

FUNDAMENTAL RIGHTS

The Indian Constitution is first and foremost a social document. The majority of its provisions are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Yet despite the permeation of the entire Constitution by the aim of national renascence, the core of the commitment to the social revolution lies in Part III (Fundamental Rights) and Part IV (Directive Principles of State Policy). *Granville Austin* consider these two parts as the conscience of the Constitution.

MEANING

The Fundamental Rights have been declared essential rights in order that human liberty may be preserved, human personality developed and an effective social and democratic life promoted. In the **Maneka Gandhi v/s Union of India** case, 1978, Justice Bhagwati observed:

These Fundamental Rights represent the basic values cherished by the people of this country (India) since the Vedic times and they are calculated to protect the dignity of the individual and create conditions in which every human being can develop his personality to the fullest extent. They weave 'a pattern of guarantees on the basic structure of human rights', and impose negative obligations on the State not to encroach on individual liberty in its various dimensions.

The inclusion of a chapter on Fundamental Rights, in the Constitution, is in accord with the trend of modern democratic thought. These rights are basic to a democratic polity. The object is, not only to ensure the inviolability of certain essential rights against authoritarianism, but also, to impress upon the people the fact of their having reached a new level national existence. The guarantee of basic human rights is an indispensable requirement of a free society.

The origin of the concept of Fundamental Rights may be traced to the 13th century England. It was in 1215 that the people of England revolted against

King John and enforced their demand for reiteration of their claims against the royal absolutism. The King was forced to acknowledge that there were certain rights of the subjects which could not be violated even by a legal sovereign.

The **Magna Carta**, 1215, which was an evidence of people's success, was a written document. It enjoined "respect for the law by the King, forbade denial of justice, prohibited unlawful detention and excessive fines.

The Constitution of England is unwritten and the supremacy of Parliament is its dominant characteristic. As a result there is no formal declaration of Fundamental Rights of the people in England. However, there prevails **Rule of Law**, which is the bedrock of British Constitution.

The Americans adopted the Constitution-making, for securing their Bill of Rights. The original Constitution framed in 1787 and brought into force in 1789, did not contain any Fundamental Rights for Americans. It was met with serious condemnation. Consequently, the first ten amendments were enacted in 1791, incorporating the Fundamental Rights. These amendments have been described as the American "**Bill of Rights**".

The framers of the Indian Constitution followed the American model in adopting and incorporating the Fundamental Rights for the people of India. The Constitution, not only, secures the Fundamental Rights, but also, provides a speedy and effective remedy for their enforcement. In a series of decisions, starting with Maneka Gandhi case, 1978, the Apex Court have widened the ambit of the Fundamental Rights and have sought to bring these rights in conformity with the global trends in human rights jurisprudence.

Definition of State (Article 12)

Article 12 defines the term "**State**" for the purpose of the Fundamental Rights. Article 12 provides that unless the context otherwise requires, "the state includes 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." Article gives an inclusive and not exhaustive definition of "the State". So defined "the State" includes—

- The Government and Parliament of India;
- The Government and the Legislature of each of the State;
- All local or other authorities within the territory of India; and
- All local or other authorities under the control of the Government of India.

Nature of Fundamental Rights

- The Fundamental Rights are individual rights and are enforceable against the state and not against individuals except right against untouchability (Article 17), right against exploitation (Articles 23 and 24) and right to personal liberty (Article 21) whereby in case of violation, an individual who has violated these rights can be taken to the court of law.
- The Fundamental Rights are regarded as limitations on the powers of state. They are also negative obligations upon the state because they are mostly negatively worded.
- The Fundamental Rights have to be exercised subject to the limitations embodied in that very part itself. So to say, the rights are not absolute or unrestricted. For, absolute rights cannot exist in modern State. If the rights are uncontrolled and absolute it may lead to chaos and anarchy in the society. However some of the Fundamental Rights are absolute. These rights are- Right against Untouchability (Article 17); right against engaging children below 14 years of age in hazardous units (Article 24) and right to freedom of conscience (Article 25).

Grounds of reasonable restrictions on Fundamental Rights

The Fundamental Rights of an individual can be restricted on the following grounds-

- For the security of the state
- For the maintenance and promotion of the interest of women, children and the socially and educationally backward classes.
- To maintain friendly relations with

foreign states.

- In case of Defamation
- Contempt of courts
- For the maintenance of public order, decency and morality.

Judicial Review and Fundamental Rights

Judicial review is the power of the Supreme Court and High Courts to declare a law as in Constitutional or void, if it is inconsistent with any of the provisions of the Constitution to the extent of such inconsistency. This power is available both against the law made by the legislature and an act of the executive.

Doctrine of Eclipse

Art 13 states that all laws inconsistent with or in contravention of the Fundamental Rights shall be void to the extent of such inconsistency. The Article reads as:

- All laws in force in the territory 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.
- 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.

The Supreme Court in the Bhikaji Narain v/s State of Madhya Pradesh propounded doctrine of eclipse and clarified that any such law is not dead altogether. It is overshadowed by the Fundamental Right and remains dormant or eclipsed to the extent it comes under the shadow of the Fundamental Rights. The eclipsed part gets revived and effective again if the prohibition brought about by the Fundamental Right is removed by an amendment to the Constitution. This was a case relating to a pre -Constitutional law.

The Supreme Court in the State of Gujarat v/s Sri Ambika Mills case 1974 gave the verdict that this doctrine is applicable to the pre-Constitutional as well as post-Constitutional law.

Doctrine Of Severability

Article 13.(1) All laws in force in the territory 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.

Clause 1 and 2 of Article 13 thus declare that laws inconsistent with or in contravention of the Fundamental Rights shall be void to the extent of such inconsistency or contravention, as the case may be.

It means that, where only a part of the law is inconsistent with or contravenes the Fundamental Rights, it is only that part which shall be void under Article 13 and not the whole of the law. The Courts apply the doctrine of severability or separability to separate the valid portion of the law from the invalid portion.

Constitutional Amendment Acts declared as unconstitutional.

Amendment act	Relevant ruling
1. Seventeenth Amendment (in part)	Golak Nath v/s State of Punjab, 1967
2. Twenty-Fifth Amendment (Art.31C)	Keshavananda Bharti case, 1973
3. Thirty- Second Amendment	Sambamurthy v/s UOI, 1987
4. Thirty-Sixth Amendment (Article 329)	Indira Gandhi v/s RajNarain, 1975
5. Article 368	Minerva mills Case, 1980
6. Fifty-Second Amendment (10 th Schedule, para 7)	Kihota v/s Zachilhu, 1993.

