreting them some assistance may be sought in the objectives enshrined in the Preamble.

In **Kesavanantha Bharathi v. State of Kerala** (AIR 1973 SC 1461), the Supreme Court held that the preamble is a part of the Constitution. The Preamble of the Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the Preamble.

The Preamble of the Constitution declares in unambiguous terms that it is the people of India who have adopted, enacted and given to themselves the Constitution.

The Preamble declares that the people of India resolved to constitute their country into a Sovereign, Socialist, Secular, Democratic and Republic.

A state is **sovereign** when there is no superior power to control it. A supreme and absolute power resides within itself. The word **sovereign** implies that India is no more dependent upon any outside authority.

The preamble declares that India to be a **Socialist** country. The word 'socialism' has no definite meaning. The term, however, implies a system of Government in which the means of production - land, labour, capital and organisation - is wholly or partially controlled by the State.

In **Excel Wear v. Union of India** (AIR 1979 SC 257), the Supreme Court considered the effect of the word "socialist" in the Preamble. The court held that the word **socialist** will enable the courts to lean more in favour of nationalisation and state ownership of industry.

The word '**secular**' contained in the preamble implies that the Indian Constitution does not recognise any religion as a state religion. It treats all religions equally. The words "**Secular**" and "**Socialist**" have been inserted by the Constitution (42nd Amendment Act, 1976).

In **St. Xavier College v. State of Gujrat** (AIR 1974 SC 1389), the Supreme Court has said: "although the word **secular state** are not expressly mentioned in the Constitution, there can be no doubt that the fathers and mothers of the Constitution wanted to establish such a state and accordingly Articles 25 to 28 have been included in the Constitution. These articles confer Freedom of Religion.

The term '**Democratic**' included in the Preamble indicates that the Constitution has established a form of Government which gets its authority from the will of the people. The rulers are elected by the people and they are responsible to the people. The democratic set up can be of two types, namely -

- (i) Direct Democracy
- (ii) Indirect Democracy.

In a Direct Democracy, the political sovereignty rests in the people. The will of the state is formulated and expressed by the people themselves. Direct democracy was practiced in the ancient Greece. In modern states, with vast territory and huge population, it is physically impossible for the people to assemble together frequently and directly participate in the making of laws. Modern democracy is, therefore, indirect and representative. In the indirect democracy, it is the representatives of the people who exercise the power of legal as well as political sovereignty. The people choose their representatives who carry on the Government. So this type of democracy is called Representative Democracy. In the Indian Constitution we have adopted indirect or representative democracy. All the adult citizen above the age of 18 years have a right to vote in the selection of their representatives.

The Preamble of the Indian Constitution declares that India will be a 'Republic'. In a republic the head of the State is not a hereditary monarch. The head of the State is only a person elected by the people or their representatives for a fixed term. In our constitution there is President who is the head of the state and is elected by the representatives of the people.

It is very clear from the preamble that the people of India intend to secure by the Constitution the following great rights:

- (1) Justice - social, economic and political
- (2) Liberty - of thought, expression, belief, faith and worship
- (3) Equality - of status and of opportunity

By this Constitution the people of India intend to secure and promote Fraternity among them all assuring the dignity of the individual and the unity and integrity of the nation.

#### **Can preamble be amended?**

This question was raised for the first time before the Supreme Court

in the historic case of **Kesavananda Bharati v. State of Kerala** (AIR 1973 SC 1461). In this case the Supreme Court held that the preamble is part of the Constitution and it can be amended like any other provisions of the Constitution by virtue of the amending power in Article 368 of the Constitution. However it was held that the amendment of Preamble can only be without offending the 'basic features' in the Preamble.

## **Topic - IV**

### **The Union and Its Territory**

[Note - Relevant Articles ie., articles 1 to 4 are given at the end of this Topic for easy reference]

The political structure prescribed by the Constitution of India is a federal Union. Article 1 of the Constitution declares that India, that is Bharat, shall be a 'Union of States'. There are at present 29 member states in this Union. The Union of India is not the result of an agreement by the States to join in a Federation. The Federation being not the result of an agreement, a member state of the Indian Union can not secede from the Union. The Federal Union of India is an indestructible (that cannot be destroyed) Union. \*

In **Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat**, (2008) 5 SCC 33, the Supreme Court observed that India is a Union of States and not an association or confederation of States.

The expression 'Union of India' is not synonymous with the expression 'Territory of India'. The Union of India includes only the member states. The 'territory of India' on the other hand includes-

- (i) all the member states,
- (ii) the Union territories, and
- (iii) the territories which may be acquired by the Government of India.

There are at present 7 Union Territories. The Union Territories are centrally administered areas. These areas are governed by the President acting through an Administrator appointed by him. The President may appoint the Governor of a State as the administrator of an adjoining Union Territory.

The First Schedule to the Constitution gives names of States and Union Territories .

### **States**

(1) Andra Pradesh (2) Assam (3) Bihar (4) Gujarat (5) Kerala (6) Madhya Pradesh  
(7) Tamil Nadu (8) Maharashtra (9) Karnataka (10) Orissa (11) Panjab (12) Rajasthan  
(13) Utter Pradesh (14) West Bengal (15) Jammu and Kashmir (16) Nagaland (17)  
Haryana (18) Himachal Pradesh (19) Manipur (20) Tripura (21) Meghalaya (22)  
Sikkim (23) Mizoram (24) Arunachal Pradesh (25) Goa (26) Chhattisgarh (27)  
Uttaranchal (28) Jharkhand. (29) Thelungana

### **Union Territories**

(1) Delhi (2) The Andaman and Nicobar Islands (3) Lakshadweep (4) Dadra and Nagar Haveli (5) Daman and Diu (6) Pondicherry (7) Chandigarh

Any territory which may at any time be acquired by Government of India will be included in the definition of territory of India. When the Government of India acquires any territory , that territory will become part of the Territory of India. In order to acquire new territory no law is to be passed by the Parliament.

### **Admission and Establishment of New States**

By virtue of Article 2 of the Constitution of India, the Parliament may by law admit into the Union or establish new states on such terms and conditions as it think fit. Thus article 2 confers two powers to the Parliament. They are-

(1) The Parliament can by enacting law admit new states into the Union. Thus the Parliament can admit a state which is duly formed and

established and are already in existence but not forming part of the territory of India.

(2) The parliament can by enacting law establish new states and admit it into the Union. The territory in which new state is formed may not be territory forming part of the territory of India.

### Formation of New State and Alteration of Boundaries of Existing States

By virtue of Article 3(a) of the Constitution parliament may by law form a new state-

- (i) by seperation of territory from any state, or
- (ii) by uniting two or more states, or
- (iii) by uniting any parts of states, or
- (iv) by uniting any territory to a part of any state.

Article 3(a) deals with the formation of a new state out of the territories of the existing States and Union territory.

Article 3 further allows the Parliament to increase the area of any state or diminish the area of any state or alter the boundaries of any state or alter the name of any state by passing a law by simple majority.

A law for the above stated purposes can be passed by the Parliament only when the following conditions are satisfied.

(i) The Bill for the formation of new state or alteration of the boundaries or the names of the existing states can be introduced in either house of the Parliament only on the recommendation of the President.

(ii) If the Bill affects area, boundaries or names of the states then the President has to refer the Bill to the legislature of the state so affected for expressing its views within the period specified by the President. If the State Legislature does not express its view within the specified period, the Bill may be introduced in the Parliament even though

the view of the state has not been obtained by the President. Even if state legislature expresses its views, the President is not bound to accept or act upon the view of the state legislature: (**Babulal v. State of Bombay** [AIR 1960 SC 51]).

In **Pradeep Choudhary v. Union of India** (2009) 12 SCC 248, U.P. State Reorganisation Bill, 1999 intended to create State of Uttaranchal was referred to the Legislature of State of U.P. The Bill included territories of Haridwar District for the proposed State of Uttaranchal. The legislature of State of U.P passed a resolution that areas of Haridwar should be deleted and should not form part of State of Uttaranchal. However, the Bill introduced in the Lok Sabha included Haridwar District, and the Bill was passed by both the Houses of Parliament and the U.P. Reorganisation Act, 2000 came into force. The constitutionality of the Act was questioned before the Supreme Court. It was held that reference of State Reorganisation Bill to State Legislature for obtaining its view is mandatory. But once reference is made, even if thereafter there has been substantive amendment of the Bill, the amended Bill need not again be referred to the State Legislature. Further it was held that the view taken by the State Legislature is not binding on the Parliament even if received in time.

All the Articles of Part I, taken together, demonstrate the flexibility of the Constitution and the strength of the Union. By a simple majority and by an ordinary legislative process Parliament can re-make the political map of India. Thus India is an "indestructible Union of destructible States".

In **Raja Ram Pal v. Hon'ble Speaker, Lok Sabha**, (2007) 3 SCC 184, the Supreme Court held that India is an indestructible Union of destructible units.

### **Problem**

The Government of India and Pakistan entered into a treaty for resolving certain

border disputes and *inter alia* provided for the transfer of one-half of the area of Berubari Union by India to Pakistan for the exchange of old Cooch - Bihar enclaves. In order to give effect to the agreement the Government of India seek your advice. Advice the Government of India.

By Article 3(c) of the Constitution of India, the Parliament may by law increase or diminish the area of any state. Now the question is whether the power of the Parliament to diminish the area of any State include the power to cede Indian territory to a foreign state.

In **Re, Berubari Case** (AIR 1960 SC 858) this question came up for the consideration of the Supreme Court of India in a reference made by the president of India under Art.143 of the Constitution. The facts of the case are as follows:

The Indo-Pakistan Agreement entered into in 1958 for resolving certain border disputes provided for the transfer of one-half of the area of Berubari Union by India to Pakistan for the exchange of Cooch-Bihar enclaves. Berubari Union comprised an area of a square miles in the state of West Bengal with a population of about 12000. When the Central Government sought to implement the agreement, a powerful political agitation was started against the proposed transfer of territory to Pakistan. There upon the President referred the matter to the Supreme Court for its advisory opinion under Art.143.

The questions referred to were-

- (i) Whether any legislation is necessary for the implementation of agreement relating to Berubari Union.
- (ii) If legislation is necessary, whether law of Parliament under Art 3 of the Constitution will be sufficient or whether an amendment of the Constitution in accordance with Art. 368 necessary or both.

The Court held that the power of Parliament under Article 3 to

diminish the area of any state does not cover ceding of Indian territory to a foreign state. The said agreement could only be implemented by an amendment of the Constitution in accordance with Article 368.

Pursuant to the courts opinion the Constitution (9<sup>th</sup> Amendment) Act, 1960 was passed for giving effect to the transfer of one-half of Berubari Union to Pakistan under an agreement entered into between the Governments of India and Pakistan.

#### Part -I

#### ~~The Union and Its Territory~~

**Article 1. Name and Territory of the Union -** (1) India, that is Bharat, shall be a Union of States

- (2) The States and the territories thereof shall be as specified in the First Schedule
- (3) The territory of India shall comprise -
  - (a) the territories of the States;
  - (b) the Union territories specified in the First Schedule; and
  - (c) such other territories as may be acquired.

**Article 2. Admission or Establishment of new States -** Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit.

**Article 3. Formation of New States and Alteration of areas, boundaries or names of existing States -** Parliament may be law -

- (a) form a new State by separation of territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State;
- (b) increase the area of any State;
- (c) diminish the area of any State;
- (d) alter the boundaries of any State;
- (e) alter the name of any State:

Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of

that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired.

**Explanation I** - In this article, in clauses (a) to (e), "State" includes a Union territory , but in the proviso, "State does not include a Union territory.

**Explanation II** - The power conferred on Parliament by clause (a) includes the power to form a new State or Union territory by uniting a part of any State or Union territory to any other State or Union territory.

**Article 4. Laws made under articles 2 and 3 to provide for the amendment of the First and Fourth Schedules and supplemental, incidental and consequential matters -** (1) Any law referred to in article 2 or article 3 shall contain such provisions for the amendment of the First Schedule and the Fourth Schedule as may be necessary to give effect to the provisions of the law and may also contain such supplemental, incidental and consequential provisions ( including provisions as to representation in Parliament and in the Legislature or Legislatures of the State or States affected by such law) as Parliament may deem necessary.

(2) No such law as aforesaid shall be deemed to be an amendment of this Constitution for the purpose of article 368.

## **Topic - V Citizenship**

[Note - Relevant Articles ie., articles 5 to 11 are given at the end of this Topic for easy reference]

The population of a State can be divided into two classes - citizens and aliens. Citizenship means membership of a State. It refers to the political status of a person. It is determined by Municipal Law or National Law.

The Constitution confers certain rights and privileges upon citizens and the same are denied to aliens. Citizens enjoy full civil and political rights. The aliens do not enjoy all of them. For example, certain fundamental rights, such as right to equality of opportunity in the matter of public employment , are available to citizens alone. Besides only citizens are eligible for certain offices, such as those of President, Vice-

president, Judge of the Supreme Court or of a High court, Attorney General, Governor of a State, Election Commissioner and Advocate General. The right to vote in elections to the Lok Sabha and State Legislature and the right to contest these elections are also confined to citizens.

The Constitution of India does not have a fixed or comprehensive law relating to citizenship in India. Part II of the Constitution simply describes categories of persons who would be deemed to be citizens of India at the date of commencement of the Constitution and specifically states that Parliament can regulate the right of citizenship by law. In exercise of this power, Parliament has enacted the Citizenship Act, 1955 which states provisions for the acquisition and termination of citizenship subsequent to the commencement of the Constitution. Hence the provisions of the Act must be read with the provisions of part III of the Constitution, so as to get a complete picture of the law of citizenship.

#### Persons who became citizens on January 26, 1950

##### 1. Domiciled Persons

According to Article 5 of the Constitution, at the commencement of the Constitution, every person who has his domicile(permanent home) in the territory of India shall be a citizen of India if he fulfils any one of the following conditions.

1. He was born in the territory of India; or
2. Either of his parents was born in the territory of India, or
3. He must have been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement.

In **Mohammad Raza V. State of Bombay** (A I R 1965 SC 1436), the appellant came to India in 1938. He went on pilgrimage to Iraq in 1945. On return, he was registered as a foreigner and several times his stay in India was extended. When the appellant returned from Iraq, he

took over the job of a cashier in a hotel. In 1957 his request to extend the stay period was refused. He contended that he must be regarded as a citizen of India under Article 5 of the Constitution. The court held that though he was a resident in India, he did not acquire citizenship because he did not have a domicile in India. In order to acquire domicil one should reside in India with intention to treat India as his permanent home.

In **Louis De Raedt v. Union of India** ([1991] 3 SCC 554), the petitioners came to India before independence and were staying continuously on the basis of foreign passports and residential permits. The petitioners were engaged in Christian missionary work. The Central Government passed an order of expulsion. The petitioners contended that they became citizens of India by virtue of Article 5 of the Constitution. The Court held that they were not having domicile in India because they had no intention to reside in India permanently.

## **2. Migrants from Pakistan**

According to Article 6, a person who has migrated from Pakistan to India, shall be deemed to be a citizen of India at the commencement of the Constitution if -

- (a) he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act, 1935 and
- (b) (i) in the case where such a person has so migrated before 19th July 1948 and has been ordinarily resident in the territory of India since that date of his migration, or
- (ii) in the case where such a person has so migrated on or after 19th July 1948 and has been duly registered (after being resident in the territory of India for at least six months immediately preceding the date of his application as a citizen of India), by an officer appointed by the Government of India.

## **3. Migrants Returned to India**

According to Article 7, a person who has, after 1st March 1947, migrated from India to Pakistan, but has returned to India under a permit

for re-settlement or permanent return, issued by or under the authority of any law, shall be deemed to be a citizen of India.

#### 4. Indian Origin but Residing in Foreign Country

According to Article 8, a person who, or either of whose parents or grand-parents was born in India, as defined by th Act of 1935, and who is ordinarily residing in any forein country shall be deemed to be a citizen of India, if he has been so registered by the diplomatic or consular representative of India, in the country where he is for the time being residing, or on application made by him to such diplomatic or consular representative, whether before or after the commencement of this Constitution, in the form and manner prescribed by the Government of the Dominion of India or the Government of India.

By virtue of Article 9 of the Constitution of India, a person shall not be a citizen of India by virtue of Article 5,6, or 8, if he has voluntarily acquired the citizenship of any foreign state.

### Part -II Citizenship

**Article 5. Citizenship at the commencement of the Constitution** - At the commencement of this Constitution every person who has his domicile in the territory of India and -

- (a) who was born in the territory of India; or
- (b) either or whose parents was born in the territory of India ; or
- (c) who has been ordinarily resident in the territory of India for not less than five years immediately preceding such commencement, shall be a citizen of India

**Article 6. Rights of Citizenship of certain persons who have migrated to India from Pakistan** - Notwithstanding anything in article 5, a person who has migrated to the territory of India from the territory now included in Pakistan shall be deemed to be a citizen of India at the commencement of this Constitution if -

- (a) he or either of his parents or any of his grand-parents was born in India as defined in the Government of India Act,1935 (as originally enacted); and
- (b) (i) in the case where such person has so migrated before the nineteenth day of July,1948, has

been ordinarily resident in the territory of India since the date of his migration, or

(ii) in the case where such person has so migrated on or after the nineteenth day of July, 1948, he has been registered as a citizen of India by an officer appointed in that behalf by the Government of the Dominion of India on an application made by him therefor to such officer before the commencement of this Constitution in the form and manner prescribed by that Government;

Provided that no person shall be so registered unless he has been resident in the territory of India for at least six months immediately preceding the date of his application.

#### **Article 7. Rights of Citizenship of certain migrants from Pakistan -**

Notwithstanding anything in articles 5 and 6, a person who has after the first day of March, 1947, migrated from the territory of India to the territory now included in Pakistan shall not be deemed to be a citizen of India:

Provided that nothing in this article shall apply to a person who, after having so migrated to the territory now included in Pakistan, has returned to the territory of India under a permit for resettlement or permanent return issued by or under the authority of any law and every such person shall for the purposes of clause (b) article 6 be deemed to have migrated to the territory of India after the nineteenth day of July, 1948.

**Article 8. Rights of Citizenship of certain persons of Indian origin residing outside India -** Notwithstanding anything in article 5, any person who or either of whose parents or any of whose grand-parents or any of whose grand-parents was born in India as defined in the Government of India Act, 1935 (as originally enacted), and who is ordinarily residing in any country outside India as so defined shall be deemed to be a citizen of India if he has been registered as a citizen of India by the diplomatic or consular representative of India in the country where he is for the time being residing on an application made by him therefor to such diplomatic or consular representative, whether before or after the commencement of this Constitution, in the form and manner prescribed by the Government of the Dominion of India or the Government of India

**Article 9. Persons voluntarily acquiring citizenship of a foreign State not to be citizens -** No person shall be a citizen of India by virtue of Article 5, or be deemed to be a citizen of India by virtue of article 6 or article 8, if he has voluntarily acquired the citizenship of any foreign country.

**Article 10. Continuance of the rights of Citizenship** - Every person who is or is deemed to be a citizen of India under any of the foregoing provisions of this Part shall, subject to the provisions of any law that may be made by Parliament, continue to be such citizen.

**Article 11. Parliament to regulate the right of citizenship by law** - Nothing in the foregoing provisions of this Part shall derogate from the power of Parliament to make any provision with respect to the acquisition and termination of citizenship and all other matters relating to citizenship.

## **Topic - VI**

### **Acquisition of Citizenship under the Citizenship Act, 1955**

The Parliament, in exercise of the power given to it under Article 11 of the Constitution, has enacted the Citizenship Act, 1955 making provisions for acquisition and termination of citizenship after the commencement of the Constitution. The Act has been amended on several occasions; and drastic amendments have been made to the Act by the Citizenship (Amendment) Act, 2003 and the Citizenship (Amendment) Act, 2005 .

The Act provides for the acquisition of Indian citizenship in five ways, i.e., birth, descent, registration, naturalisation and incorporation of territory.

#### **1. Citizenship by Birth**

By section 3 of the Act, the following persons shall be citizens of India by birth.

(a) Every person born in India on or after the 26th day of January 1950, but before the 1st day of July, 1987 shall be a citizen of India by birth.

(b) Every person born in India on or after 1st day of July, 1987, but before 3-12-2003 (the date of commencement of the Citizenship (Amendment)

Act,2003) and either of whose parents is a citizen of India at the time of his birth shall be a citizen of India by birth

(c) Every person born in India on or after 3-12-2003, if both of his parents are citizen of India or one of whose parents is a citizen of India and the other is not an illegal migrant at the time of his birth, shall be a citizen of India by birth.

By section 3(2) of the Act, such a person shall not be a citizen of India, if at the time of his birth-

(a) either his father or mother possesses such immunity from suits and legal process is accorded to any envoy of a foreign sovereign power accredited to the President of India and he or she is not a citizen of India, or

(b) his father or mother is an enemy alien and the birth occurs in a place then under occupation by the enemy.

## 2. Citizenship by Descent

By section 4 of the Act, the following persons shall be citizens of India by descent.

(a) A person born outside India on or after 26 th January 1950 , but before the 10th day of December 1992, shall be a citizen of India by descent if his father is a citizen of India at the time of his birth.

If the father of such a person was a citizen of India by descent only, that person shall not be a citizen of India by virtue of this section unless his birth is registered at an Indian consulate within one year of its occurrence or his father is, at the time of his birth, in the service under a Government in India.

(b) A person born outside India on or after 10th day of December,1992, if either of his partents is a citizen of India at the time

of his birth.

If either of the parents of such a person was a citizen of India by descent only, that person shall not be a citizen of India by virtue of this section unless his birth is registered at an Indian consulate within one year of its occurrence or either of his parents is, at the time of his birth, in the service under a Government in India.

A minor who is a citizen of India by descent and is also a citizen of any other country shall cease to be a citizen of India if he does not renounce the citizenship or nationality of another country within six months of attaining full age.

### 3. Citizenship by Registration

By section 5 of the Act, the Central Government may, on an application made in this behalf, register as a citizen of India any person who is not a citizen by virtue of the Constitution or the provisions of the Citizenship Act.

In order to register as a citizen of India, the applicant should not be an illegal migrant. The expression illegal migrant means a foreigner who has entered into India -

- (i) without a valid passport or other travel documents
- (ii) with a valid passport or other travel documents but remains in India beyond the permitted period of time.

The following categories of persons who are not illegal migrants can register as citizens of India under section 5 (1) of the Act.

(a) a person of Indian origin who is ordinarily resident in India for seven years immediately before making an application for registration. A person is deemed to be Indian origin if he, or either of his parents, was born in undivided India or in such other territory which became part of India after the 15 th day of August,1947.

- (b) a person of Indian origin who is ordinarily resident in any country or place outside undivided India.
- (c) a person who is married to a citizen of India and is ordinarily resident in India for seven years before making an application for registration.
- (d) minor children of persons who are citizens of India.
- (e) a person of full age and capacity whose parents are registered as citizens of India under clause (a) of section 5(1).
- (f) a person of full age and capacity who, or either of his parents, was earlier citizen of independent India, and has been residing in India for one year immediately before making an application for registration.
- (g) a person of full age and capacity who has been registered as an overseas citizen of India for five years, who has been residing in India for one year before making an application for registration.

#### **4. Citizenship by Naturalisation**

By section 6 of the Act, where an application in the prescribed manner is made by any person of full age and capacity not being an illegal migrant for the grant of a certificate of naturalisation to him, the Central Government may, if satisfied that the applicant is qualified for naturalisation, grant him a certificate of naturalisation.

The following are the qualifications for naturalisation.

- (a) he must not be a citizen of a country where Indian citizens are prevented from becoming citizen by naturalisation.
- (b) If he is a citizen of any country, he must undertake that he will renounce the citizenship of the other country in the event of his application for Indian citizenship being accepted.
- (c) he should have either resided in India or been in government service for 12 months before the date of making the application for naturalisation,
- (d) he should have either resided in India or been in Government service during 14 years prior to 12 months.
- (e) he should be of a good character,

(f) he should have an adequate knowledge of a language recognised by the Constitution.

(g) he should have intention to either reside in India or serve under the Government after naturalisation being granted to him

If in the opinion of the Central Government, the applicant is a person who has rendered distinguished service to the cause of science, philosophy, art, literature, world peace or human progress, it may waive all or any of the above conditions for naturalisation in his case (Section 6).

The person to whom a certificate of naturalisation is granted shall, on taking the oath of allegiance in the form specified in the Second Schedule to the Act, become a citizen of India by naturalisation as from the date on which that certificate is granted.

##### **5. Citizenship by Incorporation of Territory**

By section 7 of the Act, if any new territory becomes a part of India, the Central Government may by an order specify the persons who shall be citizens of India by reason of their connection with that territory; and those persons shall be citizens of India as from the date to be specified in the Order.

#### **TERMINATION OF CITIZENSHIP**

The Citizenship Act, 1955, also lays down how the citizenship of India may be lost whether it was acquired under the Citizenship Act, 1955, or prior to it, under the provisions of the constitution. It may happen in any of the three ways-

- (a) Renunciation or
- (b) Termination
- (c) Deprivation.

##### **(a) Renunciation of Citizenship**

By section 8 of the Act, an Indian citizen of full age and capacity

can renounce his Indian citizenship by making a declaration to that effect and having it registered. But if such a declaration is made during any war in which India is engaged, the registration shall be withheld until the Central Government otherwise directs. When a person renounces his citizenship every minor child of that person shall thereupon cease to be an Indian citizen. Such a child may, however, resume Indian Citizenship if he makes a declaration to that effect within a year after attaining full age, that is 18 years.

(b) Termination of Citizenship

By section 9 of the Act, if a citizen of India voluntarily acquires the citizenship of another country he shall cease to be a citizen of India. This provision however does not apply to a citizen who, during a war in which India may be engaged, voluntarily acquires the citizenship of another country.

(c) Deprivation of Citizenship

Deprivation is a compulsory termination of the citizenship of India. By section 10 of the Act, a citizen of India by naturalization, registration, domicile and residence, may be deprived of his citizenship by an order of the Central Government, on the following grounds:

- (a) Registration or naturalisation was obtained by means of fraud, false representation or concealment of any material fact ,or
- (b) He has shown himself by act or speech to be disloyal or disaffected towards the Indian Constitution, or
- (c) During a war in which India may be engaged he has unlawfully traded or communicated with the enemy ,or
- (d) Within five years of his registration or naturalisation he has been sentenced to imprisonment for not less than two years ,or
- (e) He has been ordinarily residing out of India for seven years continuously.

Before making an order depriving citizenship the Central Government must give to the person concerned a written notice

containing the ground on which the order is proposed to be made and in certain cases he might have his case referred to committee of Inquiry. The Central Government is then bound to refer the case to a committee consisting of a chairman and two other members. The committee of Inquiry shall hold the inquiry and the central government is to be ordinarily guided by its report in making the order.

### **One Citizenship in India**

It should be noted that our Constitution though federal, recognises one citizenship only, that is, the citizenship of India. There is no separate state citizenship. Every citizen has the same rights, privileges and immunities of citizenship, no matter in what state he resides. In federal states like the USA and Switzerland, there is a dual citizenship, namely, the citizenship of USA and the citizenship of the state where a person is born and permanently resides, and there are distinct rights and obligations flowing from the two kinds of citizenship. In India, a person born or resident in any state can acquire only one citizenship, that is, the citizenship of India.

