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## Chapter

## Fundamental Rights; Rule of Law; Separation of Powers

### Introduction

The constitution of India contains certain provisions which guarantee the basic human rights to all the citizens of India. These rights can be invoked by individual citizens if there is any violation of them. Fundamental Rights are included in Part-III of the Indian Constitution. It is also known as the 'Magna Carta' of the Indian Constitution. The Fundamental Rights enshrined in the Indian Constitution are like a guarantee which means as long as they exist in the Indian Constitution, democracy will prevail and all Indian citizens can be assured of the protection of their basic rights. Such civil liberties prevail over any other law of the land. Fundamental rights are essential for the comprehensive progress of the people and the nation. These rights are known as 'fundamenta' as they are the most essential for all-round development i.e., material, intellectual, moral and spiritual and protected by fundamental law of the land i.e. constitution. If the rights provided by Constitution especially the Fundamental rights are violated the Supreme Court and the High Courts can issue writs under Articles 32 and 226 of the Constitution, respectively, directing the State Machinery for enforcement of the fundamental rights.

### Fundamental Rights

The Constitution of India gives certain fundamental rights to the citizens of India. Part III of the Constitution provides such fundamental rights. These are as follows:

- (i) Right to Equality. (Article 14 to 18)
- (ii) Right to Freedom. (Article 19 to 22)
- (iii) Right against Exploitation. (Article 23 to 24)

- (iv) Right to Freedom of Religion. (Article 25 to 28)
- (v) Cultural and Educational Rights. (Article 29 & 30)
- (vi) Right to Constitutional Remedies. (Article 32 to 35)

**Union of India v. Naveen Jindal (2004) 2 SCC 476** - Right to fly National Flag freely with respect and dignity is fundamental right.

### Reasonable Restrictions

The fundamental rights given to a citizen are not uncontrollable. Reasonable restrictions may be imposed in the interest of the public. The State may by making law impose reasonable restrictions on the exercise of the rights conferred by the aforesaid section. Such law may be made relating to the following:

- (i) The sovereignty and integrity of India.
- (ii) The security of the State.
- (iii) Friendly relations with foreign States.
- (iv) Public order.
- (v) Decency or morality.
- (vi) Contempt of court.
- (vii) Defamation.
- (viii) Incitement to an offence.
- (ix) Prescribing professional and technical qualifications necessary for practicing any profession or carrying on any occupation, trade or business.
- (x) Carrying on by the State or by a corporation owned or controlled by the State of any trade, business, industry, service.

The following factors shall be considered to assess the reasonableness:

- (a) Object of the restriction.
- (b) Urgency, nature and extent of the evil.
- (c) Duration of the restriction.
- (d) Prevailing conditions etc.

### Case Laws

Reasonable restrictions can be imposed by an enacted law and not by executive action as observed in **Express Newspaper Pvt. Ltd. v. Union of India (1986) 1SCC 133.**



**CAB v. Authority I & B Ministry (Govt. of India) AIR (1995) SC 1236** - Freedom includes right to communication through media and is subject to reasonable restriction.

**Tata Press Ltd. v. MTNL AIR (1995) SC 2438** - Commercial advertisement is a part of freedom of speech and expression and subject to reasonable restriction.

## RIGHT TO EQUALITY

The constitution of India provides certain rights to equality to the citizens of India. Articles 14 to 18 of the constitution provides these rights. These are discussed below:

### Equality before Law

Article 14 provides provisions for equality before law. This article provides that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.

The principles of 'equality before law' and 'equal protection of the laws' seem to be same thing but these two conceptions are not identical in meaning. Equality before law is a negative concept which implies that no one should be given any special privilege. Equal protection before the laws is a positive concept which implies equal treatment in equal circumstances. The rule is that like should be treated alike and that unlike should be treated differently.

**Exceptions to the rule** - The following are the exceptions to the rule:

- The President or the Governors shall not be answerable to any court for exercise of their official duties and powers.
- No criminal proceeding can be initiated against the President or Governors during their term in office.
- No process of arrest shall be issued by any court against the President or Governors.
- No civil proceedings can be instituted claiming relief against the President or Governors for any act done in his personal capacity during certain period.