AMENDABILITY OF FUNDAMENTAL RIGHTS

Article 13(2) states that 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.

The First (Constitutional) Amendment Act, 1951 added the Ninth schedule to the Constitution which mostly contains social legislations like the land reforms acts and its provisions cannot be challenged in any court of law. Secondly Article 15 (4) was added to protect the interests of the Scheduled Castes and Schedule Tribes and the policy of reservations was introduced. This amendment act violated the right to equality, the right to property and it was challenged in the Shankari Prasad v/s Union of India case, 1951. In this case the Supreme Court held that the Parliament can amend the Fundamental Rights. In Sajjan Singh v/s State of Rajasthan (1965), the Supreme Court reiterated the same judgment. In Golaknath v/s State of Punjab (1967) the court reversed its decision and held that the Parliament has no authority to amend the Fundamental Rights.

After this, the 24th (Constitution) Amendment Act was passed in 1971. It amended Article 13 and introduced Article 13(4) which said that, nothing in this Article shall apply to amendment made under article 368.

Secondly it also changed the title of Art.368. "The power of the Parliament to amend the Constitution and the procedure thereof". Nature of Art 368 was changed and 24th Amendment Act established that any part of Constitution can be changed including the Fundamental Rights.

This 24th Constitutional (Amendment) Act was challenged in the Keshavanand Bharti v/s State of Kerala case 1973. In this case the Supreme Court propounded the Doctrine of basic structure of the Constitution.

Doctrine of Basic Structure of Constitution

The Supreme Court in Keshavananda Bharti case gave the judicial innovation of the doctrine of basic structure of the Constitution. It held that the power of the Parliament to amend the Constitution is limited to the extent of not violating the basic structure of the Constitution. However, the court did not elaborate on what constitutes the basic structure of the Constitution. Illustrative enumeration of the basic features of the Constitution varied from judge to judge with some overlap. Chief Justice Sikri: (a) supremacy of the Constitution, (b) republican and democratic form of Government, (c) secular character of the Constitution, and (d) separation of powers and



federal division of powers. Shelat and Grover: (a) the mandate to build a welfare State contained in Part-IV of the Constitution, and (b) unity and integrity of the nation. Hegde and Mukherjea: (a) sovereignty of India, (b) democratic character of the polity, (c) unity of the country, (d) essential features of individual freedoms of citizens, and (e) mandate to build a welfare State. Jaganmohan Reddy: the preamble and its elaboration in the rest of the Constitution. The judgement was criticized by some as vague and confusing and as a product of a sharply divided court. It is, however, unfair to expect from a court judgement, which arises from the specific context of a case or a bunch of cases in a particular time period, to have a Constitution-like precision and yet timeless and transcendent applicability. A Court judgement in the common law tradition is, in fact, meant to be paradigmatic whose application is gradually extended to new situations. The Constitution, too, has a similar paradigmatic applicability to changing times, only in more amplitude and lesser liability to paradigmatic shifts that we find in case laws. The case of *Indira Gandhi v. Raj Narain*, 1975 illustrates the kind of extensionability of a case law to new principles we alluded above. This judgement declared free and fair elections as part of the basic structure of the Constitution.

Through various judgments of the court, we have come to know about the basic structure of the Constitution i.e.; which parts constitute the basic structure of the Constitution.

- (i) The ideal of a welfare state.
- (ii) Secularism
- (iii) Republican and Parliamentary form of government.
- (iv) The concept of Constitutional supremacy.
- (v) Judicial Review.
- (vi) Balance between the various organs of the government.
- (vii) Rule of law
- (viii) Federalism
- (ix) Free and fair elections
- (x) Balance between the Fundamental Rights and Directive Principles of State Policy.

Thus, the basic structure means those parts of the Constitution without which the Constitution would leave its basic character. It has helped in maintaining the supremacy of the Constitution

and it has also shown a definite direction for the Constitutional developments to take place.

In the *Minerva Mills v/s Union of India* case, the Supreme Court upheld the basic structure doctrine given by Supreme Court in *Keshavanand Bharati* case.

SUSPENSION OF FUNDAMENTAL RIGHTS

Article 358 states that the Fundamental Rights provided under article 19 are automatically suspended when the National emergency is proclaimed on the grounds of war and external aggression.

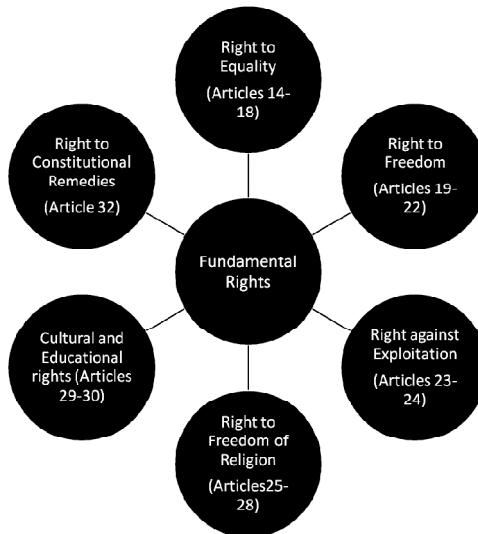
However, if the National Emergency is proclaimed on the grounds of internal armed rebellion, the rights under article 19 are not automatically suspended.

Article 359 state that if a National Emergency is proclaimed then the President may by a separate proclamation can suspend all other Fundamental Rights except those under Articles 20 and 21.

CLASSIFICATION OF FUNDAMENTAL RIGHTS

Fundamental Rights have been classified under the following six categories:

- (i) Right to Equality (Articles 14-18)
- (ii) Right to Freedom (Articles 19-22)
- (iii) Right against Exploitation (Articles 23-24)
- (iv) Right to freedom of Religion (Articles 25-28)
- (v) Cultural and Educational Rights (Articles 29-30)
- (vi) Right to Constitutional Remedies (Article 32)



RIGHTS TO EQUALITY

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.

EQUALITY BEFORE LAW

Equality before law is a negative concept. It signifies that no one is above the law. The concept has been borrowed from United Kingdom's Constitution. It is based on the concept of Rule of law.