**In Hinsa Virodhak Sangh v. Mirzapur Moti Kuresh Jamat, (2008) 5 SCC 33,** the Supreme Court observed that India is a Union of States and not an association or confederation of States. There is only one nationality i.e. Indian. Every Indian has a right to go, or settle anywhere in India, and do business of his choice in any part of India. In order to keep the country united, it is necessary to have tolerance and respect for all communities and sects.

## Overseas Citizenship

Sections 7A, 7B, 7C and 7D of the Act deal with overseas citizenship. These sections are inserted by the Citizenship (Amendment) Act, 2003.

### Registration of Overseas Citizens of India

By section 7A, the Central Government may, on an application made in this behalf, register the following persons as overseas citizens of India

- (i) Any person of full age and capacity , who is citizen of another country, but was a citizen of India at the time of, or at any time after, the commencement of the Constitution.
- (ii) Any person of full age and capacity , who is citizen of another country, but was eligible to become a citizen of India at the time of the commencement of the Constitution.
- (iii) Any person of full age and capacity , who is citizen of another country, but belonged to a territory that became part of India after the 15th day of August, 1947.
- (iv) Any person of full age and capacity, who is a child or a grandchild of a person who has registered as overseas citizen of India.
- (v) A person who is a minor child of an overseas citizen of India.

A person who is or had been a citizen of Pakistan, Bangladesh or such other country as the Central Government may specify shall not be eligible for registration as an overseas citizen of India.

### Rights of Overseas Citizens of India

By virtue of section 7B(1) of the Act, an overseas citizen of India shall be entitled to such rights as the Central Government may specify in this behalf by notification in the Official Gazette.

The Central Government has declared (Vide S.O. 542 (E) dated 11th April 2005) that the overseas citizens of India are eligible for the following rights.

(a) ✓ Granting of multiple entry lifelong visa for visiting India for any purpose.

(b) Exemption from registration with Foreign Regional Registration Officer or Foreign Registration Officer for any length of stay in India.

(c) Parity with Non-resident Indian in respect of all facilities available to them in economic, financial and educational fields except in matters relating to the acquisition of agricultural or plantation properties.

By virtue of section 7B(2) of the Act, an overseas citizen of India shall not be entitled to the following rights conferred on a citizen of India.

(a) Fundamental right conferred under Article 16 of the Constitution with regard to equality of opportunity in matters of public employment.

(b) Right conferred under Article 58 of the Constitution for election as President.

(c) Right conferred under Article 66 of the Constitution for election as Vice-President.

(d) Right conferred under Article 124 of the Constitution for appointment as a Judge of the Supreme Court.

(e) Right conferred under Article 217 of the Constitution for appointment as a Judge of the High Court.

(f) Right conferred under section 16 of the Representation of the People Act, 1950 in regard to registration as a voter.

(g) Right conferred under sections 3 and 4 of the Representation of the People Act, 1951 with regard to the eligibility for being a member of the House of the People or of the Council of States.

(h) Right conferred under sections 5, 5A and 6 of the Representation of the People Act, 1951 with regard to the eligibility for being a member of the Legislative Assembly or a Legislative Council.

(i) Right for appointment to public services and posts in connection with the affairs of the Union or of any State except for appointment in such services and posts as the Central Government may by special order in that behalf specify.

### Renunciation of Overseas Citizenship

By virtue of section 7C of the Act, if any overseas citizen of India of full age and capacity makes in the prescribed manner a declaration renouncing his overseas citizenship of India, the declaration shall be registered by the Central Government. On such registration that person shall cease to be an overseas citizen of India.

If a person ceases to be an overseas citizen of India, every minor child of that person registered as an overseas citizen of India shall thereupon cease to be an overseas citizen of India.

### Cancellation of Registration

The Central Government may, by order, cancel the registration as overseas citizen of India under the following circumstances.

- (i) If the registration was obtained by means of fraud, false representation or concealment of any material fact.
- (ii) If the overseas citizen has shown disaffection towards the Constitution of India as by law established.
- (iii) If the overseas citizen has during the war in which India may be engaged, unlawfully traded or communicated with an enemy.
- (iv) If the overseas citizen has, within five years after registration, been sentenced to imprisonment for a term of not less than two years.
- (v) If it is necessary so to do in the interest of the sovereignty and integrity of India, the security of India, friendly relations of India with any foreign country, or in the interest of the general public.

## **Topic - VII**

# **Meaning and Importance of Fundamental Rights**

Part III (Articles 12 to 35) of the Constitution of India contains a long list of Fundamental Rights.

(The Preamble of the Constitution declares that India is a democratic country) The hall-mark of a democratic society is basic human freedoms. They make democracy meaningful. The success or failure of a democracy depends largely on the extent to which these basic freedoms are enjoyed by the people in general.

A Democracy aims at the maximum development of the individual's personality. The personality of an individual is inseparably bound up with his liberty. Only a free society can truly ensure the all-round progress of its members and this in turn enriches its civilisation and culture. Therefore every democratic society pays special attention to safeguard human liberty. A common device adopted by most of the democratic countries for this purpose is to enshrine the inherent and inalienable human rights in their Constitutions and guarantee their inviolability by legislature and executive authorities.

The practice of recognising basic human rights through a written document dates back to 1214. The English people exacted an assurance from King John for respect of the then ancient liberties. This 'MAGNA CARTA' is the first written document relating to the fundamental rights of citizens.

Thereafter from time to time the King had to confer many rights to his subjects. In 1689 the Bill of Rights was written consolidating all important rights and liberties of the English people. The Bill of Rights of 1689 was considered the best result and fruit of the Glorious Revolution.

A more explicit statement of rights was made in the famous

'Declaration of the Rights of Man and of the Citizen' (1789) in France

By the Declaration of the Rights of Man and of the Citizen (1789) in France the natural, inalienable and sacred rights of man was declared and got recognition through a written document.

Following the spirit of Magna Carta of the British and the declaration of the Rights of Man and Citizen of France, the Americans incorporated the 'Bill of Rights' in their Constitution. The Americans were the first to give Bill of Rights a Constitutional status.

The practice of United States of America inspired many democratic countries of the world to incorporate a formal chapter on Fundamental Rights in their Constitutions. When the Constitution of India was being framed, the framers took inspiration from the American practice and incorporated a full chapter in the Constitution dealing with fundamental rights.

In A.K.Gopalan v. State of Madras (AIR 1950 SC 27) the Supreme Court observed that the aim of having a declaration of Fundamental rights is that certain elementary or basic rights, such as, right to life, liberty, freedom of speech and expression should be regarded as inviolable under all conditions. The shifting majority in the legislature or the executive should not have a free hand in interfering with these Fundamental Rights.

In Maneka Gandhi v. Union of India AIR 1978 SC 597, the Supreme Court observed that the Fundamental Rights guaranteed in Part III of the Constitution are calculated to protect the dignity of the individual and create conditions in which human being can develop his personality to the fullest extent. These fundamental rights impose negative obligation on the state (legislature & executive) not to encroach on individual liberty.

The Fundamental Rights are limitations upon the legislative and executive power of the state. The fundamental rights are intended to

protect the basic rights and liberties of the people against the encroachment of the government. The declaration of fundamental rights in the Constitution serves as a reminder to the government in power that certain liberties assured to the people by the Constitution are to be respected and are inviolable. The object behind the inclusion of the chapter of fundamental rights in Indian Constitution is to establish 'Rule of Law' ie., a Government of law and not of man.

The Fundamental Rights as incorporated in the Indian Constitution can be classified under the following six groups:

- (a) Right to Equality (Articles 14 - 18)
- (b) Right to Freedom (Articles 19 - 22)
- (c) Rights against Exploitation (Articles 23 - 24)
- (d) Right to Freedom of Religion (Articles 25 - 28)
- (e) Cultural and Educational Rights (Articles 29 - 30)
- (f) Rights to Constitutional Remedies (Articles 32 - 35)

The 44th Amendment has abolished the right to property as a Fundamental Right as guaranteed by Art.19(1) (f) and Art 31 of the Constitution and hence Articles 19 (1) (f) and 31 have been omitted. However right to property is a legal and Constitutional right under Article 300A.

Right to Education is made a fundamental right by the Constitution ( 86th Amendment) Act, 2002. Article 21A, which has been incorporated by the 86th amendment, provides for free and compulsory education to children of the age of six to fourteen years.

The rights which are given to the citizens by way of Fundamental Rights are a guarantee against state action. In case of violation of one's fundamental rights by the State, the aggrieved person can directly approach the High Court or Supreme Court for remedy. In case of violation of one's fundamental rights by private individuals, the ordinary legal remedies may be available but not Constitutional Remedies.

In **State of West Bengal v. Committee for Protection of Democratic Rights** (2010) 3 SCC 571, it was held that the fundamental rights are inherent and cannot be extinguished by any constitutional or statutory provision. Any law, which in its actual effect and impact abridges or abrogates fundamental rights, would be violative of basic structure of the Constitution. The actual effect and impact of the law on the rights guaranteed under part III has to be taken into account in determining whether or not it destroys the basic structure.

## **Topic - VIII** **Definition of 'STATE'**

[Note - Relevant Article ie., article 12 of the Constitution of India is given at the end of this Topic for easy reference]

The fundamental rights enshrined in Part III of the Constitution are available against 'State'. Article 12 of the constitution defines the term 'State'.

By virtue of the definition in Art 12, the term 'state' includes-

- (i) The Central Government and Parliament of India.
- (ii) The State Government and Legislature of each state.
- (iii) All local or other authorities within the territory of India.
- (iv) All local and other authorities under the control of the Government of India.

The term 'state' thus includes executive as well as the legislative organs of the Union and States. Over and above that the term 'state' includes 'Local Authorities' and 'Other Authorities' within the territory of India and which are under the control of the Government of India. Whenever the actions of these bodies violate one's fundamental rights as guaranteed in part III he can challenge the violative action before the Supreme Court or High Court.

Section 3(31) of the General Clauses Act defines the expression 'Local Authorities'. By virtue of the definition, Municipalities, District Boards, Panchayats, Improvement Trust and Mining settlement Boards are local authorities.

The term 'other authorities' used in Art 12 was interpreted by Madras High Court in University of Madras v. Santa Bai (AIR 1954 Mad 67) by applying *eiusdem generis* rule and held that the Madras University did not come within the purview of 'other authorities' and so not State within Art 12 of the Constitution.

In Ujammabai v. State of UP (AIR 1962 SC 1621) the Supreme Court rejected the interpretation given by the Madras High Court and held that the *eiusdem generis* rule could not be resorted to in interpreting the expression 'other authorities'. In Article 12 the bodies specifically named are not of the same species and the rule *eiusdem generis* has no application in such a situation.

In Electricity Board, Rajasthan v. Mohanlal (AIR 1967 SC 1857), the Supreme Court held that the expression 'other authorities' is wide enough to include all authorities created by the Constitution or statutes on whom powers are conferred by law.

In Umesh v. V.N.Singh (AIR 1967 Pat 3), the Patna High Court held that the Patna University is a State since it comes within the expression 'other authorities' as explained by the supreme court in Electricity board, Rajasthan v. Mohanlal (AIR 1967 SC 1857).

In Sukhdev Singh v. Bhagatram (AIR 1975 SC 1331), the Supreme Court held that Oil and Natural Gas Commission (ONGC), Life Insurance Corporation and Industrial Finance Corporation are authorities within the meaning of Article 12 of the Constitution and therefore, they are state. All the three corporations were created by statutes and they have power to make regulations under the statutes.

The effect of the above decision is that only authorities created by **the Constitution or by statutes** will come within the meaning of state.

In R.D.Shetty v. International Airports Authority of India (AIR 1979 1628) the Supreme Court gave a broad and liberal interpretation to the expression 'other authorities' and held that "if a body is an agency or instrumentality of government" it may be an authority within the meaning of Article 12 of the Constitution. In this case it was held that the International Airports Authority which had been created by an Act of Parliament is 'state' within the meaning of Art 12 of the Constitution.

In order to determine whether a body or corporation is an agency or instrumentality of the Government the court laid down the following tests.

- (i) If the financial resources of the state is the chief funding source of the corporation it becomes state.
- (ii) If there exists deep and pervasive state control, the corporation becomes state.
- (iii) If the functions of the corporation are of public importance and closely related to governmental functions, the corporation becomes state.
- (iv) If a department of government is transferred to corporation, the corporation becomes state.
- (v) If the corporation enjoys monopoly status which the state conferred or state protected the corporation becomes 'state' within the meaning of Art.12

The court held that the above stated tests are not conclusive but illustrative only and will have to be used with care and caution.

**In U P Warehousing Corporation v. Vijai Narain (1980) 3 SC 459,** it was held that the UP Warehousing Corporation which was

constituted under a statute and owned and controlled by the Government was an agency or instrumentality of the Government and therefore "state" within the meaning of Art 12.

In **Som Pakash v. Union of India** (AIR 1981 SC 212), the court applied the above stated tests and held a Government Company (Bharat Petroleum Corporation) fell within the meaning of the expression 'the state' used in Art 12 of the Constitution.

In **Ajay Hasia v. Khalid Mujib** (AIR 1981 SC 487), the Supreme Court held that a society registered under the Societies Registration Act is an agency or instrumentality of the State and hence a 'state' under Article 12. The society's composition is determined by the representatives of the Government. The expenses of society are entirely provided by the Central Government. The rules made by the society require prior approval of the State Government and Central Government. The society is to comply with all directions of the Government. It is completely controlled by the Government. The Government has power to appoint or remove the member of the society. In view of these elements the society is an instrumentality of the state and is, therefore, an authority within the meaning of Art. 12.

A corporation may be a statutory corporation created by a statute or a government company formed under the Companies Act, 1956 or a society registered under the Societies Registration Act, 1860 or any similar statute. It would be an 'authority' within the meaning of Art 12 if it is an instrumentality or agency of the Government and that is to be decided on a proper assessment of the case in the light of the relevant factors.

In **A.R.Anthulay v. R.S.Nayak** (AIR 1988 SC 1521), seven judges bench of the supreme court held that a court cannot pass an order or issue a direction which would be violative of fundamental rights of citizens. In view of the judgement it can be said that the expression

'state' as defined in Art 12 of the Constitution includes judiciary also.

**In Mahabir Auto Stores v. Indian Oil Corporation** (1990) 3 SC 752, it was held that the IOC is an authority within the meaning of Art 12 and thus state.

**In Bima Krishna Bose v. United India Insurance Co. Ltd** ( 2001) 6 SCC 477, it was held that a Government Company engaged in insurance business with monopoly right and privilege to carry on such business to the exclusion of others would have acquired the trappings of the "State" and is one of the "other othorities" under Article 12 of the Constitution of India.

**In Mysore Paper Mills Ltd. v. Mysore Paper Mills Officers Association and others** ( AIR 2002 SC 609), the Court held that the appellant Government Company entrusted with public duty of rural development is a "State" under Article 12 of the Constitution of India.

**In Pradeep Kumar Biswas v. Indian Institute of Chemical Biology** (2002) 5 SCC 111, the Supreme Court held that CSIR ( Council of Scientific and Industrial Reserch ) is an instrumentality or agency of Government of India and hence **state** within the meaning of Article 12 of the Constitution. By this decision the Supreme Court over-ruled its earlier decision given in **Sabhajit Tewary v. Union of India** (1975) 1 SCC 485. In **Sabhajit Tewary's Case** the Supreme Court took the view that CSIR is not a state within the meaning of Article 12.

**In Zee Telefilms Ltd. v. Union of India** (AIR 2005 SC 2677), the Supreme Court held that BCCI ( Board of Control for Cricket in India) is not financially, functionally or administratively dominated by the Government nor it is under the Control of the Government and hence **not a State** within the meaning of Article 12 of the Constitution.

### Part III

#### Fundamental Rights

Article 12. Definition - In this Part, unless the context otherwise requires, "the State" includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India.

## Topic - IX

### Some Basic Principles

- (i) **Laws Inconsistent with Fundamental Rights Shall be Void**
- (ii) **Meaning and basis of Judicial Review**
- (iii) **Doctrine of Eclipse**
- (iv) **'Law' and 'Law in Force'**
- (v) **Doctrine of Severability**
- (vi) **Doctrine of Waiver**

[Note - Relevant Article ie., article 13 of the Constitution of India is given at the end of this Topic for easy reference]

#### Judicial Review

Article 13(1) of the Constitution declares that all laws in force in the territory of India immediately before the commencement of the Constitution shall be void to the extent to which they are inconsistent with the provisions of part III of the Constitution.

Article 13(2) provides that the state shall not make any law which takes away or abridges the fundamental rights conferred by part III of the Constitution. Any law made in contravention of fundamental rights shall be void to the extent of contravention.

Article 13(3) defines the term law and the term includes any

ordinance, order, by-law , rule, regulation, notification, custom or usage having force of law. Thus not only the legislative enactment, but any other subordinate legislation or any other law having the force of law can be declared void by the courts if they are violative of fundamental rights.

Article 13 in fact provides for the 'judicial review' of all the legislations in India whether they are passed before or after the coming into force of the Constitution.

The power of Judicial Review has been conferred on the High Courts and Supreme Court of India. By virtue of the power of Judicial review these courts can pronounce or declare a law as unconstitutional if it is inconsistent with any of the fundamental rights.

All laws which are passed by the legislatures are liable to be struck down by the High courts or Supreme court if they are violative of fundamental rights.

In Kesavanatha Bharathi v. State of Kerala (AIR 1973 SC 1461), popularly known as 'Fundamental Rights' case the Supreme Court held that Judicial review is an integral part of the Constitution and the High Courts and Supreme Court have been vested with the power to decide the constitutional validity of the provisions of statutes. If the provisions of statutes are found to be violative of any of the Fundamental Rights the Supreme Court and the High Courts can strike down such provisions by virtue of Art 13 of the Constitution. It has been held that Judicial Review is the 'basic feature' of the Constitution and, therefore, it cannot be damaged or destroyed by amending the Constitution under Art 368 of the Constitution.

In A.K.Gopalan v. State of Madras (AIR 1950 SC 27) Kania C.J., observed thus: "In India the Constitution is supreme and that a statute law to be valid, must be in all conformity with the constitutional

requirements and it is for the judiciary to decide whether any enactment is constitutional or not.

For having a proper analysis of Article 13, laws can broadly classified into two. They are:

- (i) Pre-constitutional laws, and
- (ii) Post-constitutional laws,

### Pre-constitutional laws

According to Article 13(1) all pre- constitutional laws ie., laws which were in force on the date of commencement of the Constitution shall be void to the extent to which they are inconsistent with Fundamental Rights from the date of commencement of the Constitution. Thus it is very clear that Article 13(1) is not retrospective in operation. It is prospective in operation. All pre-constitutional laws inconsistent with fundamental rights will become void only after the commencement of the Constitution. They are not void ab initio. A declaration of invalidity by the court is also necessary in order to make the laws invalid.

In **Keshava Madhav Menon v. State of Bombay** (AIR 1951 SC 128), a prosecution proceeding was started against Mr.Kesava Madhav Menon under the Press (Emergency Power) Act, 1931 for the publication of a pamphlet in 1949. The Constitution of India came into force during the pendency of the proceeding in the Court. Then Mr.Keshava Madhav Menon filed a petition before the Supreme Court challenging the validity of the prosecution proceeding on the ground that the provisions of the Press (Emergency Power) Act, 1931 is violative of his fundamental right of freedom of speech and expression adumbrated in Art 19(1)(a) of the Constitution.

The Supreme Court held that Art 13(1) could not apply to his case as the offence was committed before the commencement of the Constitution. The fundamental rights conferred by part III of the Constitution became operative only on and from the date of the

Constitution. The voidness of the pre-constitutional law is limited to the future exercise of fundamental rights.

### **Doctrine of Severability or Separability**

A part of an Act may be unconstitutional. In such a case the whole Act need not be declared unconstitutional. For that purpose the doctrine of **severability** or **separability** will be applied. Thus this doctrine helps the judge to declare a part of a statute as unconstitutional without declaring the whole Act as unconstitutional.

In **Motor General Traders v. State of A P** (1984) 1 SCC 222, the Supreme Court held that by virtue of Article 13 when some provision of law is held to be unconstitutional then only the violative or repugnant provision of the law shall be treated as void and not the whole law. It is because Article 13 of the Constitution uses the words "*to the extent of such inconsistency be void*".

### **Doctrine of Eclipse and Pre-constitutional law**

The 'Doctrine of Eclipse' can be explained with the help of an example-

X is an Indian citizen. By virtue of Articles 19(1) (a) he has freedom of speech and expression. Suppose a pre-constitutional law is violative of his fundamental right of freedom of speech and expression. He challenges the constitutional validity of that law and the court declares the law as unconstitutional, being violative of his fundamental rights. When a declaration of unconstitutionality is made by the court, the law will not become void *ab initio*. It will become unenforceable. It will remain in a moribund condition. It is not dead but only overshadowed by the fundamental rights. It is eclipsed by the fundamental rights. Such a law will not be wiped out entirely from the statute book. They exist for all past transactions. They can be implemented against those persons who have no fundamental right to freedom of speech and expression,

eg. alien(non-citizen). Such a law can be validated by an amendment removing the violation of Constitution.

The doctrine of eclipse says that a law which is declared to be unconstitutional for being violative of fundamental rights is not a nullity or ab initio void, but becomes unenforceable. The said law can be implemented against any person who has no fundamental right. The law which is declared unconstitutional can be revived by an amendment to the Constitution or the Act. The effect of amendment should be to remove the shadow or to make the Act free from all blemish or infirmity. It becomes enforceable against any person after the eclipse or shadow is removed.

**In Bikaji Narayan v. State of Madhya Pradesh** ( AIR 1955 SC 781), a State Law authorised the State Government to exclude all private motor transport operators from the field of transport business. By virtue of Article 19 (1) (g) every citizen has a fundamental right to practice any profession, or to carry on any occupation, trade or business subject to reasonable restrictions imposed under Article 19 (6). By virtue of Article 19(6) the State can impose reasonable restrictions to the right to practice profession or to carry on business. Part of the Act became void from the commencement of the Constitution as it was violative of Article 19 (1) (g) of the Constitution since there was no provision in Article 19 (6) authorising the State to monopolise any business. But in 1951 Article 19(6) was amended by the Constitution (First Amendment) Act, 1951 so as to permit the monopoly of any business with the State. The Supreme Court held that after the amendment on 18 th June, 1951 the Constitutional impediment was removed and the Act became enforceable against citizens.

**In State of Gujarat v. Sri Ambica Mills** (AIR 1974 SC 1300), the Supreme Court held that the pre-constitutional laws which are declared unconstitutional will remain in a dormant or moribund condition only as against the citizens and they remain in operation as against non-

citizens who are not entitled to fundamental rights.

### **'Post - constitutional Law' and 'Doctrine of Eclipse'**

Post constitutional law is a law enacted by legislature after the commencement of the constitution. Art 13(2) clearly prohibits the state from making any law which takes away or abridges any of the Fundamental Rights. If against this clear direction state enacts a law then it will be ultra vires and void from the very inception. However a court declaration of unconstitutionality of such a law is necessary.

In **Deep Chand v. State of UP** (AIR 1959 SC 648), the Supreme Court held that a post-constitutional law which contravences a fundamental right is nullity from its inception and a still born law. It is void *ab initio*. The doctrine of eclipse does not apply to post-constitutional laws and therefore, even by a subsequent amendment that laws cannot be revived or constitutionally validated.

In **Mahendra Lal Jain v. State of U.P** (AIR 1969 SC 1019), the Supreme Court again held that the doctrine of eclipse applies only to pre-constitutional law and not to post -constitutional law A post -constitutional law which is declared void cannot be used for any purpose. Thus it cannot be used even against a person who had no fundamental rights.

But in **State of Gujarat v. Ambika Mills** (AIR 1974 SC1300) modified its earlier view and held that a post -Constitutional law which is violative of fundamental rights is not a nullity or non-existent in all cases and for all purpose. Such a law will become void or non-existent only against those persons who have fundamental rights. A person who has no fundamental right (a non-citizen) cannot take advantage of the voidness of that law. Moreover an unconstitutional law can be made valid by an amendment to the Constitution or the Act.

**The following are the main principles of doctrine of eclipse:**

1. If a pre-constitutional law is violative of any of the fundamental rights, such law can be declared void by the Supreme Court or High Court.
2. A law which is declared unconstitutional will not be wiped out entirely from the statute book. The law will continue to exist in the Statute book. But the law will become unenforceable against those persons who have fundamental rights. The law will remain in a moribund or dormant condition. Such a law can be used against those persons who have not fundamental rights.
3. If a pre-constitutional law is declared unconstitutional, the law will become unenforceable from the date of commencement of the Constitution. If a post constitutional law is declared unconstitutional, the law will become void from the date of commencement of the Statute.
4. The pre-constitutional law which is declared unconstitutional will be applicable for all transactions took place before the commencement of the Constitution.
5. The pre-constitutional law or post constitutional law which is declared unconstitutional can be enforced against those persons who have no fundamental rights.
6. The pre-constitutional law or post constitutional law which is declared unconstitutional can be validated by an amendment to the Constitution or Act so as to remove the eclipse of shadow. Once an amendment is effected for removing the unconstitutionality, the law will become enforceable from the date of amendment.

## **Doctrine of Waiver**

or

### **Can a citizen Waive his Fundamental Rights?**

*General public welfare.*

In **Basheer Nath v. Income Tax Commissioner** (AIR 1959 SC 149) the Supreme Court held that it is not open to a citizen to waive any of the fundamental rights conferred by Part III of the Constitution.

In **Behram v. State of Bombay** (AIR 1955 SC 146) the Supreme Court held that an accused person cannot give up his Constitutional right and get convicted.

## **'Law' and 'Laws in Force'**

Article 13 (3) (a) defines 'law'. Law includes any ordinance, order, by-law rule, regulation, notification, custom or usage having force of law in the territory of India.

The definition of 'law' in Article 13 (3) (a) is wider than the ordinary connotation of law. In the ordinary parlance the term law refers to enacted law or legislation. But as per the definition given in Article 13 (3) (a) the term includes all the subordinate legislations and the custom or usage having the force of law.

● In **Dwaraka Nath v State of Bihar** (AIR 1959 SC 249), the Supreme Court held that an 'administrative order' issued by an executive officer is 'law' within the meaning of Art 13 (3)(a) of the Constitution.

In **State of West Bengal v. Anwar Ali**, (AIR 1952 SC 75) the Supreme Court held that an "administrative direction or instruction" issued by the Government for guidance of its officers is not law. It does not include departmental instructions.

The term law includes custom or usage having the force of law.

However the personal laws of Hindus, Muslims and Christians are excluded from the definition of law for the purpose of Article 13: (**Bhan Ram v. Baijnath**, AIR 1962 SC 1476).

Article 13 (3) (b) defines 'law in force'. All laws passed or made by a legislature or other competent authority in the territory of India before the commencement of the Constitution and not previously repealed are 'laws in force'. Thus the term 'law in force' denote all prior and existing laws passed by the legislature or other competent authority in the territory of India and which have not been repealed earlier to the commencement of the Constitution.

**Article 13 (4) of the Constitution makes it clear that Constitutional amendments passed under Art 368 shall not be considered as 'law' within the meaning of Art.13.**

In **Kesavanantha Bharathi v. State of Kerala** (AIR 1973 SC 146), it was held that Art 13 (4) of the Constitution is valid. However the Court laid down the theory that there are certain 'basic features' of the Constitution, which cannot be amended under the amending power.