• **Equality before law — enforcement thereof** — It is now settled that the guarantee of equality before law enshrined in Article 14 is a positive concept and it cannot be enforced in a negative manner. If an illegality or irregularity has been committed in favour of anybody or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of a higher or superior court for repeating or multiplying the same or for passing wrong order.

• **Concept of equality/Principle of equality — Articles 14 and 16** — It is well settled that equals cannot be treated unequally and unequals cannot be treated equally. Treating of unequals as equals would offend the doctrine of equality enshrined in Articles 14 and 16 of the Constitution.

Article 14 guarantees equality before law whereas Article 16 takes of equal opportunities in matters of public employment. This concept of equality has to be patently infringed by a provision before that provision or any part thereof, can be declared as unconstitutional. The mere fact that there is some inconvenience arising from the language of a provision and its due implementation, cannot be a ground for declaring a provision violative of fundamental rights.

The equality clause contained in Article 14 "is the heart and soul of our Constitution".

The principle of equality would not mean that every law must have universal application for all persons who, by nature, attainment or circumstances, are in the same position.

Article 14 which refers to the principle of "equality" should not be read as a stand-alone item but it should be read in conjunction with Article 21 which embodies several aspects of life.

Article 14 is not meant to perpetuate an illegality. It provides for positive equality and not negative equality. Supreme Court, as such, it was held, was not bound to direct any authority to repeat the wrong action taken by it earlier.

It is a settled legal proposition that Art. 14 is not meant to perpetuate illegality and it does not envisage negative equality. Thus, even if some other similarly situated persons have been granted some benefit



inadvertently or by mistake, such order does not confer any legal right on another to get the same relief.

- **'Equality' — right to—**The fundamental right to equality before law and equal protection of laws as guaranteed by Art. 14 of the Constitution, clearly includes a right to have the person's rights adjudicated by a forum which exercises judicial power in an impartial and independent manner, consistent with the recognised principles of adjudication. Therefore, wherever access to courts to enforce such rights is sought to be abridged, altered, modified or substituted by directing him to approach an alternative forum, such legislative act is open to challenge as it violates the right to adjudication by an independent forum.

Principle of equality of law, if means that same law should apply to everyone.—The varying needs of different classes or sections of people require differential and separate treatment. The legislature is required to deal with diverse problems arising out of an infinite variety of human relations. It must, therefore, necessarily have the power of making laws to attain particular objects and, for that purpose, of distinguishing, selecting and classifying persons and things upon which its laws are to operate. The principle of equality of law, thus, means not that the same law should apply to everyone but that a law should deal alike with all in one class; that there should be an equality of treatment under equal circumstances. It means that equals should not be treated unlike and unlikes should not be treated alike. Likes should be treated alike.

What follows is that Article 14 forbids class legislation; it does not forbid reasonable classification of persons, objects and transactions by the legislature for the purpose of achieving specific ends.

### Classification and Class Legislation

Article 14 provides for equality of all citizens before law. This does not mean equality before one law. However, legislative classification may be made on the basis of certain principles like, geographical location or object

or occupations etc. Classification may be made on the principles laid down in **State of West Bengal v. Anwar Ali**, AIR (1952) SC 75 as stated below:

- (i) It must be founded on an intelligible differentia.
  - (ii) The differentia must have a rational nexus with the object.
- Similar expression was made in *Confederation of Ex-Servicemen Assn. v. Union of India* (2006) 8SCC 399.

The rules for permissible classification are summarized in **Ram Kishan Dalmiya v. Justice Tendulkar**, AIR (1956) SC 538 as follows:

- Article 14 forbids class legislation. It, however, does not prohibit classification.
- It must satisfy the two conditions, i.e. it must be founded on an intelligible differentia; and the differentia must have a rational nexus with the object.
- The classification may be on geographical basis or objects or occupations.
- Mathematically nicety and equality are to be maintained.
- It must be constitutional even it relates to one person consisting a group.
- The burden of proof of the unconstitutionality of any law lies upon the person who challenges it.