Rule of law was propounded by the Greek political thinker Aristotle. According to Aristotle, "Rule of Law is better than rule of men". In the modern times it has been popularized by prof. Dicey. Rule of law establishes the supremacy of law i.e., lex Superalex. Rule of law has transformed the concept of Rex lex (King is law) to the concept of Lex Rex (law is the king).

The essential characteristic of the rule of law are:

- The Supremacy of law which means that all persons (individuals and government) are subject to law.
- The Concept of justice which emphasizes interpersonal adjudication, law based on standards and the importance of procedures
- Restrictions on the exercise of discretionary powers.
- The doctrine of judicial precedent
- The common law methodology
- Legislation should be prospective and not retrospective.
- Underlying moral basis for all laws.

Exceptions to the principle of Rule of law

- (i) The President and the Governors of the State are not answerable in the court of law for the administrative decisions taken by them
- (ii) No criminal proceedings can be initiated against the President or a Governor of a State.
- (iii) The foreign diplomats and the visiting foreign dignitaries are not subjected to this law.

EQUAL PROTECTION OF LAWS

The concept "equal protection of laws" is based on Section 1 of the Fourteenth Amendment of the Constitution of the United States of America adopted on July 28, 1868.

It does not mean equal application of law for all people irrespective of the circumstances under which they are placed. It means equality as per law in equal circumstances i.e., equality among equals. There should be no discrimination between one person and another in similar circumstances.

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.

Note: this right is available only to citizens

Exceptions as provided in Art 15(3) and article 15(4).

Article 15(3) Nothing in this article shall prevent the State from making any special provision for women and children.

Article 15(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.

Note: The **93rd Constitution Amendment Act, 2005** inserted Article 15(5), which authorizes the state to make special provisions for the advancement of any socially and educationally backward classes of citizens or for the Schedule Castes and the Schedule 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.

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.

Note: this right is available only to citizens.

Exceptions

Article 16(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.

Article 16(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.

Article 16 (4A) 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.

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.

‘Untouchability’ is neither defined in the Constitution nor in the Act. The Mysore High Court has, however, held that the term is not to be understood in its literal or grammatical sense but to be understood as the practice as it had developed historically in this country. Understood in this sense, it is a product of the Hindu caste system according to which particular sections amongst the Hindus had been looked down as untouchables by other sections of that society.

The Parliament enacted the Untouchability (Offences) Act, 1955. This Act was amended by the Untouchability (Offences) Act, 1976, in order to make the law more stringent to remove the evil of Untouchability from the society. It has now been named as “*The Protection of Civil Rights Act*,” 1955. *The Protection of Civil Rights Act* prescribes punishment which may extend to imprisonment upto six month and also with a fine which may extend to five hundred rupees or both.

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. Only those titles which can create artificial social barriers have been abolished.

The National Awards were introduced by the Centre in 1954 by Presidential Notifications. The Presidential Notification made it clear that these civilian awards cannot be used as titles and should not be attached as suffices or prefixes to the name of the awards. In 1977 these awards were discontinued. However, they were again revived in 1980.

In the *Balaji Raghavan v/s Union of India* case, 1996, the petitioners challenged the validity of these National awards and requested the Court to prevent the Government of India from conferring these awards. It was contended that the national awards are titles within the meaning of Article 18. The Supreme Court held that the National awards such as Bharat Ratna, Padma Bhushan, etc., are not violative of Article 18 of the Constitution. These were awards and not titles. The National awards are given to the people for rendering meritorious service to the society or the state.

Note: Article 18 is not penal in nature but only directory in nature.

RIGHT TO FREEDOM

(Articles 19-22)

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;
- (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.

Note: Originally Article 19 (1) had seven freedoms. But Art 19 (1) (f) i.e., right to freedom of property was omitted by the 44th (Constitutional) Amendment Act, 1978. The rights granted under Article 19 are available only to the citizens.

RIGHT TO FREEDOM OF SPEECH AND EXPRESSION

Art 19(1) (a) guarantees to all citizens "right to freedom of speech and expression.

Scope and Content of the Right to Freedom of Speech and Expression

The freedom of speech and expression guaranteed under Article 19(1) (a), means the right to speak and to express one's opinion by words of mouth, writing, printing, pictures or in any other manner. It is the right of a citizen to express his views freely and openly. Openly means without any fear while freely denotes that the citizen can choose any medium to express his opinion e.g.; printing writing, putting banners and hoardings etc. It is to express one's convictions and opinions or ideas freely, through any medium of communication or visible representation, such as gesture, signs, and the like.

The right to freedom of speech and expression has been subjected to wide interpretations by the Supreme Court.

Freedom of Press

Unlike the American Constitution, Article 19(1) does not specifically or separately provides for liberty of the press. The omission was explained by Dr. B.R. Ambedkar when he observed: "*The editor of a press or the managers are merely exercising the right of expression and therefore, no special mention is necessary of the freedom of the press.*"

Right to know and to obtain information

It has been held that in a democratic government, it is elementary that citizens ought to know what their government is doing. They have the right to know every public act. It has also been held that exposure to public gaze and scrutiny is one

of the surest means of achieving a clean and healthy administration.

With a view to promote openness, transparency and accountability in administration, the Right to Information Act came into operation from Oct 12th, 2005. The Act provides for furnishing information by the public information officer on request from the person desiring to obtain it. Penalty up to Rs 25,000 can be imposed for failure to give information.

Rights of the citizens/voters to know the antecedents of the candidates at the time of election

The Supreme Court in Association for Democratic reforms v/s Union of India case, 2002, ruled that right to know the antecedents of the candidates contesting for M.P or M.L.A. including their criminal antecedents was fundamental and basic for survival of democracy. Holding that democracy cannot survive without free and fair elections, without fairly informed voters, the court said that the voter had the right to get material information with respect to a candidate contesting election for a post, which was of utmost importance in the democracy, was implied in the freedom of speech guaranteed by Article 19(1) (a).

Right to reply or answer criticism against ones views

In Life Insurance Corporation of India v/s Manubhai D.Shah, the Supreme Court held that the right to reply, i.e., the right to get published one's reply in the same news media in which something was published against or in relation to a citizen, was a part of the freedom of speech and expression.