### Part III

#### Fundamental Rights

Article 13. Laws inconsistent with or in derogation of the fundamental Rights - (1) All laws in force in the country of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

(3) In this article, unless the context otherwise requires,-

(a) "law" includes any Ordinance, order, bye-law, rule, regulation,

notification, custom or usage having in the territory of India the force of law;

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

(4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.

## **Topic - X**

### **Right to Equality**

[Note - Relevant Articles ie., articles 14 to 18 of the Constitution of India are given at the end of this Topic for easy reference]

**Articles 14 to 18 of the Constitution guarantee the right to equality.**

**Article 14 embodies the general principles of 'equality before law'. It embodies the idea of equality expressed in the Preamble.**

**Article 15 provides for a particular application of the general principles embodied in Article 14. It prohibits discrimination on grounds of religion, race, caste, sex or place of birth.**

**Article 16 guarantees equality of opportunity in public employment.**

**Article 17 provides for abolition of untouchability.**

**Article 18 provides for abolition of Titles.**

**(A) "Equality Before the Law" and "Equal Protection of the Laws"**

**By virtue of Article 14 of the Constitution of India " the State shall not deny to any person equality before the law or the equal protection of**

the laws within the territory of India."

Article 14 guarantees "equality before the law" and the "equal protections of the laws" to any person. These two phrases 'equality before the law' and 'equal protections of the laws' have been taken from the British and American Constitutions respectively.

Prima facie these expressions seem to be identical in meaning. In fact they have different meanings. However they ultimately aim establishment of 'equality of status' as adumbrated in the preamble.



The concept of 'equality before the law' means that no man is above the law and that every person, whatever be his rank or status, is subject to the ordinary law and amenable to the jurisdiction of the ordinary courts. The concept of 'equality before the law' is an aspect or corollary of Dicey's concept of Rule of Law.

The concept of 'equality before the law' implies absence of any special privilege to any person by reason of birth, creed or the like. The ordinary law of the land should be equally applicable to all. Every citizen from the Prime Minister down to the humblest peasant should be under the same responsibility for every act done by him without lawful justification. There should not have any distinction between officials and private citizens. Further no person shall be subject to harsh, uncivilized or discriminatory treatment.

The Indian Constitution, however, provides for exceptions to the above rule. Certain persons such as the President, Governor, Diplomates and Judges enjoy special privilege. These privileges are attached to the officials mentioned and there is no discrimination made between individuals in their personal capacity.

The concept of 'equal protections of the laws' means that all persons similarly circumstanced shall be treated alike both in the privileges

conferred and liabilities imposed by the laws. The rule is that the like should be treated alike and the like and unlike should not be treated alike. In other words, equals should be treated alike, equals and unequals should not be bracketed together.

The protection under Article 14 is guaranteed to any person which includes any company or association or body of individuals. The protection under Article 14 is available to both citizens and non-citizens and to natural persons and legal persons: (*Chiranjit Lal v. Union of India* (AIR 1951 SC 41)).

#### Reasonable Classification is Permitted under Article 14

The guarantee of 'equal protection of the laws' mean that among the equals, the law should be equal and equally administered. The like should be treated alike. When a group of persons are equally placed, the state cannot give special privilege to a small group in that larger group.

The concept of equal protections of the law do not mean that the same law should be applied to all persons even though they are placed under different circumstances. The identical application of law in unequal circumstances would amount to inequality. It will be equal to the administration of same medicine for different diseases.

What article 14 contemplates is 'equal treatment of persons in equal circumstance and different classes of persons should be given separate treatment' Thus Article 14 permits classification of persons, objects and transactions for the purpose of legislation. The classification, however, should be reasonable. The classification should rest upon some real and substantial distinction. Two conditions are to be satisfied for considering a classification as reasonable. They are:

- (i) The classification must be founded on an intelligible differentia which distinguishes those that are grouped together from others left out

of the group.

(ii) The differentia must have rational nexes (relation) to the object sought to be achieved by the Act (**State of West Bengal v. Anwar Ali** (1952 SCR 289).

In **State of A.P. v. Nallamilli Rami Reddi** (2001) 7 SCC 708, the Supreme Court observed "what Article 14 of the Constitution prohibits is "class legislation" and not classification for the purpose of legislation". If the Legislature reasonably classifies under a well defined class, it is not open to challenge on the ground of denial of equal treatment that the law does not apply to other persons. The test of permissible classification is two fold:

- (i) the classification must be founded on intelligible differentia which distinguishes grouped together from other who are left out of the group, and
- (ii) that differentia must have a rational connection with the object sought to be achieved.

A classification would be justified unless it is patently arbitrary.

In **E.P.Royappa v. State of Tamil Nadu** (AIR 1974 SC 555), the Supreme court has laid down a new concept of equality. The court observed thus: "the equality is a dynamic concept with many aspects and dimensions". It is antithesis to arbitrariness. In fact equality and arbitrariness are sworn enemies. One belong to the rule of law in a republic while the other belong to the whim and caprice of an absolute monarch. If an act of the State is arbitrary, it is violative of Article 14 of the Constitution. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of treatment. Article 14 is attracted where equals are treated differently without any reasonable basis.

### Decided Cases

(i) **Mithu v. State of Punjab** (AIR 1983 SC 473)

Section 303 of the Indian Penal Code prescribed that if a person under a sentence of life imprisonment commits murder he must be awarded sentence of death. Sec. 302 provides that if a person commits murder he may be awarded either the sentence of death or sentence of life imprisonment.

The supreme court struck down Section 303 of the I.P.C. as unconstitutional on the ground that the classification between persons committing murders whilst under the sentence of imprisonment and those who commit murder whilst they were not under the sentence of life imprisonment was not based on any rational principle.

(ii) **Deepak Sibal v. Punjab University** (AIR 1989 SC 903)

Punjab University rules for the admission to the evening classes of the three year LL. B course provided that the admission would be available only to the employees of Government/Semi-government institutions and not to employees of private sector. The appellant was employed in the private sector and hence he was denied admission. The appellant challenged the validity of the rule on the ground that it violates Article 14 of the Constitution.

It was held that the classification between the Government/Semi-Government employees and private sector employees for the purpose of admission to the evening classes was unreasonable and unjust and, therefore, the rule was struck down as discriminatory and violate of Article 14 of the Constitution.

(iii) **Ajay Hasia v. Khalid Mujib** (AIR 1981 SC 487)

Admission to the Regional Engineering College was on the basis of a written test and oral interview. The allocation of marks for written test was 66.66% and for oral interview 33.33%.

The oral interview was challenged on the ground that it was arbitrary and unreasonable. The Court struck down the rule prescribing high percentage of marks for oral test. It was observed that allocation of more than 15% marks to interview will be arbitrary and unreasonable. Any rule which is arbitrary and unreasonable is violative of Article 14 and so unconstitutional.

(iv) **Lila Dhar v. State of Rajasthan** (AIR 1981 SC 1777)

25 percent of marks were allotted for interview for the selection of munsiffs in the Rajasthan Judicial Service. It was held that 25% marks for interview in the Munsiff's selection was not arbitrary and thus not unconstitutional.

(v) **D.V.Bakshi v. Union of India** (1993 3 SCC 662)

Petitioners challenged the constitutional validity of the regulations of the Customs House Agents Regulations 1984. The Regulations '8 & 6 provided that at least 50 marks out of 100 for the oral test is to be obtained for getting the licence of Customs House Agent. They contended that prescribing high percentage of marks for oral test is violative of Article 14 since it gives arbitrary power to the authorities to pick and choose the candidate.

The Court held that the rule stated in Ajay Hasia case is not applicable to the selection for appointments in public services. The rule stated in Ajay Hasia case is valid for admission to educational institutions but not for entry into public services. In the case of selection of professionals higher marks for oral test can be allotted. The Regulations are held to be not violative of Article 14.

(vi) **Air India v. Nargesh Meerza** (AIR 1980 SC 1829)

The petitioner challenged Air India and Indian Airlines Regulations as unconstitutional on the ground that the conditions laid down for retirement in the Regulations were entirely unreasonable and arbitrary.

Regulation 46 provided that an air hostess would retire from the service of the corporation upon attaining the age of 35 years, or on marriage, if took place within four years of service or on the first pregnancy whichever occurred earlier.

Regulation 47 conferred Managing Director discretion to extend the age of retirement by one year at a time beyond the age of retirement upto the age of 45 years if an airhostess was found medically fit.

The court held that the termination of service on pregnancy was manifestly unreasonable and arbitrary and was clearly violative of Article 14 of the Constitution. The Regulation 46 compelling the poor Air Hostess not to have any children and thus interfere with and divert the ordinary course of human nature. Termination of Air Hostess on her pregnancy is a cruel act and it is a way insult the Indian womenhood.

The provision for extention of service of Air Hostess 'at the option' of the Managing Director confers a very wide discretion and extention of the retirement becomes entirely at the mercy and the sweet will of the Managing Director. The discretion conferred to Managing Director is excessive and uncontrolled power and thus violative of Article 14 of the Constitution.

**(vii) Indian Council of Legal Aid & Advice v. Bar council of India  
(1995 1 SCC 732)**

Rule 9 was added by the Bar Council of India in Bar Council Rules. Rule 9 barred the entry of persons who have completed the age 45 years on the date of application for enrolment as an advocate. The said rule was challenged as discriminatory and unreasonable and violative of Article 14 of the Constitution.

The Bar Council argued that the rules were intended to maintain the dignity and purity of the profession by keeping out those retire from various government and 'Quasi-government' and other institutions since

they use their past contacts to canvass for cases. Their act pollute the minds of young fresh entrants to the profession.

The Supreme Court held that the rule is unreasonable and arbitrary. There is no material to show that the persons mentioned above indulge in undesirable activities of the type mentioned above after entering the profession. Moreover the rule does not debar the revival of sanads by persons who have enrolled before the age of 45 but suspended it to take some job. That is a clear violation of Article 14 of the Constitution and hence void.

(viii) **Revathy v. Union of India** (AIR 1988 SC 835)

Section 198(2) of Code of Criminal Procedure and section 497 of Indian Penal Code disable a wife from prosecuting her husband for the offense of adultery.

The petitioner challenged the Constitutional validity of these sections on the ground that it is violative of Article 14 of the Constitution.

Sections 198(2) of Cr.P.C. and 497 of IPC confer only to the husband of the adulteress the right to prosecute the adulterer. These section do not confer the wife the right to prosecute the adulterer husband.

The Supreme Court held that these provisions are not violative of Article 14 since these sections do not confer any right to the husband to prosecute his own adulteress wife who is a party to the adultery. The wife cannot be punished even as an abettor. In such a circumstance these sections cannot be declared to be violative of Article 14 of the Constitution.

(ix) **Bagwants v. Union of India** (AIR 1989 SC 2038)

'X' married 'Y' after retirement. Two children were born in that marriage. 'X' died and his wife 'Y' claimed family pension for herself and her two minor children. The claim was denied on the ground that the

family pension can be given only to the wife of the marriage during service.

The petitioner challenged the decision of the government. It was held that the classification between marriage during service and marriage after retirement for the purpose of giving family pension is arbitrary and violative of Article 14 of the Constitution. Pension is payable on the consideration of past service rendered by the government servants. Same considerations applies to family pension. So there is no justification to keep post-retirement marriage out of the purview of the definition of the term 'family' in Pension Rule. The family pension rule 5(14)(b) which excludes 'son or daughter born after retirement for the claim of family pension was held to be violative of Article 14 of the Constitution.

(x) **Randhir singh v. Union of India** (AIR 1982 SC 879)

The Supreme court held that although the principle of 'equal pay for equal work' is not expressly declared by our Constitution it is a fundamental right. It is certainly a constitutional goal under Art 14, 16 and 39(c) of the Constitution. The right of equal pay for equal work can be enforced in cases of unequal scales of pay based on irrational classification.

(xi) **Mewa Ram v. A.I.I.Medical Science** (AIR 1989 SC 1256)

The Supreme Court held that the principle of equal pay for equal work is not an abstract doctrine. The state can prescribe different scales of pay for different posts having regard to educational qualifications, duties and responsibilities of the post. Equality must be among equals and unequals cannot claim equality. The principle of equal pay for equal work cannot be claimed invariably in every kind of service particularly in the area of professional service. Persons belonging to same class, say doctors, can be classified on the basis of educational qualifications and different scales of pay can be prescribed by the state.

**(xii) Javed v. State of Haryana (AIR 2003 SC 3057)**

The petitioners challenged the validity of section 175(1) (g) of the Haryana Panjayat Raj Act, 1994 on the ground that it was violative of Article 14 of the Constitution. Section 175(1) (g) disqualifies a person having more than two children from contesting elections for Grama Panchayats, but does not apply to offices in other institutions of Local Self Governments or in the State Legislature or in Parliament. A three Judge bench of the Supreme Court held that the provision is not discriminatory and the classification made by it is based on intelligible differentia having nexus with the object of popularisation of family planning programme. Persons having more than two children and persons having not more than two children form two different classes. The object of the restriction is to promote family planning and hence not violative of Article 14 of the Constitution.

**(xiii) National Legal Services Authority (NALSA) v. Union of India (2014)  
5 SCC 438**

By this landmark decision, the Supreme Court of India declared transgenders (**Hijras/Eunuchs**) to be the 'third gender' and affirmed that the fundamental rights granted under the Constitution of India will be equally applicable on the transgenders and gave them the right to self-identification of gender as male, female or third-gender. The court also held that the transgenders to be treated as socially and economically backward classes and should be granted reservation in admissions in educational institutions and for public appointments.

### **Article 14 and Taxation Laws**

It is not open to attack a taxing statute on the ground that it taxes some persons and objects and not others. The state has wide power in selecting persons or objects for the purpose of taxation. A taxation will liable to be struck down as violative of Article 14 if there is no reasonable basis behind the classification made by it. If the same class of property, similarly situates, is subject to unequal taxation the taxation is liable to be struck down as violative of Article 14.

**(i) Western India Theatre v. Contonment Board (AIR 1959 SC 582)**

The Contonment Board imposed a higher tax on cinema house containing large seating accomodation and situated in a busy locality where the number of visitors are more numerous. Lesser tax was imposed on smaller cinema-house containing less accomodation and situated in a locality where visitors are less numerous.

The Supreme Court held that the taxation is not violative of Article 14 of the Constitution. The classification was based on income of cinema house.

**(ii) Venkateshware Theatre v. State of Andra Pradesh (AIR 1993 Sc 1947)**

The A.P Entertainment Tax Act, 1939 was amended in 1984. The Amendment Act introduced a new system for levy of tax. Prior to the amendment tax was levied on the basis of number of persons actually admitted to each show. Under the new system for levy tax gross collection capacity per show was to be considered and different percentage was prescribed on the basis of type of theatre and the area in which it was located. The court held the classification of theatres into different classes was not violitive of Article 14.

**(iii) Indian Express Newspapers v. Union of India (1985 1 SCC 641)**

The Supreme Court held that the classification of newspapers into small, medium and big newspapers on the basis of their circulation for the purpose of levying customs duty on newsprint was not violative of Article 14.

## **(B) Discrimination on Grounds of Religion, Race, Caste, Sex, and Place of Birth**

Article 14 permits the state to classify persons or objects for the purpose of conferring rights and imposing obligations. However the classification should be reasonable.

Article 15(1) of the Constitution prohibits the state from discriminating the **citizens** on grounds, only of religion, race, caste, sex, place of birth or any of them.

The word 'discrimination' means distinguish unfavourable from others or make an adverse distinction.

In **State of Rajasthan v. Pratap Singh** (AIR 1960 SC 1208) the Supreme Court invalidated a notification under the Police Act of 1851 which declared certain areas as disturbed and made the inhabitants of those areas to bear cost of additional police station established there but exempted all Harijans and Muslims. The exemption was given on the basis only of caste or religion and hence contrary to article 15(1) of the Constitution.

In **D.P.Joshi v. State of West Bengal** (1955 SC 334), it was held that a law which discriminates on the ground of residence does not violate Article 15(1). In that case a rule of the State Medical College required a capitation fee from non-Madhya Bharat students for admission in the college. It was held that the rule discriminates on the ground of *residence* and not on the basis of *place of birth* and hence not violative of Article 15(1).

Article 15(2) declares that no citizen shall be subject to any disability restriction or condition on grounds only of religion, race, caste, place of birth or any of them with regards to-

(a) access to shop, public restaurant, hotels and places of public entertainment, or

(b) the use of wells, tanks, baths, roads and place of public resort, maintains wholly or partly out of state funds or dedicated to the use of the general public.

Thus Article 15(2) prohibits both state and private individuals from making any discrimination only on the grounds mentioned in the Article.

The object of Article 15(2) is to eradicate the abuse of the Hindu Social System and to herald a United Nation.

#### **Special provision for Women and Children**

Article 15(3) is an exception to the general principle laid down in clauses (1) and (2) of Article 15.

Article 15(3) empowers the state to make special provision for women and children. They require special protection by virtue of their very nature.

If educational institutions are established by the state exclusively for women it will not violate Articles 15(1) by virtue of Article 15(3). So also if certain seats are reserved for women in a college that does not offend Article 15(1) (**Dattatraya v. State**, AIR 1953 Bom 311).

In **Yusuf Abdul Aziz v. State of Bombay** (AIR 1954 SC 321), the accused challenged the validity of Sec. 497 of the Indian Penal Code on the ground that it violates Article 15(1) of the Constitution. Sec 497 of India Penal Code which only punishes man for adultery and exempts the woman for punishment even though she may be equally guilty as an 'abettor'. It was held that since Article 15(3) allows the state to provide special provision for women and children. Sec. 497 does not violate Article 15 (1) of the Constitution.

### **Special Provision for Advancement of Backward Classes**

Article 15(4) is another exception to classes (1) and (2) of Article 15. By virtue of Article 15 (4) the state is empowered to make special provisions for the advancement of any *socially and educationally backward class of citizen or for the Scheduled Castes and Scheduled Tribes.*

Article 15(4) of the Constitution was added by the Constitution (1st Amendment) Act, 1951.

It was necessitated as a result of the decision of the Supreme Court in State of Madras v. Champakam Dorairajan (AIR 1951 SC 226).

In the above case the Madras Government had reserved certain seats in the Medical and Engineering colleges for different communities. It was challenged by the petitioner on the ground that the reservation of seats on the basis only of caste, religion and race is violative of Article 15(1) of the Constitution.

The Supreme Court held that the reservation law violates Article 15(1) and hence void. It was held that the directive principles cannot over-ride the Fundamental rights.

To modify the effect of this decision the Constitution (1st amendment) Act, 1951 was passed and Article 15(4) was added.

Article 15 (4) is only an enabling provision and does not impose any obligation on the state to take any special action under it. Article 15(4) merely confers a discretion to act it necessary by way of making special provision for socially and educationally backward classes

### **Who are 'socially and educationally backward classes' ?**

Article 340 of the Constitution empowers the President to appoint a commission to investigate conditions of socially and educationally backward classes. On the basis of the report of the commission the

president may specify who are to be considered as Backward classes.

The court can consider whether the classification made by the government is arbitrary or is based on any intelligible and tangible principle.

#### Decided cases

- (1) **Balaji v. State of Mysore** (AIR 1963 SC 649)

The Mysore government issued an Order under Article 15(4) reserving seats in the Medical and Engineering Colleges in the state as follows:

Backward classes 28%

More backward classes 22%

Scheduled Castes and Tribes 18%

Thus 68% of the seats available in the colleges were reserved and only 32% was made available to the merit pool.

The validity of the Government Order (G.O) was challenged by candidates who had secured more marks than those admitted but failed to get admission only by reasons of the G.O.

The Court held that the sub-classification made by order between 'backward classes' and 'more backward classes' was not justified under Article 15(4). Reservation of 68% of seats in technical institutions such as Engineering and Medical Colleges to the exclusion of qualified and competent students would suffer national interest. The state would not be justified in ignoring altogether advancement of the rest of the society in its zeal to promote the welfare of backward classes. It was held that the special provision should be less than 50%. The protection by way of reservation should be reasonable and not excessive.

In **Indra Sawhney v. Union of India (Mandal Commission Case)** (AIR 1993 SC 447) the Supreme Court held that the sub-classification

of backward classes into more backward and backward classes can be done. As regards the limit of reservation the majority has held that the total reservation shall not exceed 50%.

(ii) **Periakaruppan v. State of Tamil Nadu** (AIR 1971 SC 2303)

The Supreme Court held that classification of backward classes on the basis of caste is well within the purview of Article 15(4) provided those castes are shown to be socially and educationally backward.

The court advised the government that it should not proceed on the basis that once a class is considered as backward it should continue as backward class for all the times. Such an approach, the court said, would defeat the very purpose of the reservation. The government should always keep under review the question of reservation of seats and only the classes which are really socially and backward should be allowed to have the benefit of reservation. Reservation of seats should not be allowed to become vested interest.

(iii) **K. S. Jayasree v. State of Kerala** (AIR 1976 SC 2381)

The State of Kerala appointed a Commission (Joseph Commission) to enquire into and to report as to what sections of the people in Kerala should be treated as socially and educationally backward classes. On the basis of the report of the commission the Government directed that candidates belonging to families whose annual income was Rs.10000 or above would not be eligible for seats reserved for backward classes in Medical colleges. The Supreme Court held that neither caste by itself nor poverty by itself is determining factor of social backwardness. Both caste and poverty is relevant in determining the backwardness of citizens.

(iv) **Dr. Neelima v. Dean P.G. Studies A.P Agricultural University.**  
(AIR 1993 SC 229)

A high caste girl married a boy belonging to Scheduled Tribe. After marriage she sought admission to M.Sc. course under reservation quota for Scheduled Tribes. The Court held that she was not entitled to get

the benefit of reservation available to the Scheduled Tribes.

(v) **Dr. Priti Srivastava v. State of Madhya Pradesh**(A I R 1999 SC 2894)

The Supreme Court held that the merit alone can be the criterion for selecting students to the *super speciality courses in medical and engineering*.

(vi) **AIIMS Student's Union v. AIIMS** (2002) 1 SCC 428

The Supreme Court considered the question of reservation for admission in Medical Educational Institutions. The Court held that the basic rule is equality of opportunity for every person in the country, which is a Constitutional guarantee. A candidate who gets more marks than another is entitled to preference for admission. Merit must be the test when choosing the best. This proposition has greater importance when we reach the higher levels and education like post graduate courses. Reservation can be justified only upto getting over the handicap. The higher the level of the speciality, the lesser the role of reservation. The reservation should not be excessive or injurious to the society.

**Power to Make Law to Regulate Admission in Educational Institutions for Advancement of Socially and Educationally Backward Class or for Scheduled Caste or the Scheduled Tribes**

Clause 5 of Article 15 is added by the Constitution (Ninety-third Amendment) Act,2005.

Clause 5 empowers the State to make law for making special provision relating to the admission to educational institutions including private educational institutions, whether aided or unaided by the State, for the advancement of any Socially and Educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes. Thus the State can, by law, reserve seats in private educational institutions for admission of students belonging to socially and educationall backward

classes, scheduled castes and scheduled tribes. Any such law cannot be challenged in the court on the ground that it violates Article 19 (1) (g). However the State is not competent to enact such a law to regulate admission to the educational institutions established by the minority community as referred to in Article 30(1) of the Constitution.

After the insertion of clause 5 of Article 15, the Parliament enacted the Central Educational Institutions ( Reservation in Admission) Act,2006 ( Act 5 of 2007) reserving 27 % of seats in central educational institutions for other backward classes.

**In Ashoka Kumar Thakur v. Union of India** ( 2008 (2) KHC713 (SC) (SN) : ( 2008) 6 SCC 1, the Constitutional validity of the 93 rd Constitutional amendment and the Central Educational Institutions ( Reservation in Admission) Act,2006 was challenged. The Supreme Court held that the 93 rd Constitutional amendment is not violative of the 'basic structure' of the Constitution so far as it relates to aided educational institutions. It was further held that the 27 % reservation provided in the Act is not illegal.

**In Pramati Educational and Cultural Trust v. Union of India** 2014 (2) KLT 547 (SC), it was held that exclusion of minority educational institutions from Article 15 (5) is not violative of Article 14 of the Constitution of India.

(c) **Equality of Opportunity in Public Employment (Article 16)**

Article 16(1) says that "there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the state".

Article 16(2) says that "no citizen shall, on grounds only of religion, race, caste, sex, descent place of birth, residence or any of them, be ineligible for or discriminated against in respect of any employment or

office under the state."

Article 16(1) and 16(2) lay down the general rule that no citizen can be discriminated against or be ineligible for any employment or office under the state on grounds only of religion race, caste, sex, descent, place of birth or residence or any of them.

Article 16 does not prevent the state from prescribing the necessary qualifications and selective tests for recruitment for Government services. The qualifications prescribed may, beside mental excellence, include physical fitness, sense of discipline, moral integrity, loyalty to the state. If the appointment requires technical knowledge, technical qualification may be prescribed.

The selective test must not be arbitrary. It must be based on reasonable ground and have nexus between the qualification and the object that is, the post or the nature of employment.

#### **Reservation for Residents**

Article 16(3) is an exception to clause (2) of Article 16. Article 16(2) prohibits discrimination on the ground of 'residence'. Article 16(3) empowers the Parliament to make law for reserving certain posts in state for the residents only.

In exercise of the powers conferred by Article 16(3), Parliament has passed the Public Employment (Requirement as to Residence) Act, 1957. It provides that no one will be disqualified on the ground that one is not the resident of a particular state.

The Act of 1957, however provided an exception for employment in Himachal Pradesh, Manipur, Tripura and Telengana.

**In Narasimha Rao v. State of A.P (AIR 1970 SC 442).** The Supreme Court held that though the parliament can reserve certain posts

in Andra Pradesh for the residents of the state, it cannot reserve posts in Telangana District for the residents of Telangana District only. The court declared that part of the Act 1957 as unconstitutional.

#### **Reservation for Back-ward Classes**

Article 16(4) empowers the state to make special provisions for the reservation of appointments of posts in favour of any backward class of citizens which in the opinion of the state are not adequately represented in the services under the state.

In **Devadason v. Union of India** (AIR 1964 SC 179), the Court held that clause (4) of Article 16 is an exception to clause (1) of Article 16. But in **Indra Sawhany v. Union of India** (AIR 1993 SC 477), the Supreme Court held that Article 16(4) is not an exception to Article 16(1) but gives only a permissible basis.

The reservation for backward classes should not be unreasonable. It should be considered having regard to the employment opportunities of the general public.

In **Devadason v. Union of India** (AIR 1964 SC 179) the constitutional validity of "carry forward rule" was challenged.

The rule framed by the Govcernment provided that if sufficient number of candidates belonging to the Scheduled Castes, and Scheduled Tribes were not available for appointment to the reserved quota, the vacancies that remained unfilled would be treated as unreserved and filled by the fresh available candidates. However a corresponding number of posts would be reserved in the next year for Scheduled Castes and Scheduled Tribes in addition to their reserved quota of the next year.

By applying the above rule, in actual effect 68% of vacancies were reserved for S.C and S.T.

The Supreme court strucks down the 'carry forward rule' as unconstitutional on the ground that the power vested in government under Article 16(4) could not be exercised so as to deny reasonable equality of opportunity in matters of public employment for members of classes other than backward.

The court said that each year of recruitment must be considered by itself and the reservation for the backward communities should not be excessive so as to create a monopoly. The court held that the reservation ought to be less than 50% but how much less than half would depend upon prevailing circumstances in each case.

