CHAPTER XX

FUNDAMENTAL RIGHTS (1)

SYNOPSIS

A. CONCEPT OF FUNDAMENTAL RIGHTS

Since the 17th century, if not earlier, human thinking has been veering round to the theory that man has certain essential, basic, natural and inalienable rights or freedoms and it is the function of the state, in order that human liberty may be preserved, human personality developed, and an effective social and democratic life promoted, to recognise these rights and freedoms and allow them a free play.

The concept of human rights can be traced to the natural law philosophers, such as, Locke and Rousseau. The natural law philosophers philosophized over such inherent human rights and sought to preserve these rights by propounding the theory of "social compact".[1]

According to LOCKE, man is born "with a title to perfect freedom and an uncontrolled enjoyment of all the rights and privileges of the Law of Nature" and he has by nature a power "to preserve his property—that is, his life, liberty, and estate, against the injuries and attempts of other men."[2]

The Declaration of the French Revolution, 1789, which may be regarded as a concrete political statement on Human Rights and which was inspired by the LOCKEIAN philosophy declared:

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1. See, LLOYD, INTRODUCTION TO JURISPRUDENCE, 117-123, 159 (1985).
2. Extracts from LOCKE, TWO TREATISES OF GOVERNMENT.

> "The aim of all political association is the conservation of the natural and inalienable rights of man".

The concept of human rights protects individuals against the excesses of the state. The concept of human rights represents an attempt to protect the individual from oppression and injustice. In modern times, it is widely accepted that the right to liberty is the very essence of a free society and it must be safeguarded at all times. The idea of guaranteeing certain rights is to ensure that a person may have a minimum guaranteed freedom.

The underlying idea in entrenching certain basic and Fundamental Rights is to take them out of the reach of transient political majorities. It has, therefore, come to be regarded as essential that these rights be entrenched in such a way that they may not be violated, tampered or interfered with by an oppressive government. With this end in view, some written constitutions guarantee a few rights to the people and forbid governmental organs from interfering with the same. In that case, a guaranteed right can be limited or taken away only by the elaborate and formal process of constitutional amendment rather than by ordinary legislation. These rights are characterised as Fundamental Rights.

The entrenched Fundamental Rights have a dual aspect. From one point of view, they confer justiciable rights on the people which can be enforced through the courts against the government. From another point of view, the Fundamental Rights constitute restrictions and limitations on government action, whether it is taken by the Centre, or a State or a local government. The government cannot take any action, administrative or legislative, by which a Fundamental Right is infringed.

Entrenchment means that the guaranteed rights cannot be taken away by an ordinary law. A law curtailing or infringing an entrenched right would be declared to be unconstitutional. If ever it is deemed necessary to curtail an entrenched right, that can only be done by the elaborate and more formal procedure by way of a constitutional amendment. As the Supreme Court has observed,[3] the purpose of enumerating Fundamental Rights in the Constitution "is to safeguard the basic human rights from the vicissitudes of political controversy and to place them beyond the reach of the political parties who, by virtue of their majority, may come to form the government at the centre or in the State".

The modern trend of guaranteeing Fundamental Rights to the people may be traced to the Constitution of the U.S.A. drafted in 1787. The U.S. Constitution was the first modern Constitution to give concrete shape to the concept of human Rights by putting them in to the Constitution and making them justiciable and enforceable through the instrumentality of the courts.

The original U.S. Constitution did not contain any Fundamental Rights. There was trenchant criticism of the Constitution on this score. Consequently, the Bill of Rights came to be incorporated in the Constitution in 1791 in the form of ten amendments which embody the LOCKEIAN ideas about the protection of life, liberty and property.[4]

The nature of the Fundamental Rights in the U.S.A. has been described thus: "The very purpose of a Bill of Rights was to withdraw certain subjects from the

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3. *Chairman, Rly. Board v. Chandrima Das,* AIR 2000 SC 988, 997 : (2000) 2 SCC 465.
4. B. BAILYN, IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION, (1967).

vicissitudes of political controversy, to place them beyond the reach of majorities and officials, to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly and other Fundamental Rights may not be submitted to vote; they depend on the outcome of no elections."[5]

In modern times, the concept of the people's basic rights has been given a more concrete and universal texture by the Charter of Human Rights enacted by the United Nations Organization (U.N.O.),[6] and the European Convention on Human Rights.[7] The Preamble to the Universal Declaration of Human Rights *inter alia* declares:

> "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world".

The concept of Fundamental Rights thus represents a trend in the modern democratic thinking.[8] The enforcement of human rights is a matter of major significance to modern constitutional jurisprudence. The incorporation of Fundamental Rights as enforceable rights in the modern constitutional documents as well as the internationally recognised Charter of Human Rights emanate from the doctrine of natural law and natural rights.

For sometime now a new trend is visible in India, *viz*., to relate the Fundamental Rights in India to the International Human Rights. While interpreting the Fundamental Rights provisions in the Indian Constitution, the Supreme Court has drawn from the International Declarations on Human Rights.[9] The Supreme

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5. JUSTICE JACKSON in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624.

6. IAN BROWNLIE, BASIC DOCUMENTS ON HUMAN RIGHTS (1971); (1998) 40 *JILI*, 1-327.

The General Assembly of the United Nations Organisation adopted the Universal Declaration of Human Rights on Dec. 10, 1948. This document has proved to be a mere declaration without any teeth. The Charter has so far remained merely a formal document without any measures having been taken to facilitate the realization of the basic freedoms and the human rights which the document contains.

7. For trends in the present-day Africa in the area of human rights, see, D.O. Ahic, Neo-Nigerian Human Rights in Zambia: A Comparative Study with some countries in Africa and West Indies, 12 *J.I.L.I.* 609 (1970).

8. In Europe, the Council of Europe adopted the European Convention for the Protection of Human Rights and Fundamental Freedoms on Nov. 4, 1950. The Convention has set up both a Commission and a Court of Human Rights to investigate and adjudicate upon claims made by individuals.

9. As will be apparent from the following discussion on specific Fundamental Rights, and the judicial interpretation thereof, the Supreme Court of India has frequently drawn from the Declaration of Human Rights to define the scope and content of the Fundamental Rights in India: see, for example: *Maneka Gandhi v. Union of India*, AIR 1978 SC 597; *M.H. Hoskot v. State of Maharashtra*, AIR 1978 SC 1548 : (1978) 3 SCC 544; *Randhir Singh v. Union of India*, AIR 1982 SC 879; *D.K. Basu v. Union of India*, AIR 1997 SC 610; *Vishaka v. State of Rajasthan*, (1997) AIR SCW 3043 : (1997) 6 SCC 241; *People's Union for Civil Liberties v. Union of India*, (1997) 1 SCC 301; *Apparel Export Promotion Council v. A.K. Chopra*, AIR 1999 SC 6251 : (1999) 1 SCC 759; *Chairman, Rly. Board v. Chandrima Das*, AIR 2000 SC 988 : (2000) 2 SCC 465. All these cases are discussed in the text which follows.

In *Madhu Kishwar v. State of Bihar*, AIR 1996 SC 1864 at 1869 : (1996) 5 SCC 125, the Supreme Court referred to the Declarations on "The Right to Development" adopted by the UN General Assembly on December 4, 1986, and also to Vienna Conventions on the Elimination of all forms of Discrimination against women (CEDAW) ratified by the UNO on Dec. 18, 1979.

Also see, *People's Union for Civil Liberties v. Union of India*, AIR 1997 SC 568, 575 : (1997) 1 SCC 301.

Court, for example, has made copious references to the Universal Declaration of Human Rights, 1948, and observed:

> "The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence".[10]

There is no formal declaration of people's Fundamental Rights in Britain. The orthodox doctrine of the Sovereignty of Parliament prevailing there does not envisage a legal check on the power of Parliament which is, as a matter of legal theory, free to make any law even though it abridges, modifies or abolishes any basic civic right and liberty of the people.[11] The power of the executive is however limited in the sense that it cannot interfere with the rights of the people without the sanction of law.[12]

There prevails in Britain the concept of Rule of Law which represents, in short, the thesis that the executive is answerable to the courts for any action which is contrary to the law of the land. Rule of law constitutes no legal restraint on the legislative power of Parliament and, thus, cannot be equated to the concept of Fundamental Rights.

Until 1998, the protection of individual freedom in Britain, therefore, rested not on any constitutional guarantees but on public opinion, good sense of the people, strong common law traditions favouring individual liberty and the Parliamentary form of government. British lawyers often questioned the very basis of the theory of declaring basic civil rights in a constitutional document.

The British model could not be duplicated elsewhere. The fact remains that Britain is a small and homogeneous nation, having deep-rooted democratic traditions. But these conditions do not prevail in other countries which are composed of diverse elements, having no deep-rooted traditions of individual liberty, and which, therefore, face very different problems from those of Britain.

Even in Britain, there was an ever growing realisation that guaranteed civil rights do serve a useful purpose and that Britain should also have a written Bill of Rights.[13] Britain had accepted the European Charter on Human Rights.[14] But this was not good enough because the Charter did not bind Parliament but could be used only to interpret the local law. The feeling was that law made by Parliament was in essence law made by the House of Commons. This, in practice, meant that a government having support of a majority in the House (though it had the support only of a minority of electorate), could often force through whatever legisla-

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10. *Chairman, Railway Board v. Chandrima Das*, AIR 2000 SC 988 at 997 : (2000) 2 SCC 465.

11. *Supra*, Ch. II, Sec. M.
Also, *Lord Wright in Liversidge v. Anderson*, 1942 A.C. 206.

12. LORD ATKIN in *Eshugbayi v. Govt. of Nigeria*, 1931 A.C. 662.

13. HOOD PHILLIPS, CONST. AND ADM. LAW, 40, 438 (1978); also, REFORM OF THE CONSTITUTION (1970); DE SMITH, CONST. AND ADM. LAW, 439 (1977); SCARMAN, *ENGLISH LAW—THE NEW DIMENSION*; ANDERSON, ON LIBERTY, LAW AND JUSTICE (1978).
On July 7, 75, a resolution was moved in the House of Commons demanding that England should have a Bill of Rights. There is some opposition as well in academic circles to having a Bill of Rights; See, YARDLEY, Modern Constitutional Developments: Some Reflections. 1975 *Pub. Law* 197; LLOYD, Do We Need A Bill of Rights? *M.L.R.* 121 (1976); H.W.R. WADE, *CONSTITUTIONAL FUNDAMENTALS*, 24-40 (1980).
See also, REPORT OF SELECT COMMITTEE ON A BILL OF RIGHTS (HOUSE OF LORDS, 1978).

14. There have been some cases in Britain in this area: *Waddington v. Miah*, (1974) 1 W.LR. 613; *R. v. Secretary of State for Home Affairs ex p. Bhajan Singh*, (1975) 2 All ER 1081; *Bulmer Ltd. v. Bollinger, S.A.*, (1974) 2 All ER 1226.

tion it desired. What was, therefore, necessary was a Bill of Rights which could curb parliamentary legislative power. As SCARMAN observed:[15]

> "Without a Bill of Rights protected from repeal, amendment, or suspension by the ordinary processes of a bare Parliamentary majority controlled by the government of the day, human Rights will be at risk."[16]

Ultimately, the British Parliament enacted the Human Rights Act, 1998. The purpose of the Act is to give effect to the rights and freedoms guaranteed under the European Convention on Human Rights. The Act is a significant constitutional innovation.

The Act incorporates the Convention in Schedule I. These are the rights to which the Act gives effect. All legislation, so far as possible, is to be read and given effect to in a way which is compatible with convention rights [s. 3(1)(a)]. S. 2(1)(a) requires a Court determining a question regarding a convention right, to take into account any "judgment, decision, declaration or a advisory opinion of the European Court of Human Rights, so far as the same is relevant to the proceedings in question."

Under s. 4(1), the Court may make a declaration that a legal provision is incompatible with a convention right. In such a case, under s. 10(1)(b), the Minister may by order make such amendments to the legislation as he considers necessary to remove the incompatibility. Thus, the Minister is empowered to make "remedial orders" to remove incompatibilities between primary legislation (as passed by Parliament) and the Convention. But a draft of the order has to be approved by both Houses of Parliament.

The British Act falls short of a declaration of Fundamental Rights in the Constitution (such as is the case in India) in several respects; viz.:

(1) In India, if a law is incompatible with a Fundamental Right, the law is void.[17] Not so in Britain. The Human Rights Act does not provide the courts with the power to strike down legislation which is inconsistent with the Convention rights. A judicial declaration of incompatibility does not make the legislation void. In fact, such a declaration does not affect the validity of the law at all.

(2) The incompatibility may be removed by the Minister with the approval of Parliament. If the Minister does not seek to remove the incompatibility, the law in question continues to exist. This means that Parliament is free, if it so chooses, to enact and maintain in force legislation that is incompatible with the Convention rights. Not so in India where a void law is regarded as non-est.[18]

(3) The British Act is only an Act passed by Parliament. Parliament can repeal or amend the same by passing another Act. The Act is not entrenched against repeal but can be repealed in the ordinary way. On the other hand, a declaration of Fundamental Rights in the Constitution is of a more enduring and abiding nature than a mere statutory declaration of rights because to make any change in the Fundamental Rights, the Constitution needs to be amended which is a much more arduous and elaborate procedure than passing or amending an ordinary law.[19]

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15. *Supra*, footnote 13.
16. *Ibid*, 69.
17. See, *infra*, Sec. C.
18. *Ibid.*
19. See, Ch. XLI, *infra.*

The Australian Constitution, following the traditions of Britain, does not have a Bill of Rights but guarantees only a few rights, *e.g.*, freedom of religion.[20]

In a federal country, the problem becomes more complicated as there may be attacks on individual liberty and freedom not only at the Central level, but even at the state level.