Demonstrations and Picketing

It has been held that demonstrations or picketing are visible manifestations of one's ideas and in effect a form of speech and expression. However, in order to be protected under Article 19(1)(a), the demonstrations or picketings must not go beyond the limits of persuasion or inducement and which does not restrain others from what they please, would be saved under Article 19(1)(a).



No Right to call or enforce BANDH, Hartals, Blockades

The Supreme Court in CPI v/s Bharat Kumar, 1998 reiterated with approval the decision of the Kerala High Court in Bharat Kumar v/s State of Kerala, 1997, and laid down that there was no right to call or enforce 'Bandh' which interfered with the exercise of fundamental freedoms of other citizens, in addition, to causing national loss in many ways. The court held that hartal and boycott can be illegal if accompanied by violence. Regarding a blockade, no one has a right to call for a blockade of the office of the local authority in exercise of the right of their free movement.

Freedom of Silence

In Bijoe Emmanuel v/s State of Kerala, the Supreme Court held that no person could be compelled to sing National Anthem 'if he has genuine conscientious objections based on his religious belief'. In this case, their children belonging to Jehovah's Witnesses were expelled from the school for refusing to sing the National Anthem during school prayers. They used to stand up respectfully when the National Anthem was being sung, but did not join in singing it. The Kerala High Court upheld their expulsion from the school on the ground that it was their fundamental duty to sing the National Anthem and that they committed an offence under the Prevention of Insults to National Honours Act, 1971.

The Supreme Court, however, reversed the decision of the High Court and observed that they did not commit any offence. It was held that the expulsion of the children from that school was a violation of their fundamental right under article 19(1) (a) which also included freedom of silence.

Right of a convict to express himself

In M. Hasan v/s State of Andhra Pradesh, 1998, the Andhra Pradesh High Court held that refusal to journalists and videographers seeking interview with condemned prisoners amounted to deprivation of citizens fundamental right to speech and expression under Article 19 (1) (a). As far as the exercise of Fundamental Rights concerned, the Court said, position of a condemned prisoner was on par with a free citizen. He had a right, the court ruled, to give his ideas and was entitled to be interviewed or to be televised.

Reasonable Restrictions on freedom of Speech and Expression

Clause 2 of Article 19, provides: 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.

On the basis of the above article, the grounds of restrictions being imposed.

- (1) In the interest of the security of country.
- (2) Friendly relations with foreign States.
- (3) For the maintenance of public order, morality & decency.
- (4) On the grounds of contempt of Court and defamation.
- (5) Instigating violence.

Art 19 (1) (b) guarantees to all citizens "the right to assemble peaceably and without arms". Clause (3) of Article 19 provides: Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law insofar 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.

Reasonable restrictions on Freedom of Assembly

The right to hold assembly conferred by Article 19 (1) (b) is, however, not absolute. It is subjected to the following limitations-

- a. The assembly must be peaceful;
- b. It must be unarmed; and
- c. The State may impose reasonable restrictions under clause (3) of Article 19 in the interest of public order or sovereignty and integrity of India.

Article 19 (1) (c) guarantees to all citizens "the right to form associations or unions." Clause (4) of Article 19 provides: 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.

Scope and Content of the Right to Freedom of Speech and Expression

An association means "a collection of persons who have joined together for a certain object, which may be for the benefit of the members or the improvement, welfare or advantage of the public or some scientific, charitable or similar purpose". It is a term of widest connotation. Therefore, the right to form associations or unions guaranteed by Article 19 (1) (c) includes the right to form companies, societies, partnership firms, trade unions, clubs, political parties and the like body of persons. It is the right of every citizen, to be a member of or to associate himself, with any organization, association, union, club, company or society.

According to the Supreme Court the right to form association includes the right to join or not join, to continue or not to continue with an association. Right to form trade union emanates from this right. Right to form trade unions emanates from this right.

Article 19(1) (d) guarantees to all citizens "the rightto move freely throughout the territory of India". Clause (5) of this Article provides: Nothing in sub-clauses (d) 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.

On the basis of the above provision, the following reasonable restrictions can be imposed on the Freedom of Movement

- In the interest of country's security,
- For protecting the interests and culture of the Schedule Tribes.
- For maintenance of public order, decency and morality.

Article 19 (1) (e) guarantees to all citizens "the rightto reside and settle in any part of the territory of India". Clause (5) of this Article provides: Nothing in sub-clauses (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.

Note: Broadly speaking the two rights contained in Articles 19 (1) (d) and 19 (1) (e) are parts of the same right and are complementary and often go together. Article 19 (1) (e) is the natural corollary to Article 19 (1) (d). The object behind the guarantee contained in 19 (1) (d) and 19 (1) (e) is to make Indian citizens national minded. It is to put an end to petty and parochial considerations. These provisions have thus removed all internal barriers within territory of India or any of its parts.

Article 19 (1) (g) guarantees to all citizens "the rightto practice any profession, or to carry on any occupation, trade or business.

This right is subjected to Clause (6) of Article 19. Clause (6) of this Article provides: 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.

Definition of Profession, Trade, Business and Occupation

The term "Occupation" means some activity by which a person is occupied or engaged. It would



be an activity of a person undertaken as a means of livelihood or a mission of life. The term "profession" has been interpreted to mean an occupation requiring the exercise of intellectual skill, often coupled with manual skill. The term "business" means any activity involving the production, distribution and consumption of wealth and the production and availability of material services. While "trade" is an activity concerning the sale and purchase of goods.

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.

Note: Available to all individuals and cannot be suspended even during emergency.

An analysis of Article 20 leads us to the following conclusions:

- (1) The state shall not enact ex-post facto criminal legislation.-Ex-post facto law means enacting a law and giving retrospective effect to it. Criminal legislations cannot be given retrospective effect but they should be given a prospective effect. This Art prevents the govt. or the authority from misusing the law for its own self-interest.
- (2) The state shall not practice double jeopardy: Double Jeopardy means punishing an individual twice for the same crime.
- (3) The state shall not compel an individual to provide self-incriminating evidence: Self-incriminating evidence means compelling an individual to make a statement and making use of that statement in the court of law to get him punished. This is to save the individual from the arbitrary acts of the executive.

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.