#### **Indra Sawhney v. Union of India (AIR 1993 SC 477)**

The scope and extent of Article 16(4) has been examined thoroughly by the Supreme Court in this historic case popularly known as the *Mandal Case*.

#### **Facts of the Case**

On Jan 1, 1979, while the government headed by the Prime Minister Sri. Morarji Desai was in power, the President appointed the second Backward Classes Commission under Article 340 of the Constitution under the chairmanship of Sri. B.P. Mandal to investigate the socially and educationally backward classes within the territory of India and recommend steps to be taken for their advancement including desirability for making provisions for reservation of seats for them in government jobs.

The commission submitted its report on March 21, 1979 popularly known as *Mandal Commission Report*.

It has identified as many as 3743 castes as socially and educationally backward classes and recommended for reservation of 27% Government jobs for them.

In the mean time the Janata Government collapsed and the congress party headed by the Prime Minister Smt. Indira Gandhi came to power at

the Centre. The congress Government did not implement the Mandal Commission Report till 1989.

In 1989 the congress party was defeated in the parliamentary elections and the Janata Dal again came into power. The Government of India headed by Prime Minister Sri. V.P.Singh issued the Office Memoranda on August 13, 1990 reserving 27% seats for backward classes in government services on the basis of the recommendations of the Mandal Commission.

This threw the Nation into turmoil and a violent anti-reservation movement rocked the nation for nearly three months resulting in huge loss of persons and property.

A writ petition on behalf of the Supreme Court Bar Association was filed challenging the validity of the Office Memorandum and for staying its operation.

The Five Judge Bench of the Court stayed the operation of the O.M. on October 1, 1990.

The Janata Government again collapsed and in 1991 and the congress party again came to power at the centre.

The congress party government headed by Sri.P.V.Narasimha Rao issued another Office Memorandum on Sep. 25, 1991 with two changes. They are:

- (i) The 27% reservation to Backward classes should be given to the poorer sections of socially and Educationally backward classes.
- (ii) 10% of vacancies are reserved for economically backward sections of higher castes.

The five Judges bench referred the matter to a Special Constitution

Bench of 9 Judges.

The 9 Judges Constitution Bench of the Supreme court by 6:3 majority held as follows:

(i) 27% reservation for backward classes is valid but the reservation can be implemented only when "Creamy layer" among them are eliminated.

(ii) The Government of India has to set up a Commission to exclude socially advanced persons that is, the creamy layer among backward classes.

(iii) A person belonging to a backward class who becomes a member of the IAS, IPS or any other All India Service could not seek benefit of reservation for his children.

(iv) The sub-classification between backward class and more backward classes is not unconstitutional (Balaji case in this point was thus over-ruled). The classification between backward and more backward is necessary to help the more backward classes, otherwise the advanced sections of backward classes might take all the benefit of reservations.

(v) The maximum limit of reservation cannot exceed 50% (on this point the court affirmed the Balaji and Devadasan cases in which the 50% rule was laid down).

(vi) The 'carry forward rule' is valid provided it should not result in breach of 50% limit. The 50% limit can only be exceeded in extraordinary situations.

(vii) The reservation cannot be made in promotions. The reservations is confined only to initial appointments.

(viii) The 10% reservation for economically backward classes among higher castes is unconstitutional.

(ix) Those states where the reservation is more than 50% have to reduce it to 50% (unfortunately the politicians have started floating the judgement of the court. The Tamil nadu Government instead of reducing the total reservation to 50% has enacted a law for giving sanction to

69% reservation for backward classes and the legislation had been included in the 9th schedule to save from judicial review. The Karnataka Government has increased the reservation from 73% to 80%. All this is done in clear violation of the Supreme court judgement.

### The Constitution( 77th Amendment )Act, 1995 and the Constitution (Eighty-fifth Amendment )Act, 2001

By the 77 th amendment a new clause (4-A) has been added to Article 16 of the Constitution. The said clause has again been amended by the eighty-fifth amendment.

By virtue of Article 16(4-A) as it now stands the state can make any provision for reservation in matters of promotion with consequential seniority, to any class or classes of posts in the services under the State in favour of the Schedule Caste and the Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State.

Thus the amendment nullified the Mandal ruling in connection with reservation for promotion in the case of Scheduled Castes and Scheduled Tribes.

In **P.G. Institute of Medical & Research v. Faculty Association** (AIR 1998), the Supreme Court held that there cannot be any reservation in a single post cadre.

In **Ajith Singh v. State of Punjab** ( AIR 1999 SC 3471), it was held that Articles 16(4) and 16(4A) do not confer any fundamental rights nor do they impose any constitutional duties but are only in the nature of enabling provision vesting a discretion in the State to consider providing reservation of the circumstances mentioned in those articles so warranted.

### **Constitution ( Eighty -first Amendment) Act,2000**

In **Indra Sawhney v. Union of India** (AIR 1993 SC 477), the Supreme Court held that reservation to any post shall not exceed 50 %. In order to put an end 50 % ceiling on reservation for SC's /ST's and Backward Classes the Amendment has inserted a new new clause ( 4B) to Article 16. By Article 16(4B), vacancies which could not be filled up in the previous years shall be treated as a seperate class of vacancies and will be filled up in any succeeding years and shall not be considered together with the vacancies of the year or years, even if they go beyond the 50 % limit.

### **Clause 5 of Article 16**

By virtue of Article 16 (5) in the case of religious or denominational institutions, the state government can by law reserve office of such institution exclusively to the persons professing a particular religion or belonging to a particular denomination.

### **D. Abolition of Untouchability**

By virtue of Article 17 "Untouchability is abolished and its practice in any form is forbidden". The enforcement of any disability arising out of "Untouchability" shall be an offence punishable in accordance with law.

Thus Article 17 abolished untouchability and its practice is also forbidden. If it is practiced in any form it becomes an offence. By virtue of Article 35(a)(ii) the Parliament can by law prescribe punishment for this offence.

In exercise of the power conferred by Article 35 Parliament has enacted the Untouchability (Offences) Act, 1955 and prescribed punishment .

This act of 1955 has been amended in 1976 and renamed as the Protection of Civil Rights Act, 1955.

The word 'untouchability' has not been defined either in the Constitution or in the Act of 1955.

In **Devarajah v. Padmanna** (AIR 1958 Mys. 84), the Mysore High Court held that the term is to be understood as the practice as it had developed historically in this country. It is a product of Hindu caste system according to which particular sections amongst the Hindu had been looked down as untouchables by the other sections of that society.

In the Amended Act i.e., the Protection of Civil Rights, Act, 1955, the expression 'Civil Right' is defined as "any right accruing to a person by reason of the abolition of untouchability by Article 17 of the Constitution.

Under the amended Act the following acts are declared as offences arising out of "untouchability".

- (i) Refusing admission to any person to public institutions such as hospital, dispensary, educational institution on the ground that he is an untouchable.
- (ii) Preventing any person from entering any place of worship or from worshipping or offering prayers therein on the ground that he is an untouchable.
- (iii) Preventing any person from entering any place of public restaurant, hotel or public entertainment on the ground that he is an untouchable.
- (iv) Preventing any person with regard to the use of any reservoir, tap or other source of water, road, cremation ground or any other place where service are rendered to the public on the ground that he is an untouchable.
- (v) Refusing to sell goods or render services to any person on the ground that he is an untouchable.
- (vi) Insulting a member of a Scheduled Caste on the ground of

- untouchability.
- (vii) Preaching untouchability, directly or indirectly.
- (viii) Justifying untouchability on historical, philosophical or religious grounds or on the ground of tradition of the caste system.

The Protection of Civil Rights Act prescribes punishment for the above stated offenses which may extend to imprisonment upto six months and also with fine which may extend to five hundred rupees or both. In the case of subsequent convictions, the punishment may range from one to two years imprisonment. A person convicted of the offense of untouchability shall be disqualified for election to the parliament or state legislature.

The Act further imposes a duty of Public servants to investigate such offences. If a public servant, wilfully neglects the investigation of any offence punishable under this Act , he shall be deemed to have abetted the offence punishable under this Act.

**In People's Union for Democratic Rights v. UNION of India** (AIR 1982 SC 1473), popularly known as *Asiad project workers case*, the Supreme Court held that the fundamental right guaranteed under Article 17 are available against private individuals and it is the Constitutionl duty of the state to take necessary steps to see that these fundamental rights are not violated.

**In State of Karnataka v. Appa Balan Ingale and others** (AIR 1993 SC 1126), the respondents were tried for offences under sections 4 and 7 of the Protection of Civil Rights Act, 1955 and convicted and sentenced to undergo simple imprisonment for one month and a fine of Rs.100 each.

The charge against the respondents were that they restrained the complainants by show of force from taking water from a newly dug up borewell (tube well) on the ground that they were untouchables.

The High Court acquitted them. The state went on appeal and the Supreme Court upheld the conviction.

The Court held that the object of Article 17 and the Act of 1955 is to liberate the society from blind and ritualistic adherence and traditional belief which has lost all legal or normal base. It seek to establish new ideas for society- equality to Dalits at par with general public, absence of disabilities, restrictions or prohibitions on grounds, of caste or religion.

### E. Abolition of Titles

By virtue of Article 18(1), no title shall be conferred by the State to any person. However, the State is not debarred from conferring military and academic distinctions even though they may be used as titles. Further the state is not debarred from conferring any distinction or award which cannot be used as a title ie., an appendage to one's name. Thus, the award of Bharat Ratna or Padma Vibhushan cannot be used by the recipient as a title and does not come within the Constitutional prohibition.

Article 18(2) prohibits the Indian Citizen from accepting any title from any foreign State.

By virtue of Article 18(3) a non-citizen of India who holds any office of profit under the state cannot accept any title from any foreign state. However he can accept any title from any foreign state with the consent of the President of India.

By virtue of Article 18(4) a person holding any office of profit under the state cannot accept any present, emolument or office of any kind from or under any foreign state. However he can accept the present, emolument or office of any kind from or under any foreign state with the consent of the President of India.

**Balaji Raghavan v. Union of India (1996 1 SCC 361)**

In this case the petitioner challenged the validity of National Awards such as Bharat Ratna, Padma Vibhushan etc., and requested the court to prevent the Government of India from conferring these Awards. It was argued that these awards are titles and are grossly misused and they are granted to persons who are undeserving of them. The Supreme Court held that these National Awards are not "titles" and thus not violative of Article 18 of the Constitution.

It is to be noted that there is no penalty prescribed for infringement of the above prohibition. Article 18 is merely directory. The Parliament can make a law for dealing with persons who accept a title in violation of the prohibition of Article 18. No such law has so far been passed by parliament.

**Part III**

**Fundamental Rights**

**Article 14. Equality before law** - The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

**Article 15. Prohibition of discrimination on grounds of religion race, caste, sex or place of birth** - (1) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

(2) No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to -

- (a) access to shops, public restaurants, hotels, and places of public entertainment; or
- (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of general public.

(3) Nothing in this article shall prevent the State from making any special provision for women and children.

(4) Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

(5) Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

**Article 16. Equality of opportunity in matters of public employment - (1)**  
There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union Territory prior to such employment or appointment.

(4) Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State.

(4-A) Nothing in this article shall prevent the State from making any provision for reservation in matters of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which in the opinion of the State are not adequately represented in the services under the State.

(4-B) Nothing in this article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4-A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

**Article 17. Abolition of Untouchability** - "Untouchability" is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of "untouchability" shall be an offence punishable in accordance with law.

**Article 18. Abolition of Titles** - (1) No title, not being a military or academic distinction, shall be conferred by the State.

(2) No citizen of India shall accept any title from any foreign State.

(3) No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.

(4) No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

## **Topic - XI**

# **Right to Freedom**

Articles 19 to 22 of the Constitution deal with different aspects of personal liberty. These Articles constitute backbone of the enshrined fundamental rights.

### **Six Freedoms to Citizens**

[Note - Relevant Article i.e., articles 19 is given at the end of this Topic for easy reference]

Article 19(1) of the Constitution guarantees six freedoms to citizens of India. They are-

- (a) Freedom of Speech and Expression
- (b) Freedom to Assemble peaceably and without arms
- (c) Freedom to form Associations or Unions or Co-operative Societies
- (d) Freedom to Move Freely throughout the Territory of India.
- (e) Freedom to Reside and Settle in any Part of India.
- (g) Freedom to Practice any profession, or to carry on any occupation, trade or business

Article 19(1)(f) was omitted by the Constitution (Forty Fourth Amendment) Act 1978. Thus with effect from 20.6.1979 the right to acquire, hold and dispose of property has ceased to be a fundamental right.

### **Limitations upon the Freedoms**

The six freedoms are not absolute. A modern state cannot guarantee absolute freedom of individuals. The six freedoms are subject to the control and regulation of state. Articles 19(2) to (6) of the Constitution empower the state to impose by its laws reasonable restrictions to these freedoms in the larger interest of the society. The

restrictions, however, should be reasonable and must not be arbitrary. The Constitution of India really attempts "to strike a balance between individual liberty and social welfare".

The restrictive laws passed by the legislature are subject to the judicial review. The laws passed by the legislature under Article 19(2) to (6) can be challenged in a court of law where it is unreasonable. The courts can declare such law as unconstitutional if the restrictions are found to be unreasonable.

### Part III Fundamental Rights

#### Article 19. Protection of certain rights regarding freedom of speech, etc.

- (1) All citizens shall have the right -

- (a) to freedom of speech and expression;
- (b) to assemble peaceably and without arms;
- (c) to form associations or unions or co-operative societies;
- (d) to move freely throughout the territory of India;
- (e) to reside and settle in any part of the territory of India; and
- (g) to practice any profession, or to carry on any occupation, trade or business.

(2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with Foreign States, public order, decency or morality, or in relation to contempt of Court, defamation or incitement to an offence.

(3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, reasonable restrictions on the exercise of the right conferred by the said sub -

clause.

(4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order or morality, reasonable restrictions on the exercise of the right conferred by the said sub - clause.

(5) Nothing in sub-clauses (d) and (e) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing reasonable restrictions on the exercise of any of the rights conferred by the said sub - clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.

(6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred by the said sub - clause, and, in particular , nothing in the said sub-clause shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to,

- (i) the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business, or
- (ii) the carrying on by the State, or by a corporation owned or controlled by the State, of any trade, business, industry or service, whether to the exclusion, complete or partial, of citizens or otherwise.

## **Topic - XII**

### **Discuss the Scope of "Freedom of Speech and Expression"**

**or**

### **"Freedom of Press" whether a Fundamental Right ?**

Article 19(1) (a) guarantees to all citizen the freedom of speech and expression. By virtue of Article 19(2) the state can impose reasonable restrictions to this freedom on the following grounds.

- (i) In the interest of the sovereignty and integrity of India.
- (ii) In the interest of the security of state
- (iii) In the interest of friendly relations with foreign states
- (iv) In the interest of public order, decency or morality
- (v) In relation to contempt of court
- (vi) Defamation
- (vii) Incitement to an offence

"Freedom of Speech and Expression" is indispensable in a democracy. It means the right to express one's own convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode. The expression "freedom of speech and expression" <sup>public shot cheyake</sup> cannontes the liberty to propogate others views also. It implies the right to propogate or publish the views of other and thus the 'freedom of press' is included in this expression.

#### **Illustrative Decisions**

- (i) **Kameshwar Singh v. State of Bihar ( AIR 1962 SC 1166)**

The Supreme Court held that demonstration or picketing are visible manifestation of one's ideas and in effect a form of speech and expression. Demonstration and picketing are protected under Article 19 (1) (a) of the Constitution. However they should not be violent and disorderly.

(ii) **K.A.Abbas v. Union of India** (AIR 1971 SC 481)

The petitioner has challenged the validity of film censorship as violative of his fundamental right of freedom of speech and expression.

Under the Cinematograph Act, 1952 films are divided into two categories i.e., 'U' film and 'A' films. 'U' films are meant for unrestricted exhibition while 'A' films can be shown to adults only.

The petitioners film "Tale of Four Cities" was refused "U" certificate.

The court held that pre-censorship of films was justified under Article 19(2). Hence classification of films between two categories i.e. 'A' (for adults only) and 'U' (for all) was held to be valid.

(iii) **Maneka Gandhi v. Union of India** (AIR 1978 SC 597)

The Supreme Court held that the freedom of speech and expression guaranteed under Article 19 (1) (a) has no geographical limitation and thus the freedom can be exercised not only in India but outside and if State (as defined in Article 12) action sets up barrier to its citizens freedom of speech and expression in any country in the world, it would violate Article 19 (1) (a) as much as if it inhibited such expression within the country. Freedom of speech and expression carries with it the right to gather information and to speak and express oneself at home and abroad and to exchange thoughts and ideas with others not only in India but also outside.

(iv) **Bijoe Emmanuel v. State of Kerala** (1986 3 SCC 615)

This case is popularly known as National Anthem Case. In this case three children belonging to Jehovah's witness were expelled from the school since they refused to sing the National Anthem.

The circular issued by the Director of Public Instructions, Kerala had made it obligatory for students in the schools to sing the National Anthem.

(The children in this case stood up respectfully when the National Anthem was being sung at their school but they did not join in singing it.)

They refused to sing the national anthem as according to them it was against their religious faith which does not permit them to join in any rituals except in their prayer to Jehovah, their God.

(They challenged the validity of expulsion before the High Court of Kerala and it was held that the expulsion valid.)

Then they went on appeal to the Supreme court. The Supreme Court held that they did not commit any offence under the Prevention of Insults to National Honour Act, 1971 since they stood up respectfully when the national anthem was being sung.

Further it was held that the children's expulsion from the school was a violation of their fundamental right under 19(1)(a) which includes the 'freedom of silence' or 'freedom not to speak'.

**(v) Secretary, Ministry of Information & Broadcasting v. Cricket Association of Bengal (CAB) (1995 2 SCC 161)**

In this case CAB wrote a letter to the Director General of Doordarshan that a six nations International Cricket Tournament would be held in November 1993 and requested the DD to make necessary arrangements for telecasting all the tournaments in India. The CAB had agreed to pay the requisite royalty amount to DD.

The CAB entered into an agreement with a foreign TV (Trans World International) for telecasting all the matches out of India. The CAB asked the DD to make available its TV signals for telecasting the tournaments out of India.

The DD refused the permission and CAB filed a writ petition in the Calcutta High Court. The court directed the DD to provide all facilities

for telecasting the matches by the agency (TWI) appointed by the CAB.

The government filed an appeal in the Supreme Court.

The Supreme Court held that the government has no monopoly on electronic media and a citizen has under Article 19(1)(a) a right to telecast and broadcast to the viewers/listeners through television and radio any important event. The government can impose restrictions on such a right only on grounds specified in Article 19(2) and not on any other ground. State monopoly on electronic media is not specified in clause (2) of Article 19.

(vi) Tata Press Ltd. v. Mahanagar Telephone Nigam Ltd.(1995 (5) SCC 139)

The Mahanagar Telephone Nigam is a Government Company controlled by the Government of India. Nigam is established to establish, maintain and control the telecommunication service within the territorial jurisdiction of the Union Territory of Delhi, the Municipal Corporation of Bombay, New Bombay and Thane.

Till 1987 Nigam used to publish and distribute the telephone directory consisting of white pages only. In 1987 Nigam entrusted the publication of telephone directory to outside contractors. They were directed to raise revenue for the publication by procuring advertisements and publishing the same as "yellow pages" appended to the telephone directory.

Meanwhile Tata Press Ltd. started to publish "Tata Press Yellow Pages". This Tata Press Yellow pages comprised paid advertisements from businessmen, traders and professionals.

The Nigam and the Union of India filed a civil suit before civil court of Bombay for a declaration that they alone have the right to print and publish the list of telephone subscribers and Tata Press Ltd have no

right to print or publish without the permission of Nigam. They contended that the act of Tata Press Ltd. is a violation of India Telegraph Act. They sought for an injunction against Tata Press Ltd. for publishing "yellow pages".

The City Civil Court dismissed the suit. The Bombay High Court allowed appeal filed by the Union of India and restrained Tata Press Ltd. from publishing "yellow pages".

The Tata Press Ltd. filed an appeal against the judgement of the Bombay High Court.

The Supreme Court held that a commercial speech (advertisement) is a part of the freedom of speech and expression guaranteed under Article 19(1) (a) of the Constitution. It can only be restricted on the grounds specified in clause (2) of Article 19. The court held that the commercial advertisement, which are deceptive, unfair, misleading and untruthful could be regulated by the government. In this case the Union government or the Nigam have no right to restrain the appellant. Tata Press Ltd. from publishing "Tata Yellow Pages".

The right guaranteed under Article 19(1)(a) cannot be denied by creating a monopoly in favour of the Government. It can only be restrained on ground mentioned in Article 19(2) of the Constitution.

(vii) Communist Party of India (M) v. Bharat Kumar and others (A I R 1998 SC 184)

A three Judge Bench of the Supreme Court, upholding the Full Bench Judgement of the Kerala High Court, held that calling and holding of 'Bundh' by political parties or organisations is unconstitutional and is hence illegal as it violates the fundamental rights of the citizens guaranteed by Articles 19(1) (a) and 21 of the Constitution in addition to causing national loss. No political party has right to call for Bundh on the ground that it is part of its fundamental right of freedom of speech

and expression under Article 19(1) (a). No political party or organisation can claim that it is entitled to paralyse the industry and commerce in the entire state or nation and is entitled to prevent the citizens not in sympathy with its view point from exercising their fundamental rights or from performing their duties for the benefit of the state or the nation. The political parties and organisations which destruct public and private properties when enforces the Bundh are liable to compensate the Government, the public and the private citizens for the loss suffered by them for such destruction.

(viii) **Kerala Vyapari Vyavasai Ekopana Samathi V. State of Kerala**  
(2000 [2] KLT 430)

The Kerala High Court held that indulging in destruction of public and private property and causing loss of production and holding the society to ransom in the name of staging a 'Hartal' cannot be considered to be a constitutional act based on rights conferred by the Constitution. There is no such freedom in any one guaranteed by the Constitution. When a call for Hartal made by an association or body of citizens is enforced by coercion or force an occasion clearly arises for the Election Commission to take action for cancelling the registration of that body or association. Those who have called for the hartal would be liable for the damage caused to public property and can be sued on the principle of compensation or on tort over and above the penal liability under the Prevention of Damage to the Public Property Act, 1984. The State can sue the wrongdoers and their instigators for recovery of damages.

(ix) **Wadhera v. State (N.C.T of Delhi)** [2000 (2) KLT 295] (Delhi H.C)

The court held that freedom of speech and expression is a natural right and which a human being acquires on birth and there for it is a basic human right. This basic human right has been recognised by the Universal Declaration of Human Rights(1948). In the Preamble of the Constitution of India, the people of India declared their solemn resolve to secure to all its citizen liberty of thought and expression. This resolve is reflected in Art.19 (1) (a) of the Constitution which guarantees to all

citizens the fundamental right to freedom of speech and expression. A "demonstration" is a visible manifestation of the feelings or sentiments of an individual or a group and thus a communication of one's ideas to others to whom it is intended to be conveyed. "Demonstration" is in effect is a form of speech or of expression. Holding of a peaceful and orderly demonstration by way of protest is an exercise of the fundamental rights guaranteed by Art. 19(1) (a) and 19 (1) (b) of the Constitution.

(x) **Union of India v. Association for Democratic Reforms ( AIR 2002 SC 2112)**

The Court held that in a democracy the "little man" or "voter-citizen" of the country would have "basic elementary right to know full particulars of a candidate who is to represent him either in the Parliament or Legislative Assembly, where laws to bind his liberty and property may be enacted: The voters have a fundamental right under Article 19 (1) (a) to know the antecedents including criminal past of a candidate, his qualification including educational qualification and details of his assets.

The Court directed the Election Commission to issue a notification making it compulsory for those who contest elections to make available information about their education, assets, liabilities and criminal antecedents for the benefit of voters. Thereupon the Election Commission issued a notification making it compulsory to give details of candidates along with their nomination papers.

In order to overcome the impact of the decision of the Supreme Court and the notification of the Election Commission, the Parliament amended the Representation of the People Act, 1951 ( R.P.Act) and inserted s.33B by the Representation of the People ( Third Amendment ) Act, 2002. Section 33 B reads as follows: **Notwithstanding anything contained in any judgement of any court or any order of the Election Commission no candidate shall be liable to disclose or furnish any such information, in respect of his election, which is not required to**

**be disclosed or furnished under this Act or the rules made thereunder." (The impact of the amendment was that the candidates were not to give any details as per notification of the Election Commission.)**

**In People's Union for Civil Liberties ( PUCL) v. Union of India (2003) 4 SCC 399,** the Petitioners challenged the Constitutional validity of s.33B of the R.P.Act. The Supreme Court struck down s.33B as it is violative of voters-citizens fundamental right to get information included in the expression freedom of speech and expression under Article 19 (1) (a) of the Constitution. The Supreme Court also observed that the "voting at an election is a form of expression and a fundamental right under Article 19 (1) of the Constitution.

**(xi) T.K. Rangarajan v. Government of Tamil Nadu (2003) 6 SCC 581**

~~The Supreme Court held that government employees have no fundamental right to resort to strike. Government employees cannot claim that they can take the society at ransom by going on strike. Even if there is some injustice to the employees they have to resort to the machinery provided under different statutory provisions for redressal of their grievances.~~

**(xii) Union of India v. Naveen Jindal ( AIR 2004 SC 1559) ( National Flag Case)**

The Respondent Naveen Jindal is Joint Managing Director of a Public Limited Company incorporated under the Companies Act. He being in charge of the factory of the said company situated at Raigarh in Madhya Pradesh was flying National Flag at the office premises of his factory. He was not allowed to do so by the Government officials on the ground that the same is impermissible under the Flag Code of India. The Respondent challenged the said action.

The Supreme Court held that the citizens have a fundamental right to fly the national flag with respect and dignity under Article 19 (1) (a) of

the Constitution. The fundamental right to fly National Flag is not an absolute right but a qualified one being subject to reasonable restrictions under clause ( 2 ) of Article 19 of the Constitution of India. The Emblems and Names ( Preservation of Improper Use) Act,1950 and the Prevention of Insults to National Honour Act, 1971 regulate the use of the National Flag. National flag cannot be used for commercial purpose. A citizen can use National Flag to express his nationalism, patriotism and love for motherland.

### Freedom of Press

Article 19(1) (a) does not expressly mention the liberty of the press. However, in a number of cases our Supreme Court has held that the freedom of press is implicit in the right of freedom of speech and expression. The freedom of press is essential for political liberty and proper functioning of democracy.

Freedom of Press is a cherished right on all democratic countries. The news papers are supposed to guard public interest by bringing forth the misdeeds, failing and lapses of the government and other public institutions. Thus the news papers have been described as the "Fourth Estate".

#### (i) **Brij Bhusham v. State of Delhi (AIR 1950 SC 129)**

The Chief Commissioner of Delhi issued an order under Sec. 7 of the East Punjab Safety Act, 1949 against the printer, publisher and editor of an English weekly of Delhi. The order directed him to submit for scrutiny before publication all communal matters and news and view.

The court struck down the order. It was held that the imposition of Pre-Censorship of a journal is a restriction on the liberty of the press which is an essential part of the freedom of speech and expression declared by Article 19(1)(a).