In the modern era, it has become almost a matter of course to prescribe formally the rights and liberties of the people which are deemed worthy of protection from government interference. The wide acceptance of the notion that a formal Bill of Rights is a near necessity in the effective constitutional government arises, to some extent, from a feeling that mere custom or tradition alone cannot provide to the Fundamental Rights the same protection as their importance deserves. "The unique English situation is not simply exportable, and other nations have generally felt that their governments need the constant reminder which a bill of rights provides, while their people need the reassurance which it can supply."[21]

An outstanding example of this trend is Canada. To begin with, the Canadian Constitution had only a few guaranteed Rights.[22] Then, the Canadian Parliament enacted a law laying down basic Rights of the people.[23] Being only a law made by Parliament, it did not constitute any restriction on Parliament itself. The matter has now been taken further. The Canadian Constitution has been amended and a Charter of Rights has been formally incorporated therein in 1982.[24]

B. FUNDAMENTAL RIGHTS IN INDIA

Coming to India, a few good reasons made the enunciation of the Fundamental Rights in the Constitution rather inevitable. For one thing, the main political party, the Congress, had for long been demanding these Rights against the British rule. During the British rule in India, human rights were violated by the rulers on a very wide scale. Therefore, the framers of the Constitution, many of whom had suffered long incarceration during the British regime, had a very positive attitude towards these rights.

Secondly, the Indian society is fragmented into many religious, cultural and linguistic groups, and it was necessary to declare Fundamental Rights to give to the people a sense of security and confidence. Then, it was thought necessary that people should have some Rights which may be enforced against the government which may become arbitary at times. Though democracy was being introduced in India, yet democratic traditions were lacking, and there was a danger that the majority in the legislature may enact laws which may be oppressive to individuals or minority groups, and such a danger could be minimised by having a Bill of Rights in the Constitution.

The need to have the Fundamental Rights was so very well accepted on all hands that in the Constituent Assembly, the point was not even considered

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20. S. 116 of the *Australian Constitution*.
21. BOWIE, STUDIES IN FEDERALISM, 567, 601.
22. Ss. 93 and 133 of the British North America Act.
23. See the various articles on the subject in 37 *Can. B.R.* 1-217 (1959). Also AUBURN, Canadian Bill of Rights and Discriminatory Statutes, 86 *LQR* 306 (1970); WALTER S. TRANOPOLSKY, *The Canadian Bill of Rights* (1975).
24. See (1983) 61 *Can. B.R.* 1-442.

whether or not to incorporate such Rights in the Constitution. In fact, the fight all along was against the restrictions being imposed on them and the effort all along was to have the Fundamental Rights on as broad and pervasive a basis as possible.[25]

The Fundamental Rights are a necessary consequence of the declaration in the Preamble to the Constitution that the people of India have solemnly resolved to constitute India into a sovereign 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 opportunity.[26]

Part III of the Constitution protects substantive as well as procedural rights.[27]

The Fundamental Rights in India, apart from guaranteeing certain basic civil Rights and freedoms to all, also fulfil the important function of giving a few safeguards to minorities, outlawing discrimination and protecting religious freedom and cultural rights. During emergency, however, some curtailment of the Fundamental Rights does take place.[28] But all these curtailments of Fundamental Rights are of a temporary nature.

Fundamental Rights must not be read in isolation but along with directive principles and fundamental duties.[29]

The Indian Constitution guarantees essential human rights in the form of Fundamental Rights under Part III and also directive principles of State policy in Part IV which are fundamental in the governance of the country. Freedoms granted under Part III have been liberally construed by various pronouncements of the Supreme Court in the last half a century, keeping in view the International Covenants to which India is a party. The object has been to place citizens at a centre stage and make the State accountable.[30]

Articles 12 to 35 of the Constitution pertain to Fundamental Rights of the people. These Rights are reminiscent of some of the provisions of the Bill of Rights in the U.S. Constitution but the former cover a much wider ground than the latter. Also, the U.S. Constitution declares the Fundamental Rights in broad and general terms. But as no right is absolute, the courts have, in course of time, spelled out some restrictions and limitations on these Rights. The Indian Constitution, however, adopts a different approach in so far as some Rights are worded generally; in respect of some Fundamental Rights, the exceptions and qualifications have been formulated and expressed in a compendious form in the Constitution itself, while in respect of some other Rights, the Constitution confers power on the Legislature to impose limitations. The result of this strategy has been that the constitutional provisions pertaining to Fundamental Rights have become rather detailed and complex.

The framers of the Indian Constitution, learning from the experiences of the U.S.A., visualized a great many difficulties in enunciating the Fundamental

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25. For an analysis of discussion on Fundamental Rights in the Constituent Assembly; see, GRANVILLE AUSTIN, THE INDIAN CONSTITUTION OF A NATION, 50-113 (1966).
26. See, Ch. I, *supra.*
27. *Pratap Singh v. State of Jharkhand,* (2005) 3 SCC 551 : AIR 2005 SC 273.
28. *Supra,* Ch. XIII, Sec. B(b).
Also, *infra,* Ch. XXXIII, Sec. F.
29. *Javed v. State of Haryana,* (2003) 8 SCC 369 : AIR 2003 SC 3057.
30. *People's Union for Civil Liberties v. Union of India,* (2005) 2 SCC 436 : (2005) 1 JT 283.

Rights in general terms and in leaving it to the courts to enforce them, *viz.*, the Legislature not being in a position to know what view the courts would take of a particular enactment, the process of legislation becomes difficult; there arises a vast mass of litigation about the validity of the laws and the judicial opinion is often changing so that law becomes uncertain; the judges are irremovable and are not elected; they are, therefore, not so sensitive to public needs in the social or economic sphere as the elected legislators and so a complete and unqualified veto over legislation could not be left in judicial hands.[31] Even then, certain rights especially economic Rights, have had to be amended from time to time to save some economic programmes.[32]

The Fundamental Rights in the Indian Constitution have been grouped under seven heads as follows:

(*i*) *Right to Equality* comprising Articles 14 to 18, of which Article 14 is the most important.[33]

(*ii*) *Right to Freedom* comprising Articles 19 to 22 which guarantee several freedoms, the most important of which is the freedom of speech.[34]

(*iii*) *Right against Exploitation* consists of Articles 23 and 24.[35]

(*iv*) *Right to Freedom of Religion* is guaranteed by Articles 25 to 28.[36]

(*v*) *Cultural and Educational Rights* are guaranteed by Articles 29 and 30.[37]

(*vi*) *Right to Property is* now very much diluted and is secured to some extent by Arts. 30-A, 31-A, 31-B and 31-C.[38]

(vii) Right to Constitutional Remedies is secured by Articles 32 to 35.

These Articles provide the remedies to enforce the Fundamental Rights, and of these the most important is Art. 32.[39]

As the Fundamental Rights constitute by and large a limitation on the government, the most important problem which the courts have been faced with while interpreting these rights has been to achieve a proper balance between the rights of the individual and those of the state or the society as a whole, between individual liberty and social control. This is a very difficult as well as a delicate task indeed in these days of development of the country into a social welfare state. On the whole, however, one could say that in the area of non-economic matters, like freedom of speech or the right to life, the line has been shifting in favour of the individual, while in the area of economic matters, the line has been constantly shifting in favour of social control. This has been achieved both by judicial interpretation as well as constitutional amendments as the discussion in the following pages will amply depict.

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31. B.N. RAU, INDIA'S CONSTITUTION IN THE MAKING, 245.
32. See, *infra*, Chs. XXIV, Sec. H; Chs. XXXI, XXXII; XLI and XLII.
33. See, Chs. XXI, XXII and XXIII, *infra.*
34. See, Chs. XXIV, XXV, XXVI and XXVII, *infra*.
35. See, Ch. XXVIII, *infra.*
36. See, Ch. XXIX, *infra*.
37. See, Ch. XXX, *infra.*
38. See, Chs. XXXI, XXXII, *infra.*
39. See, Ch. XXXIII, *infra.*

The Fundamental Rights guarantee certain economic rights. Too much emphasis on these rights might have led to the emergence of a *laissez faire* economy in India which is now an out of date concept. Accordingly, partly by judicial interpretation, and partly by constitutional amendment process, emphasis has come to be laid on social control in economic matters leading to the emergence of a regulated economy.

The right to property also has had a chequered history. Originally it was secured by Arts. 19(1)(*f*) and 31, and the courts were prone to give these provisions a broad perspective thus giving to property rights a better protection. But now the Fundamental Right to property has been very much diluted. This development has been discussed fully later.[40]

But, on the other hand, in the post 1977era, the most notable development has been that great emphasis has come to be laid on the right to life and personal liberty, *i.e.*, the freedom of the person guaranteed by Art. 21. Art. 21 has been given a new dimension by judicial interpretation.[41] In *Maneka Gandhi*,[42] the landmark case which initiated the process of expansion of the scope of Art. 21, the Court has observed:

> "The attempt of the Court should be to expand the reach and ambit of the Fundamental Rights rather than to attenuate their meaning and content by a process of judicial construction."

The great metamorphosis that has occurred in the judicial view as regards Art. 21 can be appreciated if the restrictive view adopted by the Supreme Court in *Gopalan*[43] is set against the expansive interpretation of Art. 21 in a series of cases beginning *Maneka Gandhi* in 1977.

In a nutshell, it may be said that, on the whole, the Supreme Court has displayed judicial creativity of a high order in interpreting the Fundamental Rights, especially during the last two decades. Reference may be made in this connection *inter alia* to such landmark Supreme Court cases as *Maneka Gandhi*, *Indra Sawhney*,[44] *Asiad* cases.[45] In *Ajay Hasia*,[46] BHAGWATI, J., has observed:

> "It must be remembered that the Fundamental Rights are constitutional guarantees given to the people of India and are not merely paper hopes or fleeting promises and so long as they find a place in the Constitution, they should not be allowed to be emasculated in their application by a narrow and constricted judicial interpretation".

The Supreme Court has even enunciated the doctrine of implied Fundamental Rights. The Court has asserted that in order to treat a right as Fundamental Right it is not necessary that it should be expressly stated in the Constitution as a Fundamental Right. Political, social and economic changes occurring in the country

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40. *Infra*, Chs. XXIV, Sec. G; Chs. XXXI and XXXII, *infra*.
41. *Infra*, Ch. XXVI.
42. AIR 1978 SC 597 : (1978) 1 SCC 248; *infra*, Ch. XXVI, Sec. D.
43. *Infra*, Ch. XXVI, Sec. B.
44. *Indra Sawhney v. Union of India*, AIR 1993 SC 477; *infra*, Ch. XXIII.
45. *People's Union for Democratic Rights v. Union of India*, AIR 1982 SC 1473 : (1982) 3 SCC 235; *infra*, Ch. XXVIII.
46. *Ajay Hasia v. Khalid Mujib*, AIR 1981 SC 487 at 493 : (1981) 1 SCC 722.

may entail the recognition of new rights and the law in its eternal youth grows to meet social demands.[47]

There is no rule that unless a right is expressly stated as a Fundamental Right it cannot be treated as one. Over time, the Supreme Court has been able to imply by its interpretative process, several Fundamental Rights, such as, freedom of press, right to privacy, out of the expressly stated Fundamental Rights.

By and large, barring some exceptions, the Supreme Court has, on the whole, interpreted the Fundamental Rights in a liberal manner. The Court has laid emphasis on this aspect from time to time. For instance, in *Pathumma*,[48] the Court has stated that in interpreting the Constitution, "the judicial approach should be dynamic rather than static, pragmatic and not pedantic and elastic rather than rigid." But the award of a sentence by the order of a Court cannot amount to violation of any of the Fundamental Rights.[49] On the whole, the Supreme Court has displayed a liberal and creative attitude in interpretation of Fundamental Rights and this has had a profound influence on the development and delineation of the Fundamental Rights in course of time. This will become clear from the following discussion.

The Fundamental Rights are not all distinct and mutually exclusive Rights. Each freedom has different dimensions and a law may have to meet the challenge under various Fundamental Rights. Thus, a law depriving a person of his personal liberty may have to stand the test of Arts. 14, 19 and 21 to be valid. Formerly, however, the courts had applied the doctrine of exclusivity of Fundamental Rights and treated each right as a distinct and separate entity,[50] but this view has now undergone a change,[51] thus, providing to the courts a better leverage to test the validity of laws affecting Fundamental Rights.

The Supreme Court plays a very significant role in relation to the Fundamental Rights. In the first place, the Court acts as the protector and the guardian of these rights. In the second place, the Court acts as the interpreter of the Fundamental Rights. The Supreme Court acts as the "sentinel on the qui vive" in relation to the Fundamental Rights. Commenting on its role entrusted to it under the Constitution to protect Fundamental Rights, the Supreme Court has observed in *Daryao*[52]:

> "The Fundamental Rights are intended not only to protect individual's rights but they are based on high public policy. Liberty of the individual and the protection of his Fundamental Rights are the very essence of the democratic way of life adopted by the Constitution, and it is the privilege and the duty of this Court to uphold those rights. This Court would naturally refuse to circumscribe them or to curtail them except as provided by the Constitution itself."

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47. *Unni Krishnan, J.P. v. State of Andhra Pradesh,* AIR 1993 SC 2178 : (1993) 1 SCC 645; *infra*, Ch. XXVI, for fuller discussion on this aspect.
48. *Pathumma v. State of Kerala,* AIR 1978 SC 771 : (1978) 2 SCC 1.
49. *Lalita Jalan v. Bombay Gas Co. Ltd.,* (2003) 6 SCC 107 : AIR 2003 SC 3157.
50. Chs. XXVI and XXVII, *infra.*
51. *Cooper* (*Bank Nationalisation* case), *infra*, Ch. XXVI, Sec. C; *Maneka Gandhi*, *infra*, Ch. XXVI, Sec. D.
52. *Daryao v. State of Uttar Pradesh,* AIR 1961 SC 1457, at 1461 : (1962) 1 SCR 574. See, *infra*, Ch. XXXIII, Sec. A.

The Fundamental Rights play a noteworthy role in the area of the Indian Administrative Law. A phenomenon generally discernible today in practically every democracy is the vast growth in the functions, powers and activities of the Administration under the impact of the modern philosophy of 'welfare state'. A large amount of discretion is left in the hands of administrative authorities. An important problem of modern Administrative Law is to seek to strengthen the techniques to control the administration in the exercise of its various powers. Some of the Fundamental Rights like Arts. 14, 19, 22 and 31 have been used for this purpose.