Article 21 which cannot be suspended even during emergency secures two rights:

1. Right to Life; and
2. Right to Personal Liberty.

RIGHT TO LIFE

Meaning

The right to life does not merely mean the continuance of a person's animal existence. It means 'the fullest opportunity to develop one's personality and potentiality to the highest level possible in the existing stage of our civilization. The right implies a reasonable standard of comfort and decency.

Different facets of the right to life

Right to life under Article 21 on face appears to be a colorless article. However, this Article has been receiving the widest interpretations by the courts. It has given rise to more number of inferred rights. Inferred right is one which is not explicitly provided in the Constitution but has been implied under the existing Constitution by the judiciary by giving liberal interpretations. The different facets of this right are being discussed below.

- (1) Right to dignified life.
- (2) Right to reputation
- (3) Right to livelihood
- (4) Right of a couple to adopt a son for making their life more meaningful.
- (5) Right not to commit suicide
- (6) Right to shelter.
- (7) Right against cruel punishment.
- (8) Right against denial of wages.
- (9) Right to speedy trial
- (10) Right to live in unpolluted environment
- (11) Right to Health and timely medical aid
- (12) Right against delayed execution.
- (13) Right to die with dignity.
- (14) Right to sleep.



RIGHT TO PERSONAL LIBERTY

Different facets of the right to personal liberty:

1. Right to Privacy
2. Right to go abroad.
3. Right against illegal detention
4. Right to bail.
5. Right against hand-cuffing
6. Right to write a book.
7. Right against solitary confinement- Right to socialize
8. under- trials not to be kept with convicts

Procedure established by law

Procedure established by law means that judiciary will look whether there is a law passed to the effect or not. Secondly it shall see whether the law has been passed by a competent authority or not and thirdly whether it has been passed in the prescribed manner or not.

Due Process of Law

The idea of due process of law has been borrowed from the US Constitution. It says that, while looking into the interpretation of law the court shall look into all the provisions of the procedure established by law and should also see that whether the law is just, fair and reasonable or not.

Principle of Natural Justice

There are 3 principles of Natural justice:

1. No man can be a judge in his own case.
2. No man shall be punished unheard, and
3. An authority while deciding an issue shall act in an unbiased manner.

Thus, Article 21 extends the Principle of Natural Justice and also the due process of law.

Supreme Court's verdict on Euthnesia

In a landmark judgement delivered by a two-judge bench of the Supreme Court (March, 2011) in the Aruna Shanbaug case laid down a broad legal framework for dealing with a subject that has not received the attention it deserves from the legislature. Upholding the distinction between active euthanasia, which involves taking specific steps such as injecting a person with a lethal substance, and passive euthanasia,

which is withdrawing medical treatment with the knowledge that it will cause death, the court has held that the latter is permissible in exceptional circumstances — for example, when a patient is kept alive purely mechanically and when he or she is “only able to sustain involuntary functioning through advanced medical technology.” Citing a slew of international case laws on the subject, the Supreme Court has laid down a strict framework for the procedure to be adopted for non-voluntary passive euthanasia until suitable legislation is in place. All mercy-killing pleas should be heard by a two-member bench of the appropriate High Court and decisions may be taken only after seeking medical opinion from three empanelled doctors, who must examine the patient, his or her medical records, and also get the views of the hospital staff. Leaving such decisions entirely to a patient’s relatives or doctors carries the risk that murders will be carried out in the guise of mercy killing.

Article 21A-Right to Education-“The State shall provide free and compulsory education to all children of the age of six to fourteen years in such a manner as the State may, by law, determine.”

Note: Article 21A was added by the 86th Constitution (Amendment Act), 2002.

Focus on : Right of children to Free and Compulsory Education Act

The Right of children to Free and Compulsory Education Act has come into force from April 1, 2010. From this day the right to education was to be accorded the same legal status as the right to life as provided by Article 21A of the Indian Constitution. Every child in the age group of 6-14 years is to be provided 8 years of elementary education in an age appropriate classroom in the vicinity of his/her neighbourhood.

Any cost that prevents a child from accessing school will be borne by the State which shall have the responsibility of enrolling the child as well as ensuring attendance and completion of 8 years of schooling. No child shall be denied admission for want of documents; no child shall be turned away if the admission cycle in the school is over and no child shall be asked to take



an admission test. Children with disabilities will also be educated in the mainstream schools.

All private schools shall be required to enroll children from weaker sections and disadvantaged communities in their incoming class to the extent of 25% of their enrolment, by simple random selection. No seats in this quota can be left vacant. These children will be treated on par with all the other children in the school and subsidized by the State at the rate of average per learner costs in the government schools (unless the per learner costs in the private school are lower).

All schools will have to prescribe norms and standards laid out in the Act and no school that does not fulfill these standards within 3 years will be allowed to function. All private schools will have to apply for recognition, failing which they will be penalized to the tune of Rs 1 lakh and if they still continue to function will be liable to pay Rs 10,000 per day as fine. Norms and standards of teacher qualification and training are also being laid down by an Academic Authority. Teachers in all schools will have to subscribe to these norms within 5 years.

RIGHT TO EDUCATION ACT, 2009 RULES

The National Commission for Protection of Child Rights (NCPCR) has been mandated to monitor the implementation of this historic Right. A special Division within NCPCR will undertake this huge and important task in the coming months and years. A special toll free helpline to register complaints will be set up by NCPCR for this purpose. NCPCR welcomes the formal notification of this Act and looks forward to playing an active role in ensuring its successful implementation.

NCPCR also invites all civil society groups, students, teachers, administrators, artists, writers, government personnel, legislators, members of the judiciary and all other stakeholders to join hands and work together to build a movement to ensure that every child of this country is in school and enabled to get at least 8 years of quality education.

RTE has been a part of the directive principles of the State Policy under Article 45 of the Constitution, which is part of Chapter 4 of the Constitution. And rights in Chapter 4 are not

enforceable. For the first time in the history of India we have made this right enforceable by putting it in Chapter 3 of the Constitution as Article 21. This entitles children to have the right to education enforced as a fundamental right.

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 magistrate 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.

The analysis of the above provisions shows that Article 22 guarantees the following safeguards against arrest or detention made under the ordinary law relating to the commission of offences-

- a. Right to be informed, as soon as may be, of the grounds for arrest or detention.
- b. Right to consult and be defended by a legal practitioner of his choice.
- c. Right to be produced before the nearest magistrate within 24 hours of his arrest.
- d. Right not to be detained in custody beyond 24 hours without the authority of the magistrate.