(ii) **Virendra v. State of Punjab** (AIR 1957 SC 896)

The Supreme Court held that prohibiting Newspaper from publication of its own views of correspondents about the burning topic of the day is a serious encroachment on the valuable right of freedom of speech and expression.

(iii) **Express Newspaper v. Union of India** (AIR 1958 SC 578)

The Supreme court held that a law which imposes pre-censorship or curtails the circulation or prevents newspapers from being started is violative of Article 19(1)(a).

(iv) **Romesh Thapper v. State of Madras** (AIR 1950 SC 124)

The petitioner was printer, publisher and editor of a weekly journal in English called "Cross Road" printed and published in Bombay.

The government of Madras issued an order prohibiting the entry into or the circulation of journal in the State of Madras. This was done in exercise of their powers under Section 9(1-A) of the Maintenance of Public Order Act, 1949.

The court held that the freedom of speech and expression includes freedom of propagation of ideas and that freedom is ensured by the freedom of circulation. The law banning entry and circulation of journal in a state is void and unconstitutional.

(v) **R.Rajagopal v. State of Tamil Nadu** (1994 6 SCC 632)

A condemned prisoner Auto Shanker who was convicted for six murders and sentenced to death had written his autobiography in jail and handed over the same to his wife with the knowledge and approval of the jail authorities for delivering it to his advocate with a request to publish it in a Tamil weekly magazine "Nakeeran". The autobiography depicted a close relation between prisoner and several IAS, IPS and other officers, some of whom were indeed his partners in several crimes.

The printer and publisher of the weekly magazine announced that they would publish the sensational life history of Auto Shankar soon.

This announcement sent shock waves among several police and prison officials who were afraid that their links with the condemned prisoner would be exposed.

They forced Auto Shanker, by applying third degree methods, to write letters addressed to the Inspector General of Prisons and the Editor of the Magazine requesting that his life story should not be published in the Magazine.

The Inspector General of Prisons wrote a letter to the Editor on 15th July, 1994 informing him that the autobiography was false and Auto Sanker had denied that had written any such book and therefore asked him to stop the publication of serial.

(The printer, publisher and editor of the Magazine filed a petition challenging the validity of the letter dated July 15, 1994 before the Supreme Court.)

The Court held the petitioner has a right to publish the autobiography of Auto Shankar so far as it appears from the public records even without his consent or authorisation. The government has no authority in law to impose a prior restraint upon publication of defamatory material against its officials. Public authorities who apprehend that they or their colleagues may be defamed could not prevent the press from publication of such materials. (They could take action for damages after publication of such materials if they prove that the publication was based on false facts. Further no action could be initiated against the press if publication was based on public records including court records.)

A citizen has a right to safeguard the PRIVACY of his own, his family, marriage, procreation, motherhood, child bearing and education

among other matters. This RIGHT TO PRIVACY is included in Article 21 of the Constitution. None can publish anything concerning the above matters without the persons consent whether truthful or otherwise. If he does so he would be violating the right to privacy of the person concerned and would be liable for action for damages.

The court made it clear that any publication concerning the privacy aspects would become unobjectionable if such publication was based upon *public records including court records*.

To the above stated general rule, the court expressed an exception.. The name of a female who was victim of sexual assault, kidnapping, abduction or a like offence should not be published in the news papers or magazines.

(The court held the petitioners was entitled to publish the autobiography by Auto Shankar as it appeared from public records.)

**(vi) M. Hassan v. Government of A .P(A I R 1998 A.P.35 (FB)**

The Andra Pradesh High Court held that the denial by Jail authorities to journalists and videographer to interview the condemned prisoners in jail amounts to deprivation of a citizen's fundamental right of freedom of speech and expression under Article 19(1)(a) of the Constitution.

**(vii) State v. Charita (AIR 1999 SC 1379)**

~~The Supreme Court held that the press does not have an unfettered right to interview an undertrial prisoner in jail. If the trial of the accused was pending before the Additional Sessions Judge he had authority to grant permission to the press to interview the under-trial prisoner inside the jail. The court while granting permission will have to weigh the competing interest between the right of the press and the right of the authorities prohibiting such interview in the interest of administration of justice. The permission granted should be subject to the relevant Rules and Regulations contained in the Jail Manual.~~

(viii) **Express Newspapers Pvt. Ltd. v. Union of India** (1986 ISSC 133)

By an agreement of lease the government of India allotted certain plots to the Express News papers Pvt.Ltd. for construction of its press building. The Express News Papers then constructed a new Express building.

The Lt. Governor of Delhi alleged that the new Express Building was constructed in contravention of municipal corporation laws and served a notice of re-entry and for its demolition. The construction of new building was in confirmity with the lease deed and with express sanction of the lessor ie., the Goverment of India. The notice was really intended to silence the voice of Express newspapers.

The petitioners challenged the constitutional validity of notice of re-entry and the threatened demolition of the Express Building on the ground that it was violative of Article 14, 19(1)(a) and (g) of the Constitution.

The court held that the impugned notice constituted direct and immediate threat to the freedom of the press and were thus violative of Articles 19(1)(a) and 14 of the Constitution.

### **Restrictions on the Freedom of Speech and Expression**

By virtue of Article 19(2) the freedom of speech and expression can be restricted by the state on the following grounds:

(i) **In the interest of sovereignty and integrity of India**

By virtue of Article 19(2) the state can impose reasonable restriction on the freedom of speech and expression in the interest of sovereignty and integrity of state. Thus the freedom of speech and expression can be restricted so as not to permit any citizen to challenge the integrity or

soverignty of India or to preach cession of any part of India from the Union.

(ii) In the interest of the security of the state

The state can impose reasonable restriction on the freedom of speech and expression in the interest of the security of the state. Speech and expression on the part of Individual which incite to or encourage the commission of violent crimes can be prohibited by the state on the ground of security of state. An incitement to an armed revolution is enough to attract the term security of the state.

(iii) In the interest of friendly relations with foreign states

A citizen's freedom of speech and expression can be restricted in the interest of friendly relation with foreign states. A citizen can be prohibited from malicious propoganda against a foreign friendly state. It is because unrestricted freedom of speech and restriction may jeopardise the maintanance of good relations between India and that State.

The Foreign Regulations Act, 1932 provides punishment for libel by Indian Citizens against foreign dignitaries. The India citizen can fairly criticise the foreign policy of a foreign government.

It is to be noted that the members of the common wealth including Pakistan is not a "foreign state" for the purpose of the constitution and thus the freedom of speech and expression cannot be restricted on the ground that the matter is adverse to Pakistan.

(iv) In the Interst of Public Order

This ground of restriction was added by the constitution (First Amendment ) Act, 1951 in order to meet the situatioin arised from the supreme court's decision in Romesh Thapper's case (AIR 1950 SC 124). In that case the supreme court held that a law banning the entry of a journal in the state of Madras in the interest of 'public prder' was

violative of Article 19(1)(a) since there was no ground allowing the state to restrict the freedom of speech and expression on the ground of 'public order'.

**In Babulal Parate v. State of Madras** (AIR 1961 SC 884), Sec. 144 of the Criminal Procedure Code was challenged on the ground that it imposed unreasonable restriction on the right of freedom of speech and expression. Under Sec. 144 Criminal Procedure Code if a Magistrate is of the opinion that there is sufficient ground for immediate danger of breach of peace he can by a written order direct a person or persons to abstain from certain acts if he considers that such direction is likely to prevent or tend to prevent a disturbance of public tranquility or a riot or affray.

The court upheld the validity of Sec. 144 holding that anticipatory action to prevent disorder is within the ambit of clause (2) of Article 19.

(v) **In the Interest of Decency or Morality.**

The freedom of speech and expression can reasonably be restricted in the interest of decency or morality.

Sections 292 to 294 of the Indian Penal Code provide instances of restrictions on the freedom of speech and expression in the interest of decency or morality.

(vi) **Contempt of Court**

The freedom of speech and expression can be restricted if it amounts to contempt of court.

Section 2 of the Contempt of Court Act 1971 defines 'contempt of court'. It may be either civil contempt or criminal contempt.

Civil Contempt means wilful breach of any judgement, decree, direction, order, writ or other process of a court or wilful breach of an undertaking given to a court.

Criminal Contempt means the publication of any matter which-

- (i) Scandalised or tends to scandalise or lowers or tends to lower the authority of any court, or
- (ii) Prejudices, or interferes or tends to interfere with the due course of any judicial proceedings, or
- (iii) Interferes or tends to interfere with, or obstructs or tends to obstruct the administration of justice in any other manner.

Contempt of court is punishable with simple imprisonment for a term of 6 months or with fine which may extend to Rs. 2000/- or with both.

(vii) Incitement to an Offence

The freedom of speech and expression can be restricted if that result in the incitement to an offense.

### **Topic -XIII**

### **Discuss "Freedom of Assembly" and its Restrictions**

Article 19(1)(b) of the Constitution guarantees to all citizens of India a right to assemble peaceably and without arms. The right to assemble is subject to the following restrictions.

- (i) The assembly must be peaceable
- (ii) It must be unarmed
- (iii) Reasonable restrictions can be imposed under clause 3 of Article 19 in the interest of 'Sovereignty and integrity of India' or 'public order'.

The right of assembly includes right to hold meetings and to take out procession. There can be reasonable restrictions to these freedoms.

Section 144 of the Criminal Procedure Code, 1973 empowers the Magistrate to restrain an assembly, meeting or procession if there is a risk of obstruction, annoyance or injury to any person lawfully employed or danger to human life, health or safety or a disturbance of the public tranquility or a riot or an affray.

The Police Act, 1861 empowers a police officer to direct the conduct and prescribe the route and time of all assemblies and processions in the interest of public order. Under section 30 of this Act a prior licence has to be taken by member of the public to take out a procession.

By virtue of section 141 of the Indian Penal Code, an assembly of five or more persons shall become an Unlawful Assembly, if such an assembly has a common object of -

- (i) resisting the execution of any law or legal process, or
- (ii) committing any mischief or criminal trespass, or
- (iii) obtaining possession of any property by force, or
- (iv) compelling a person to do what he is not legally bound to do or omit which he is legally entitled to do, or
- (v) overawing the Government by means of criminal force.

By section 129 of the Criminal Procedure Code, 1973 such an assembly may be ordered to be dispersed if the disturbance to the public peace is reasonably apprehended.

By section 151 of the Indian Penal Code, it an offence not to disperse after a lawful command to disperse has been given.

All the above mentioned statutory provisions impose reasonable restrictions under Clause 3 of Article 19 on the right of freedom of assembly.

## **Topic - XIV**

### **Discuss the Freedom To form “ Associations, Unions and Co-operative Societies” under the Constitution**

Article 19(1)(c) of the Constitution of India guarantees to all citizens the right to form association or unions or co-operative societies . The words "co-operative societies" were inserted by the Constitution ( Ninety-seventh Amendment) Act, 2011.

The State may, by virtue of Articles 19(4), impose reasonable restrictions on this right in the interest of public order or morality or sovereignty and integrity of India.

The right to form associations, union and co-operative societies includes the right to form companies, societies, partnerships, trade unions and political parties.

The freedom to form association includes the right to continue with the association. It implies the freedom not to form or not to join in an association or union.

**O. K. A. Nair v. Union of India (AIR 1976 SC 1179)**

The appellants were civilian employees designated as 'non-combatants such as cooks, chowkidars, paskers, barbers, mechanics, boot-makers, tailors etc. attached to the Defence Establishments.

They formed an association known as Civil Employees Union. The commandant declared their union as unlawful association.

They challenged that impugned action of commandant was violative of their fundamental right guaranteed under Article 19(1)(c) of the Constitution. They contended that their service conditions are regulated by civil service rules and therefore they are not members of

**the Armed forces within the meaning of Article 33 of the constitution.  
(Article 33 denies fundamental rights to members of Armed Forces).**

**It is the duty of these non-combatants to accompany the Armed Personnel on active service or in camp or on march. Though their service conditions are regulated by Civil Service Rules they are integral to Armed Forces and they also come within the description of 'the members of Armed forces' and thus they are not entitled to the Fundamental Right to form Association or Union.**

**Balakotiah v. Union of India (AIR 1958 SC 232)**

The appellant was terminated from the Railway Services since he was a member of Communist party and a trade unionist. The appellant challenged that the termination from service amounted in substance to a denial of the right of freedom of association. The termination was held to be not a contravention of his right to form association since the order did not prevent him from continuously as a member of Communist Party.

## **Topic-XV Discuss the Freedom of Movement and its Restrictions**

Article 19(1)(d) of the Constitution guarantees to all citizens of India the right to move freely throughout "the territory of India". The citizens of India can go wherever they like in the Indian territory without any kind of restrictions whatsoever. They can move freely from one state to another. So also they can move freely from one place to another place within the same state.

The right to move freely throughout the territory of India is subject to reasonable restrictions. Article 19(5) of the Constitution says that "in the interest of general public" or "for the protection of the interest of any scheduled tribe" the state can impose reasonable restrictions on the

freedom of movement.

**N.B.Khare v. State of Delhi (AIR 1950 SC 211)**

The District Magistrate of Delhi passed an order of exterrnent and directed the petitioner to remove himself immediately from Delhi district and not to return for a period of three months. The order was made under the East Punjab Safety Act, 1949.

The petitioner challenged the order on the ground that it violated his right to move freely throughout the territory of India.

The Court held that the order impose only reasonable restriction in the interest of general public and hence valid.

**State of Uttar Pradesh v. Kaushalya (AIR 1964 SC 416)**

A prostitute was ordered to remove herself from the limits of a busy city under the suppression of Immoral Traffic in Women and Girls Act, 1956. The order was held to be valid since it imposed a reasonable restriction on the right to move freely throughout the territory of India in the interest of general public.

The right of a citizen to move freely may also be restricted for the protection of the interest of Scheduled Tribes. The object is to protect the original tribes settled in Assam. These tribes have their own culture, language, customs and manners. There can be reasonable restriction upon the entry of outsiders to these areas.

## **Topic - XVI**

# **Discuss the “Freedom of Residence” and its Restrictions**

Article 19(1)(e) of the Constitution guarantees to every citizen the right to reside and settle in any part of the territory of India.

This right is subject to reasonable restrictions imposed by law "in the interest of general public" or "for the protection of the interest of any scheduled tribes". These restrictions are equally applicable to the right to move freely throughout the territory of India.

### **State of M.P. v. Bharat Singh (AIR 1967 SC 1170)**

Section 3(1) of the M.P. Public Security Act, 1959 empowered the state government to issue an order requiring a person to reside or remain in such a place as might be specified in the order or to ask him to leave the place and to go another place selected by authorities in the interest of security of the state or public order.

The respondent challenged the constitutional validity of Sec.3(1). It was held that the Act did not give an opportunity to the person concerned to present his case. The place selected by the authorities may not have residential accommodation or means of livelihood and thus the Act is violate of Article 19(1)(e).

### **N.B.Khare v. State of Delhi (AIR 1950 SC 211)**

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**In Khalid Mundappilly v. Executive Engineer and Others (2010 (3) KHC 1 (DB),** the petitioner filed a public interest litigation challenging the permission granted by the respondents to hold public meetings on the PWD road in front of Aluva Railway Station. The Court held that the holding of meetings on public roads and road margins is an illegal act and prohibited the respondents and other Government agencies including PWD, Police, Revenue and Local authorities from granting any permission to hold meetings on public roads and road margins.

**In Chief Secretary to Government v. Khalid Mundappilly (2010 (3) KHC 661 (DB),** the Chief Secretary to Government filed a review petition seeking review of the above judgment. The High Court of Kerala dismissed the review petition and held that no one has a fundamental right to assemble or hold meeting on public road or road margin which are meant only for vehicular traffic and for travelling public. Right to conduct meeting is nothing superior than freedom of movement. ( In order to bypass the Order of High Court, the Kerala Public Ways ( Restriction of Assemblies and Processions) Act,2011 was enacted by the Kerala Legislative Assembly.)

## **Topic-XVII**

# **Discuss Freedom of Profession, Occupation, Trade or Business and its Restrictions**

By virtue of Article 19(1)(g) all citizens shall have the right to practice any profession, or to carry on any occupation, trade or business.

The right to practice any profession or to carry on any occupation, trade or business is not unqualified. This right can be restricted by authority of law. The state can under Article 19(6) make any law imposing reasonable restriction on this right in the interest of public. So also state can prescribe professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business. Similarly the state can nationalise any trade or business and carry it on itself to the exclusion of all the citizens wholly or partially.

### **Decided Cases**

- (1) **Hathising Mfg. Co. v. Union of India** (AIR 1960 SC 923)

The Supreme Court held that the right to carry on a business includes a right to close it at any time the owner likes. So the state cannot compel a citizen to carry on business against his will.

It is to be noted that the right guaranteed under Article 19(1)(g) is not an absolute right. It can be restricted, regulated or controlled by law in the interest of public. If one does not start a business at all he cannot be compelled to start one. If he has started a business he has no absolute right to close down it.

- (2) **Excel Wear v. Union of India** (AIR 1979 SC 25)

Excel wear was a registered firm engaged in manufacturing of garments for exporting to the foreign countries. Due to serious labour trouble the factory at Bombay was running at a recurring loss. The petitioners, Excel Wear, found it difficult to carry on the business. They

so served a notice to the government under section 25-O of the Industrial, Disputes Act, 1947 for the prior approval for the closure of business. The government refused permission even though the petitioners could not pay even minimum wages to the labourers. The petitioners challenged the order of refusal before the Supreme Court. The Supreme Court struck down sections 25(O) and 25(R) of the Industrial Disputes Act as unconstitutional. These sections are held to be not reasonable restrictions in the interest of public.

**(3) Fertilizer Corporation Kamgar Union v. Union of India**  
(AIR 1981 SC 344)

The workers Union challenged the validity of the sale of certain plants of the public corporation namely Sindri Fertilizer Factory on the ground that it would result in the retrenchment of 11,000 workers employed in the corporation and thus the sale would deprive them of their right to carry on their occupation as industrial workers. The Court held that Article 19(1)(g) does not guarantee the right to work in a particular post of one's own choice. The closure of an establishment in which a workman is employed does not by itself infringe the fundamental right to carry on an occupation. If workers are retrenched they can pursue any other occupation.

**(4) Kerala S M T Fed. v. Kerala T.B.O Association**  
(1994 5 SCC 28)

The Government of Kerala made two orders under Sec 4 of the Kerala Marine Fishing Regulation Act, 1980. By these orders bottom trawling was prohibited completely within the territorial water for a period of 44 days during monsoon period. The owners and operators of mechanised boats challenged these orders as violative of their right to carry on business under Article 19(1)(g). Their boats are practically confined to the seashore during the prohibited period and they cannot go to sea. The Supreme Court held that the orders are reasonable and valid since the object of these orders were to protect the larger sections of fishermen and assuring livelihood of traditional fishermen. Moreover

these orders conserves fish wealth and avoid possible law and order problem in coastal area and the sea. Above all these boat owners can conduct bottom-travelling beyond territorial water during the prohibited period.

**(5) Khoday Distilleries Ltd. v. State of Andra Pradesh**

(1995 SCC 574)

The Andra Pradesh government had imposed a ban on trade or business in liquor by private person in the state under the A.P. (Regulation of Wholesale Trade, Distribution and Retail Trade in Indian Liquor and foreign liquor, wine and Beer) Act, 1993. The petitioners challenged the constitutional validity of the Act. The Supreme court held that the rights under Article 19(1) (a) are not absolute. The state can impose reasonable restrictions on this right in the public interest. A citizen has no fundamental right to trade or business in activities which are immoral or criminal and in articles or goods which are injurious to general public. The state has power to prohibit the manufacture, sale, possession, distribution and consumption of alcohol as per the directive principle contained in Article 47 except for medicinal purposes. Hence citizens have no right to carry on trade or business in liquors.

**(6) Sodan Singh v. New Delhi Municipal Committee**

(AIR 1989 SC 1988)

The petitioners are poor hawkers carrying on business on the pavements of roads of Delhi and New Delhi. The municipal committee banned the hawking business on the pavements of roads. They challenged the validity of prohibition on the ground that the prohibition violated their fundamental rights guaranteed under Articles 19(1)(g) and 21 of the Constitution.

The Supreme Court observed thus: public streets are primarily to be used by the public generally as pathways for passing and re-passing but there are other ancillary purposes for which the public streets can be used as of right. Street trading is an age-old vocation adopted by human

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The Supreme Court observed thus: public streets are primarily to be used by the public generally as pathways for passing and re-passing but there are other ancillary purposes for which the public streets can be used as of right. Street trading is an age-old vocation adopted by human

being to earn living. Hawkers have a fundamental right to carry on business of their own choice. However they have no right to do so on a particular place. They cannot claim that they should be permitted to trade on every road in the city. If a road is not wide enough to conveniently manage the traffic on it, no hawking may be permitted at all, or may be sanctioned only once a week. Hawking may also be prohibited near hospitals or where necessity of security reasons so demands. The hawking cannot be prohibited absolutely on the ground that pavements of roads are meant exclusively for passing or re-passing and not for any other purpose. Hawking on the pavements give advantage to the general public also since ordinary articles of every day use will be available for a comparatively lesser price. Thus the right to conduct hawking on pavements of roads to be reasonably restricted and not to be prohibited absolutely. The state has to frame proper schemes for regulating the Hawking business by creating hawking and non-hawking zones. The decision accepted "street trading" as one of the legitimate modes of earning livelihood.

**(7) Vasanth Nagar Allottees' Association v. District Collector  
(2000 [1] KLT 148)**

The Kerala High Court held that every citizen has a right to use the public street vested in the state as a beneficiary, but this right is subject to such reasonable restrictions as the state may choose to impose. Street trading is a fundamental right under Art.19(1) (g) of the Constitution but it is subject to reasonable restrictions which the state may choose to impose by virtue of Art.19(6) of the Constitution. The right to street trading does not extend to a citizen occupying on any specific place of his choice on pavement regardless of the rights of others, including pedestrians, to make use of the pavements. The very purpose of providing footpath is to ensure that the pedestrians are able to go with a reasonable measure of safety and security.

**(8) Chintaman Rao v. State of M.P**

(AIR 1955 SC 118)

A law authorised the Government to prohibit all persons residing in certain areas engaging themselves in the manufacture of bidi during the agricultural season. The Government prohibited bidi making as per the law. The object of the law was to provide adequate labour for agricultural operation. The Supreme Court held the law was invalid as it imposed unreasonable restriction on the freedom of business. The law not only compels those who are engaged in agricultural work from taking other vocation but also prohibits persons such as infirm, disabled, old women and children incapable of working as agricultural labours from engaging themselves in bidi making for their livelihood. Hence the law is arbitrary and unreasonable.

**(9) Municipal corporation , Ahmedabad v. Jain Mohd. Usmanbhai**

(1986 3 SCC 20)

The Municipal Commissioner issued a standing order under the Bombay Provincial Municipal Corporation Act, 1949. By that order the commissioner directed that the municipal slaughter houses should be closed on seven days in a year viz birthday, nirwan day and shraddha day of Mahatma Gandhi, birthdays of Lord Rama, Lord Krishna, Jain Samvatsari and Mahavir Jayanti. The petitioner challenged the validity of the order on the ground that it imposed unreasonable restriction on his right to carry on trade as a beef dealer. It was held that the standing order imposed reasonable restriction in the public interest and hence valid.

**(10) Ram Bux Chaturbhuj v. State of Rajasthan (AIR 1963 SC 851)**

It was held that the imposition of licence fee as a requirement for granting of licence to a citizen to carry on trade or business or profession does not amount to an unreasonable restriction.

**(11) Bijoy Cotton Mills Ltd. v. State of Ajimer** (AIR 1955 SC 33)

The petitioner challenged the constitutional validity of the Minimum Wages Act which empowers the Government to fix minimum wages to be given to the labourers in a particular industry. It was held that the Act impose reasonable restriction in the interest of general public. The object of the Act is to prevent the employment of sweated labour in the interest of general public.

**(12) Unni Krishnan J.P. v. State of A.P** (1993) 1 SCC 645

The Supreme Court held that the right to establish an educational institution and imparting education is not a commercial activity and such activity can neither be a trade or business nor can it be a profession within the meaning of Article 19 (1) (g). Trade or business normally connotes an activity carried on with a profit motive. Education has never been commerce in this country. (It is to be noted that this decision is over-ruled in *T.M. A Pai Foundation* case ( 2002 (8) SCC 481)

**(13) T.M. A Pai Foundation v. State of Karnataka** ( 2002 (8) SCC 481)

The Supreme Court held that the establishment and running of an educational institution where a large number of persons are employed as teachers or administrative staff, and an activity is carried on that results in imparting of knowledge to students must necessarily be regarded as an occupation, even if there is no element of profit generation. The right to establish and administer educational institutions is guaranteed under the Constitution to all citizens under Article 19 (1) (g) and 26 and the minorities specifically under Article 30.

**(14) Islamic Acadamey of Education v. State of Karnataka**  
(2003) 6 SCC 697

The Supreme Court held that the right to establish an educational institution under Article 19(1) (g) is not absolute and it is subject to laws imposing reasonable restrictions and laws for recognition and affiliation of professional institutions.

**(15) P.A. Inamdar v. State of Maharashtra (2005) 6 SCC 537**

The Supreme Court held that the right to establish an educational institution, for charity or for profit, being an occupation, is protected by Article 19 (1) (g). However no capitation fee can be permitted to be charged and no seat can be permitted to be appropriated by payment of capitation fee.. The charging of capitation fee by unaided minority and non-minority institutions for professional courses is not permissible.

**Professional and Technical Qualifications**

The state can by law prescribe professional or technical qualifications necessary for practicing any profession or carrying on any trade or business.

The Advocates Act, the India Medical Councils Act, the Chartered Accountants Act etc. are examples of such law.

**State Trading and Nationalisation**

The state can nationalise any trade or business and carry it on itself to the exclusion of all citizens wholly or partially. The creation of state Monopoly shall not be considered as a deprivation of a citizens right to trade or busines or occupation. A law creating state monopoly is not open to challenge on the ground that it is unreasonable or it is not in the interest of general public.

## **Topic - XVIII**

### **Principle of Proportionality**

Article 19 (1) provides for six freedom to citizens of India. They are :

- (i) Freedom of Speech and Expression
- (ii) Freedom to Assemble peaceably
- (iii) Freedom to Form Associations and Unions
- (iv) Freedom to move freely throughout the territory of India
- (v) Freedom to reside and settle any part of India
- (vi) Freedom to practice any profession or occupation, or to carry on any trade or business.

These freedoms are not absolute. By virtue of Article 19 (2) to (6), these freedoms can be restricted by law. The Parliament and State Legislatures are competent to make laws restricting the freedoms guaranteed under Article 19 (1). However the restrictions imposed by legislations should be reasonable. The reasonableness of the restriction will be tested by the Courts. If the restrictions imposed by legislations are found to be unreasonable or disproportionate to the situation, the Supreme Court and High Courts can declare that law as unconstitutional. Some times the statute imposing reasonable restrictions may confer discretionary power to administrative authorities to impose the restriction in individual cases. If the administrative authorities vested with discretionary power to impose restrictions in individual cases abuses their power or imposes unreasonable or disproportionate restrictions, then also the courts can test the administrative action and declare any action of administrative authority as unconstitutional. The reasonableness of the restrictions imposed by the Statute and administrative actions will be tested by the Court by applying "principle of proportionality". By this principle, if the restrictions imposed are found to be unreasonable or disproportionate to the situation, the court will declare the statute or administrative action as unconstitutional.