In a large number of cases, validity of laws conferring discretion on the Administration has been scrutinised with reference to the Fundamental Rights. For this purpose, both substantive as well as procedural parts of the law are taken into consideration.[53] On the substantive side, the courts have taken objection in many cases to bestowal of arbitrary and unregulated discretion on the Administration. On the procedural side, laws conferring discretion without necessary procedural safeguards have been invalidated. In some cases, objection has been taken to the exercise of administrative discretion on the ground of its being discriminatory, or having been exercised without due procedure. The discussion in the following pages amply illustrates the several points mentioned here.[54]

C. JUSTICIABILITY OF FUNDAMENTAL RIGHTS

ART. 13 : LAWS INCONSISTENT WITH FUNDAMENTAL RIGHTS

Art. 13 is the key provision as it gives teeth to the Fundamental Rights and makes them justiciable. The effect of Art. 13 is that the Fundamental Rights cannot be infringed by the government either by enacting a law or through administrative action.

Article 13(1) declares that all pre-Constitution laws shall be void to the extent of their inconsistency with the Fundamental Rights. Art. 13(1) deals with the pre-Constitution laws; if any such law is inconsistent with a Fundamental Right, it becomes void from 26-1-50, the date on which the Constitution of India came into force.

According to Art. 13(2), the State 'shall not make any law' which takes away or abridges the Fundamental Rights; and a law contravening a Fundamental Right is, to the extent of the contravention, void.

Article 13(2) is the crucial constitutional provision which deals with the post-Constitution laws. If any such law violates any Fundamental Right it becomes void *ab initio, i.e.,* from its inception. The effect of Art. 13(2) thus is that no Fundamental Right can be infringed by the state either by legislative or administrative action.

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53. *N.B. Khare v. Delhi*, AIR 1950 SC 211 : 1950 SCR 519.

54. For a detailed discussion on this aspect of Administrative Law, see : M.P. JAIN, Administrative Discretion and Fundamental Rights, 1 *JILI*, 223 (1959); M.P. JAIN, A TREATISE ON ADMINISTRATIVE LAW, I, Ch. XVIII, 765-835; JAIN, THE EVOLVING INDIAN ADMINISTRATIVE LAW, Ch. VI (1983); JAIN, CASES & MATERIALS ON INDIAN ADMN. LAW, II, Ch. XV, 1565-1911.

Article 13 makes the judiciary, and especially the Apex Court, as the guardian, protector and the interpreter of the Fundamental Rights.[55] It is the function of the courts to assess individual laws *vis-à-vis* the Fundamental Rights so as to ensure that no law infringes a Fundamental Right. The courts perform the arduous task of declaring a law unconstitutional if it infringes a Fundamental Right. It is the function of the courts to ensure that no statute violates a Fundamental Right. This is the exercise of its protective role by the judiciary, *i.e.*, protecting the Fundamental Rights from being violated by a statute. A statute is declared unconstitutional and void if it comes in conflict with a Fundamental Right.

Article 13 confers a power as well as imposes an obligation on the courts to declare a law void if it is inconsistent with a Fundamental Right. This is a power of great consequence for the courts. The Supreme Court has figuratively characterised this role of the courts as that of a "sentinel on the *qui vive*.[56] It may however be underlined that the courts do not lightly declare a statue unconstitutional because they are conscious of their responsibility in declaring a law made by a democratic legislature void. On the whole, not many statutes have been hit by Fundamental Rights. However, judicial review of administrative action is some what more pervasive than that of legislative action. The expansive purview of Art. 21 and other Articles, as stated above, affects administrative action very deeply as will be clear by the later discussion. The principles of Judicial Review of legislation and interpretation of the Constitution are fully discussed in a later Chapter.[57]

The Supreme Court has further bolstered its protective role under Art. 13(2) by laying down the proposition that judicial review is the 'basic' feature of the Constitution.[58] This means that the power of judicial review cannot be curtailed or evaded by any future Constitutional amendment. Protection of the institution of judicial review is crucially interconnected with the protection of Fundamental Rights, for depriving the Supreme Court and other Courts of their power of judicial review would mean that the Fundamental Rights become non-enforceable, "a mere adornment", as they will become rights without remedy.

This idea has been conveyed by CHANDRACHUD, C.J., as follows in *Minerva Mills*:[59]

> "It is the function of the Judges, nay their duty, to pronounce upon the validity of laws. If courts are totally deprived of that power, the fundamental rights conferred on the people will become a mere adornment because rights conferred on the people will become a mere adornment because rights without remedies are as writ in water. A controlled constitution will then become uncontrolled."

As KHANNA, J., has emphasized in *Kesavananda*:[60]

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55. See, Sec. B, *supra.*
56. *State of Madras v. V.G. Row,* AIR 1952 SC 196 : 1952 SCR 597.
57. On Judicial Review of Legislation, see, *infra,* Ch. XL.
58. For discussion on the Doctrine of 'Basic Features' of the Constitution, see, *infra,* Ch. XLI.
59. *Minerva Mills Ltd. v. Union of India,* AIR 1980 SC. 1789 : (1980) 2 SCC 591.
Also see, *Waman Rao v. Union of India,* AIR 1981 SC 271 : (1981) 2 SCC 362.
60. *Kesavananda v. State of Kerala,* AIR 1973 SC 1461 : (1973) 4 SCC 225.
For a detailed discussion on this case, see, *infra,* Ch. XLI.

> "As long as some Fundamental Rights exist and are a part of the Constitution, the power of judicial review has also to be exercised with a view to see that the guarantees afforded by those rights are not contravened…Judicial review has thus become an integral part of our constitutional system".

AHMADI, C.J., speaking on behalf of a bench of seven Judges in *L. Chandra Kumar v. India*,[61] has observed:

> "The Judges of the Superior Court have been entrusted with the task of upholding the Constitution and to this end, have been conferred the power to interpret it. It is they who have to ensure that the balance of power envisaged by the Constitution is maintained and that the legislature and the executive do not, in the discharge of their functions, transgress constitutional limitations…..We, therefore, hold that the power of judicial review over legislative action vested in the High Courts under Art. 226[62] and in this Court under Art. 32[63] of the Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure. Ordinarily, therefore, the power of the High Courts and the Supreme Court to test the constitutional validity of legislation can never be ousted or excluded."

Accordingly, in the instant case, the Supreme Court has declared unconstitutional clause 2(d) of Art. 323A and clause 3(d) of Art. 323B, to the extent they sought to exclude jurisdiction of the High Courts and the Supreme Court conferred under Arts. 226, 227 and 32. The Court has observed in this connection:

> "The jurisdiction conferred on the High Courts under Arts. 226/227 and upon the Supreme Court under Art. 32 of the Constitution is part of the inviolable basic structure of our Constitution. While this jurisdiction cannot be ousted, other Courts and Tribunals may perform a supplemental role in discharging the powers conferred by Articles 226/227 and 32 of the Constitution."[64]

It may be appreciated that declaration of Fundamental Rights in the Constitution cannot be of much avail if no machinery is provided for their enforcement. The Constitution confers this protective role on the Supreme Court and the High Courts. These Courts can issue various writs, orders and directions for the enforcement of these Fundamental Rights by virtue of Arts. 32 and 226.[65]

It may be interesting to know that the U.S. Constitution does not specifically provide for judicial review. But, as early as 1803, in the famous case of *Marbury v. Madison*,[66] the Supreme Court asserted that it would review the constitutionality of the Congressional Acts. MARSHALL, C.J., expounded the theory of judicial review of the constitutionality of Acts of Congress as follows:

> "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the Courts must decide on the operation of each. So if a law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that

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61. AIR 1997 SC 1125, at 1130 : (1997) 3 SCC 261.
For discussion on this case, see, Ch. VIII, Sec. I.

62. For discussion on Art. 226, see, *supra*, Ch. VIII, Secs. C and D.

63. For discussion on Art. 32, see, *infra*, Ch. XXIII, Sec. A.

64. See, *Chandra Kumar*, *supra*, footnote 61, at 1156.

65. For discussion on Art. 32, see, *infra*, Ch. XXXIII; for Art. 226, see, *supra*, Ch. VIII.

66. 1 Cranch 137.
Also see, *infra*, Ch. XL.

> the Court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty."

Article 13 deals with statute law and not with the law declared by the courts, or with the directions or orders made by the Supreme Court under Art. 142.[67]

D. STATE

Most of the Fundamental Rights are claimed against the state and its instrumentalities and not against private bodies.[68] Art. 13(2), as stated above, bars the 'state' from making any 'law' infringing a Fundamental Right.

The two important concepts used in this provision, are : 'state' and 'law'. These concepts need some elucidation.

Fundamental Rights are claimed mostly against the 'state'.

Article 12 gives an extended significance to the term 'state'. Art. 12 clarifies that the term 'state' occurring in Art. 13(2), or any other provision concerning Fundamental Rights, has an expansive meaning.

According to Art. 12, the term 'state' includes—

(*i*) the Government and Parliament of India:

(*ii*) the Government and the Legislature of a State;

(*iii*) all local authorities; and

(*iv*) *other authorities* within the territory of India, or under the control of the Central Government.

The actions of any of the bodies comprised within the term 'state' as defined in Art. 12 can be challenged before the courts under Art. 13(2) on the ground of violating Fundamental Rights.

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

(a) OTHER AUTHORITIES

The interpretation of the term 'other authorities' in Art. 12 has caused a good deal of difficulty, and judicial opinion has undergone changes over time. Today's government performs a large number of functions because of the prevailing phi-

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67. *Ashok Kumar Gupta v. State of Uttar Pradesh,* (1997) 5 SCC 201, at 248 : 1997 SCC (L&S) 1299.
For discussion on Art. 142, see, *supra*, Ch. IV, Sec. G.

68. *Shamdasani v. Central Bank of India,* AIR 1952 SC 59; *Vidya Verma v. Shivnarain,* AIR 1956 SC 108 : (1955) 2 SCR 983.
But see, Arts. 17 and 23, *infra*, Chs. XXIII, Sec. H and XXVIII, Sec. A.

losophy of a social welfare state.[69] The government acts through natural persons as well as juridical persons. Some functions are discharged through the traditional governmental departments and officials while some functions are discharged through autonomous bodies existing outside the departmental structure, such as, companies, corporations *etc.*

While the government acting departmentally, or through officials, undoubtedly, falls within the definition of 'state' under Art. 12,[70] doubts have been cast as regards the character of autonomous bodies. Whether they could be regarded as 'authorities' under Art. 12 and, thus, be subject to Fundamental Rights?

An autonomous body may be a statutory body, *i.e.*, a body set up directly by a statute, or it may be a non-statutory body, *i.e.*, a body registered under a general law, such as, the Companies Act, the Societies Registration Act, or a State Co-operative Societies Act, *etc.* Questions have been raised whether such bodies may be included within the coverage of Art. 12.

For this purpose, the Supreme Court has developed the concept of an "instrumentality" of the state. Any body which can be regarded as an "instrumentality" of the state falls under Art. 12. The reason for adopting such a broad view of Art. 12 is that the Constitution should, whenever possible, "be so construed as to apply to arbitrary application of power against individuals by centres of power. The emerging principle appears to be that a public corporation being a creation of the state is subject to the Constitutional limitation as the state itself".[71] Further that "the governing power wherever located must be subject to the fundamental constitutional limitations".[72]

In *Rajasthan State Electricity Board v. Mohanlal*,[73] the Supreme Court ruled that a State electricity board, set up by a statute, having some commercial functions to discharge, would be an 'authority' under Art. 12. The Court emphasized that it is not material that some of the powers conferred on the concerned authority are of commercial nature. This is because under Art. 298,[74] the government is empowered to carry on any trade or commerce. Thus, the Court observed: "The circumstance that the Board under the Electricity Supply Act is required to carry on some activities of the nature of trade or commerce does not, therefore give any indication that the 'Board' must be excluded from the scope of the word 'state' is used in Art. 12."

In *Sukhdev v. Bhagatram*,[75] three statutory bodies, *viz.*, Life Insurance Corporation, Oil and Natural Gas Commission and the Finance Corporation, were held to be "authorities" and, thus, fall within the term 'state' in Art. 12. These corporations do have independent personalities in the eyes of the law, but that does not

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69. For further discussion on this concept see Ch. XXXIV, *infra*, under Directive Principles.

70. *K.A. Karim & Sons v. I.T.O.*, 1983 Tax. L.R. 1168; *Hujee Mohd. Ibrahim v. Gift Tax Officer*, 1983 Tax. L.R. 1160; *Imperial Chemical Industries Ltd. v. Registrar of Trade Marks*, AIR 1981 Del. 190.

71. MATHEW, J., in *Sukhdev v. Bhagatram*, AIR 1975 SC 1331 : (1975) 1 SCC 421.

72. AIR 1975 SC, at 1352.

73. AIR 1967 SC 1857 : (1967) 3 SCR 377.

74. See, *supra*, Ch. XII, Sec. C; *infra*, Chs. XXIV, XXX and XXXIX.

75. AIR 1975 SC 1331 : (1975) 1 SCC 421.
For a detailed comment on this case see, M.P. JAIN, The Legal Status of Public Corporations and their Employees, 18 *JILI* 1 (1976).

mean that "they are not subject to the control of the government or that they are not instrumentalities of the government".[76]

The question was considered more thoroughly in *Ramanna D. Shetty v. International Airport Authority*,[77] The International Airport Authority, a statutory body, was held to be an 'authority'. The Supreme Court also developed the general proposition that an 'instrumentality' or 'agency' of the government would be regarded as an 'authority' or 'State' within Art. 12 and laid down some tests to determine whether a body could be regarded as an instrumentality or not. Where a corporation is an instrumentality or agency of the government, it would be subject to the same constitutional or public law limitation as the government itself. In this case, the Court was enforcing the mandate of Art. 14 against the Corporation.[78]

By now though the question of statutory bodies had been settled, as stated above, yet that of the non-statutory bodies, still continued to cause confusion and difficulty.

In several cases hitherto, a government company incorporated under the Indian Companies Act had been held to be not an 'authority' under Art. 12.[79] In *Sabhaji Tewary v. India*,[80] a case decided after *Sukhdev*, the Supreme Court ruled that the Indian Council of Scientific Research, a body registered under the Societies Registration Act (thus a non-statutory body), but under a good deal of governmental control and funding, was not a 'state'.

There were judicial observations in *Sukhdev* to the effect that even a non-statutory body could be treated as an 'authority' if it could be regarded as an instrumentality or agency of the government. But these observations did not affect the judicial thinking in *Sabhajit*.[81] Again, the Supreme Court made observations in *Raman* suggesting that a non-statutory body could be regarded as an 'authority' if it could be regarded as an instrumentality of the government, but the actual body involved there was statutory in nature.