The principle of classification was applied in *R. K. Garg v. Union of India*, AIR (1976) SC 1559. (Special Bearer Bond case)

### Prohibition of Discrimination on Grounds of Religion, Race, Caste, Sex or Place of Birth

Article 15 provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them. No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to—

- (a) access to shops, public restaurants, hotels and places of public entertainment; or



(b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

This shall not however prevent the State from making any special provision for women and Children and also shall not prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes.

This shall not also prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions.

Further this shall not also prevent the State from making -

- (a) any special provision for the advancement of any economically weaker sections of citizens other than the classes specified in the constitution; and
- (b) any special provision for the advancement of any economically weaker sections of citizens other than the classified citizens in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions in which in the case of reservation would be in addition to the existing reservations and subject to a maximum of 10% of the total seats in each category.

Economically weaker sections shall be such as may be notified by the State from time to time on the basis of family income and other indicators of economic disadvantage.

The States may make special provision for women and children or for the advancement of any socially and educationally backward classes of citizen or for Schedule Castes or Schedule Tribes. Place of birth and residence however do not imply the same meaning.

As held by the Supreme Court in *D. P. Joshi v. State of M. P. AIR (1955)*, discrimination on the basis of residence does not violate Article 15.

### Equality of Opportunity in Matters of Public Employment

Article 16 of the Constitution provides that there shall be equality of opportunity for all citizens in the matter relating to employment or appointment to any office under the State. No citizen shall, on the grounds of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for or discriminated against any employment or office under the State.

**Exceptions:** There are however certain exceptions.

- (i) The Parliament may however make law in regard to a class or classes of employment or appointment to an office under the Government, local body prescribing requirement as to residence within that State or Union Territory.
- (ii) The State may make provisions for reservation in favour of backward class of citizens which, in the opinion of the State, is not adequately represented in the service under the State.
- (iii) The State may make provisions in the matter of promotion, with consequential seniority, to any class or classes of posts in the services under the State in favour of Schedule Castes or Schedule Tribes, which, in the opinion of the State, is not adequately represented.
- (iv) The State may fill any unfilled vacancies of a year which are reserved for any category to be filled in any succeeding year. Such class of vacancies shall not be considered for determining the ceiling of reservation on total number of vacancies in that year.
- (v) The Article shall not affect the operation of any law which provides that the incumbent to an office of any religious institution shall be a person professing a particular religion or belonging to a particular denomination.

### Abolition of Untouchability

Article 17 states that 'untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of untouchability' shall be an offence punishable in accordance with law. The enforcement of any disability arising out of untouchability shall be an



offence punishable in accordance with law. Protection of Civil Rights Act, 1955 [Previously Untouchability (Offence) Act, 1955] deals with offences relating to untouchability. All offences of untouchability punishable as non-compounding offences shall be punishable upto 3 months.

### Abolition of Titles

Article 18 provides provisions for abolition of titles. Accordingly, no title, not being a military or academic distinction, shall be conferred by the State. No citizen of India shall accept any title from any foreign State. No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State. No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State. As per the Article no titles like 'Sir', 'Raj Bahadur' etc, not being a military or academic distinction, shall be conferred by the State. No citizen holding office of trust under the State shall accept any title from foreign States without the consent of the President. National awards are however not violative of this provision.

## RIGHT TO FREEDOM

### Freedoms Guaranteed by the Constitution

Article 19 of the Constitution of India guarantees to the citizens the following six freedoms:

- (a) Freedom of speech and expression.
- (b) Freedom of assembly peaceably and without arms.
- (c) Freedom of associations and unions.
- (d) Freedom to move freely throughout the territory of India.
- (e) Freedom to reside and settle in any part of the territory of India.
- (f) (deleted)
- (g) Freedom to practice any profession, or to carry on any occupation, trade or business.

[Sub-clause (f) has been deleted vide Constitution (Forty-fourth Amendment) Act, 1978, w.e.f. 20-6-1979.]

The above guarantees are discussed here below:

- (i) **Freedom of speech and expression** - Article 19(1)(a) gives right to the citizens of India freedom of speech and expressions. This right include speaking good or bad or even not to speak.

### Case Laws

**Narmada Bachao Andolan v. Union of India (1999) 8 SCC 150** - Freedom of speech shall, however, not be used as a licence to distort and misrepresent orders of court and present an incomplete and one-sided picture tending to scandalize court and subject it to ridicule.