## **Topic-XIX**

### **Discuss the Constitutional Protections of an Accused Person**

[Note - Relevant Article ie., article 20 is given at the end of this Topic for easy reference]

Article 20 of the Constitution provides three protections to an accused person. They are:-

- (i) Protection against Ex post facto law
- (ii) Protection against Double Jeopardy
- (iii) Protection against self-incrimination

#### **(A) Protection Against Ex post Facto Law**

Article 20 (1) of the Constitution says that no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence. Similarly an accused shall not be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of commission of the offence.

By virtue of first part of Article 20(1) the legislature cannot make a criminal law with retrospective effect. Ordinarily legislature can make prospective as well as retrospective laws. But Article 20(1) prohibits legislature from making retrospective criminal laws. The legislature can make a retrospective civil law. Criminal laws cannot be ex post facto law (ie., a law which imposes penalties retrospectively). If an act is not an offence at the date of its commission , it cannot be made an offence at a date subsequent to its commission by passing an Act. The protection is just for conviction and sentence only and not for prosecution and trial under a retrospective law. A trial procedure different from what it was at the date of the commission of the offence or by a special court constituted after commission of the offence cannot be held to be violative of Article 20(1) of the Constitution: (**Shiv Bahadur Singh v. State (AIR 1983 SC 394)**).

By virtue of second part of Article 20(1) an accused is not liable to be punished with a greater penalty than that which he might have been subjected to at the time of commission of the offence.

**Kedar Nath v. State of West Bengal (AIR 1953 SC 404)**

The accused committed an offence in 1947. The offence was punishable by imprisonment or fine or both. The Act was amended in 1949 and the punishment was enhanced. The Supreme Court held that the enhanced punishment could not be applicable to the crime committed by the accused in 1947 and hence the additional fine imposed by the amended Act was set aside.

**T.Baral v. Henry An Hoe (1983 1 SCC 177)**

On 16th August 1975 the accused committed an offence under the provisions of the prevention of Food Adulteration Act. The punishment prescribed for the offence was imprisonment for life. On April 1, 1976 the Act was amended and the imprisonment was reduced to 3 years imprisonment. The Supreme Court held that the accused could take advantage of the amended Act and thus he is liable only for reduced punishment.

**(B) Protection against Double Jeopardy**

By Article 20(2) of the Constitution no person shall be prosecuted and punished for the same offence more than once. This clause embodies the common law rule of nemo debet vis vexari. It means no man should be put twice in peril for the same offence. If he is prosecuted again for the same offence for which he has already been prosecuted he can take defence of his former acquittal or conviction.

The following are the essentials for the application of this protection.

- (a) The person must be accused of a offence
- (b) Prosecution must have taken place before a court or judicial tribunal

- (c) The accused must have been prosecuted and punished in the previous proceeding

If all the above conditions are satisfied a second 'prosecution and punishment' for the same offence is prohibited.

**Maqbool Hussain v. State of Bombay (AIR 1953 SC 325)**

The appellant brought some gold into India without making a declaration to the Customs Authorities. The Customs Authorities confiscated the gold under the Sea Custom Act. He was charged under the Foreign Exchange Regulation Act for the offence of bringing gold into India without declaration. The appellant contented that second prosecution under the F E R A was violation of Article 20(2):

The Court held that the confiscation under the Sea Customs Act was not a prosecution and punishment. So the prosecution under the F E R A is not violative of Article 20(2). The plea of double jeopardy was not accepted by the Court.

**Venkataraman v. Union of India (AIR 1954 SC 375)**

The appellant was dismissed from service as a result of inquiring under the Public Service Enquiry Act, 1960 after the proceedings were held before the Enquiry Commission. Thereafter he was prosecuted for bribery under the Indian Penal Code and the Prevention of Corruption Act. The Appellant challenged the second proceedings as violative of Article 20(2). The court held that the enquiry before the Enquiry Commissioner did not amount to prosecution of an offence. So the second prosecution of the appellant was not violative of Article 20(2) of the Constitution.

**(C) Protection against Self-incrimination**

Article 20(3) of the Constitution provides that no person accused of any offence shall be compelled to be a witness against himself. Thus this clause provides for protection against self incrimination. The right

under Article 20(3) is available to a person who is accused of an offence. He cannot be compelled to be a witness. In other words an accused person cannot be compelled to give evidence against himself.

**M.P.Sharma v. Satish Chandra (AIR 1954 SC 300)**

A person whose name was mentioned as an accused in the First Information Report by the police and investigation was ordered by the magistrate could claim the protection of this Article. In this case the court held that an accused cannot be compelled to give oral, documentary and testimonial evidence. Further it was held that the finger impressions or specimen handwritings of an accused cannot be taken compulsorily.

**State of Bombay v. Kathi Kalu Ogad (AIR 1961 SC 1808)**

It was held that the protection under Article 20 (3) is available only against compulsion 'to be a witness' Thus an accused cannot be compelled to say something which is based upon his personal knowledge. If the accused person's photograph or finger print or specimen handwriting is taken compulsorily that would not violate Article 20(3) of the Constitution. Thus the rule laid down in Sharma's case that finger impression cannot be taken compulsorily has been restricted and now the protection is available only against *compulsion to be a witness*. If police seizes some material objects from the accused's house under a search warrant, or compulsorily takes photographs or finger prints or specimen signature of an accused, he cannot claim the protection of Article 20(3) of the Constitution.

**Parshadi v. state of U.P(AIR 1957 SC 211)**

The appellant was charged with murder. He stated to the police that he would give clothes of the deceased which he had placed in a pit. In the presence of witnesses and the police had dug out the clothes which were identified as the clothes belonging to the deceased.

It was held that the information given by an accused person after his arrest to a police officer which leads to the discovery of a fact is

admissible in evidence under Sec 27 of the Evidence Act and is not violative of Article 20(3) of the Constitution.

**Nandini Satpathy v. P.L. Pani (AIR 1977 SC 1025)**

The appellant was a former Chief Minister of Orrisa. Certain charges of corruption were levelled against her. In the course of investigation she was called upon to attend at a police station and to answer certain written questions. The appellant refused to answer questions and claimed the protection of Article 20(3). She was prosecuted under Sec. 179.I.P.C. for refusing to answer questions put by a lawful authority. The Supreme Court held that an accused need not answer questions which would expose her to guilt of some accusation.

**V.S.Kuttan Pillai v. Ram Krishnan (AIR 1980 SC 185)**

Police conducted search of the premises occupied by the accused and seized some documents and articles. The appellant contented that the documents recovered as a result of search and seizure cannot be used against him as it violates his fundamental right guaranteed under Article 20(3) of the Constitution. The Supreme Court held that the document recovered as a result of search and seizure can be produced in the courts as an evidence against the accused as he is not compelled to give evidence against himself. The protection is available only against compulsion to be a witness.

**Yusufalli v. State of Maharashtra (AIR 1968 SC 147)**

The statement made by the accused was tape-recorded without his knowledge. It was held that the tape-recorded statement of the accused though made without his knowledge is admissible since there was no force or oppression. It is not violative of Article 20(3).

**Selvi v. State of Karnataka (AIR 2010 SC 1974)**

In the case the Supreme Court held that the Narcoanalysis, polygraph and BEAP tests results in testimonial compulsion and thus these tests are not permissible in law. However taking of samples of

bodily substances (like hair, blood etc.) specimen signatures and handwriting samples are permissible. Extracting testimonial responses by means of narcoanalysis, polygraph and BEAP tests intrude upon a person's mental privacy and are therefore impermissible in law. Protection of mental privacy is available to accused as well as to victim of offence. A female who alleges to be victim of sexual offence cannot be subjected to polygraph test to ascertain whether she is making truthful allegation.

### Part III Fundamental Rights

Article 20. Protection in respect of conviction for offences - (1) No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

- (2) No person shall be prosecuted and punished for the same offence more than once.
- (3) No person accused of any offence shall be compelled to be a witness against himself.

## **Topic - XX**

### **Protection of Life and Personal Liberty**

or

**"No person shall be deprived of his life or personal liberty except according to procedure established by law". Comment.**

[Note - Relevant Article ie., article 21 is given at the end of this Topic for easy reference]

Article 21 of the Constitution guarantees 'right to life' and 'personal liberty' to citizens as well as foreigners. By virtue of this Article a person shall not be deprived of his *life or personal liberty* except according to *procedure established by law*.

Article 21 protects the right to life and personal liberty of citizen not only from the Executive action but from legislative action also.

After the decision of Supreme Court in Maneka Gandhi v. Union of India, (AIR 1978 SC 597) a person can be deprived of his *life and personal liberty* only if two conditions are satisfied. They are:

- (1) There must be a law.
- (2) That law must prescribe a just, fair and reasonable procedure.

Before the decision in Maneka Gandhi's case executive could interfere with the liberty of citizen if there was a valid law even though the procedure is not just fair and reasonable.

#### **Personal liberty - Meaning and Scope**

In A.K.Gopalan v. State of Madras (AIR 1950 SC 27), the Supreme Court gave a very literal meaning to the concept of 'personal liberty'. It was held that the concept means only liberty relating to physical

body of the individual. Thus the right of personal liberty refers to the freedom from arrest and detention from false imprisonment or wrongful confinement.

**In Kharak Singh v. State of UP** (AIR 1963 SC 1295) Supreme Court widened the scope of the right of 'personal liberty'. It was held that the concept of personal liberty does not limit to bodily restraint or confinement in prisons but includes variety of rights other than those dealt with in Article 19. Thus several rights such as right to travel abroad comes within the purview of Article 21.

**In Satwant Singh v. Assistant Passport Officer, New Delhi** (AIR 1967 SC 1836), the Supreme Court held that the right to travel abroad is part of a person's personal liberty within the meaning of Article 21 of the Constitution.

**In Maneka Gandhi v. Union of India** (AIR 1978 SC 597) the petitioners passport was impounded by the Central Government under Sec.10(3)(c) of the Passport Act, 1967. The Act authorises the Government to do so if it was necessary in the interest of the general public. The Government of India has not given any reason for its decision in the interest of the general public. The petitioners challenged the validity of the order on the ground that it violated Articles 14, 19(1)(a) and 21 of the Constitution. The Supreme Court held that the government was not justified in withholding the reasons for impounding the passport from the petitioner. The order withholding reasons for impounding the passport was in violation of the rule of natural justice embodied in the maximum *audi alteram partem*. It was held that the personal liberty of an individual can be restrained only on the basis of a law and a procedure established by that law. The procedure established by law should be *just fair and reasonable*. In this case the Attorney General stated that the Government was agreed to consider the representation of the petitioner. The Supreme Court held that since the defect of the order was removed, the right to go abroad of the petitioner was deprived only

in accordance with the procedure established by law (Passport Act). So the order is not violative of Articles 14, 19(1)(a) or 21 of the Constitution.

### **Right to Life - Different Shades and Colours**

The concept of 'right to life' has many dimensions. The supreme court has given very wide connotation to this expression through a series of decisions.

- (1) **Peoples Union for Democratic Rights v. Union of India** (AIR 1982 Sc 1473)

The Supreme Court held that non-payment of minimum wages to workers employed in various Asiad Projects in Delhi was a denial to them of their right to live with basic human dignity and thus violative of Article 21 of the Constitution. Right to live is not merely confined to physical existence but it includes within its ambit the **right to live with human dignity**.

- (2) **Oliga Tellis v. Bombay Municipal Corporation** (AIR 1986 SC 980)

This case is popularly known as pavement dwellers case. In this case the Supreme Court held that the right to life in Article 21, includes the '**right to livelihood**' also.

- (3) **D.K.Yadav v. J.M.A. Industries** (1993 3 SCC 258)

The Supreme Court held that the right to life enshrined under Article 21 includes the **right to livelihood** and therefore termination of the service of a worker without giving him reasonable opportunity of hearing is unjust, arbitrary and illegal. The Court ordered the petitioners reinstatement with 50 percent back wages.

- (4) **Chameli Singh v. State of UP** (1996 2 SCC 549)

It was held that the **right to shelter** is a fundamental right under Article 21 of the Constitution. It was observed that the right to life

guaranteed in any civilised society implies water, decent environment, education, medical care and shelter. These are basis human rights known to anycivilised society. Shelter for human being is not a mere protection of his life and limb. It is the home where he has opportunities to grow physically, mentally, intellectually and spiritually. In view of the importance of the right to shelter, the court held that it is the duty of the state to provide housing facilities to Dalits and Tribes to enable them to come into the mainstream of national life.

(5) **R.Rajagopal v. State of T.N** (1994 6 SCC 632)

This case is popularly known as Auto Shankar case. In this case the Supreme Court held 'the right to privacy' is guaranteed by Article 21 of the constitution. A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. No one can publish anything concerning the above matters without his consent whether truthful or otherwise. If he does so, he would be violating the right of the person concerned and would be liable in an action for damages. The above stated rule is subject to an exception. If the publication is of a matter based on public record including court record it will be unobjectionable. A woman who is the victim of a sexual assault or kidnapping should not further be subjected to the indignity of her name by publication of her name in the press or media even though her name and identity is appeared in the public records.

(6) **State of Maharastra v. Nadhulkar Narain** (AIR 1991 SC 207)

The supreme court held that the right to privacy is available even to a woman of easy virtue and no one can invade her privacy. In this case a police officer visited the house of one Banubai in uniform and demanded to have sexual intercourse with her. On refusing he tried to have her by force. She raised a hue and cry. When he was prosecuted he argued that she was a lady of easy virtue. The court held that the police officer violated her **right to privacy** guaranteed under Article 21

of the constitution.

(7) **People's Union for Civil Liberties v. Union of India** (AIR 1997 SC 568)

The Supreme Court held that telephone tapping is a serious invasion of an individual's **right to privacy** which is part of the right to life and personal liberty enshrined under Article 21 of the Constitution and it should not be resorted to by the state unless there is public emergency or interest of public safety requires.

(8) **Consumer Education and Research Centre v. Union of India** (1995 3 SCC 42)

The Supreme court has held that the **right to health and medical care** is a fundamental right under Article 21 of the Constitution. Right to life in Article 21 includes protection of the health and strength of the worker. The expression 'life' in Article 21 does not connote mere animal existence. It has much wider meaning which includes *right to livelihood, better standard of life, hygenic conditions in work place and leisure.*

(9) **Kirloskar Brothers Ltd. v. Employees State Insurance Corporation** (1996 2 SCC 682)

The Supreme court held that 'right to health' is a fundamental right of the workmen. It was held that even private industries should ensure and provide opportunities for health and vigour of the workmen.

(10) **Jolly George Varghese v. Bank of Cochin** (AIR 1980 SC 470)

The Supreme Court held that the arrest and detention of an honest judgement-debtor, who has no means to pay the debt, violates his fundamental right guaranteed under Article 21 of the Constitution. Krishna Iyer J observed "To be poor is no crime" and one who has no means to pay his debt shall be put in prison to compel him to pay the debt.

**(11) Gain Kaur v. State of Punjab (1996 2 SCC 648)**

A five judge constitutional Bench of the Supreme court has held that the right to life under Article 21 **does not include "right to die", or "right to be killed".**

This decision has over-ruled the Supreme Court's decision in **P.Rathinam v. Union of India (1994 3 SCC 394)**. In that case it was held that right to life in Article 21 include right to die and thus section 309 of I.P.C was declared as unconstitutional. The new decision in Gain Kaur's case changed the position and now Sec 309 is constitutionaly valid.

**(12) Paramananda Karta v. Union of India (AIR 1989 SC 2039)**

It was held that all doctors, whether government or private have to extend medical aid to injured person immediately to preserve life without waiting for legal formalities.

**(13) State of Maharashtra v. Manubhai Pragaji Vashi (1995 5 SCC 730)**

The Supreme court held that **right to free legal aid and speedy trial** are guaranteed fundamental rights under Article 21 of the Constitution.

**(14) Suk Das v. Union Territory of Arunachal Pradesh (1986 5 SCC 401)**

The Supreme Court held that failure to provide free legal aid to an accused at the state cost unless refused by the accused, would vitiate the trial. He need not apply for the same. **Free legal aid at the state cost** is a fundamental right of an accused person under Article 21 of the Constitution.

**(15) Hussainara Khatoon v. Home Secretary, State of Bihar (AIR 1979 SC 1360)**

A petition for a writ of Habeas Corpus was filed by a number of

under-trial prisoners who were in jails in the State of Bihar for years awaiting their trial. The Supreme court held that "right to speedy trial" is a fundamental right guaranteed under Article 21 of the Constitution. Speedy trial is the essence of criminal justice. "*Justice delayed, justice denied*". The court ordered the Bihar government to release forthwith the under-trial prisoners on their personal bonds.

(16) **Prem Shankar v. Delhi Administration** (AIR 1980 SC 1535)

The Supreme Court held that handcuffing should be resorted to only when there is clear and present danger of escape from the police control. Handcuffing is held to be prime facie inhuman and, therefore, unreasonable and thus violative of Article 21.

(17) **Citizen for Democracy v. State of Assam** (1995 3 SCC 743)

In this case an eminent journalist in his capacity as president of "Citizen for Democracy" through a letter brought to the notice of the Supreme Court that seven TADA detenues admitted in the hospital in the State of Assam were handcuffed and tied with rope to check their movement. The court treated the letter as a petition under Article 32 of the Constitution and held that handcuffing and in addition tying with ropes of the patient-prisoners who are admitted in the hospitals is inhuman and violation of human rights guaranteed under Article 21 of the Constitution.

(18) **Triveni Ben v. State of Gujarat** (AIR 1989 SC 142)

A five judge bench of the supreme court has held that **undue long delay in execution of the death sentence** will entitle the condemned person to approach the court for conversion of death sentence into life imprisonment. No fixed period of delay could be held to make the sentence of death inexecutable. Earlier in **T.V.Vatheeswaran v. State of Tamil Nadu** (AIR 1981 SC 625), it was held that delay in execution of death sentence exceeding 2 years would entitle the convicted to claim commutation to life imprisonment. The new decision makes it clear that

no fixed period could be held to make the sentence of death inexecutable. The court will have to examine the nature of delay and circumstances of the case. In the present case Triveni Ben's death sentence was commuted to life imprisonment.

It was held that undue delay in execution of death sentence due to the delay in disposal of mercy petition by the President would certainly cause mental torture to the condemned prisoner and therefore would be violative of Article 21.

**(19) Madhu Mehta v. Union of India (1989 4 SCC 62)**

The mercy petition of a convicted who was sentenced to death was pending before the President of India for 9 years. This matter was brought to the notice of the court by one Madhu Mehta, the National Convenor of Hindustan Andolan. The Supreme Court held that speedy trial in criminal cases is the content of Article 21 and this principle is equally applicable for the disposal of mercy petitions. The court directed death sentence to be commuted to life imprisonment as there was no sufficient justifying reasons for such a long delay in disposal of the convict's mercy petition.

**In Mahendra Nath Das v. Union of India (2013) 6 SCC 253,** mercy /clemency petition was rejected by the President after a long period of 12 years. Out of 12 years, 8 years' time is completely unexplained. In such circumstances, the rejection of appellant's mercy petition was declared illegal and quashed the rejection order and sentence of death was commuted into life imprisonment.

**In Devender Pal Singh Bhullar v. State ( NCT of Delhi) 2013 6 SCC 195,** it was held that delay in deciding mercy / clemency petition may be one of the grounds for commutation of death sentence to life imprisonment. However the same principle cannot be applied to persons convicted for acts of terrorism. Terrorists use bullets, bombs and other weapons of mass killing for achieving their perverted political and other goals or wage war against the State. While doing so, they do not show

any respect for human lives. People who do not show any mercy or compassion while killing innocent persons are not entitled plead for mercy and project delay in disposal of petition filed under Article 72 (power of President to grant pardon )or 161 (power of Governer to grant pardon) as a ground for commutation of death sentence.

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

The Supreme Court held that the 'right to education' is a fundamental right under Art. 21 of the Constitution.

(21) **Unnikrishnan v. State of A.P** (1993) 1 SCC 645

The Supreme Court held that 'right to education' is a fundamental right under Art.21 of the Constitution.

(22) **D. K. Basu v. State of West Bengal** (A I R 1997 SC 610)

The Court held that the precious right guaranteed under Art.21 of the Constitution could not be denied to convicts, under-trials, and other prisoners in custody except according to the procedure established by law.

The Court laid down the following guidelines to be followed in all cases of arrest or detention.

1. The police officer carrying out arrest of a person should bear accurate, visible and clear identification and name-tags with their designation.
2. The police officer carrying out arrest of a person shall prepare a Memo of Arrest at the time of arrest and such memo must be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is made.
3. A person who has been arrested or detained shall be entitled to

have informed one friend or relative or other person known to him or having interest in his welfare.

4. The person must be made aware of this right to have some one informed of his arrest or detention as soon as he is put under arrest or is detained.

5. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the legal aid organisation in the district and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest. The names and particulars of the police officials in whose custody the arrestee is also be recorded.

7. The arrestee should be examined at the time of arrest and record major and minor injuries, if any, present on his or her body. The "inspection memo" must be signed by the arrestee and the police officer effecting the arrest and its copy be provided to the arrestee.

8. The arrestee may be permitted to meet his lawyer during interrogatin, though not throughout the interrogation.

**(23) M.C. Mehta V. Union of India ( A I R 1987 SC 1086)**

The Supreme Court held that the' right to live in pollution free environment' is a part of the right to life under Art.21 of the Constitution

**(24) Murali S. Deora v. Union of India ( 2001) 8 SCC 765**

The Supreme Court held that "public smoking" is injurious to health of non-smokers and passive smokers. Non-smokers and passive smokers

are compelled to be victims of pollution caused by cigarette smoke. It is indirect deprivation of their right to life guaranteed under Article 21 of the Constitution. The Court directed Central and State Governments to prohibit smoking in public places , namely,

- (1) Auditorium
- (2) Hospital Buildings
- (3) Health Institutions
- (4) Educational Institutions
- (5) Libraries
- (6) Court Buildings
- (7) Public Offices
- (8) Public Conveyances including Railways

**(25) Vishaka v. State of Rajasthan ( AIR 1997 SC 3011)**

The Supreme Court held that the working women have a fundamental right to work with human dignity and for safeguards against sexual harassment in work places under Article 14,15, 19 and 21 . The Supreme Court has laid down some guidelines to prevent sexual harassment of working women in places of their work and declared that the employers and persons in charge of work places whether in the public or private sector, should take appropriate steps to prevent sexual harassment.

**Compensation for Violation of Article 21**

In **Rudal Shah v. State of Bihar** (1983) 4 SCC 141, the Supreme Court held that the Court has power to award monetary compensation in appropriate cases where there is violation of the fundamental right of the citizens. In this case the Supreme Court directed the Bihar Government to pay compensation to the tune of Rs.30,000/- to Rudal Shah who had to remain in Jail for 14 years even after his acquittal.

In **Bhim Singh v. State of J& K** (1985) 4 SCC 677, the Supreme Court awarded Rs.50,000/- to the petitioner as compensation for the violation of his fundamental right of personal liberty under Article 21 of the Constitution. In this case the petitioner an MLA was arrested and detained in police custody and deliberately prevented from attending Session of the Legislative Assembly by the Police Officers.

**In People's Union for Democratic Rights v. Police Commissioner, Delhi** (1989) 4 SCC 730, a labourer was taken to the police station for doing some work. He was severely beaten when he demanded wages and ultimately succumbed to the injuries. It was held that the State was liable to pay compensation and accordingly directed the Government to pay Rs.75,000/- as compensation to the family of the deceased.

**In Kewal Patil v. State of UP** (1995) 3 SCC 600, the Supreme Court awarded compensation to the tune of Rs.1,00,000/- to the widow of a convict who was killed in jail by a co-accused while serving his sentence under Section 302 of the Indian Penal Code as it resulted in deprivation of his life contrary to law and in violation of Article 21. A prisoner does not cease to have fundamental right except to the extent he has been deprived of it in accordance with law. His death was caused due to the failure of jail authorities to protect him.

### Part III Fundamental Rights

**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.

## **Topic - XXI**

### **Right to Education**

[Note - Relevant Article ie., article 21A is given at the end of this Topic for easy reference]

By the Constitution ( 86 th Amendment) Act,2002 a new article ( Article 21-A) has been inserted to the Constitution after Article 21.

By virtue of Article 21 A, the right to education for all children of the age of 6 to 14 is made a fundamental right.

Article 21 A says that "the State shall provide free and compulsory education to all children of the age of 6 to 14 years in such manner as the State may, by law, determine.

Thus the State is under a duty to provide free and compulsory education to all children of the age of 6 to 14 years. The manner of giving free and compulsory education to the children is to be determined by the State by law. In order to implement the fundamental right declared under Article 21 A, the Parliament enacted the Right of Children to Free and Compulsory Education Act,2009.

Even before the insertion of Article 21A, the Supreme Court has in **Mohini Jain v. State of Karnataka (1992)3 SCC 666** held that right to education is a fundamental right under Article 21 of the Constitution.

 In **Unnikrishnan v. State of A.P. (1993) 1 SCC 645** also the Supreme Court has held that "right to education" is a fundamental right under Article 21 of the Constitution.

In **Pramati Educational and Cultural Trust v. Union of India 2014 (2) KLT 547 (SC)**, it was held that inserting Article 21 A of the Constitution do not alter the basic structure or framework of the Constitution, and hence constitutionally valid.

### Part III

#### Fundamental Rights

Article 21-A. Right to Education - The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

### Topic -XXII

## Discuss the Safeguards under the Indian Constitution against Arbitrary Arrest and Detention.

[Note - Relevant Article ie., article 22 is given at the end of this Topic for easy reference]

Article 22 of the Constitution confers protection against arbitrary arrest and detention.

Article 22 can be studied under two heads:

- (1) Protection of persons arrested under ordinary laws
- (2) Protection of persons arrested and detained under the preventive detention laws.

#### (1) Constitutional Protections of Arrested Persons under Ordinary Laws

Article 22(1) and (2) guarantee four rights on a person who has been arrested for any offence under an ordinary law. They are:-

- (i) The arrested person shall be informed as soon as may be of the grounds of his arrest.
- (ii) He shall be given opportunity to consult and to be defended by a lawyer of his own choice.
- (iii) He shall be produced before a Magistrate within 24 hours.
- (iv) The arrested person shall not be detained in custody beyond the

period of 24 hours except by the order of the Magistrate.

The above stated rights are not available to persons arrested and detained under any law providing for preventive detention. So also an enemy alien cannot claim the protection provided in Article 22(1) and (2).

In **Joginder Kumar v. State of UP** (1994 4 SCC 260) the Supreme Court laid down certain guidelines governing arrest of a person during investigation. The guidelines are:

- (i) The arrested person has a right to inform one of his friend, relative or other person the fact of his arrest and place of his detention.
- (ii) The Police Officer has to inform the arrested person of this right when he is brought to the police station.
- (iii) The police has to inform the fact of arrest to the person suggested by the arrested person and an entry has to be made in the police diary as to who was informed of the arrest.

The court directed that the Magistrate, before whom the arrested person is produced, has to satisfy himself that the above stated requirements have been complied with.

In **D. K. Basu v. State of West Bengal** (A I R 1997 SC 610), the Court laid down the following guidelines to be followed in all cases of arrest or detention.

1. The police officer carrying out arrest of a person should bear accurate, visible and clear identification and name-tags with their designation.
2. The police officer carrying out arrest of a person shall prepare a Memo of Arrest at the time of arrest and such memo must be attested by at least one witness, who may be either a member of the family of the arrestee or a respectable person of the locality from where the arrest is

made.