Burmah Shell was nationalised and vested in the Government itself under the Burmah Shell (Acquisition of Undertakings in India) Act, 1976. The Act provided that the undertaking would be vested in a government company. Accordingly, the undertaking was taken over by the Bharat Petroleum Corporation, a government company registered under the Indian Companies Act. The question was whether Bharat Petroleum—which was neither a government department nor

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76. *Ibid.*, at 1356.

77. AIR 1979 SC 1628 : (1979) 3 SCC 489.
For detailed comments on this case, see M.P. JAIN, JUSTICE BHAGWATI and *Indian Adminsitrative Law*, (1980) Ban. L.J. 1, 38-45.

78. For further discussion on *Ramanna,* see, Ch. XXXIX, *infra;* for Art. 14, see, Ch. XXI, *infra.*

79. See, *R.D. Singe v. Secretary,* B.S.S.I. Corp., AIR 1974 Pat. 212; *M.L. Nohria v. Gen. Ins. Corp. of India*, AIR 1979 P&H 183; *Abdul Ahmad v. Govt. Woollen Mill*, AIR 1979 J&K 57.

80. AIR 1975 SC 1329 : (1975) 1 SCC 485.
This case has now been overruled : see, *infra*, 1197.

81. See JAIN, *supra*, footnote 80.

a statutory body but merely a company—could be regarded as an "authority" and so "state" under Art. 12.

In *Som Prakash v. Union of India*,[82] the company was held to fall under Art. 12. The Court emphasized that the true test for the purpose whether a body was an 'authority' or not was not whether it was formed by a statute, or under a statute, but it was "functional". In the instant case, the key factor was "the brooding presence of the state behind the operations of the body, statutory or other". In this case, the body was semi-statutory and semi-non-statutory. It was non-statutory in origin (as it was registered); it also was recognised by the Act in question and, thus, had some "statutory flavour" in its operations and functions. In this case, there was a formal transfer of the undertaking from the Government to a government company. The company was thus regarded as the "alter ego" of the Central Government. The control by the Government over the corporation was writ large in the Act and in the *factum* of being a government company. Agency of a State would mean a body which exercises public functions.[83]

The question regarding the status of a non-statutory body was finally clinched in *Ajay Hasia*,[84] where a society registered under the Societies Registration Act running the regional engineering college, sponsored, supervised and financially supported by the Government, was held to be an 'authority'. Money to run the college was provided by the State and Central Governments. The State Government could review the functioning of the college and issue suitable instructions if considered necessary. Nominees of the State and Central Governments were members of the society including its Chairman. The Supreme Court ruled that where a corporation is an instrumentality or agency of the government, it must be held to be an authority under Art. 12. "The concept of instrumentality or agency of the government is not limited to a corporation created by a statute but is equally applicable to a company or society…." Thus, a registered society was held to be an 'authority' for the purposes of Art. 12. *Ajay Hasia* has initiated a new judicial trend, *viz.,* that of expanding the significance of the term "authority".

In *Ajay Hasia,* The Supreme Court laid down the following tests to adjudge whether a body is an instrumentality of the government or not:

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

(2) Where the financial assistance given by the government is so large as to meet almost entire expenditure of the body, it may indicate that the body is impregnated with governmental character.

(3) It is a relevant factor if the body enjoys monopoly status which is conferred or protected by the state.

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82. AIR 1981 SC 212 : (1981) 1 SCC 449.

83. *Deewan Singh v. Rajendra Prosad Ardevi,* (2007) 10 SCC 528, 542 : AIR 2007 SC 767, it is difficult to extract precisely the principle on which the judgment proceeded.

84. *Ajay Hasia v. Khalid Mujib,* AIR 1981 SC 487 : (1981) 1 SCC 722.

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

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

The important question is not how the juristic person is born, but why has it been brought into existence? It does not matter what is the structure of the body in question: it may be statutory or non-statutory; it may be set up by, or under, an Act of the Legislature or even administratively. It does not matter whether the body in question has been set up initially by the government or by private enterprise. It does not matter what functions does the body discharge; it may be governmental, semi-governmental, educational, commercial, banking, social service. The Supreme Court has pointed out that even if it may be assumed that one or the other test as provided in the case of *Ajay Hasia* may be attracted, that by itself would not be sufficient to hold that it is an agency of the State or a company carrying on the functions of public nature.[85] In view of the several views and tests suggested by Supreme Court it is not possible to make a close ended category of bodies which would be considered to be a state within the meaning of Art.12. The question in each case will have to be considered on the basis of facts available as to whether in the light of the cumulative facts as established, the body is financially, functionally, administratively dominated, by, or under the control of the Government. Such control must be particular to the body in question and must be pervasive.

Mere regulatory control whether under statute or otherwise would not serve to make a body a part of the State. Hence when the facts revealed :

(1) The Board of Control of Cricket in India was not created by a statute;

(2) No part of the share capital of the Board was held by the Government;

(3) Practically no financial assistance was given by the Government to meet the whole or entire expenditure of the Board;

(4) The Board did enjoy a monopoly status in the field of cricket but such status is not State conferred or State protected.

(5) There was no existence of a deep and pervasive State control and the control, if any, is only regulatory in nature as applicable to other similar bodies.

(6) The Board was not created by transfer of a government owned corporation and was an autonomous body.

The Court noted that the Union of India has been exercising certain control over the activities of the Board in regard to organizing cricket matches and travel

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85. *Federal Bank Ltd. v. Sagar Thomas,* (2003) 10 SCC 733 : AIR 2003 SC 4325.

of the Indian team abroad as also granting of permission to allow the foreign teams to come to India. The Court also assumed that even if there was some element of public duty involved in the discharge of the Board's functions the Board would not be an authority for the purpose of Article 12.

In the absence of any authorization, if a private body chooses to discharge any functions or duties which amount to public duties or State functions which is not prohibited by law then it may be considered to be an instrumentality of the State.[86]

In *S. C. Chandra*[87] the Supreme Court came dangerously close to creating a confusion in relation to the concepts of instrumentality of the State. The judgment in this case was a common one and involved, amongst others Bharat Coking Coal Limited. Without any discussion whatsoever the Court appears to have approved the view taken by Division Bench of the Jharkhand High Court that BCCL was "not an instrumentality of the State as per Section 617 of the Companies Act as its dominant function was to raise coal and sale and imparting education was not its dominant function.".

The question which arose for decision was whether the teachers of a school not owned by BCCL and was run by a Managing Committee and whose teachers were never appointed by BCCL, although BCCL used to release non-recurring grants subject to certain conditions would result in such teachers to be considered as the employees of BCCL and entitled to all benefits available to the regular employees of BCCL.

In this factual background it is not understandable as to how the question of BCCL being an instrumentality of the State could be of any relevance either before the Division Bench of the High Court or the Supreme Court. Since the school was not owned or managed by BCCL and not even entirely dependent upon financial aid from BCCL it could not have been considered to be an instrumentality of the State. "Dominant function" test was applied in a situation where there was no function which the BCCL was obliged to discharge. This case cannot be an authority for the proposition that BCCL is not an instrumentality of the state.

The Courts have been led to take such an expansive view of Art. 12 because of the feeling that if instrumentalities of the government are not subjected to the same legal discipline as the government itself because of the plea that they were distinct and autonomous legal entities, then the government would be tempted to adopt the stratagem of setting up such administrative structures on a big scale in order to evade the discipline and constraints of the Fundamental Rights thus eroding and negating their efficacy to a very large extent. In this process, judicial control over these bodies would be very much weakened.[88]

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86. *Zee Telefilms Ltd. v. Union of India,* (2005) 4 SCC 649 : AIR 2005 SC 2677.
87. *S.C.Chandra v. State of Jharkhand,* (2007) 8 SCC 279 : AIR 2007 SC 3021.
88. *Steel Authority of India Ltd. v. National Union Water Front Workers,* AIR 2001 SC 3527, 3540-3542 : (2001) 7 SCC 1.

The law appears to be now settled in view of the judgment of a seven Constitution Bench of the Supreme Court in *Pradeep Kumar Biswas*[89] where, after considering the authorities it concluded that the tests formulated in Ajay Hasia[90] were not a rigid set of principles so that if a body falls within any of those tests, ex hypothesi, it must be considered to be a State within the meaning of Article 12. The Court suggested a general guideline observing:

> "The question in each case would be whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a State within Article 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a State."

The main tests which the courts apply to determine whether a body is an instrumentality of the government or not are: funding and control. Is the entire share capital or a major part of it held by the government? Is the body in question effectively controlled by the government not only in the making of its policy but also in carrying out its functions? Does the government foot a substantial part of the bill for running the operations of the concerned body? Is the administration of the body in the hands of the government-appointed directors and are they subject to government control in the discharge of their functions? Does the state exercise deep and pervasive control over the body in question? Whether the operation of the corporation is an important public function closely related to governmental functions? Does the body enjoy monopoly status conferred or protected by the state? The above tests are not exhaustive but only indicative or illustrative. It is for the courts to decide in each case whether the body in question falls within the purview of Art. 12.

A company enjoying the monopoly of carrying on a business under an Act of Legislature has the "trappings" of "state" and is an "authority" under Art. 12.[91]

Once a body is characterised as an 'authority' under Art. 12, several significant incidents invariably follow, *viz.*:

(1) The body becomes subject to the discipline of the Fundamental Rights which means that its actions and decisions can be challenged with reference to the Fundamental Rights.

(2) The body also becomes subject to the discipline of Administrative Law.

(3) The body becomes subject to the writ jurisdiction of the Supreme Court under Art. 32 and that of the High Courts under Art. 226.

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89. *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111 : (2002) 4 JT 146. See also *Steel Authority of India Limited v. Madhusudan Das*, (2008) 15 SCC 560. See also *State of U.P. v. Radhey Shyam Rai*, (2009) 5 SCC 577 : (2009) 3 JT 393.

90. *Ajay Hasia v. Khalid Mujib Sehravardi*, (1981) 1 SCC 722 : AIR 1981 SC 487.

91. *Biman Kishore Bose v. United India Insurance Co. Ltd.*, (2001) 6 SCC 477 : (2001) 6 JT 125.

In course of time, the Supreme Court has been expanding the horizon of the term "other authority" in Art. 12. A large number of bodies, statutory[1] and non-statutory,[2] have been held to be 'authorities' for purposes of Art. 12. For example, the Supreme Court has held the Statistical Institute as an authority. It is a registered society but is governed by the Indian Statistical Institute Act, 1959. The composition of the body is dominated by the representatives appointed by the Central Government. The money required for running the Institute is provided entirely by the Central Government. It has to comply with all the directions issued by the Central Government. "The control of the Central Government is deep and pervasive and, therefore, to all intents and purposes, it is an instrumentality of the Central Government and as such is an 'authority' within the meaning of Art. 12 of the Constitution".[3]

The Indian Council of Agricultural Research came into existence as a department of the government, continued to be an attached office of the government even though it was registered as a society, it was wholly financed by the government. The ICAR was accordingly held to be an 'authority' under Art. 12 as it was a society set up by the state.[4] A cooperative society is not a State within Art. 12 unless the tests indicated in *Ajay Hasia*,[5] are satisfied.[6] Cooperative societies cannot be, without examination of relevant factual aspects, equated with public sector undertakings.[7]

In *Central Inland Water Transport Corporation v. Brojo Nath*,[8] the corporation, a government company incorporated under the Companies Act, has been held to be an authority, and so the 'state' within the meaning of Art. 12. The Supreme Court has laid down the following significant principle in this regard:

> "If there is an instrumentality or agency of the state which has assumed the garb of a government company as defined in S. 617 of the Companies Act, it does not follow that it thereby ceases to be an instrumentality or agency of the

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1. *Statutory bodies* held to fall under Art. 12—Food Corporation: *Punjab v. Raja Ram*, AIR 1981 SC 1694 : (1981) 2 SCR 712; State Bank of India: *State Bank of India v. Kalpaka Transport Co.*, AIR 1979 Bom. 250; Utter Pradesh Warehousing Corporation: *U.P. Warehousing Corporation v. Vijay Narain*, AIR 1980 SC 840. Gujarat State Financial Corporation: *Guj. State Fin. Corp. v. Lotus Hotels (P) Ltd.*, AIR 1983 SC 848; University: *Gadadhar v. Calcutta University*, AIR 1981 Cal. 216; Electricity Board: *Omega Advertising Agency v. State Electricity Board*, AIR 1982 Gau. 37 : *DCM Ltd. v. Assistant Engineer, Rajasthan State Electricity Board, Kota*, AIR 1988 Raj 64; *Oil and Natural Gas Commission: Oil and Natural Gas Commission v. Association of N.G.C. Industries of Gujarat*, AIR 1990 SC 1851; Nationalised Banks: *Hyderabad Commercials v. Indian Bank*, AIR 1991 SC 247; Life Corporation of India: *LIC of India v. Consumer Education & Research Centre*, AIR 1995 SC 1811; *Harshad J. Shah v. LIC*, AIR 1997 SC 2459 : (1997) 5 SCC 64; see also *Bank of India v. O.P. Swarnakar*, (2003) 2 SCC 721 : AIR 2003 SC 838, Nationalised Banks held covered.

2. Non-statutory bodies—*Andhra Pradesh* State Irrigation Development Corporation (a body registered under the Indian Companies Act): *B. Satyanarayana v. State of Andhra Pradesh*, AIR 1981 AP 125; *Delhi Transport Corporation v. D.T.C. Mazdoor Congress*, AIR 1991 SC 101 : 1991 Supp (1) SCC 600. Also see, *infra*, footnotes 21, 22.

3. *B.S. Minhas v. Indian Statistical Institute*, AIR 1984 SC 363, 369 : (1983) 4 SCC 582.

4. *P.K. Ramachandra Iyer v. Union of India*, AIR 1984 SC 541 : (1984) 2 SCC 141.

5. (1981) 1 SCC 722.

6. *Zoroastrian Coop. Housing Society Ltd. v. District Registrar, Co-op. Societies (Urban)*, (2005) 5 SCC 632 : AIR 2005 SC 2306, held to be not 'state'.

7. *UPSEB v. Sant Kabir Sahakari Katai Mills Ltd.*, (2005) 7 SCC 576 : (2005) 8 JT 399. See also *State of Assam v. Barak Upatyaka D.U. Karmachari Sanstha*, (2009) 5 SCC 694 : AIR 2009 SC 2249, mere provision of financial assistance for several years is not conclusive.