**Baldev Singh v. State (2002) 3 SCC 667** - Freedom of speech and expression which includes a fair criticism of law and executive action could not be infringed on the ground of remote or speculative ground.

Freedom of speech including freedom of press is not absolute and unlimited. It is subject to restrictions contained in Article 19(2). [AIR 1986 SC 872]

- (ii) **Freedom of Assembly** - Article 19(1)(b) gives right to the citizens of India freedom of assembly peaceably and without arms. The citizens have right to assemble but the State is authorized to impose reasonable restriction in the interest of the sovereignty and integrity of the country and public order.
- (iii) **Freedom of Association** - Article 19(1)(c) gives right to the citizens of India freedom of associations and unions. This includes freedom to hold meeting and take procession without arms. This guarantees to form associations without arms. The govt. has right to put reasonable restrictions in the interest of the sovereignty and integrity of the country and public order and morality.

### Case Laws

Whether right to form association also includes the right not to form association is not clear. In *Tikaranj v. Govt. of U. P.* AIR (1956) SC 676 the Supreme Court held that it does not. But in *Sitharamachary*



*v. Sr. Dy. Inspector of Schools* AIR (1958) AP 78 it was held that making mandatory for all teachers to become member of an association is violative of Article 19(21)(c).

(iv) **Freedom of movement** - Article 19(1)(d) gives right to the citizens of India freedom to move freely throughout the territory of India. This right does not include moving abroad. State may also impose reasonable restriction in movement of the citizens in the interest of public and interest of the Schedule tribes.

(v) **Freedom of residence** - Article 19(1)(e) gives right to the citizens of India freedom to reside and settle in any part of the territory of India. This includes to make business throughout India. The government may also put reasonable restriction.

(vi) **Freedom of trade and commerce** - Article 19(1)(g) gives right to the citizens of India freedom to practice any profession, or to carry on any occupation, trade or business.

### Case Law

In *Chintaman Rao v. The State of Madhya Pradesh*, AIR (1951) SC 118 it was held a total prohibition against carrying on business in bidis during the agricultural season was unreasonable and void under Article 19(1)(g) of the Constitution of India.

### Protection against Conviction

Article 20 of the Constitution provides protection against conviction. Accordingly, no person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence. Further, no person shall be prosecuted and punished for the same offence more than once and no person accused of any offence shall be compelled to be a witness against himself.

**Ex post facto laws** - No person shall be convicted of any offence except for violation of any law. No person shall be subject to a penalty greater than that stated under the law at the time of commission of the offence. A person can only be convicted on the basis of law in force at the time of commission of the offence. No act can be changed into an offence with retrospective effect. Enhanced punishment inserted in the Act for any

offence cannot be applied to an offence committed before insertion of the enhanced punishment.

**Double jeopardy** - Double jeopardy means punishment for more than once for the same offence. No person shall be prosecuted and punished for the same offence more than once. This is based on the maxim 'nemo debet bis vexari' which means that a man shall not be penalized for the same offence for more than once.

**Prohibition against self-incrimination** - No person accused of any offence shall be compelled to be witness against himself.

### Protection of Life and Personal Liberty

Article 21 provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. Life means, as observed by the Supreme Court, 'the right to live with human dignity and the same does not connote continued drudgery'. Personal liberty does not mean merely the liberty of the body but more than that. Procedure established by law must be right, just, fair, reasonable, realistic and not arbitrary, fanciful or oppressive. It must follow the principle of natural justice.

### Case Laws

- Even the State is obliged to protect the life and personal liberty of non-citizens as observed in *National Human Rights Commission v. State of Arunachal Pradesh* (1996) 1 SCC 742.
- Right to water is also right to life as observed in *State of Karnataka v. State of A.P.* (2000) 9 SCC 572.
- The expression personal liberty is of the widest amplitude and cannot be restricted as observed in *Narindent v. Union of India*, (2002) 2 SCC 210.
- Deprivation of life or personal liberty must be according to procedure, just, fair, reasonable and pragmatic. (*Ahmedabad Municipal Corpn. V. Nawab Khan Gulab Khan*, AIR 1997 SC 152)
- In *A. K. Gopalan v. State of Madras*, it was held that there must be a law and a procedure and the executive should follow the procedure to deprive a person of his personal liberty. It extends to both substantive and procedural law.