3. A person who has been arrested or detained shall be entitled to have informed one friend or relative or other person known to him or having interest in his welfare.

4. The person must be made aware of this right to have some one informed of his arrest or detention as soon as he is put under arrest or is detained.

5. The time, place of arrest and venue of custody of an arrestee must be notified by the police where the next friend or relative of the arrestee lives outside the district or town through the legal aid organisation in the district and the police station of the area concerned telegraphically within a period of 8 to 12 hours after the arrest.

6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest. The names and particulars of the police officials in whose custody the arrestee is also be recorded.

7. The arrestee should be examined at the time of arrest and record major and minor injuries, if any, present on his or her body. The "inspection memo" must be signed by the arrestee and the police officer effecting the arrest and its copy be provided to the arrestee.

8. The arrestee may be permitted to meet his lawyer during interrogatin, though not throughout the interrogation.

(2) **Protection of Persons Arrested and Detained under the Preventive Detention Laws**

Article 22(4) to (7) of the Constitution provides for protection of a person who has been arrested and detained under the preventive detention laws such as the Maintenance of Internal Security Act, 1971(MISA), the National Security Act, 1980(NSA), the Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA), and the Prevention of Terrorism Act, 2002(POTA).

Preventive detention is not to punish a person for having done

something against law. It is intended to prevent him from doing an act which is violative of a law.

Preventive detention laws are repugnant to democratic constitution. Such types of laws are not found in any of the democratic countries of the world except in India. In India preventive detention laws are permitted under the Constitution and safeguards are also provided in the Constitution itself.

The first preventive detention law of India was passed by the Parliament of India on 26th Feb 1950. The Act is called Preventive Detention Act, 1950. The object of the Act was to provide for detention with a view to preventing any person from acting in a manner prejudicial to the defence of India, the relation of India with foreign powers, the security of India or a state, the maintenance of public order and the maintenance of supplies and services of essential to the communities. The Act of 1950 was only a temporary measure. It was ceased to have effect on 31st April, 1951. However the life was extended from time to time till it lapsed on Dec 31, 1969.

The Preventive detention law was revived in the form of Maintenance of Internal Security Act, 1971 (MISA). This Act continued to be in operation until the year 1977. That Act was repealed by the Janata Government in 1978.

After two years the Care Taker government headed by Mr. Charan Singh again revived the Preventive Detention Law and enacted the Prevention of Blackmarketing and Maintenance of supplies of Essential Commodities Act, 1980. Its object is to prevent black marketing and hoarding of essential commodities.

In 1980 the President issued the National Security Ordinance and subsequently it was enacted into law known as National Security Act.

In 1987 the Terrorist and Disruptive Activities (Prevention) Act (TADA) was passed with a view to dealing with specific situations of terrorism in Punjab, Kashmir and some parts of the north-east.

In the year 2002, the Prevention of Terrorism Act, 2002 was enacted to prevent and suppress growing terrorism.

Over and above these preventive detention laws, there are some other laws also. They are:

- (1) Conservation of Foreign Exchange, Prevention of Smuggling Activities Act, 1974 (COFEPOSA)
- (2) The Smugglers and Foreign Exchange Manipulators (Forfeiture of Property Act), 1976. (SAFEMA)
- (3) The Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substance Act, 1988.

#### Constitutional Protections

Clauses 4 to 7 of Article 22 guaranteed the following safeguards to a person arrested and detained under any of the preventive detention laws.

(1) The detention order passed by the competent authority according to the preventive detention law shall not authorise the detention of a person for a period exceeding three months.

(2) A detention for a longer period is permissible only if the Advisory Board consisting of Judges of High Court or persons qualified to be judges of the High Court has allowed the detention for a longer period before the expiry of the said period of three months.

(3) The authority making the order of detention must communicate to the person detained the grounds of his arrest.

(4) The authority should give the defence an opportunity to make his representation against the order of detention.

### Part III

#### Fundamental Rights

**Article 22. Protection against arrest and detention in certain cases - (1)**  
No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrat within a period of twenty four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply -

- (a) to any person who for the time being is an enemy alien; or
- (b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless -

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention.

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause( 7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe-

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

(c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause 4.

## **Topic - XXIII**

### **Discuss the Constitutional Right against Exploitation**

[Note - Relevant Article ie., article 23 and 24 are given at the end of this Topic for easy reference]

**Articles 23 and 24 of the Constitution deal with right against exploitation.**

#### **Prohibition of Traffic in Human beings and Forced labour**

Article 23 prohibits 'traffic in human beings' and 'begar' and other similar forms of 'forced labour'. Any contravention of this prohibition shall be an offence punishable in accordance with law.

'Traffic in human beings' means selling and buying of men and women like goods and animals. The expression includes immoral traffic in women and children for immoral or other purposes. "Slavery" comes within the meaning of the expression.

**Article 35 of the Constitution authorises the Parliament to make**

laws for punishing the prohibited acts under Article 23. In pursuance of Article 35, the parliament has passed the Suppression of Immoral Traffic in Women and Girls Act, 1956 (Now it is renamed as the Immoral Traffic (Prevention) Act, 1956) for punishing acts which results in traffic in human beings.

Begar and other similar forms of forced labour are also prohibited by Article 23. Begar means involuntary work without payment. The state is under a positive duty to take step to abolish evils of begar and other similar forms of forced labours. The parliament has enacted Bonded Labour System (Abolition) Act, 1976 to provide for the abolition of bonded or forced labour system with a view to prevent economic and physical exploitation of the weaker sections of the people.

**In Peoples Union for Democratic Rights v. Union of India** (AIR 1982 SC 1943), the supreme court held that even if a person has contracted with another to perform service and there is consideration for such service in the shape of liquidation of debt, he cannot be forced to continue to perform such service as it would be forced labour within the meaning of Article 23. No one shall be forced to provide labour or service against his will even though it be under a contract of service to another for remuneration which is less than minimum wages.

#### **Compulsory Service for Public Purpose**

Article 23(2) of the Constitution provides an exception to the above stated general rule. Article 23(2) empowers the state to impose compulsory service for public purpose. However the state cannot make any discrimination between the citizens on the ground only of religion, race, caste or class or any of them.

**In Dulal Samanta v. D.H.Howrah** (AIR 1958 Cal. 365), it was held that compulsory military service or social service can be imposed by the state because they are neither begar nor traffic in human beings.

### **Prohibition of Employment of Children**

Article 24 of the Constitution prohibits employment of children below 14 years in factories and hazardous employment.

**In People's Union of Democratic Rights v. Union of India** (AIR 1983 SC 1473), the Supreme Court held that construction work is a hazardous industry and children below 14 years of age cannot be employed in this work.

The Child Labour (Prohibition and Regulation) Act, 1986 prohibits the engagement of children in certain processes which are considered unsafe and harmful to them.

The Factories Act, 1948, the Mines Act, 1952, the Merchant Shipping Act, 1958, etc. are some of the legislations which prohibit employment of children below 14 years of age.

Article 24 does not prohibit their employment in any innocent or harmless job or work.

### **Part III**

#### **Fundamental Rights**

##### **Article 23. Prohibition of traffic in human beings and forced labour -**

(1) Traffic in human beings and beggar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

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

##### **Article 24. Prohibition of employment of children in factories, etc. - 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.**

## **Topic - XXIV**

### **Right to Freedom of Religion (Articles 25 - 28)**

[Note - Relevant Articles ie., articles 25 to 28 are given at the end of this Topic for easy reference]

The Preamble to the Constitution declares that India will be a secular state. The people of India resolved to secure the liberty of thought, expression, belief, faith and worship to its citizen. The state can have no religion of its own. It should treat all religions equally. The State must extend similar treatment to the Temple, the Church and the Mosque.

#### **Freedom of Religion**

Article 25(1) of the Constitution guarantees to every person the freedom of conscience and the right to profess, practice and propagate religion.

The freedom of conscience is an absolute inner freedom of the citizen to mould his own relation with God in whatever manner he likes. To 'profess' a religion means to declare freely and openly one's faith and belief. To 'practice religion' means to perform the prescribed religious duties, rites and to exhibit his religious belief by such acts as prescribed by religious order in which he believes. To 'propagate' means to spread and publicise his religious views for the edification of others. The right to propagate one's religion does not give a right to convert any person to one's own religion.

In the name of religion no act can be done against public order, morality and health of the public. The parliament can by law regulate or restrict any economic, financial, political or other secular activity which is associated with religious practice. The state is empowered to make laws for social welfare and social reform. The state can make laws to eradicate social evils such as Sati, Devadasi which are practiced in the name of religion.

Explanation I to Article 25 recognises the right of Sikhs to wear and carry *Kripans* as a religious practice.

#### Decided Cases

(1) **Mohd. Hanif Quareshi v. State of Bihar** (AIR 1958 SC 731)

The petitioner claimed that the sacrifice of cows on the occasion of Bakrid was an essential part of his religion and therefore the state law prohibiting the slaughter of cows was violative of his fundamental right under Article 25 of the constitution.

The Supreme Court rejected this contention and held that the sacrifice of cow on the Bakrid day was not an essential part of Mohammeden religion and hence could be prohibited by the state.

(2) **Acharya Jagdishwaranand Avadhuta v. Commission of Police (popularly known as Anand Marga Case)**(1984 4 SCC 522)

The Supreme Court held that the 'Thanda Dance' in procession or at public places by Ananda Margis carrying lethal weapons and human skulls was not essential religious rites of the followers of Ananda Marga and hence such procession can be prohibited in the interest of 'public order' and 'morality'.

(3) **Javed v. State of Haryana** (AIR 2003 SC 3057)

The Petitioner challenged the constitutional validity of s.175 (11) (q) of the Haryana Panchayat Raj Act,1994 which disqualifies persons having more than two children from contesting election for the post of Saranch and Panch as violative of Article 25 of the Constitution. The Supreme Court held that such a prohibition is not violative of Article 25 of the Constitution.

(4) **Rev Stainislaus v. State of M.P.** (AIR 1977 SC 908)

The Supreme Court held a legislation prohibiting forcible conversion

of one's own religion in the interest of public order can be passed and such a law is not violative of fundamental right under Article 25 of the Constitution.

(5) **Satya Ranjan Majhi v. State of Orissa** (2003) 7 SCC 439

The Supreme Court held that there is no fundamental right to convert another person to one's own religion. What Article 25 grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets.

**Freedom to Manage Religious Affairs**

Article 26 confers to every religious denomination or any section of it the following rights-

- (1) To establish and maintain institutions for religious and charitable purposes
- (2) To manage its own affairs in matters of religion
- (3) To own and acquire movable and immovable property.
- (4) To administer such property in accordance with laws.

In **Bramchari Sidheswar Shai. v. State of W.B** (1995 (4)SCC 646), the Supreme Court held that Ramakrishna Mission is a religious denomination within Hindu religion and therefore they are entitled to claim fundamental rights conferred on them under Article 26 of the Constitution.

**Freedom from Taxes for the Promotion of any Particular Religion**

Article 27 provides that no person shall be compelled to pay any tax for the promotion or maintenance of any particular religion or religious denomination. The public money collected by way of tax cannot be spent by the state for the promotion of any particular religion.

**Prohibition of religious instruction in state aided institutions**

Article 28 of the Constitution says that no religious instruction shall be imparted in any educational institution wholly maintained out of state funds. No person attending any educational institution recognised by

the state or receiving aid out of state fund shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution unless such person or , if such person is a minor, his guardian has given his consent thereto.

In the case of institutions that are administered by the state but established under any trust or endorsement there is no restriction and religious instruction can be imparted.

### Part III

#### Fundamental Rights

##### Right to Freedom of Religion

**Article 25. Freedom of conscience and free profession, practice and propagation - (1)** Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion.

(2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law -

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

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

**Explanation I** - The wearing and carrying of kripans shall be deemed to be included in the profession of the Sikh religion.

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

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

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

purposes;

- (b) to manage its own affairs in matters of religion;
- (c) to own and acquire movable and immovable property ; and
- (d) to administer such property in accordance with law.

**Article 27. Freedom as to payment of taxes for promotion of any particular religion -** No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for promotion or mainenance of any particular religion or religious denomination.

**Article 28. Freedom as to attendance at religious instruction or religious worship in certain educational institutions -** (1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

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

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

## **Topic - XXV**

### **The Right of Minorities to Establish and Manage Educational Institutions**

[Note - Relevant Articles ie., articles 29 and 30 are given at the end of this Topic for easy reference]

By virtue of Article 29(1) any section of the citizens residing in any part of India having a distinct language, script or culture of its own shall have a right to conserve the same. A minority community can preserve its language, script or culture by and through educational institutions.

By virtue of Article 29(2) no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Article 30 of the Constitution guarantees to all linguistic and religious minorities the right to establish and to maintain educational institutions of their own choice.

Thus the right conferred under Article 30 are available to two types of minorities -

- (i) religious ,and
- (ii) linguistic

These two classes of minorities can establish and administer educational institutions in order to conserve their language, script or culture.

The 'right' to establish refers to bring into existence. The 'right to administer' means the right to effectively manage and conduct the affairs of the institution.

The right conferred on the religious and linguistic minorities to

administer educational institutions of their choice is **not an absolute right**. This right is not free from regulation. The right to administer is not the right to maladministration. State can prescribe reasonable regulations to ensure the excellence of the institutions. State can impose regulations in the interest of efficiency of instruction, discipline , health, sanitation, morality, public order and the like.

In **St. Xaviers College v. State of Gujarat** (AIR 1970 SC 1389), a seven Judge Bench of the Supreme Court had on occasion to examine the extent and scope of Article 30(1). The petitioner, a Jesuit Society of Ahmedabad, was running the St. Xaviers College of Arts and Commerce in Ahmedabad with the object of giving higher education to Christian students. The college was affiliated to the Gujarat University. The Gujarat University Act, 1949 was amended in 1973.

Sec. 33 A of the Amended Act provided that every college affiliated to the Gujarat University shall be under the management of 'Government Body' consisting of a representative of the University nominated of teachers, non-teaching staff and students of college. The act also provided for a selection committee for recruitment of the principal and the members of the staff. The selection committee members will be nominated by the Vice-Chancellor.

Section 41 of the Act confers power on the University to approve the appointment of the teachers made by the college.

Section 51-A provides that no member of the teaching staff or non-teaching staff of the affiliated college shall be dismissed or remove or reduced in rank except after an enquiry in which he has been informed of the charges and given a reasonable opportunity of being heard and the penalty is approved by the Vice-Chancellor or any officer of the University authorised by him.

The Supreme Court held that these provisions violated the right of

the minority to Administer the educational institutions of their choice and hence, therefore, did not apply to minority institutions.

In **Mark Netto v. Govt. of Kerala** (AIR 1979 SC 89), the appellant, who was manager of a Roman Catholic Mission School, Trivandrum , for boys applied to the Education Authorities in Kerala, for permission to admit girl students, in their High School. The Education Authorities refused to give sanction for the admission of the girl students under Kerala Education Rules, 1959 on the following grounds -

- (i) The school was not established as mixed school and it was purely a boys school.
- (ii) There was another Muslim girls school with in the radius of one mile.

The appellant contended that the Kerala Education Rule 1959 was violative of Article 30(1) as it interfered with the right of the Christian community to administer educationl institution of their choice.

The appellant argued that the Christian Community in that locality did not want to send their girl students in the Muslim girls school.

The Supreme Court held that the Rule authorising the Education authority to refuse permission is violative of Article 30(1) of the Constitution and thus not applicable to minorities.

In **State of Kerala v. Rev. Mother Provincial**(AIR 1970 SC 2079), the Supreme Court held that Section 63(1) of the Kerala University Act, 1969 which conferred power on the government to take over the management of a minority institution on its default in carrying out the directions of the state government was *ultra vires* since the provision violates Article 30 (1) of the Constitution.

**In Bramchari Sidheswar v. State of West Bengal**(1995) 4 SCC

646, the Supreme Court held that the Rama Krishna Mission established by Vivekananda to propagate Vedanta values as expounded by Ramakrishna is not a minority religion separate and distinct from Hindu Religion and therefore not entitled to claim the fundamental right under Article 30 of the Constitution.

In **St. John's Teachers Training Institute v. State of Tamil Nadu** (1993) 3 SCC 594, the appellant challenged the validity of the Recognition Rules made by the Government under the T.N. Minority Schools (Recognition and Payment of Grants) Rules, 1977 as amended by the Order of 1991 on the ground that they were violative of Articles 30 (1) and 14 of the Constitution.

The appellant was running Teachers Training Institutes in the State of Tamil Nadu. The Government had refused to recognise these institutes on the ground that they have failed to satisfy the conditions for grant of recognition as provided in the government order.

The Recognition Rules provided for the extent of land sizes of class rooms, cost of library with 10,000 books , number of bath rooms, furnitures and laboratory equipments, teaching appliances, sports, games, music equipments, pay grounds minimum qualification for teaching and non-teaching staffs, hostel, staff quarters etc. The High Court held that these conditions are regulatory in nature and framed with a view to promoting excellence of educational standard and ensuring security of the service of teachers and other employees of the institutions. The minority institutions must be fully equipped with educational excellence to keep in step with other institutions. The writ petition was dismissed with these observations. The Supreme court agreed with the reasonings and conclusions of the High court and dismissed the Special Leave Appeal.

In **T.M.A Pai Foundation v. State of Karnataka** (AIR 2003 SC 355), the Supreme court held that the State Governments and Universities cannot regulate the admission policy of unaided educational

institutions run by linguistic and religious minorities, but the Government and Universities can specify academic qualifications for students and make rules and regulations for maintaining academic standards. The admission process evolved by unaided minority educational institutions should be transparent. The procedure adopted or selection made should not tantamount to maladministration. Minority educational institutions would have to comply with conditions laid down by Universities or Boards to get recognition or affiliation. In the case of aided minority educational institutions offering professional courses, the court held that the admission can only be through a common entrance test conducted by the State or University.

In this case the Court held that the minority status is to be determined on the basis of the demographic composition of states i.e., in proportion of their position in the population in different states and not on all India basis.

The Court further held that the non-minorities can run educational institutions in the same way as minorities under Article 19 (1) (g) of the Constitution.

**In Islamic Academy of Education v. State of Karnataka (2003) 6 SCC 697**, the Supreme Court held that non-minority educational institutions in certain matters cannot and do not stand on the same footing as minority educational institutions which enjoy protection of Article 30 and the preferential right to admit students of their own community / language. In this case the Court permitted states to fix quota for seat sharing between management and the State on the basis of "local needs" of each state in the unaided private educational institution.

**In P.A. Inamdar v. State of Maharashtra (AIR 2005 SC 3236)**, the Supreme Court overruled that part of the decision in **Islamic Academy of Education v. State of Karnataka (2003) 6 SCC 697** which allowed the states to fix quota for seat sharing between management

and the State on the basis of "local needs" of each state in the unaided private educational institutions. The Court held that in unaided private professional institutions ( both minority and majority) state cannot reserve seats. The private unaided professional institutions ( minority and non-minority ) cannot be forced to accept reservation policy of the State. Unaided institutions can have their own admissions provided it is fair, transparent, and non-exploitive and based on merit. However the unaided private institutions cannot charge capitation fee.

In order to overcome the decisions of the Supreme Court rendered in **T.M.A Pai Foundation case** and **P.A. Inamdar's Case**, the Constitution has been amended and clause 5 has been added to Article 15. Clause 5 empowers the State to make law to reserve seats in aided and unaided private colleges for the advancement of any Socially and Educationally backward classes of citizens or for the Scheduled Caste or the Scheduled Tribes. However the State is not competent to enact such a law to regulate admission to the educational institutions established by the minority community as referred to in Article 30(1) of the Constitution.

**In Dayanand Anglo Vedic (DAV) College Trust and Management Society v. State of Maharashtra** (2013) 4 SCC 14, it was held that in order to claim minority status for an institution in any State, the institution concerned should be "established" by persons who are a minority in the State concerned and thereafter it is to be "administered" by persons who are also a minority in that State.

**Power to Make Law to Regulate Admission in Educational Institutions for Advancement of Socially and Educationally Backward Class or for Scheduled Caste or the Scheduled Tribes**

Clause 5 of Article 15 is added by the Constitution (Ninety-Third Amendment) Act,2005.

Clause 5 empowers the State to make law for making special provision relating to the admission to educational institutions including private educational institutions, whether aided or unaided by the State, for the advancement of any Socially and Educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes. Thus the State can, by law, reserve seats in private educational institutions for admission of students belonging to socially and educationally backward classes, scheduled castes and scheduled tribes. Any such law cannot be challenged in the court on the ground that it violates Article 19 (1) (g). However the State is not competent to enact such a law to regulate admission to the educational institutions established by the minority community as referred to in Article 30(1) of the Constitution.

**In Pramati Educational and Cultural Trust v. Union of India** 2014 (2) KLT 547 (SC), it was held that inserting clause 5 of Article 15 and Article 21 A of the Constitution do not alter the basic structure or framework of the Constitution and hence constitutionally valid.

### Part III Fundamental Rights Cultural and Educational Rights

**Article 29. Protection of interest of minorities -** (1) Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same

(2) No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

**Article 30. Right of minorities to establish and administer educational institutions -** (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

(1 A) In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, referred to in clause (1), the State shall ensure that the amount fixed by or

determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause.

(2) The State shall not, in granting aid to educational institutions, discriminate against any educational institution on ground that it is under the management of a minority, whether based on religion or language.

## **Topic- XXVI**

### **Saving of Certain Laws**

Articles 31A, 31B and 31C of the Constitution provides for saving of certain laws. By virtue of these Articles, one cannot challenge the constitutional validity of certain laws as being violative of certain fundamental rights.

**By Article 31A,** no law providing for the following purposes shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by Article 14 or Article 19 of the Constitution.

(a) Any law providing for the acquisition by State of any estate or of any rights therein or the extinguishment or modification of any such rights.

(b) Any law providing for the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property.

(c) Any law providing for the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations.

(d) Any law providing for the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof.

(e) Any law providing for the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the

purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or cancellation of any such agreement, lease or licence.

If a law for any of the above stated purpose is made by the Legislature of a State, the protection of Article 31 A will be available only if it receives the assent of the President of India.

Further if any law provides for acquisition by the State of any estate, it should provide for payment of compensation at a rate which shall not be less than the market value thereof.

**By Article 31B,** none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void on the ground that such Act, Regulation or provision is inconsistent with or takes away or abridges any of the fundamental rights conferred by Part III of the Constitution. The impact of Article 31 B is that if a statute is included in the ninth schedule to the Constitution, one cannot challenge such a law as being violative of any of the fundamental rights.

In **I.R. Coelho v. State of Tamil Nadu** (2007) 2 SCC1, the Supreme Court held that the power of judicial review is a basic structure of the Constitution and hence the laws included in Schedule IX after 24-4-1973 (the date of decision in Kesavanatha Baharati Case) shall be subject to judicial review. While laws may be added to the Ninth Schedule, once Article 32 (power of Supreme Court to issue writs to enforce fundamental rights) is triggered, these legislations must answer to the complete test of fundamental rights. Thus now one can challenge the constitutional validity of a statute which is included in the Ninth Schedule on the ground that it is violative of any of the fundamental rights.

**By Article 31C,** no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV (Directive

Principles of State Policy) shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by article 14 or article 19 and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy. In **Kesavanatha Bharati v. State of Kerala** ( AIR 1973 SC 1461, the Supreme Court held that the provision in italics to be invalid.

## **Topic- XXVII**

### **Right to Constitutional Remedies (Writs)**

A mere declaration of fundamental rights is meaningless unless there is an effective machinery for the enforcement of such rights. The maxim is: *ubi jus ibi remedium*. The maxim means where there is a right there is remedy. If there is no remedy there is no right at all. It is remedy which makes the right meaningful and real.

The founding fathers and mothers of our Constitution have provided for an effective remedy for the enforcement of fundamental rights. Article 32 of the Constitution empowers the Supreme Court to issue writs in the nature of *habeas corpus*, certiorari, prohibition, mandamus or quo warranto for the enforcement of the fundamental rights. Article 226 empowers High Courts to issue writs for the enforcement of fundamental rights or any other legal rights.

A person whose fundamental rights are violated can move either the Supreme Court under Article 32 or High Court under Article 226 of the Constitution for the enforcement of his fundamental rights . Right to approach the Supreme Court for the enforcement of the fundamental rights under Article 32 itself is a fundamental right.

#### **Res Judicata**

The principle of *Res Judicata* is that if a matter in issue is heard

and finally decided by a competent court , a second suit on the very same cause of action or matter in issue is barred. This principle is applied to writ proceedings also. Section 11 of the Code of Civil Procedure,1908 deals with the principle of Res Judicata.

The Jurisdiction of Supreme Court and High Courts to issue writs for the enforcement of fundamental rights is concurrent. A person who has to vindicate his fundamental rights can either invoke the jurisdiction of the Supreme Court under Article 32 or that of a High Court under Article 226 of the Constitution. Both the Supreme Court and High Court can exercise jurisdiction and issue writs for the enforcement of fundamental rights. Thus, if a writ petition filed in the High Court is dismissed on merits the question is: whether the aggrieved person can approach the Supreme Court under Art32 of the Constitution or again file a writ petition under Article 226 in the same High Court on the same cause of action. In order to find out the answer to this question the following decisions of the Supreme Court and High Courts are to be considered.

(1) **M. S. Sharma v. Sinha (AIR 1960 SC 1186)**

In this case the Court held that if a writ petition filed in the High Court is dismissed on merits, a subsequent writ petition cannot be filed in the same court on the same cause of action.

(2) **Daryao v. State of M.P (AIR 1961 SC 1547)**

In this case the Supreme Court held that a petitioner could not maintain a petition under Article 32 if his earlier petition under Article 226 is dismissed by the High Court *on merits* , as it would be barred by *Res Judicata* .

(3) **A.R. Choudhari v. Union of India (A I R 1974 SC 532)**

In this case the Supreme Court held that if a writ petition is moved in the High Court is dismissed *not on merits*, a subsequent petition before the Supreme Court under Article 32 is maintainable.

**(4) Metal Corporation v. Union of India (AIR 1970 Cal. 15)**

In this case the Court held that if a writ petition moved in the Supreme Court under Article 32 is dismissed, a writ petition for the same cause of action cannot be filed in the High Court under Article 32 of the Constitution.

**(5) Lallubhai Jogibhai v. Union of India (A I R 1981 SC 728)**

In this case the Supreme Court held that the a petition for writ of *habeas corpus* can be filed even though an earlier petition for this writ was dismissed on merits. Therefore if a petition under Article 226 is dismissed a fresh petition before the Supreme Court under Article 32 is not barred. The principle of *Res Judicata* is not applicable in the case of *habeas corpus*.

**Locus Standi ( Who can Apply) - Public Interest Litigation**

'Locas Standi' or 'Standing' means the legal capacity of a person to initiate court proceedings.

The general rule is that only a person whose fundamental rights are infringed has *locus standi* or the right to move the Supreme Court or High Court for a writ to enforce his fundamental rights.

In the case of a petition for a writ of *habeas corpus* the above stated general principle is not applicable. A petition for the writ of *habeas corpus* may be made by the person illegally detained or if he is not in a position to make the application, it can be made by a near relative or a friend who has interest in his welfare.