8. AIR 1986 SC 1571 : (1986) 3 SCC 156.

state. For the purposes of Art. 12, one must necessarily see through the corporate veil to ascertain whether behind that veil is the face of an instrumentality or agency of the state".

Mysore Paper Mills, a government company, has been held to be an instrumentality of the State Government and, hence, an authority under Art. 12.[9] More than 97% of the share capital of the company has been contributed by the State Government and the financial institutions of the Central Government, Out of 12 directors, 5 are government nominees and the rest are approved by the Government; the company has been entrusted with important public duties and the Government exercises various other forms of supervision over the company. The company is an instrumentality of the Government and its physical form of a company "is merely a cloak or cover for the Government." Any doubt as to whether a writ petition under Art. 226 would lie against state corporation has been set at rest by the declaration of the Supreme Court.[10]

Not only a body sponsored or created by the government may be treated as an 'authority', but even a private body (one sponsored and formed by private persons) may be so treated if—(*i*) it is supported by extraordinary assistance given by the state, or (*ii*) if the state funding is not very large, state financial support coupled with an unusual degree of control over its management and policies may lead to the same result. The various tests laid down in *Ajay Hasia* case would have to be applied and considered cumulatively.[11] Applying *Ajay Hasia* tests (i) to (iv) it has been held that the appellant Mill was neither an instrumentality nor an agency of the Government and was not an "other authority".

The Cochin Refineries Ltd. incorporated under the Companies Act has been held to be not an 'authority' because only 53 per cent of its share capital has been subscribed by the Central Government; 26 per cent share is held by a private foreign company which also nominates two directors on the board of directors; government control over the company is not large; government's financial assistance is not unusual.[12] And a general regulation under a statute does not render activities of the body so regulated as subject to such control of the State as to bring it within the meaning of State under Art. 12.[13]

Some non-statutory bodies which have been held to be 'authorities' within the meaning of Art. 12 are:

1. The Council for the Indian School Certificate Examinations—a society registered under the Societies Registration Act, and imparting education and holding examinations.[14]

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9. *Mysore Paper Mills Ltd. v. The Mysore Paper Mills Officers' Association,* (2002) 2 SCC 167 : AIR 2002 SC 609.

10. *Virendra Kumar Srivastava v. U.P. Rajya Karmachari Kalyan Nigam,* (2005) 1 SCC 149 : AIR 2005 SC 411.

11. *GM, Kisan Sahkari Chini Mills Ltd. v. Satrughan Nishad,* (2003) 8 SCC 639 : AIR 2003 SC 4531.

12. *R.M. Thomas v. Cochin Refineries Ltd.,* AIR 1982 Ker. 248.
Also see, *Pritam Singh v. State of P&H,* AIR 1982 P&H 228.
The Bengal Chamber of Commerce registered under the Companies Act is not an authority: In re: *M.L. Shaw*, AIR 1984 Cal 22.

13. *S.S.Rana v. Registrar Coop. Societies,* (2006) 11 SCC 634 : (2006) 5 JT 186.

14. *Vibhu Kapoor v. Council of I.S.C. Examination,* AIR 1985 Del 142.

2. An aided school receiving 95% of its expenses by way of government grant and subject to regulations made by the department of education though managed by a registered body.[15]
3. The Indian Council of Agricultural Research, a society registered under the Societies Registration Act.[16]
4. Even if the entire share capital of a company is subscribed by the government, it cannot yet be treated as a government department. The company has its own corporate personality distinct from the government. Such a government company can still be treated as an authority under Art. 12.[17] Government companies, such as, Bharat Earth Movers Ltd., Indian Telephone Industries Ltd., in which the Government holds 51% share capital, and which are subject to pervasive government control, have been held to be "other authorities" under Art. 12.[18]
5. The regional rural banks set up in pursuance of the power given by a statute. A regional bank is wholly funded by a nationalised bank, Central Government and the State Government. It is sponsored by a nationalised bank; it is under the pervasive control of the Central Government and it discharges functions analogous to those discharged by a welfare state.[19]
6. The Sainik School Society registered under the Societies Registration Act. The society establishes and manages Sainik schools. A Sainik school is fully funded by the Central and State Governments and the Central Government exercises over-all control over the society.[20]
7. The State Financial Corporation constituted under the State Financial Corporation Act, 1951 has been held to be state within the meaning of Article 12 of the Constitution and was required to act fairly, reasonably in accordance with the statutory and constitutional scheme including Article 14.[21]
8. The Children's Aid Society, a registered body under the Societies Registration Act, having the Chief Minister of Maharashtra as the *ex-officio* President and the Minister of Social Welfare as its Vice-President.[22]
9. National Agricultural Cooperative Federation of India (NAFED).[23]

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15. *Manmohan Singh v. Commr., U.T., Chandigarh,* AIR 1985 SC 364 : 1984 Supp SCC 540.
16. *P.K. Ramachandra Iyer v. Union of India,* AIR 1984 SC 541 : (1984) 2 SCC 141.
17. *Dr. S.L. Agarwal v. The Gen. Manager, Hindustan Steel Ltd.,* AIR 1970 SC 1150; *Western Coalfields Ltd.v. Special Area Dev. Authority,* AIR 1982 SC 697 : (1982) 1 SCC 125; *Steel Authority of India Ltd. v. Shri Ambica Mills Ltd.,* AIR 1998 SC 418 : (1998) 1 SCC 465; *Hindustan Steel Works Construction Ltd. v. State of Kerala,* AIR 1997 SC 2275; *Balbir Kaur v. Steel Authority of India*, AIR 2000 SC 1596 : (2000) 6 SCC 493. See also *State of Uttaranchal v. Alok Sharma, Subsidiaries of Kumaon Mandal Vikas Nigam Ltd. (though wound up) were 'State'*, (2009) 7 SCC 647 : (2009) 6 JT 463.
18. *M. Kumar v. Earth Movers Ltd.*, AIR 1999 Kant 343.
19. *Chairman, Prathama Bank Moradabad v. Vijay Kumar,* AIR 1989 SC 1977 : (1989) 4 SCC 441.
20. *All India Sainik Schools Employees Ass. v. Defence Minister-cum-Chairman, Board of Governors, Sainik School Society,* AIR 1989 SC 88 : 1989 Supp (1) SCC 205.
21. *Everest Wools Pvt. Ltd. v. U.P. Financial Corporation,* (2008) 1 SCC 643 : (2008) 1 JT 140.
22. *Sheela Barse v. Secretary, Children Aid Society,* AIR 1987 SC 656 : (1987) 3 SCC 50.
23. *Ajoomal v. Lilaram,* AIR 1983 SC 278 : (1983) 1 SCC 119.

10. Delhi Stock Exchange is covered by definition of State under Art. 12 and amenable to writ jurisdiction of High Court.[24]
11. Projects and Equipment Corp. of India, a subsidiary owned by the State Trading Corporation which is also a non-statutory body.[25]
12. U.P. State Co-operative Land Development Bank Ltd. is a cooperative society but it is under pervasive control of the State Government and is an extended arm of the Government. It is thus an instrumentality of the State.[26]

In *Sabhajit Tewary,*[27] the Council of Scientific and Industrial Research (CSIR) was held to be not an "authority" under Art. 12. Now, the Supreme Court has overruled *Tewary* holding it to be erroneous. CSIR has now been held to be an "authority" under Art. 12.[28]

Punjab Water Supply & Sewerage Board is an autonomous body and the statute which incorporates it provides that any direction issued by the State shall be binding on it and brings it within the concept of State in Art. 12 and are bound to comply with the Constitutional scheme of equality enshrined in Articles 14 and 16 of the Constitution of India.[29]

In this expansive trend, there have been some discordant notes as well. One such example is furnished by *Tekraj v. Union of India*,[30] where the Supreme Court has held the Institute of Constitutional and Parliamentary Studies as not being an 'authority' under Art. 12. The Institute is a registered society receiving grants from the Central Government and having the President of India, Vice-President and the Prime Minister among its honorary members. The Central Government exercises a good deal of control over the Institute. In spite of Government funding and control, the Court has refused to hold it as an authority with the remark:

> "…… ICPS is a case of its type—typical in many ways and the normal tests may perhaps not properly apply to test its character."

On the same basis, National Council of Educational Research and Training has been held to be outside the scope of Art. 12. NCERT is a society registered under the Societies Registration Act. It is largely an autonomous body; its activities are not wholly related to governmental functions; government control is confined mostly to ensuring that its funds are property utilised; its funding is not entirely from government sources.[31]

A private educational institution, even if it is recognised by, or affiliated to, a university, cannot be regarded as an instrumentality of the government for pur-

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24. *K. C. Sharma v. Delhi Stock Exchange,* (2005) 4 SCC 4 : AIR 2005 SC 2884.
25. *A.L. Kalra v. P & E Corp. of India,* AIR 1984 SC 1361.
26. *U.P. State Coop. Land Development Bank Ltd. v. Chandra Bhan Dubey,* AIR 1999 SC 753 : (1999) 1 SCC 741.
27. *Supra,* note 73.
28. *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology,* 2002 5 SCC 111 : (2002) 4 JT 146.
29. *Punjab Water Supply and Sewerage Board v. Ranjodh Singh,* (2007) 2 SCC 491 : AIR 2007 SC 1082.
30. AIR 1988 SC 469 : (1988) 1 SCC 236.
31. *Chander Mohan Khanna v. National Council of Educational Research and Training,* (1991) 4 SCC 578 : AIR 1992 SC 76.

poses of Art. 12. Recognition is only for the purposes of conforming to the standards laid down by the State. Affiliation is with regard to the syllabi and the courses of study.[32]

The expanding connotation being given to the term 'authority' in Art. 12 is an instance of judicial creativity. The courts have adopted this stance to bring as many bodies as possible within the discipline of Fundamental Rights. Wider the concept of 'other authority' wider the coverage of Fundamental Rights.

The courts have been able to bring within the sweep of Fundamental Rights every instrumentality or agency through which the government acts. Almost all government activities have been subjected to the obligation of Fundamental Rights. BHAGWATI, J., in his opinion in *Ajay Hasia*[33] provided the rationale for expansively interpreting the term "authority" in Art. 12. A modern government functions, under the impulse of the philosophy of a welfare state, on a very broad scale: it undertakes a multitude of socio-economic functions.[34] For the sake of convenience, the government not always departmentally but also through various types of bodies, such as, a company, co-operative society, corporation *etc*., "but this contrivance of carrying on such activities through a corporation cannot exonerate the government from implicit obedience to the Fundamental Rights." BHAGWATI, J., went on to observe:

> "To use the corporate methodology is not to liberate the government from its basic obligation to respect the Fundamental Rights and not to override them. The mantle of a corporation may be adopted in order to free the Government from the inevitable constraints of red-tapism and slow motion but by doing so, the Government cannot be allowed to play truant with the basic human rights. Otherwise it would be the easiest thing for the Government to assign to a plurality of corporations almost every state business, such as, Post and Telegraph, T.V. and Radio, Rail Road and Telephones—in short every economic activity and thereby cheat the people of India out of the Fundamental Rights guaranteed to them."[35]

BHAGWATI, J., maintained:

> "The courts should be anxious to enlarge the scope and width of the Fundamental Rights by bringing within their sweep every authority which is an instrumentality or agency of the government or through the corporate personality of which the government is acting…"

Thus, in giving an expansive interpretation to the term "other authority" in Art. 12, the Supreme Court is discharging its protective role, *i.e.*, to protect the Fundamental Rights from being annihilated by the Government resorting to the expedient of setting up various bodies, outside government departments, to discharge its manifold functions.

A Fundamental Right can be enforced against an authority when it is within the Indian territory, or it is under the control of the Government of India though outside the Indian territory. In the latter case, a writ would be issued to the Gov-

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32. *Unni Krishnan, J.P. v. State of Andhra Pradesh,* AIR 1993 SC 2178, at 2206 : (1993) 1 SCC 645.
33. AIR 1981 SC 487 : (1981) 1 SCC 722; *supra,* footnote 90.
34. For discussion on this aspect, see, under "Directive Principles", Ch. XXXIV, *infra.*
35. AIR 1981 SC 487, at 493 : (1981) 1 SCC 722.

ernment of India which can have it executed by the concerned authority by exercising its power of control over it.

A *quasi*-judicial authority is not subject to the control of the government in the functional sense, and, therefore, no order can be passed against the government for enforcement of a Fundamental Right by a *quasi*-judicial body functioning outside India.[36] As the Supreme Court has stated, the mere fact that the authority is appointed and is subject to the disciplinary action by the government, is not determinative of the question of control.

What is necessary is a control of functions of the authority; the government should be in a position to give directions to the authority "to function in a particular manner with respect to such function". The government can exercise such control over an administrative or executive body but not on a *quasi*-judicial body. The government could not direct a *quasi*-judicial body to act in a particular matter before it in a particular manner. It therefore resolves to this that no Fundamental Right can be claimed against a *quasi*-judicial body functioning outside the Indian territory.

Another example of the expansive interpretation of the expression "other authorities" in Art. 12 is furnished by the recent decision of the Supreme Court in *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*.[37] In this case, the Supreme Court has overruled *Sabhajit Tewary*[38] and has held that the Council of Scientific and Industrial Research (CSIR) is an authority under Art. 12 and was bound by Art. 14.[39] The Court has ruled that "the control of the Government in CSIR is ubiquitous". The Court has now laid down the following proposition for identification of "authorities" within Art. 12:

> "The question in each case would be—whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the government. Such control must be particular to the body in question and must be pervasive. If this is found then the body is a state within Art. 12. On the other hand, when the control is merely regulatory whether under statute or otherwise, it would not serve to make the body a state".[40]

Even though a body, entity or corporation is held to be "State" within the definition of Article 12 of the Constitution, what relief is to be granted to the aggrieved person or employee of such a body or entity is a subject matter in each case for the Court to determine on the basis of the structure of that society and also its financial capability and viability.[41]

Bombay Port Trust is an instrumentality of the State and hence an "authority" within the meaning of Article 12 and amenable to writ jurisdiction of the Court.[42]

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36. *K.S. Rama Murthy v. Chief Commissioner, Pondicherry*, AIR 1963 SC 1464 : (1964) 1 SCR 656. For a comment on the case, see, 5 *JILI*, 522.
37. (2002) 5 SCC 111 : (2002) 4 JT 146.
38. *Supra*, note.
39. *Infra*, Ch. XXI.
40. (2002) 5 SCC at 134.
41. *Virendra Kumar Srivastava v. U.P. Rajya Karmachari Kalyan Nigam*, (2005) 1 SCC 149 : AIR 2005 SC 411.
42. *Jamshed Hormusji Wadia v. Board of Trustees, Port of Mumbai*, (2004) 3 SCC 214 : AIR 2004 SC 1815.