Exceptions

Article 22 says that these rights are not available to the enemy aliens and secondly the persons detained under the preventive detention laws.

Article 22(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.

PREVENTIVE DETENTION

"Preventive detention" means the detention of a person without trial in such circumstances that the evidence in possession of the authority is not sufficient to make a legal charge. The justification for preventive detention is suspicion or reasonable apprehension, reasonable probability, of the impending commission of an act prejudicial to the State. The aim is to prevent the abuse of freedom by anti-social and subversive elements.

The Supreme Court in **A.K.Gopalan v/s State of Madras case, 1950**, explaining the necessity of provisions relating to preventive detention observed: *This sinister-looking feature, so strangely out of place in a democratic Constitution, which invests personal liberty with the sacrosanctity of a fundamental right, and so incompatible with the promises of its preamble, is doubtless designed to prevent the abuse of freedom by anti-social and subversive elements which might imperil the national welfare of the infant republic.*

Legislations on Preventive Detention

Both, the Union Parliament and the State Legislatures are vested with power to make laws providing for preventive detention. Entry 9 in list I of the Seventh Schedule reads as "Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India; persons subjected to such detention." Entry 3 in List III of the Seventh Schedule provides: "Preventive detention for reasons connected with the security of a state, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention."

It was on 26th February, 1950, that the first law relating to preventive detention was placed on the Statute book. It was titled as the Preventive Detention Act, 1950. The act was enacted 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 or the maintenance of public order, the maintenance of supplies and services essential to the community.

The preventive detention Act, 1950 was enacted as purely a temporary measure and was to cease to have effect on 1st April, 1951. However, its life was extended from time to time till it lapsed on December 21, 1969.

A new law relating to preventive detention, titled as the maintenance of Internal Security Act, 1971 (MISA), was enacted, which was continued until it was repealed on 3rd August, 1977.

Another Preventive Detention law in the form of Prevention of Black-marketing and maintenance of Supplies of Essential Commodities Act, 1980 was enacted with a view to prevent black marketing or hoarding of essential commodities. The Act is still in force.

The National Security Ordinance, 1980 was promulgated by the President in September 1980 providing for preventive detention of persons responsible for communal and caste riots and other activities prejudicial to the security of the Country. It was replaced by the National Security Act, 1980. It provides for preventive detention of persons acting in any manner prejudicial to the defence of India, the relations of India with foreign powers, the security of India, the maintenance of supplies and services essential to the community and also for regulating the presence or expulsion of a foreigner from India. The NSA, 1980, is still in force.

To deal with specific situation of terrorism in Punjab, Jammu and Kashmir and other parts of the North-East, the Terrorist and Disruptive Activities (Prevention), 1987, (TADA), was enacted, providing for preventive detention of persons assisting or rendering any assistance to terrorists or disruptionists.

The TADA lapsed in May, 1995. A softer version of the defunct TADA has been brought in on October 17, 2001, in the form of the Prevention of Terrorism Ordinance, 2001, with the object of rubbing out the terrorists with bases in foreign countries. The Ordinance was replaced by the Prevention of Terrorism Act, 2002.

In addition to the above laws, the Central laws which provide for preventive detention, which are presently in force, include the Conservation of Foreign Exchange and Prevention of Smuggling Act, 1974; the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances act, 1988.



Safeguards against arrest or detention made under Preventive Detention law [Articles 229(4) to (7)]

Article 22(4) (a) A person arrested under a preventive detention law cannot be detained beyond three months.

If he is to be detained beyond three months, his detention shall be approved by an Advisory Committee/ Board headed by a sitting judge of the concerned High Court. The other two members shall be sitting or retired judges of the High Court. The opinion of the Advisory Board confirming the detention must be obtained before the expiry of the first three months of detention.

Note: The Constitution (Forty-fourth Amendment) Act, 1978 proposed to amend Clause (4) (a) of Article 22 to the effect that a detention without obtaining the opinion of the Advisory Board shall continue for not more than two months. This change was to be brought into force by a notification by the Government of India. As yet no such notification has been issued and therefore the law remains as it was prior to the said amendment act.

(b) The detaining authority must communicate, as soon as may be, to the detenu, the grounds of such detention;

(c) The detenu must be afforded the earliest opportunity to make a representation against the order of detention.

(d) No detention beyond the maximum period prescribed under a law made by Parliament under Clause 7(b).

Supreme Court on Preventive detention;

In the Pooja Batra v/s UOI Case 2009, the Supreme Court has held that a person cannot be held in preventive detention (custody) without adequate evidence as otherwise it would be violative of his or her "personal liberty" guaranteed by the Constitution.

In matters relating to preventive detention, authorities have to examine whether there was any organized act or activities giving room for an inference that the detainees would continue to indulge in similar prejudicial activity warranting detention of the person, the apex court said.

"In an appropriate case, if there is no adequate material for arriving at such a conclusion based on solitary incident the court is required and is bound to protect him in view of the personal liberty which is guaranteed under the Constitution of India," a Bench of Justices Dalveer Bhandari and P Sathasivam observed.

Under law, a person can be held under "preventive detention" for a certain period if there are sufficient evidence to indicate that the accused has the propensity to indulge in criminal activities, if he/she is not detained by the authorities.

The Bench passed the observation while upholding an appeal filed by Pooja Batra challenging the preventive detention of her husband Deepak Batra by Customs authorities under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act (COFEPOSA).

RIGHT AGAINST EXPLOITATION

Article 23. Prohibition of traffic in human beings and forced labour.—(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

Traffic in Human beings means engaging in slavery and servitude and forcing women, children and the crippled in immoral activities. Begar means forced labours with or without payment

Exceptions under Article 23

Article 23 (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.

For instance- during elections the state can compel the government officials to do duties and during war the state can compel the individuals to work in auxiliary units.

Notes on Article 23

Article 23(1) envisages legislation for the enforcement of the Constitutional prohibition. Section 374 of the Indian Penal Code is one such enactment, though a pre- Constitution one. Specific legislation also exists regarding immoral



traffic in women and girls and regarding bonded labour. The Immoral Traffic (Prevention) Act 1956, was initially enacted as the 'Suppression of Immoral Traffic in Women and Girls Act, 1956' in pursuance of the International Convention for the Suppression of the Traffic in persons and of the exploitation of the prostitution of others signed at New York on 9th May, 1950. This Act was amended twice, once in 1978 and second time in 1986.