In the case of writ of quo warranto also an individual whose right has not been infringed can approach the court to challange the holding of a substantive public office by an usurper.

The acceptance of **Public Interest Litigation (Social Action Litigation)** as a legitimate method to enforce the fundamental rights has

practically made the conventional approach to *locus standi* irrelevant. In a large number of cases the Supreme Court and various High Courts have issued writs allowing the petitions filed by voluntary associations, lawyers, journalists, and social workers for the enforcement of fundamental rights. The petitions filed by these 'public spirited citizens' are entertained by the Courts for vindicating the rights of the poor, weak and exploited sections of the community.

**In S.P. Gupta and Others v. President of India and others (A I R 1982 SC 149)** (popularly known as Judges Transfer Case) the Supreme Court held that if a legal wrong or legal injury is cause to a person by reason of violation of any fundamental right and such person is by reason of poverty, helplessness or disability unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Article 226 or in the Supreme Court under Article 32 of the Constitution. In this case the Supreme Court upheld the right of a practising lawyers to maintain a writ petition under Article 32 challenging the validity of transfer of High Court Judges which affected independence of judiciary.

**In People's Union for Democratic Rights v. Union of India (A I R 1982 SC 1473)**, the People's Union for Democratic Rights, an organisation striving for protecting democratic rights, wrote a letter to Sri. Justice Bhagawati pointing out that the provisions of various labour laws were not being observed in relation to the workmen employed in the construction work of various projects connected with Asian Games which were held at Delhi in 1982 and thereby fundamental rights of those workers were being violated. The letter was treated as a writ petition and the court directed the Government to see that various labour laws are followed by the contractors who are engaged by the government for the construction work of various projects. The contractors engaged workers through Jamedars without paying minimum wages and giving medical aid and other facilities. Children below 14 years were also employed in the construction work. The court recognised the

competence of voluntary organisation to entertain writ petitions to enforce fundamental rights of the poor workers.

In **Olga Tellis v. Municipal Corporation of Bombay** (1985) 3 SCC 545 the Supreme Court entertained the petition filed by a journalist who challenged the order for eviction of pavement dwellers in Bombay.

In **Upendra Baxi and others v. State of U.P** (AIR 1987 SC 191), a letter written by two law professors to the Supreme Court was treated as a writ petition and gave directions to the Government to give sufficient protection to those girls who had been remanded to a Protective Home set up under the Suppression Of Immoral Traffic in Women and Girls Act, 1956.

In **M.C. Mehta v. State of Tamil Nadu** (AIR 1997 SC 417), the Supreme Court entertained a petition filed by a social activist-lawyer to protect interest of children employed in match factories.

In **Indian Council for Enviro-legal Action v. Union of India** (1996) 5 SCC 281, a public interest litigation for proper implementation of environment protection laws was entertained by the court at the instance of a voluntary association.

In **Peoples Union for Civil Liberties v. Union of India** (1997) 1 SCC 301, a public interest litigation for protection of right to privacy was entertained by the court at the instance of a voluntary association.

In **Murali S. Deora v. Union of India** (2001) 8 SCC 765, a public interest litigation was filed by the Congress leader Murali S. Deora against 'public smoking'. The Supreme Court held that 'public smoking' is injurious to health of non-smokers and passive smokers. Non-smokers and passive smokers are compelled to be victims of pollution caused by cigarette smoke. It is indirect deprivation of their right to life guaranteed under Article 21 of the Constitution. The Court directed Central and State

Governments to prohibit smoking in public places, namely

1. Auditoriums
2. Hospital Buildings
3. Health Institutions
4. Educational Institutions
5. Libraries
6. Court Buildings
7. Public Offices
8. Public Conveyances including Railways.

While it is true that social action litigation is an important instrument of social justice, it should be ensured that it is not abused. Public interest litigation should not be used as a mask for frivolous litigation.

In **B.Singh v. Union of India** ( AIR 2004 SC 1923) the Supreme Court observed as follows:

"Public Interest Litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and /or publicity seeking is not lurking. It is to be used as an effective weapon in the armoury of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be allowed to be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. The Court must be careful to see that a body of persons or member of public who approaches the Court is acting bona fide and not for personal gain or private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations by masked phantoms who moniter at times from behind. Often they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy -bodies deserve to be thrown out by rejection at the threshold, and in appropriate cases with exemplary costs.

#### **Amenability to Writ Jurisdiction (Against whom writ can be issued)**

A writ can be issued against 'state' as defined in Article 12 of the Constitution to enforce fundamental rights. It is well settled that a writ of

*habeas corpus* can be issued to any one, whether a public authority or a private individual. A writ of quo warranto can be issued to the holder of a substantive public office.

### **Different Writs**

The Supreme Court and High Courts can issue the following writs for the enforcement of fundamental rights.

#### **1. Habeas Corpus**

Habeas Corpus literally means 'produce the body'. The writ of *habeas corpus* is issued when a person is detained by another illegally or without any lawful justification. It is issued to release the detained person from illegal detention.

The writ of *habeas corpus* is issued in the form of an order directing the person who has detained another to bring that person before the court and inform the court by what authority he has detained that person. If the cause shown for detention is not justifiable according to law the court will order immediate release of the person under detention. If the cause shown are justifiable the court will reject the application.

In **Kanu Sanyal v. District Magistrate, Darjeeling** (AIR 1974 SC 510), the Supreme Court held that while dealing with an application for a writ of *habeas corpus* the production of the detained person in the court is not essential. When an application for a writ of *habeas corpus* is filed, the court will first issue a *rule nisi* (preliminary order) to the authority who has detained the applicant to show cause the legality of detention. If the causes shown are not justifiable, the court will order immediate release of the detenu.

#### **Who can apply**

An application for a writ of *habeas corpus* can be made by the person who is illegally detained. If he is not in a position to file the petition any person who is interested in his welfare can file an application

for and on behalf of the person under illegal detention. Thus a relative or a friend of the detenu can file an application for a writ of habeas corpus.

### **How to apply**

The general rule is that a formal petition is to be filed for issuing a writ of habeas corpus. But the Supreme Court may issue a writ of habeas corpus even though the application does not fulfil the strict rules of pleading. Even a post card written by the detenu from jail would be sufficient to invoke the jurisdiction of the court. The court may take such a letter as a writ petition and examine the legality of the detention.

### **Grounds for issue of writ of habeas corpus**

A writ of Habeas Corpus will be issued under the following circumstances to protect a persons fundamental right to liberty.

1. If the person who is arrested is not produced before the magistrate within 24 hours of his arrest
2. If the power of detention vested in an authority was exercised *mala fide*.
3. If law under which detention is ordered is *ultra vires* the Constitution.

### **2. Mandamus**

The writ of mandamus is an order of the Court commanding a person or a public authority to do or to refrain from doing something in the nature of a public duty or a statutory duty. If a public authority who has to perform a public duty fails to do his duty and which has violated a persons fundamental right the court will issue the writ of mandamus to that authority and command the authority to perform his function.

The writ of mandamus will be issued when there is a failure to perform a mandatory duty by a public authority. A writ of Mandamus will not be issued when the duty is only discretionary. The party applying for a writ of mandamus must show that he made a demand and it was

refused by the public authority.

A writ of mandamus does not lie against a private individual or any private organisation because they are not entrusted with a public duty.

A writ of mandamus can not be issued personally against the President of India or Governor of a State in regard to the performance of the duties of his office(Art. 361). The central government or the state government, as the case may be, has liability in such a case and is amenable to the writ jurisdiction.

A writ of mandamus cannot be issued against government to enforce an obligation arising out of contract : (**East India Commercial Co. v. Collector of Customs** [A I R 1962 SC 1893])

### 3. Certiorary

A writ of Certiorary is issued by the Supreme Court or High Court to quash or nullify an order made without jurisdiction or in violation of the rules of natural justice by an inferior court or body exercising judicial or quasi-judicial function.

A writ of certiorary will be issued when the following conditions are satisfied

1. The authority or body or agency should have legal authority to determine questions affecting the rights of individuals.
2. The authority should be under a duty to act judicially.
3. The authority should have acted in excess of legal authority or without jurisdiction or against the principles of natural justice or there should be error of law apparent on the face of the record.

In **Syed Yakoob v. Radha Krishnan** (AIR 1955 SC 477), the Supreme Court held that an error of law which is apparent on the face of the record can be corrected by a writ of certiorary but not an error of fact.

In **State of U P v. Mohd. Nooh** (AIR 1958 SC 86), the Supreme Court held that the writ of certiorary can be issued to a body performing judicial or quasi-judicial function for correcting errors of jurisdiction, as when an inferior court or tribunal acts without jurisdiction, or in excess of it or fails to exercise it.

In **Prabodh Verma v. State of U.P.** (AIR 1985 SC 167), the Apex Court held that a writ of certiorari cannot be issued for declaring an Act or an Ordinance as unconstitutional or void. A writ of certiorari can only be issued by the Supreme Court under Article 32 of the Constitution or a High Court under Article 226 of the Constitution to direct inferior courts, tribunals or authorities to transmit to the court the record of proceedings pending therein for scrutiny and, if necessary, for quashing the same. If the court finds that an Act or Ordinance is unconstitutional or void, the court can declare the Act or Ordinance as unconstitutional and issue a writ of mandamus to the Government and its officers not to enforce the provisions of the Act or Ordinance.

In **Murali v. Returning Officer** (2001 (1) KLT 854, the Kerala High Court held that a writ of certiorari will not lie for quashing a legislation. The whole purpose of that prerogative writ is for correcting mistakes committed by courts or tribunals or authorities on scrutiny of records in the impugned proceedings. The Legislature is not an inferior court or tribunal. It is a co-ordinate branch. The High Court is competent to examine the Constitutional validity of legislation and entitled to declare the legislation as ultra vires the Constitution if it is found to be offensive of Part III of the Constitution. The High Court can issue a writ of mandamus to the Government not to enforce the unconstitutional legislation. The courts cannot issue a writ of mandamus to the Legislature to enact a statute. The Courts cannot issue a writ of certiorari to quash a legislation. What the court can do is to declare the legislation as unconstitutional and issue a writ of mandamus to the Government not to enforce the legislation.

#### **4. Prohibition**

A writ of prohibition is issued to prevent an inferior court or tribunal from exceeding its jurisdiction or acting contrary to the rules of natural justice. It is issued by the Supreme Court or High Court to keep the inferior courts within the limits of their jurisdiction. It is issued to judicial and quasi judicial bodies for preventing them from exercising jurisdiction which is not vested in them or to prevent them from abusing the jurisdiction.

A writ of Prohibition lies only against judicial and quasi-judicial authorities.

In **Hari Vishnu Kamath v. Ahmad Ishaque**(A I R 1955 SC 233), the Supreme Court held that a writ of prohibition is issued when an inferior court takes up for hearing a matter over which it has no jurisdiction. It is issued to forbide it form continuing the proceedings. If the court hears the matter without jurisdiction and gives a decision a writ of certiorary will be issued to quash the decision given with out jurisdiction.

#### **5. Quo Warranto**

The words *quo warranto* means 'what is your authority'. This writ is issued to a person who holds a public office to show the court under what authority he holds the office. When an application for a writ of quo warranto challenging the authority of a person holding a public office is filed the court will issue a show cause notice to the person holding the public office. The holder of office can show the authority under which he holds the office. If the enquiry leads to the finding that the holder of office has no valid authority to hold it, the court may pass an order preventing the holder from continuing in office and may also declare the office vacant.

The object of the writ of quo warranto is to prevent a person from holding an office which he is not legally entitled to hold.

An application for a writ of quo warranto can be filed by any private person although he is not personally aggrieved. Any member of public can challenge the right of a person to hold a public office.

In **Lakhanpal v. A. N. Ray** (A I R 1975 Del 66), the validity of the appointment of Mr. Justice A. N. Ray as the Chief Justice of India was questioned on the ground that Mr. Justice A. N. Ray was appointed overlooking seniority of three justices. The petition of writ for quo warranto was dismissed on the ground that by the time of the consideration of the petition A. N. Ray , C.J had become seniormost because of the resignation of the three judges who were senior to him.

## **Topic -XXVIII**

### **Directive Principles of State Policy**

Part IV of the Constitution(Articles 36 to 51) deals with Directive Principles of State Policy.

The Directive Principles are the ideals which the Union and State Governments must keep in mind while they formulate policy or pass a law. The Directive Principles lays down certain economic, social and welfare policies which are to be followed by the state in the governance of this country. These directive principles impose a duty on the state to take positive action in certain directions in order to promote the welfare of the people and achieve economic democracy.

Though the state is under a positive duty to apply these Directive Principles in making of laws they are not enforceable by any court. In other words, the court cannot compel the state to enact a law by following the directive principles.

The following are the directive principles which are to be followed

by the state in adopting its policies or making laws.

1. The state shall adopt its policy to secure equal right of men and women to an adequate means of livelihood.
2. The state shall adopt its policy to secure that the distribution of ownership and control of the material resources of the community is to the common good.
3. The state shall adopt its policy to secure that the operation of economic system does not result in concentration of wealth and means of production to the common detriment.
4. The state shall endeavour to secure equal pay for equal work for both men and women.
5. The state shall endeavour to protect the health and strength of workers, both men and women.
6. The state shall adopt its policy to ensure that the tender age of children are not abused.
7. The state shall adopt its policy to ensure that the citizen are not forced by economic necessity to enter avocations unsuited to their age or strength.
8. The state shall adopt its policy to ensure that the children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity.
9. The state shall adopt its policy to ensure that the children and youth are protected against exploitation and against moral and material abandonment.

10. The state shall endeavour to secure that the operation of the legal system promotes justice on the basis of equal opportunity.
11. The state shall endeavour to provide free legal aid to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.
12. The state shall endeavour to organise village panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self government.
13. The state shall adopt its policy to secure the right to work.
14. The state shall adopt its policy to secure right to education.
15. The state shall endeavour to provide public assistance in case of unemployment, old age, and disablement.
16. The state shall adopt its policy to secure just and humane conditions of work and for securing maternity relief.
17. The state shall endeavour to secure a living wage, leisure and social and cultural opportunities to all workers.
18. The state shall take steps to promote cottage industries in Rural Areas.
19. The state shall endeavour to secure the participation of workers in the management of undertakings or establishments engaged in any industry.
20. The state shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.

21. The state shall endeavour to provide early childhood care and education for all children until they complete the age of six years.
22. The state shall endeavour to raise the level of nutrition and standard of living of the people.
23. The state shall adopt its policy to bring about prohibition of the consumption of intoxicating drinks or drugs which are injurious to health except for medicinal purpose.
24. The state shall endeavour to organise agriculture and animal husbandry on modern and scientific lines.
25. The state shall take steps to preserve and improve the breeds.
26. The state shall take steps to prohibit the slaughter of cows and calves and other milch and draught cattle.
27. The state shall endeavour to protect and improve environment and to safeguard the forest and wild life of the country.
28. The state shall protect every monument or place or object or artistic or historic interest declared to by law made by Parliament to be of national importance from spoilation, disfigurement, destruction, removal, disposal or export.
29. The state shall take steps to separate the judiciary from the executive.
30. The state shall endeavour to promote international peace and security. The state shall strive to maintain just and honourable relations between nations. The state shall strive to foster respect for international law and treaty obligations. The state shall strive to encourage settlement of international disputes by arbitration.

## **Relation between Fundamental rights and Directive Principles of State Policy**

Part III of the Constitution (Articles 12 -35)provides for Fundamental Rights. Part IV of the Constitution(Articles 36-51) provides Directive Principles of State Policy.

The fundamental rights guaranteed in Part III of the Constitution are enforceable through court of law. If the state violates any of the fundamental rights the aggrieved person can approach the Supreme Court or High Court for enforcement of his fundamental right. These fundamental rights are injunctions against the state. The state cannot make a law violating any of the fundamental rights. Any law enacted by the legislature or made by the executive will be *ultra vires* the constitution if it is violative of the Fundamental Rights.

The Directive Principles of State Policy contained in Part IV of the Constitution are not enforceable through court of law. If the state fails to enact a law to implement a directive principle, a citizen cannot approach a court of law to give direction to the state to enact a law. If the legislature enacts a law in violation of a directive principle the court cannot declare it as unconstitutional.

When the state makes a law to implement a directive principle, it may sometimes violate the fundamental rights. In such a case the question normally arising is: whether such a law can be justified on the ground that it is made to secure the directive contained in Part IV of the Constitution.

In **State of Madras v. Champakam Dorairajan**(AIR 1951 SC 228) the Supreme Court observed that a law which violates fundamental right cannot be justified on the ground that it is made to implement a directive contained in Part IV of the Constitution. In other words Directive

Principles cannot override Fundamental Rights. The Directive Principles have to run as subsidiary to the Chapter on Fundamental Rights. In case of any conflict between fundamental rights and directive principles the fundamental rights would prevail.

**In Re Kerala Education Bill** ( AIR 1957 SC 956), the Supreme Court observed that though the directive principles cannot override the fundamental rights, the court may not entirely ignore the directive principle in determining scope and ambit of fundamental rights. The court should adopt the principle of harmonious construction and should give effect to both as much as possible.

**In Kesavananda Bharati v. State of Kerala** (AIR 1973 SC 1461) the Supreme Court has said that fundamental rights and directive principles are meant to supplement one another.

**In Unni Krishnan v. State of A P**(1993) 1 SCC645 , the Supreme Court held that the fundamental rights and directive principles are supplementary and complementary to each other and the provisions in Part III should be interpreted having regard to the preamble and Directive Principles of state policy.

**In State of Bombay v. Balsara** (AIR 1951 SC 318), the validity of Bombay Prohibition Act which prohibited manufacturing and sale of liquor in the state was challenged as being violative of fundamental right to engage in any profession or carry on any trade. The court gave weight to Article 47 which directs the state to bring about prohibition of consumption of intoxicating drink except for medical purposes and held that the restriction imposed by the Act was reasonable.

#### **Implementation of Directives**

A large number of laws have been enacted to implement the directives contained in Part IV of the Constitution.

The Banking Companies ( Acquisition and Transfer of Undertakings) Act, 1969, the Equal Remuneration Act,1976, the Employees Provident Funds Act,1952, the Maternity Benefit Act,1961, the Bonded Labour System Abolition Act, 1976, the Payment of Bonus Act,1965, the Kerala Land Reforms Act,1963 etc., are examples of laws enacted for implementing the directives contained in Part IV of the Constitution.

## **Topic - XXIX**

### **Fundamental Duties**

Article 51A of the Constitution adumbrates certain Fundamental Duties of every citizen. These Fundamental Duties are included in the Constitution by the 42 nd Amendment Act,1976.

The following are the Fundamental Duties

1. Every citizen shall be under a duty to abide by the Constitution and respect its ideals and institutions.
2. Every citizen shall be under a duty to respect the National Flag and the National Anthem
3. Every citizen shall be under a duty to cherish and follow the noble ideals which inspired our national struggle for freedom
4. Every citizen shall be under a duty to uphold and protect the sovereignty, unity and integrity of India.
5. Every citizen shall be under a duty to defend the country and render national service when called upon to do so.
6. Every citizen shall be under a duty to promote harmony and the spirit of brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities.

7. Every citizen shall be under a duty to renounce practices derogatory to the dignity of women.
8. Every citizen shall be under a duty to value and preserve the rich heritage of our composite culture.
9. Every citizen shall be under a duty to protect and improve the natural environment including forests, lakes, rivers and wildlife, and to have compassion for living creatures.
10. Every citizen shall be under a duty to develop the scientific temper, humanism and the spirit of inquiry and reform.
11. Every citizen shall be under a duty to safeguard public property and to abjure violence.
12. Every citizen shall be under a duty to strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavour and achievement.
13. Every citizen who is a parent or guardian shall provide opportunities for education to his child or ward between the age of six and fourteen years.

## **MODEL PROBLEMS**

- 1. By an amendment to the Bar Council Rules, the age limit for enrolment as an advocate was fixed as 45. A person whose application for enrolment was rejected on the ground that he had crossed the upper age limit, challenges the rule as discriminatory and unreasonable. Decide.**

**Hint :** The amendment is discriminatory and unreasonable. The amendment is violative of Article 14 and 19 (1) (g) of the Constitution.

**In Indian Council of Legal Aid & Advice v. Bar council of India (1995 1 SCC 732), Rule 9 was added by the Bar Council of India in Bar Council Rules. Rule 9 barred the entry of persons who have completed the age 45 years on the date of application for enrolment as an advocate. The said rule was challenged as discriminatory and unreasonable and violative of Article 14 of the Constitution.**

The Bar Council argued that the rules were intended to maintain the dignity and purity of the profession by keeping out those retire from various government and 'Quasi-government' and other institutions since they use their past contacts to canvass for cases. Their act pollute the minds of young fresh entrants to the profession.

The Supreme Court held that the rule is unreasonable and arbitrary. There is no material to show that the persons mentioned above indulge in undesirable activities of the type mentioned above after entering the profession. Moreover the rule does not debar the revival of sanads by persons who have enrolled before the age of 45 but suspended it to take some job. That is a clear violation of Article 14 of the Constitution and hence void. (Read Topic IX - Right to Equality)

- 2. The State of Kerala enacted an Act declaring that there is no "creamy layer" among the backward classes in the State. The validity of the Act is challenged on**

the ground that it is violative of Article 14 and 16(4) and also the law laid down by the Supreme Court in **Indra Sawhney v. Union of India** ( AIR 1993 SC 447). Decide

Hint: In **Indra Sawhney (II) v. Union of India** ( 2000)1 SCC 168: AIR 2000 SC 498), the Legislature of State of Kerala enacted the Kerala State Backward Classes ( Reservation of Appointments or Posts in Services ) Act, 1995 was declared by the Supreme Court as unconstitutional and invalid. In **Mandal Case**( **Indra Sawhney v. Union of India** ( AIR 1993 SC 447) the Supreme Court directed the Governments to identify the creamy layer and exclude them from the benefits of reservation within three years. The State of Kerala did not implement the direction of the Supreme Court. The State of Kerala enacted the Kerala State Backward Classes ( Reservation of Appointments or Posts in Services ) Act, 1995, By this enactment it was declared that there is no creamy layer among the backward classes in the State. The object of this Act was to avoid the consequences of the decision in **Indra Sawhney v. Union of India** ( AIR 1993 SC 447). The Nair Service Society ( NSS ) Challenged the Constitutional validity of the Act. The State of Kerala sought for the extention of time for appointment of a commission to identify the creamy layer among the backward classes. The Supreme Court directed the High Court of Kerala to appoint a committee to identify "creamy layer" under the Charmanship of a retired Judge of the High Court. The Kerala High Court appointed a committee for identifying the creamy layer under the Charimanship of Justice K.J. Joseph. The Committee submitted its report identifying creamy layer. The Supreme Court held that the Act of 1995 is discriminatory and violative of Article 14, 16(1) and 16(4) of the Constitution and therefore, unconstitutional and invalid. The creamy layer in the backward classes is to be treated on par with the forward classes and is not entitled to the benefits of reservation. If the creamy layer is not excluded there will be discrimination and violation of Article 14 and 16(1) in as much as equals ( forward and creamy layer of backward classes) cannot be treated equally. Likewise, non-exclusion of creamy layer will also be violative of Articles 14,16(1) and 16(4) of the Constitution since equals ( creamy layer) cannot be treated as equal to the rest of the

backward class. ( Read Topic IX - Right to Equality)

3. The Inspector General of Prisons writes to the Editor of a Weekly Magazine, asking him to stop the publication of the autobiography of a condemned prisoner since it may be defamatory to some senior police officials and may violate their privacy. The editor seeks a direction from the Supreme Court to the State Government not to interfere with the freedom of the Press. Decide

Hint: In **R.Rajagopal v. State of Tamil Nadu** (1994 6 SCC 632), a condemned prisoner Auto Shanker who was convicted for six murders and sentenced to death had written his autobiography in jail and handed over the same to his wife with the knowledge and approval of the jail authorities for delivering it to his advocate with a request to publish it in a Tamil weekly magazine "Nakeeran". The autobiography depicted a close relation between prisoner and several IAS, IPS and other officers, some of whom were indeed his partners in several crimes.

The printer and publisher of the weekly magazine announced that they would publish the sensational life history of Auto Shankar soon.

This announcement sent shock waves among several police and prison officials who were afraid that their links with the condemned prisoner would be exposed.

They forced Auto Shanker, by applying third degree methods, to write letters addressed to the Inspector General of Prisons and the Editor of the Magazine requesting that his life story should not be published in the Magazine.

The Inspector General of Prisons wrote a letter to the Editor on 15th July, 1994 informing him that the autobiography was false and Auto Sanker had denied that had written any such book and therefore asked him to stop the publication of serial.

The printer, publisher and editor of the Magazine filed a petition challenging the validity of the letter dated July 15, 1994 before the Supreme Court.

The Court held the petitioner has a right to publish the autobiography of Auto Shankar so far as it appears from the public records even without his consent or authorisation. The government has no authority in law to impose a prior restraint upon publication of defamatory material against its officials. Public authorities who apprehend that they or their colleagues may be defamed could not prevent the press from publication of such materials. They could take action for damages after publication of such materials if they prove that the publication was based on false facts. Further no action could be initiated against the press if publication was based on public records including court records.

A citizen has a right to safeguard the **PRIVACY** of his own, his family, marriage, procreation, motherhood, child bearing and education among other matters. This **RIGHT TO PRIVACY** is included in Article 21 of the Constitution. None can publish anything concerning the above matters without the persons consent whether truthful or otherwise. If he does so he would be violating the right to privacy of the person concerned and would be liable for action for damages.

The court made it clear that any publication concerning the privacy aspects would become unobjectionable if such publication was based upon *public records including court records*.

To the above stated general rule, the court expressed an exception. The name of a female who was victim of sexual assault, kidnapping, abduction or a like offence should not be published in the news papers or magazines.

The court held the petitioners was entitled to publish the autobiography by Auto Shankar as it appeared from public records. (Read

Topic XI- Freedom of Speech and Expression)

4. Section 309 of the India Penal Code, which makes attempt to commit suicide an offence, is challenged as violative of Article 21 of the Constitution. Decide

Hint: In **Gain Kaur v. State of Punjab** (1996 2 SCC 648), a five judge constitutional Bench of the Supreme court has held that the right to life under Article 21 does not include "right to die", or "right to be killed".

This decision has over-ruled the Supreme Court's decision in **P.Rathinam v. Union of India** (1994 3 SCC 394). In that case it was held that right to life in Article 21 includes right to die and thus section 309 of I.P.C was declared as unconstitutional. The new decision in Gain Kaur's case changed the position and now s. 309 IPC is constitutionaly valid. ( Read Topic XIX Protection of Life and Liberty)

5. An Act passed by the State Legislature prescribed punishment for "forcible conversion of any person to any religion" The Act was challenged as violative of the right to propogate religion under Article 25 of the Constitution. Decide

Hint: In **Rev Stainislaus v. State of M.P.** (AIR 1977 SC 908), the Supreme Court held a legislation prohibiting forcible conversion of one's own religion in the interest of public order can be passed and such a law is not violative of fundamental right under Article 25 of the Constitution.

In **Satya Ranjan Majhi v. State of Orissa** (2003) 7 SCC 439, the Supreme Court held that there is no fundamental right to convert another person to one's own religion. What Article 25 grants is not the right to convert another person to one's own religion, but to transmit or spread one's religion by an exposition of its tenets. ( Read Topic XXIII- Right to Freedom of Religion).