The multiple test as laid down by the majority view in Pradip Biswas is to be applied for ascertaining whether a body is a State within the meaning of Art. 12.[43]

(b) LOCAL AUTHORITY

The expression 'local authority' in Art. 12 refers to a unit of local self-government like a municipal committee or a village panchayat.[44]

The Delhi Development Authority, a statutory body, has been held to be a 'local authority' because it is constituted for the specific purpose of development of Delhi according to plan which is ordinarily a municipal function.[45] The activities of the D.D.A. are limited to Delhi. It has some element of popular representation in its composition and enjoys a considerable degree of autonomy.

In the instant case, reference was made to the definition of "local authority" given in S. 3(31) of the General Clauses Act which runs as follows:

> "'Local authority' shall mean a municipal committee, district board, body of port commissioners or other authority legally entitled to, or entrusted by the Government with, the control or management of a municipal or local fund."

The Supreme Court has ruled that to be characterised as a 'local authority', the authority concerned must have separate legal existence as a corporate body, it must not be a mere government agency but must be legally an independent entity; it must function in a defined area and must ordinarily, wholly or partly, directly or indirectly, be elected by the inhabitants of the area. It must also enjoy a certain degree of autonomy either complete or partial, must be entrusted by statute with such governmental functions and duties as are usually entrusted to municipal bodies such as those connected with providing amenities to the inhabitants of the locality like health and education, water and sewerage, town planning and development roads, markets, transportation, social welfare services, *etc*. Finally, such a body must have the power to raise funds for furtherance of its activities and fulfillment of its objectives by levying taxes, rates, charges or fees.

In *Calcutta State Transport Corporation v. Commr. of Income-tax, West Bengal*,[46] the Supreme Court refused to characterise the Corporation as a 'local authority'. The corporation is meant only for the purpose of providing road transport services and has no element of popular representation in its constitution. Its powers and functions bear no relation to the powers and functions of a municipal committee. It is more in the nature of a trading corporation.

A Fundamental Right is not infringed by a judicial order and no action, therefore, lies against a Court or judge on the ground of breach of a Fundamental

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43. *Virendra Kumar Srivastava v. U.P. Rajya Karmachari Kalyan Nigam*, (2005) 1 SCC 149 : AIR 2005 SC 411.

44. *Ajit Singh v. State of Punjab*, AIR 1967 SC 856 : (1967) 2 SCR 143; *State of Gujarat v. Shantilal Mangaldas*, AIR 1969 SC 634 : (1969) 1 SCC 509; *J. Hiralal v. Bangalore Municipality*, AIR 1982 Knt. 137.
See, *Supra*, Ch. IX, Secs. H and I.

45. *Union of India v. R.C. Jain*, AIR 1981 SC 951 : (1981) 2 SCC 308.
Also, *Premji Bhai Parmar v. Delhi Development Authority*, AIR 1980 SC 738 : (1980) 2 SCC 129.

46. AIR 1996 SC 1316 : (1996) 8 SCC 758.

Right,[47] the reason being that what a judicial decision purports to do is to decide the controversy between the parties brought before the court.

Even a *quasi*-judicial body acting within its jurisdiction under a valid law does not infringe a Fundamental Right merely by misinterpreting a law.[48] But if a *quasi*-judicial body acts under an *ultra vires* law, or outside its jurisdiction, or ignores mandatory rules of procedure prescribed in the relevant law, or infringes principles of natural justice, and thereby affects a Fundamental right then its action can be quashed by the courts.[49]

IBA and Banks which were created under respective Parliamentary Acts or nationalized in terms of the Banking Companies (Acquisition and Transfer of Undertakings) Acts, 1970 and 1980 were "State" within meaning of Art. 12.[50]

Without expressing any opinion on the question as to whether a cooperative society is a "State" within the meaning of Article 12 of the Constitution, the Supreme Court has held that a writ petition will be maintainable when the action of the cooperative society is violative of mandatory statutory provisions by which it is governed.[51]

E. LAW

Another term used in Art. 13(2) is 'law'.[52]

The basic norm contained in Art. 13(2) is that any 'law' inconsistent with a Fundamental Right is void.

The term 'law' in Art. 13 has been given a wide connotation so as to include any ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law [Art. 13(3)(*a*)]. This means that, not only a piece of legislation, but any of the things mentioned here can be challenged as infringing a Fundamental Right. Accordingly, *inter alia* the following have been held to be 'law' under Art. 13, the validity of which can be tested on the touchstone of Fundamental Rights:

(i) a resolution passed by a State Government under Fundamental Rule 44 of the State;[53]

(ii) a government notification under the Commissions of Inquiry Act setting up a commission of inquiry;[54]

(iii) a notification[55] or an order[56] under a statute;

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47. *Naresh v. State of Maharashtra*, AIR 1967 SC 1 : (1966) 3 SCR 744.
48. *Ujjam Bai v. State of Uttar Pradesh*, AIR 1962 SC 1621 : (1963) 1 SCR 778; *Pioneer Traders v. C.C., Imports and Exports*, AIR 1963 SC 734 : 1963 Supp (1) SCR 349.
For a comment on the *Ujjam Bai* case, see, 4 *JILI*, 452.
49. *Kamala Mills v. Bombay*, AIR 1965 SC 1942 : 1966 (1) SCR 64.
See, under '*Certiorari*', Ch. VIII, Sec. E(iv), *supra*.
50. *Indian Banks' Association, Bombay v. Devkala Consultancy Service*, (2004) 11 SCC 1 : AIR 2004 SC 2615.
51. *A. Umarani v. Registrar, Coop. Societies* (2004) 7 SCC 112 : AIR 2004 SC 4504 Quere – why it should not be applicable limited companies or registered bodies etc.
52. *Supra.*
53. *State of Madhya Pradesh v. Mandawar*, AIR 1954 SC 493 : (1955) 1 SCR 599.
54. *Dalmia v. Justice Tendolkar*, AIR 1958 SC 538 : 1959 SCR 279.
55. *Madhubhai Amathalal Gandhi v. Union of India*, AIR 1961 SC 21 : (1961) 1 SCR 191.
56. *Pannalal Binjraj v. Union of India*, AIR 1957 SC 397 : 1957 SCR 233.

(iv) an administrative order;[57] but administrative instruction is not law within the meaning of Article 13.[58]

(v) a custom or usage;[59]

(vi) bye-laws of a municipal or a statutory body;[60]

(vii) regulations made by a statutory corporation like the Life Insurance Corporation.[61]

The validity of the above can be questioned under the Fundamental Rights.

The bye-laws of a co-operative society framed under the Co-operative Societies Act do not fall within the purview of Art. 13.[62]

Parliament, while making an Act cannot be deemed to have taken into consideration an earlier law found to be in contravention of Art. 13.[63]

Though a law as such may not be invalid, yet an order made under it can still be challenged as being inconsistent with a Fundamental Right because no law can be presumed to authorise anything unconstitutional.[64]

A question of great importance which has been debated in India from time to time is whether the term 'law' in Art. 13(1) would include an Act passed by Parliament to amend the Constitution. The question has been discussed fully at a later stage in this book.[65]

One point needs to be emphasized. A restriction on a Fundamental Right can be imposed only through a statute, statutory rule or statutory regulation. A Fundamental Right cannot be put under restraint merely by an administrative direction not having the force of law.[66]

(a) PERSONAL LAWS

There prevail in India several personal laws, such as, Hindu Law, Muslim Law, Parsi Law, Christan Law of marriage and divorce. These are by and large non-statutory, traditional systems of law having some affinity with the concerned religion. Being ancient systems of law, there are several aspects of these systems of laws which are out of time with the modern thinking and may even be incompatible with some Fundamental Rights.

From time to time, several features of these laws have been challenged before the courts on the ground of their incompatibility with the Fundamental Rights. By and large, in such cases, the courts have adopted an equivocal attitude. The

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57. *Balaji v. State of Mysore*, AIR 1963 SC 649 : 1963 Supp (1) SCR 439.
58. *Punit Rai v. Dinesh Chaudhary*, (2003) 8 SCC 204 : AIR 2003 SC 4355.
59. *Sant Ram v. Labh Singh*, AIR 1965 SC 314 : (1964) 7 SCR 756.
60. *Tahir v. District Board*, AIR 1954 SC 630.
61. *Bhagatram, supra*; *Hirendra Nath Bakshi v. Life Insurance Corp*., AIR 1976 Cal. 88.
62. *Co-op. Credit Bank v. Industrial Tribunal*, AIR 1970 SC 245.
63. *Rakesh Vij v. Raminder Pal Singh Sethi*, (2005) 8 SCC 504 : AIR 2005 SC 3593.
64. *Narendra Kumar v. Union of India*, AIR 1960 SC 430 : (1960) 2 SCR 375; *State of Madhya Pradesh v. Bharat Singh*, AIR 1967 SC 1170 : (1967) 2 SCR 454.
65. *Infra*, Ch. XLI.
66. *Bishan Dass v. State of Punjab*, AIR 1961 SC 1570 : (1962) 2 SCR 69; *Kharak Singh v. State of Uttar Pradesh*, AIR 1963 SC 1295 : (1964) 1 SCR 332; *Satwant Singh v. A.P.O.*, AIR 1967 SC 1836 : (1967) 3 SCR 525.

courts have adopted the policy of non-interference keeping in view the susceptibilities of the groups to which these laws apply.

For this purpose, the courts have adopted two strategies. One, in some cases the courts have ruled that the challenged features of personal laws are not incompatible with the Fundamental Rights. Reference to this aspect is made in the course of the following discussion on specific Fundamental Rights, especially, under Arts. 14, 15, 25 and 26. Two, the courts have denied that the personal laws fall within the coverage of Art. 13 and, thus, these laws cannot be challenged under the Fundamental Rights. For instance, GAJENDRAGADKAR, J., observed in *State of Bombay v. Narasu Appa Mali*:[67]

> "……. the framers of the Constitution wanted to leave the personal laws outside the ambit of Part III of the Constitution (*viz.*, Fundamental Rights). They must have been aware that these personal laws needed to the reformed in many material particulars and in fact they wanted to abolish these different personal laws and to evolve one common code. Yet they did not wish that the provisions of the personal laws should be challenged by reason of the Fundamental Rights …. and so they did not intend to include these personal laws within the definition of the expression "laws in force".

The view expressed by the Bombay High Court in *Narasu* has been reiterated in several cases by the High Courts[68] and the Supreme Court.[69] For example, in *Ahmedabad Women Action Group v. Union of India*,[70] a public interest litigation was filed through a writ petition to declare the Muslim Personal Law which allows polygamy as void as offending Arts. 14 and 15.[71] The Supreme Court refused to take congnisance of the matter. The Court observed that the issues raised involve questions of state policy with which the Court does not ordinarily have any concern. The remedy lies somewhere else (meaning the Legislature) rather than the courts.

In *P.E. Mathew v. Union of India*,[72] s. 17 of the Indian Divorce Act, a Central pre-Constitutional Law, was challenged as arbitrary, discriminatory and violative of Art. 14. But the Kerala High Court adopted the ratio of the Supreme Court cases, cited above, that the personal Christian Law, lay outside the scope of Fundamental Rights. Though the Court did agree that s. 17 was unjustified and discriminatory yet it did not say so. The Court left the matter to the Legislature to amend the law adopting the plea that personal laws do not fall under the purview of the Fundamental Rights. The Court ruled that personal laws are outside the scope of Art. 13(1) as they are not laws as defined in Art. 13(3)(*b*).

A word of comment on the line of decisions mentioned above may be in order at this stage.

After the commencement of the Constitution, several Acts have been passed by Parliament and the State Legislatures modifying several aspects of these personal laws. *Prima facie*, it is difficult to argue that these statutes do not fall within the scope of Art. 13(3)(*a*). But because of the sensitivities of the people

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67. AIR 1952 Bom 84.
68. *Srinivasa Aiyar v. Saraswati Ammal*, AIR 1952 Mad 193; *Ram Prasad v. State of Uttar Pradesh*, AIR 1957 All 411.
69. *Krishna Singh v. Mathura Ahir*, AIR 1980 SC 707 : (1981) 3 SCC 689.
70. AIR 1997 SC 3614 : (1997) 3 SCC 573.
71. For discussion on Arts. 14 and 15(1), see, Chapters XXI and XXII, *infra.*
72. AIR 1999 Ker 345.

and the delicate nature of the issues involved, the Courts have thought it prudent not to interfere with these laws on the touchstone of Fundamental Rights and leave it to the Legislature to reform these laws so as to bring them in conformity with the Fundamental Rights.

Article 13(1) says that all "laws in force" in India when the Constitution comes in force shall be void if inconsistent with a Fundamental Right. According to Art. 13(3)(*b*), the expression "laws in force" *includes* laws passed or made by a Legislature or other competent authority." This is an inclusive definition. It is clear, that Art. 13(3)(*b*) does not exclude other forms of law besides the pre-Constitution legislative enactments. But the Court has rejected the argument that Art. 13(1)(b) is only inclusive and not exhaustive. Even if we accept the literal, technical and narrow interpretation of Art. 13(3)(*b*) that it refers only to pre-Constitution legislation and does not include uncodified judge-made amorphous personal laws, there is no reasons or logic in excluding from the scope of Fundamental Rights legislative Acts enacted in the area of personal laws before and after the commencement of the Constitution, such as, the Indian Divorce Act. The only explanation for this judicial stance can be that as a matter of judicial policy the courts do not wish to get involved in the delicate task of adjudging these Acts *vis-à-vis* Fundamental Rights.[73]

(b) CUSTOM

What is the position of customs extant in India before the commencement of the Constitution and continued thereafter. In *Gazula Dasaratha Rama Rao v. State of Andhra Pradesh*,[74] the Constitution Bench of the Supreme Court expressed the view that Art. 13(1) which says that laws in force in India before the commencement of the Constitution shall be void if inconsistent with Fundamental Rights "includes custom or usage having the force of law". The Court observed:

> "Therefore, even if there was a custom which has been recognized by law… that custom must yield to a Fundamental Right".