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.

This right can be enforced against both the state and an individual.

RIGHT TO FREEDOM OF RELIGION

Article 25. Freedom of conscience and free profession, practice and propagation of religion.—

(1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

This Clause secures to every person:

- a. Freedom of conscience; and
- b. Right to practice, profess and propagate the religion of one's own choice.

a. Freedom of Conscience:

The expression "freedom of conscience" means the inner-freedom of an individual to mould his religious views. Any belief which is genuinely and conscientiously held, attracts the protection of Article 25(1).

- b. To **profess** means to declare freely and openly one's faith or belief. It is to declare one's belief in such a way that it would be known to those whom it may concern. To **practice** means to perform religious duties, rites or rituals. To **propagate** means to spread and publicise one's religious views.

Legislations on conversion

The legislative history relating to the issue of conversion in India underscores the point that the authorities concerned were never favourably

disposed towards conversion. While British India had no anti-conversion laws, many Princely States enacted anti-conversion legislation: the Raigarh State Conversion Act 1936, the Patna Freedom of Religion Act of 1942, the Sarguja State Apostasy Act 1945 and the Udaipur State Anti-Conversion Act 1946. Similar laws were enacted in Bikaner, Jodhpur, Kalahandi and Kota and many more were specifically against conversion to Christianity. In the post-independence era, Parliament took up for consideration in 1954 the Indian Conversion (Regulation and Registration) Bill and later in 1960 the Backward Communities (Religious Protection) Bill, both of which had to be dropped for lack of support. The proposed Freedom of Religion Bill of 1979 was opposed by the Minorities Commission due to the Bill's evident bias.

However, in 1967-68, Orissa and Madhya Pradesh enacted local laws called the Orissa Freedom of Religion Act 1967 and the Madhya Pradesh Dharma Swatantraya Adhiniyam 1968. Along similar lines, the Arunachal Pradesh Freedom of Religion Act, 1978 was enacted to provide for prohibition of conversion from one religious faith to any other by use of force or inducement or by fraudulent means and for matters connected therewith. The latest addition to this was the Tamil Nadu Prohibition of Forceable Conversion of Religion Ordinance promulgated by the Governor on October 5, 2002 and subsequently adopted by the State Assembly. Each of these Acts provides definitions of 'Government', 'conversion', 'indigenous faith', 'force', 'fraud', 'inducement' (and in the case of Arunachal, that of 'prescribed and religious faith'). These laws made forced conversion a cognisable offence under sections 295 A and 298 of the Indian Penal Code that stipulate that malice and deliberate intention to hurt the sentiments of others is a penal offence punishable by varying durations of imprisonment and fines. As early as 1967, it became evident that the concern was not just with forced conversion, but with conversion to any religion other than Hinduism and especially Christianity and Islam. In the Orissa and Madhya Pradesh Acts, the punishment was to be doubled if the offence had been committed in respect of a minor, a woman or a person belonging to the Scheduled Caste or Scheduled Tribe community. These may be seen as further reinforcing the several statutory penalties for



ceasing to be a Hindu such as the 1955-56 Hindu Law enactments namely Hindu Minority and Guardianship Act 1956 (Section 6), Hindu Adoption and Maintenance Act 1956 (Sections 7, 8, 9, 11, 18-24), Hindu Marriage Act 1955 (Sections 13 (ii), 13 A) and the Hindu Succession Act (section 26). The picture is complete if we account for the fact that most of these laws are aimed to keep the low caste Hindus within the fold of Hinduism. And so while law prohibits conversion, 'reconversion' of low caste Hindus is permissible. If a low caste Hindu who had converted to another faith or any of his descendants reconverts to Hinduism, he might get back his original caste (Kailash Sonkar (1984); S. Raja Gopal AIR 1969).

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.

However the affair of these institutions can be regulated for the maintenance of public order, decency etc.

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

Article 28. Freedom as to attendance at religious instruction or religious worship in certain educational institutions.—(1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.

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

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

An analysis of Article 28 shows that the provision relates to religious instructions to be imparted in educational institutions. For this purpose Article 28 divides educational institutions under 4 heads.

- (i) Educational institutions owned and controlled completely by the state- In such institutions no religious instructions can however be imparted.
- (ii) The institutions that receive aid out of the state funds- In such institutions religious instructions may be imparted but the students cannot be compelled to undertake these instructions.
- (iii) Institutions recognized by the state- In such institutions religious instructions may be imparted but the students are not compelled to follow it.
- (iv) The educational institutions that are administered by the state but have been established by charitable institutions and endowments. Here religious instructions may be imparted and the students have to compulsorily take over the instructions.

CULTURAL AND EDUCATIONAL RIGHTS

Article 29. Protection of interests 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.



Article 30(2): The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Note: These rights are also known as minority rights. The object behind Articles 29 and 30, in the opinion of the Supreme Court, is the recognition and preservation of the different types of people, with diverse languages and different beliefs, which constitute the essence of secularism in India.

RIGHT TO CONSTITUTIONAL REMEDIES

It is true that a declaration of Fundamental Rights is meaningless unless there is effective machinery for the enforcement of the rights. It is a remedy which makes the right real. If there is no remedy, there is no right at all. It was therefore, in the fitness of things that our Constitution makers having incorporated a long list of Fundamental Rights have also provided for an effective remedy for the enforcement of these rights under article 32 of the Constitution. Article 32 itself is a fundamental right.

Article 32 confers one of the "highly cherished rights". This right has been held to be an important and integral part of the basic structure of the Constitution. It empowers an individual to approach the Supreme Court directly in case his one or more Fundamental Rights are violated. The significance of incorporating article 32 in the Constitution was explained by Dr. B.R. Ambedkar in his observation:

"If I was asked to name any particular article in the Constitution as the most important- an article without which the Constitution would be a nullity- I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it."

Article 32 has been described as the cornerstone of the democratic edifice raised by the Constitution. In the Ramesh Thapar v/s State of Madras case 1950, the Supreme Court held that it is because of this Article that the Supreme Court should be declared as the guardian or protector of Fundamental Rights. The apex court further held that the Supreme Court could not, consistently with the responsibility laid upon it, refuse to entertain applications seeking protection against infringements of such rights.