In *Sant Ram v. Labh Singh*,[75] the Constitution Bench of the Supreme Court ruled that a customary right of pre-emption by vicinage was void under Art. 19(1)(*f*).[76] The Court referred to Art. 13(1)(*a*) which says that 'law' includes 'custom'. The Court also ruled that the definition of 'laws in force' contained in Art. 13(1)(*b*) "does not in any way restrict the ambit of the word 'law' in Art. 13(1)(*a*).[77]

In *Madhu Kishwar v. State of Bihar*,[78] RAMASWAMI, J., expressed the view that customs of tribals, though elevated to the status of law by Art. 13(1)(*a*), "yet it is essential that the customs inconsistent with or repugnant to constitutional Scheme must always yield place to Fundamental Rights."

RAMASWAMI, J., adopting an activist attitude ruled that tribal women would succeed to the estate of their male relations. The majority generally agreed with

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73. This topic has further been discussed later. See, Chs. XXI, XXII, XXIX and XXXIV, *infra.*
74. AIR 1961 SC 564, 570 : (1961) 2 SCR 931.
75. AIR 1965 SC 314 : (1964) 7 SCR 756.
76. For discussion on Art. 19(1)(f), see Ch. XXXI, Sec. D.
77. *Ibid.*, at 316.
78. AIR 1996 SC 1864, 1871 : (1996) 5 SCC 125.

this approach though it adopted a conservative approach in the specific situation and desisted from declaring a tribal custom as inconsistent with Art. 14 saying that to do so "would bring about a chaos in the existing state of law."[79] The majority made male succession subject to the right of livelihood of the female dependent.

This discussion reveals a dichotomy in the judicial attitudes as expressed in *Madhu Kishwar*[80] and *Narasu Appa Mali*[81] If the Supreme Court holds customs pre-existing the constitution to be subject to Fundamental Rights, then there seems to be no reason as to why personal laws ought not to be held subject to Fundamental Rights.

In the view of the author, the Supreme Court has adopted the correct approach in the cases concerning customs. In cases concerning personal laws, the courts have adopted a policy approach, rather than a legalistic approach.

F. UNCONSTITUTIONALITY OF A STATUTE

Article 13(1) refers to pre-Constitution laws while Art. 13(2) refers to post-Constitution laws. A law is void if inconsistent with a Fundamental Right.

A void statute is unenforceable, *non-est*, and devoid of any legal force: courts take no notice of such a statute, and it is taken to be notionally obliterated for all purposes.

In *Behram v. State of Bombay*,[82] the Supreme Court has observed on this point:

> "Where a statute is adjudged to be unconstitutional, it is as if it had never been. Rights cannot be built up under it, contracts which depend upon it for their consideration are void, it constitutes a protection to no one who has acted under it and no one can be punished for having refused obedience to it before the decision was made. And what is true of an Act void in toto is true also as to any part of an Act which is found to be unconstitutional and which consequently has to be regarded as having never at any time been possessed of any legal force…."

Any law made in contravention of Part III is dead from the very beginning and cannot at all be taken notice of or read for any purpose whatsoever.[83]

The above proposition is not however universally or absolutely true in all situations. It is subject to a few exceptions as follows:

(1) Some Fundamental Rights apply to all persons, citizens as well as non-citizens, *e.g.*, Arts. 14, 21, while some of these Rights, such as Art. 19, apply only to citizens.[84]

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79. *Ibid.*, at 1885.
80. *Supra*, footnote 78.
81. *Supra*, footnote 67; also, *supra*, footnote 70.
82. *Behram v. State of Bombay*, AIR 1955 SC 123 : (1955) 1 SCR 613.
Also see, VENKATARAMAN, The Status of an Unconstitutional Statute, 2 *JILI*, 401 (1960).
For further discussion on this topic see, Ch. XL, Sec. F, *infra.*
83. *Rakesh Vij v. Raminder Pal Singh Sethi*, (2005) 8 SCC 504 : AIR 2005 SC 3593.
84. *Chairman Rly. Board v. Chandrima Das,* AIR 2000 SC 988 : (2000) 2 SCC 465.
Also see, *infra*, under Arts. 14, 19 & 21.

A law inconsistent with a Fundamental Right of the former type is ineffective *qua* all persons. On the other hand, a law inconsistent with a Fundamental Right available to citizens only, is *non-est* only *qua* citizens but not *qua* non-citizens who cannot claim the benefit of the Fundamental Right in question.[85]

(2) Art. 13(1) is prospective and not retrospective.[86] Therefore, a pre-Constitution law inconsistent with a Fundamental Right becomes void only after the commencement of the Constitution. Any substantive rights and liabilities accruing under it prior to the enforcement of the Constitution are not nullified. It is ineffective only with respect to the enforcement of rights and liabilities in the post-Constitution period.

A person was being prosecuted under a law before the Constitution came into force. After the Constitution came into force, the law became void under Art. 19(1)(*a*).[87] It was held that Art. 13(1) could not apply to him as the offence had been committed before the enforcement of the Constitution and, therefore, the proceedings against him were not affected.[88]

But the procedure through which rights and liabilities were being enforced in the pre-Constitution era is a different matter. A discriminatory procedure becomes void after the commencement of the Constitution and so it cannot operate even to enforce the pre-Constitution rights and liabilities.[89] A law inconsistent with a Fundamental Right is not void as a whole. It is void only to the extent of inconsistency. This means that the doctrine of severability has to be applied and the offending portion of the law has to be severed from the valid portion thereof.[90]

G. DOCTRINE OF ECLIPSE

The prospective nature of Art. 13(1) has given rise to the doctrine of eclipse.

A legal provision enacted in 1948, authorising the State Government to exclude all private motor transport business, became inconsistent with Art. 19(1)(*g*) when the Constitution came into force in 1950.[91] In 1951, Art. 19(1)(*g*) was amended so as to permit the State Government to monopolise any business.[92] What was the effect of the constitutional amendment of 1951 on the law of 1948? Whether the law having become void was dead once for all and so could not be revitalised by a subsequent constitutional amendment without being re-enacted, or whether it was revived automatically? It was to solve this problem that the Supreme Court enunciated the doctrine of eclipse in *Bhikaji v. State of Madhya Pradesh*.[93]

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85. *State of Gujarat v. Shri Ambica Mills*, AIR 1974 SC 1300 : (1974) 4 SCC 656.

86. Art. 13(1) runs as follows:
"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."

87. For Art. 19(1)(*a*), see, *infra*, Ch. XXIV, Sec. C.

88. *Keshavan Madhava Menon v. State of Maharashtra*, AIR 1951 SC 128 : 1951 SCR 228.
Also, *Rabindra Nath v. Union of India*, AIR 1970 SC 470 : (1970) 1 SCC 84.

89. *Lachmandas v. State of Maharashtra*, AIR 1952 SC 235 : 1952 SCR 710.

90. See *Sub-Inspector Rooplal v. Lt. Governor*, (2000) I SCC 644 : AIR 2000 SC 594.
For the Doctrine of Severability, see, *infra*, Sec. H; also, Ch. XL, *infra*.

91. For discussion on Art. 19(1)(*g*), see, *infra*, Ch. XXIV, Sec. H.

92. *Ibid.*

93. AIR 1955 SC 781 : (1955) 2 SCR 589.

The doctrine of eclipse envisages that a pre-Constitution law inconsistent with a Fundamental Right was not wiped out altogether from the statute book after the commencement of the Constitution as it continued to exist in respect of rights and liabilities which had accrued before the date of the Constitution.[1] Therefore, the law in question will be regarded as having been 'eclipsed' for the time being by the relevant Fundamental Right. It was in a dormant or moribund condition for the time being. Such a law was not dead for all purposes. If the relevant Fundamental Right is amended then the effect would be "to remove the shadow and to make the impugned Act free from all blemish or infirmity". The law would then cease to be unconstitutional and become revivified and enforceable.[2]

The doctrine of eclipse has been held to apply only to the pre-Constitution and not to the post-Constitution laws. The reason is that while a pre-Constitution law was valid when enacted and, therefore, was not void *ab initio*, but its voidity supervened when the Constitution came into force, a post-Constitution law infringing a Fundamental Right is unconstitutional and a nullity from its very inception. Therefore, it cannot be vitalised by a subsequent amendment of the Constitution removing the infirmity in the way of passing the law.[3] The Supreme Court has distinguished between Arts. 13(1) and 13(2), as the phraseology of the two is different from each other.

Article 13(2) which applies to the post-Constitution laws prohibits the making of a law abridging Fundamental Rights, while Art. 13(1) which applies to the pre-Constitution laws contains no such prohibition. Under Art. 13(1), the operation of the pre-Constitution law remains unaffected until 26-1-1950, even if it becomes inoperative after the commencement of the Constitution. Under Art. 13(2), the words "the State shall not make any law" indicate that after the commencement of the Constitution, no law can be made so as to contravene a Fundamental Right. Such a law is void *ab initio*. Therefore, the doctrine of eclipse cannot apply to such a law and it cannot revive even if the relevant Fundamental Right is amended later to remove the hurdle in the way of such a law.[4]

In case the law contravenes a Fundamental Right limited to the citizens only, it will operate with respect to the non-citizens,[5] but it will not be revived *qua*-citizens merely by the amendment of the Fundamental Right involved.[6] Because Art. 13(2) affects the competence of the legislature to enact it with respect to the citizens, the law will have to be re-enacted after the constitutional amendment if it is desired to make it operative *qua* the citizens as well.

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1. *The Keshavan Madhava Menon* case, *supra*, footnote 88.

2. Also, *Purshottam v. Desai*, AIR 1956 SC 20 : (1955) 2 SCR 887.

3. The Privy Council has also held that an invalid statute is non-existent and a later constitutional amendment will not automatically revive it: *Akar v. A.G. of Sierra Leone*, (1969) 3 All ER 384, 392.

Also see, *Dularey Lodh v. IIIrd. Addl. Dist. Judge, Kanpur*, AIR 1984 SC 1260 : (1984) 3 SCC 99.

4. *Saghir v. State of Uttar Pradesh*, AIR 1954 SC 728 : (1955) 1 SCR 707; *Deep Chand v. State of Uttar Pradesh*, AIR 1959 SC 648; *Muhammadbhai v. State of Gujarat*, AIR 1962 SC 1517; *Abu Khan v. Union of India*, AIR 1983 SC 1301 : (1984) 1 SCC 88.

5. *State of Gujarat v. Shri Ambika Mills Ltd.*, AIR 1974 SC 1300 : (1974) 4 SCC 656.

6. *Mahendralal Jain v. State of Uttar Pradesh*, AIR 1963 SC 1019 : 1963 Supp (1) SCR 912. Also *supra*, Ch. XVIII, Sec. C.

An Act declared unconstitutional under Arts. 14, 19 and 31(2), is revived when it is put in the Ninth Schedule.[7] The express words of Art. 31B cure the defect in such an Act with retrospective operation from the date it was put on the statute book. Such an Act even though inoperative when enacted because of its inconsistency with a Fundamental right, assumes full force and vigour retrospectively as soon as it is included in the IX Schedule. It is not necessary to re-enact such an Act.[8]

From this arises another question. When a post-Constitution law is held inconsistent with a Fundamental Right, can it be revived by amending the Act in question so as to remove the blemish, or will it have to be re-enacted as a whole? The Delhi High Court has held by a majority that the Act will have to be re-enacted and it cannot be revived by its mere amendment.[9] This view appears to emanate logically from the position adopted by the Supreme Court in treating such a law void *ab-initio* and not applying the doctrine of eclipse to the post-Constitution laws as discussed above.

There is no direct Supreme Court case on the specific point. The nearest authority on the point is the *Shama Rao* case.[10] An Act was challenged on the ground of excessive delegation.[11] Pending the decision, the Legislature passed an amending Act seeking to remove the defect. The Supreme Court ruled by a majority that when an Act is bad on the ground of excessive delegation, it is still-born and void *ab initio*, and it cannot be revived by an amending Act seeking to remove the vice. The whole Act should be re-enacted in the modified form.

This ruling supports the proposition that an Act held invalid under Art. 13(2) could not be revived merely by amending it but will have to be re-enacted. The same proposition will apply when an Act infringes a Fundamental Right applicable to the citizens only. Such a law will be regarded as 'still-born' *vis-à-vis* the citizens even though it may be operative *qua* the non-citizens, and so it will have to be re-enacted if it is desired to make it valid *qua* the citizens.[12]

A reference may be made here to *Hari Singh v. Military Estate Officer, Delhi*.[13] The Punjab Public Premises Act was declared void by the Supreme Court as being inconsistent with Art. 14.[14] There was a corresponding law made by Parliament enacted in 1958. Consequent upon the Supreme Court decision on the Punjab Act, Parliament re-enacted its own law in 1971, seeking to remove the blemish pointed out by the Supreme Court, and made it operative retrospectively

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7. See, *infra*, Chs. XXXI and XXXII.

8. *L. Jagannath v. Authorised Officer*, AIR 1972 SC 425 : (1971) 2 SCC 893. *Infra*, Ch. XXVII for Art. 31B.

9. *P.L. Mehra v. D.R. Khanna*, AIR 1971 Del. 1.

10. AIR 1967 SC 1480 : (1967) 2 SCR 650.

11. *Supra*, Ch. II, Sec. N.

12. *State of Gujarat v. Shri Ambica Mills*, *supra*, note 51.

JUSTICE DESHPANDE has argued cogently against this rule. He favours application of the doctrine of eclipse to the post-Constitution laws as well. He pleads that mere amendment of the law should be sufficient to revivify it in case it conflicted with the Fundamental Right. See his dissenting judgement in the *Mehra* case, *supra*, note 55. Also, DESHPANDE, *Judicial Review of Legislation*, 9, 177, 185, 198, 220.

For a review of the book by the author see, 16 *JILI*, 727, 736.

Also see, VENKATARAMA AIYAR J. in *Sundararamier's* case, AIR 1958 SC 468.

13. AIR 1972 SC 2205 : (1972) 2 SCC 239.

14. *Infra*, Ch. XXI.

with effect from the date of commencement of the original Act. A new clause was also added saying that all orders made under the old law would be deemed to be valid and effective as if they were made under the new law. This clause was challenged, the argument being that the 1958 Act being unconstitutional, there could not be validation of anything done under an unconstitutional Act. Holding the clause to be valid, the Supreme Court called it a fallacious argument for it overlooked the crucial point that the 1971 Act was made effective retrospectively from the date of the 1958 Act and the action done under the 1958 Act was deemed to have been done under the 1971 Act, and the new Act was valid under Art. 14.[15]

H. DOCTRINE OF SEVERABILITY

According to Art. 13, a law is void only "to the extent of the inconsistency or contravention" with the relevant Fundamental Right. The above provision means that an Act may not be void as a whole; only a part of it may be void and if that part is severable from the rest which is valid, then the rest may continue to stand and remain operative. The Act will then be read as if the invalid portion was not there. If, however, it is not possible to separate the valid from the invalid portion, then the whole of the statute will have to go.[16]

The Supreme Court has explained the doctrine as follows in *RMDC*:[17]

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

The Supreme Court has laid down the following propositions as regards the doctrine of severability:[18]

(1) The intention of the Legislature is the determining factor in determining whether the valid parts of a statute are separable from the invalid parts. The test is whether the Legislature would have enacted the valid parts had it known that the rest of the statute was invalid.[19] "The test of severability requires the Court to ascertain whether the legislature would at all have enacted the law if severed part was not the part of the law".[20]

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15. Similar clauses have been held valid in *West Ramnad Electric Distribution Co v. State of Madras*, AIR 1962 SC 1753 : (1963) 2 SCR 747; *State of Mysore v. D. Achiah Chetty*, AIR 1969 SC 477 : (1969) 1 SCC 248.

16. *Kameshwar Pd. v. State of Bihar*, AIR 1962 SC 1166 : 1962 Supp (3) SCR 369; *State of Madhya Pradesh v. Ranojirao Shinde*, AIR 1968 SC 1053 : (1968) 3 SCR 489.

17. *R.M.D.C. v. Union of India*, AIR 1957 SC 628, at 633; *Kihota Hollohon v. Zachilhu*, AIR 1993 SC 412 at 440 : 1992 Supp (2) SCC 651.

18. See, *RMDC, Ibid*; *Motor General Traders v. State of Andhra Pradesh*, AIR 1984 SC 121 : (1984) 1 SCC 222.

19. *Harakchand v. Union of India*, AIR 1970 SC 1453 : (1969) 2 SCC 166.
Also, *Att. Gen. for Alberta v. Att. Gen. for Canada*, (1947) AC 503, 518.

20. *Kihota Hollohon, supra*, Ch. II, Sec. F(a).

In determining the legislative intent on the question of severability, it will be legitimate to take into account the history of the legislation, its object, the title and the preamble to it.

(2) If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety.

(3) On the other hand, if they are so distinct and separate that after striking out what is invalid, what survives can stand independently and is workable—the portion which remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest had become unenforceable.

If the nature or the object or the structure of the legislation is not changed by the omission of the void portion, the latter is severable from the rest.[21]

(4) Even when the valid provisions are distinct and separate from the invalid provisions, but if they all form part of a single scheme which is intended to operate as a whole, then the invalidity of a part will result in the failure of the whole.

(5) Likewise, though the valid and invalid parts of a statute are independent and may not form part of a scheme, but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.

(6) If after the invalid portion is expunged from the statute, what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void. The reason is that a Court cannot make alterations or modifications in the law in order to enforce what remains of it after expunging its invalid portion; otherwise it would amount to judicial legislation.[22]

(7) The severability of the valid and invalid provisions of a statute does not depend on whether the provisions are enacted in the same section or different sections; it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provision therein.

In the *R.M.D.C.* case was involved the Prize Competitions Act which was broad enough to include competitions of a gambling nature as well as those involving skill. Under Art. 19(1)(*g*),[23] Parliament could restrict prize competitions only of a gambling nature but not those involving skill. Holding that the application of the Act could be restricted to the former, the Court stated that Parliament would have still enacted the law to regulate competitions of gambling nature; nor did restricting the Act to this kind of competitions affect its texture or colour. The provisions of the Act were thus held severable in their application to competi-

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21. *Gopalan v. State of Madras*, AIR 1950 SC 27, 46 : 1950 SCR 88; *Kihota Hollohon, supra*, Ch. II Sec. F(a).

In *Hinds v. R.*, (1976) 1 All ER 355, invalid portion of the statute was severed from the rest because what was left was a sensible legislative scheme or a grammatical piece of legislation requiring no addition or amendment.

Also see, *Laxmi Khandsari v. State of Uttar Pradesh*, AIR 1981 SC 873, 891 : (1981) 2 SCC 600.

22. *Sewpujanrai v. Customs Collector*, AIR 1958 SC 845 : 1959 SCR 821.

23. For Art. 19(1)(g), see, *infra*, Ch. XXIV, Sec. H.

tions in which success did not depend to any substantial extent on skill. This illustrates proposition (1) mentioned above.

To some extent, there exists an inconsistency between the *Thappar*[24] and the *R.M.D.C.* case. When an offending provision is couched in a language wide enough to cover restrictions within and without the constitutionally permissible limits, according to the *Thappar* case it cannot be split up if there is a possibility of its being applied for purposes not sanctioned by the Constitution,[25] but according to the *R.M.D.C.* case, such a provision is valid if it is severable in its application to an object which is clearly demarcated from other objects falling outside the constitutionally permissible legislation. The Supreme Court has itself pointed out this aspect of the matter in *Supdt. Central Prison v. Dr. Lohia*,[26] but left open the question. The Court, however, stated that in the *R.M.D.C.* case, the difference between the two classes of competitions, namely, those that are gambling in nature and those in which success depends on skill, was clear cut and had long been recognised in legislative practice. But when the difference between what is permissible and what is not permissible is not very precise, the whole provision is to be held void, whether the view taken in the *Romesh Thappar* or the *R.M.D.C* case is followed.

It appears that it is difficult to evolve a clear cut principle as much depends on the facts of each case, the determining factor being whether, on the provision being sustained to the extent it falls within the permissible limits, is there any danger of its being misused for the purpose not permitted? If the Court has the ultimate control to decide whether a particular application of the law goes beyond the permissible limits, then there may not be any danger of misuse of the provision. If, however, the matter has been left to the subjective satisfaction of the Executive, and the Court cannot scrutinise the basis of such satisfaction to see whether the law has been applied to a purpose not permitted, then it will be safer to declare the whole provision bad.

I. WAIVER OF FUNDAMENTAL RIGHTS

Can a person waive any of his Fundamental Rights?

To begin with, VANKATARAMA AIYAR, J., in *Behram v. State of Maharashtra*,[27] divided the Fundamental Rights into two broad categories:

(i) Rights conferring benefits on the individuals, and

(ii) those rights conferring benefits on the general public.

The learned Judge opined that a law would not be a nullity but merely unenforceable if it was repugnant with a Fundamental Right in the former category, and that the affected individual could waive such an unconstitutionality, in which case the law would apply to him. For example, the right guaranteed under Art. 19(1)(*f*) was for the benefit of properly-owners and when a law was found to in-

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24. *Romesh Thappar v. State of Madras*, AIR 1950 SC 124 : 1950 SCR 594.
Also see, *infra*, under Art. 19(1)(a), Ch. XXIV, Sec. C.

25. Also see, *Chintamanrao v. State of Madhya Pradesh*, AIR 1951 SC 118 : 1950 SCR 759.

26. AIR 1960 SC 633 : (1960) 2 SCR 821.
Also see, under Art. 19(1)(*a*) *infra*, Ch. XXIV, Sec. C.

27. AIR 1955 SC 123 : (1955) 1 SCR 123.

fringe Art. 19(1)(*f*), it was open to any person whose right had been infringed to waive his Fundamental Right.[28] In case of such a waiver, the law in question could be enforced against the individual concerned.

The majority on the bench, however, was not convinced with this argument and repudiated the doctrine of waiver saying that the Fundamental Rights were not put in the Constitution merely for individual benefit. These Rights were there as a matter of public policy and, therefore, the doctrine of waiver could have no application in case of Fundamental Rights. A citizen cannot invite discrimination by telling the state 'You can discriminate', or get convicted by waiving the protection given to him under Arts. 20 and 21.[29]

The question of waiver of a Fundamental Right has been discussed more fully by the Supreme Court in *Basheshar Nath v. I.T. Commissioner*.[30] The petitioner's case was referred to the Income-tax Investigation Commission under S. 5(1) of the relevant Act. After the Commission had decided upon the amount of concealed income, the petitioner on May 19, 1954, agreed as a settlement to pay in monthly instalments over Rs. 3 lacs by way of tax and penalty. In 1955, the Supreme Court declared S. 5(1) *ultra vires* Art. 14.[31] The petitioner thereupon challenged the settlement between him and the Commission, but the plea of waiver was raised against him. The Supreme Court however upheld his contention.

In their judgments, the learned Judges expounded several views regarding waiver of Fundamental Rights, *viz.*:

(1) Art. 14 cannot be waived for it is an admonition to the state as a matter of public policy with a view to implement its object of ensuring equality. No person can, therefore, by any act or conduct, relieve the state of the solemn obligation imposed on it by the Constitution.

(2) A view, somewhat broader than the first, was that none of the Fundamental Rights can be waived by a person. The Fundamental Rights are mandatory on the state and no citizen can by his act or conduct relieve the state of the solemn obligation imposed on it.

The constitution makes no distinction between Fundamental Rights enacted for the benefit of an individual and those enacted in public interest or on grounds of public policy.

A large majority of the people in India are economically poor, educationally backward and politically not yet conscious of their rights. Individually or even collectively, they cannot be pitted against the state, and, therefore, it is the duty of the judiciary to protect their Rights against themselves.

(3) The minority judges took the view that an individual could waive a Fundamental right which was for his benefit, but he could not waive a Right which was for the benefit of the general public. This was reiteration of the view expressed by VENKATARAMAN, J., in *Behram*, as stated above.

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28. For discussion on Art. 19(1)(*f*), see, *infra*, Ch. XXIV, Sec. G; Ch. XXXI, Sec. B.
29. For comments on Arts. 20 and 21, see, *infra*, Chs. XXV and XXVI.
30. AIR 1959 SC 149 : 1959 Supp (1) SCR 528.
31. For a discussion on Art. 14, see, *infra*, next Chapter.

In view of the majority decision in *Basheshar*, it is now an established proposition that an individual cannot waive any of his Fundamental Rights.[32] This proposition has been applied in a number of cases.

According to the Bombay High Court:[33] "The state cannot arrogate to itself a right to commit breach of the Fundamental Rights of any person by resorting to principles of waiver or estoppel or other similar principles." Similarly, the Gauhati High Court has explained that the Fundamental Rights have been embodied in the Constitution not merely for the benefit of a particular individual but also as a matter of constitutional policy and for public good, and, therefore, the doctrine of waiver or acquiescence cannot be applied thereto. "A citizen cannot voluntarily get discrimination or waive his Fundamental Right against discrimination" as the right of not being discriminated against is enshrined in Art. 14 and is a Fundamental Right.[34]

In *Olga Tellis,*[35] the Court asserted that "the high purpose which 'the constitution seeks to achieve by conferment of fundamental rights is not only to benefit the individual but to secure the larger interests of the community.' Therefore, even if a person says, either under mistake of law or otherwise, that he would not enforce any particular Fundamental Right, it cannot create an estoppel against him. "Such a concession, if enforced, would defeat the purpose of the Constitution. Were the argument of estoppel valid, an all-powerful state could easily tempt an individual to forgo his precious personal freedoms on promise of transitory, immediate benefits."

In *Olga Tellis,* in a writ proceeding in the High Court, the pavement dwellers gave an undertaking that they would not claim any Fundamental Right to put up huts on pavements or public roads and that they would not obstruct the demolition of the huts after a certain date. Later, when the huts were sought to be demolished after the specified date, the pavement dwellers put up the plea that they were protected by Art. 21. It was argued in the Supreme Court that they could not raise any such plea in view of their previous undertaking. The Court overruled the objection saying that Fundamental Rights could not be waived. There can be no estoppel against the Constitution which is the paramount law of the land. The constitution has conferred Fundamental Rights not only to benefit individuals but to secure the larger interests of the community. The Court observed : "No individual can barter away the freedoms conferred on him by the Constitution".

Therefore, in spite of their earlier undertaking in the High Court, the pavement dwellers are entitled to raise the plea of Art. 21 of the Constitution in their favour.[36]

Recently, in *Nar Singh Pal v. Union of India,*[37] the Supreme Court has asserted:

> "Fundamental Rights under the Constitution cannot be bartered away. They cannot be compromised nor can there be any estoppel against the exercise of Fundamental Rights available under the Constitution".

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32. N.L. NATHANSON, Waiver of Constitutional Rights in Indian and American Constitutional Law, 4 *JILI*, 157 (1962).

33. *Yousuf Ali Abdulla Fazalbhoy v. M.S. Kasbekar,* AIR 1982 Bom. 135 at 143.

34. *Omega Advertising Agency v. State Electricity Board*, AIR 1982 Gau. 37.

35. *Olga Tellis v. Bombay Municipal Corporation,* AIR 1986 SC 180, at 192-193 : (1985) 3 SCC 545.

36. For discussion on Art. 21, see, *infra,* Ch. XXVI.

37. (2000) 3 SCC 589, 594 : AIR 2000 SC 1401.

In the instant case, a casual labourer with the Telecom Department had worked continuously for 10 years and had thus acquired the "temporary" status. He was prosecuted for a criminal offence but was ultimately acquitted. In the meantime, his service was terminated. He questioned the order of termination but also accepted retrenchment benefit. The Supreme Court ruled that his service could not have been terminated without a departmental inquiry and without giving him a hearing. Acceptance of retrenchment benefit by him did not mean that he had surrendered all his constitutional rights. Accordingly, the order of termination was quashed by the Supreme Court and he was reinstated in service.

The doctrine of non-waiver developed by the Supreme Court of India denotes manifestation of its role of protector of the Fundamental Rights.

It may be of interest to know that in the U.S.A., a Fundamental Right can be waived.[38]

38. *Pierce Oil Corporation v. Phoenix Refining Co.*, 259 US 125 (1922); *Boykin v. Alabama*, 395 US 238 (1969); NATHANSON, *supra*, footnote 32, 4 *JILI*, 157 (1962).