For the proper enforcement of the Fundamental Rights Article 32(2) gives the Supreme Court the power to issue writs. A *writ* is an order or command issued by a court in writing under its seal. Writs originated under the Roman law but have been developing under the British Constitution. The concept of writs has been borrowed from the British Constitution. It is in the nature of a command or prohibition from performing certain acts that are specified in the orders of the court.

TYPES OF WRITS

Habeas Corpus: It literally means "to have the body". It can be issued against the state as well as against individual. It is issued in order to safeguard the individual liberty. It is issued in case of wrongful confinement by an individual or illegal detention by the State. The court can order that the detained person be produced before the court in order to ascertain or verify the grounds of his detention. If the detention is found illegal, the court shall order the release of the person. Thus, this writ is essential for maintaining individual liberty.

Mandamus: It literally means "Command". It can be issued only against a public authority or public organization and not against private individuals or organizations. This writ is in the form of a command to the public office to do or not to do certain acts. It cannot be issued against the President or Governor of state or private organizations.

Prohibition: It is a writ issued by a higher court to a lower court or a quasi-judicial body. It cannot be issued against non-judicial bodies. This writ is issued on the ground of excess of jurisdiction, absence of jurisdiction or for acting in violation of principle of natural justice. It is a prohibitive writ i.e., the writ is in the form of prohibiting the judicial or quasi-judicial body from proceeding further with a case.

Certiorari: This writ is similar to the writ of prohibition except that prohibition is issued when the case is pending in the court of law while the writ of certiorari is issued when the judgment or order or direction has been given by the court to quash that judgment.

Quo Warranto: It literally means 'what is your authority'? The writ is issued to call upon the



holder of a public office to show to the court, under what authority he is holding that office. The purpose of the writ is to prevent a person from holding an office, which he is not legally entitled to hold.

Petition under Article 32 and Res Judicata:

Res Judicata is a rule of public policy that there should finality to binding decisions of courts of competent jurisdiction and that parties to the litigation should not be vexed with the same litigation again. The principle is embodied in section 11 of the Code of Civil procedure. If a question has been once decided by the Supreme Court under article 32, the same question cannot be reopened, again under Article 226. In Daryao v/s state of UP case, 1961, it was held that where the matter had been heard and decided by the High Court under article 226, the writ under article 32 is barred by the rule of res judicata and could not be entertained. But there is an important exception to the rule of res judicata. In Gulam Sarvar v/s Union of India Case 1967, the Court held that the rule of res judicata is not applicable in the writ of habeas corpus and where the petitioner has been refused a writ from the High Court, he may file a petition for the same writ under Article 32.

WRIT JURISDICTION OF SUPREME COURT AND HIGH COURTS

Under Article 32 of the Constitution, the Supreme Court can issue writs for the enforcement of the Fundamental Rights only. On the other hand, under Article 226 of the Constitution, the High Courts have been empowered to issue writs for the enforcement of the Fundamental Rights as well as other legal rights of the individuals. Thus, the writ jurisdiction of the High Courts is wider than that of the Supreme Court.

Under Article 32 of the Constitution, the Supreme Court is bound to issue writs if an individual approaches the apex Court on the violation of the Fundamental Rights. On the other hand, under Article 226 of the Constitution, the High Courts are not bound to issue writs. They can suggest some alternatives also. Thus, the Supreme Court

has been made the custodian or the guardian of the Fundamental Rights of the citizens.

Focus: Amendments to the Fundamental Rights since 1995

1. 77th Constitution Amendment Act, 1995-

The amendment introduced a new Article 16(4A) which provides that the reservation in favour of the scheduled castes and scheduled tribes can be made in promotion in the public services.

2. 81st Constitution Amendment Act, 2000-

This amendment also adds another Article 16(4B) which provides that the number of unfilled posts of the scheduled castes, scheduled tribes and other Backward castes shall not be included in the number of fresh vacancies to be filled up. The implication of this amendment is that the number of backlog vacancies shall lie beyond the permissible limit of 50% of vacancies in the reserved category.

3. 82nd Constitution Amendment Act, 2000-

This amendment inserts a new proviso in Article 335, which provides that the state may relax the minimum qualifying marks for the scheduled castes and scheduled tribes candidates in promotional examinations.

4. 85th Constitution Amendment Act, 2002- It

effects further amendment to Article 16(4A) which provides that consequential seniority shall also be taken into consideration in promotions of scheduled caste and the scheduled tribe candidates to various government posts.

5. 86th Constitution Amendment Act, 2002- This

amendment inserts Art. 21A which provides fundamental right to free and compulsory education to children from 6 to 14 year of age in a manner determined by law by the state.

6. 93rd Constitution Amendment Act, 2005- This

amendment act inserts Article 15(5), which authorizes the state to make special provisions for the advancement of any socially and educationally backward classes of citizens or for the Schedule Castes and the Schedule 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.



Members of Armed Forces and the Fundamental Rights

Article 33 provides that Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to,—

- (a) the members of the Armed Forces; or
- (b) the members of the Forces charged with the maintenance of public order; or
- (c) persons employed in any bureau or other organization established by the State for purposes of intelligence or counter intelligence; or
- (d) persons employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organization referred to in clauses (a) to (c),

be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them

Article 33 enables Parliament to modify Fundamental Rights in relation to military or para-military forces, police forces and analogous forces. The restrictions on the Fundamental Rights under article 33 can be imposed only by Parliament by law.

Prior to the Constitution (Fiftieth Amendment) Act, 1984, Article 33 empowered the imposition of restrictions on Fundamental Rights only in respect of members of Armed Forces or the forces

charged with the maintenance of public order. The Amendment included the later two more categories of persons.

Restrictions on Fundamental Rights during the Operation of Martial Law

Article 34 provides: "*Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.*"

Article 34 empowers Parliament to make any law for indemnifying any person for acts done during the operation of martial law. The power of Parliament is subject to two conditions-

- a. The act must have been done in connection with the maintenance or restoration of order; and
- b. Martial law must be in force in the area where the act was done.

In the proper sense of the term, martial law means 'the suspension of ordinary and the government of a country or part of it by military tribunals.' It must be noted that the Constitution does not have a provision authorizing proclamation of martial law. However, it is implicit in the text of Article 34 that the Government may declare martial law in any part of the territory of India.