- In *Maneka Gandhi v. Union of India*, it was observed that a law prescribing a procedure for depriving a person of personal liberty has to meet the requirements of Article 14 and 19.

### Right to Education

Article 21A of the Constitution provides that the State shall provide free and compulsory education to all children of the age of six to fourteen years. This Article was inserted by the eighty-sixth amendment to the Constitution in 2002. Before this, the constitution provided as a directive principle to provide compulsory education for all children upto the age of 14 years. After announcement of the National Policy on education in 1986, the task of providing free and compulsory education to all children came to lime light. After long deliberation, the amendment came to provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State might by law determine.

### Protection against Arrest and Detention in certain Cases

Article 22 of the Constitution provides that no person who is arrested shall be detained without being informed of the grounds for such arrest. He shall not be denied the right to consult and to be defended by a legal practitioner of his choice. Every person who is arrested and detained in custody shall be produced before the nearest magistrate within 24 hours of such arrest excluding time necessary for journey from the place of arrest to the court.

These provisions shall not apply to (a) any person who for the time being is an enemy alien; or (b) who is arrested or detained under any law providing for preventive detention.

Detention of a person without trial being draconian in nature.

### RIGHT AGAINST EXPLOITATION

The Constitution of India provides the following provisions as regards to right against exploitation.

### Prohibition of Traffic in Human Beings and Forced Labour

Trafficking in human being means to deal man and woman like goods such as to sell or let or otherwise dispose them off. Article 23 of the Constitution prohibits traffic in human beings and beggar and other similar forms of forced labour. Any contravention of this provision shall be an offence punishable in accordance with law.

### Prohibition of Employment of Children

Article 24 of the Constitution provides that no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment. Various laws like the Factories Act, 1948, the Employment of Children Act, 1938, the Child Labour (Prohibition and Regulation) Act, 1986 are some of the legislations which protect employment of child labour. The Supreme Court has given detailed guidelines for employment of child labour in *M. C. Mehta case*.

### RIGHT TO FREEDOM OF RELIGION

The Constitution of India provides the following provisions as regards to freedom of religion.

#### Freedom of Conscience and Free Profession, Practice and Propagation of Religion

Article 25 of the Constitution provides that subject to public order, morality and health and other provisions, all persons are equally entitled to freedom of conscience and the right to freely profess, practise and propagate religion. However, State can make law regulating any economic, financial, political or other secular activity associated with religious practice and providing for social welfare and reform or throwing open of Hindu religious institutions to all Hindus. The reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion. The wearing of Kirpans shall be deemed to be included in the profession of the Sikh religion.

#### Case Law

This Article applies to all persons in the country in addition to the Citizens of the country as observed in *Ratilal v. State of Bombay*, (1954) SCR



105. The State may impose compulsory service for public purpose. In imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

### **Rights Provided to Every Religious Denomination**

Article 26 of the Constitution provides that subject to public order, morality and health, every religious denomination shall have the right to the following:

- (i) To own and acquire movable and immovable property.
- (ii) To establish and maintain institutions for religious and charitable purposes.
- (iii) To manage its own affairs in matter of religion.
- (iv) To administer its property in accordance with law.

### **Freedom as to Payment of Taxes for Promotion of any Particular Religion**

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

### **Freedom as to Attendance in Religious Instruction or Religious Worship**

Article 28 of the Constitution provides that no religious instruction shall be provided in any educational institution wholly maintained out of State fund. This shall not apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution. No person attending any educational institution recognized by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent.

## **CULTURAL AND EDUCATIONAL RIGHTS**

The Constitution of India provides the following provisions as regards to cultural and educational rights.

### **Protection of Interest of Minorities**

Article 29 of the Constitution provides that the citizens residing in the territory of India having a distinct language, script or culture of its own shall have the right to conserve the same. No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on the grounds only of religion, race, caste, language or any of them.

### **Right to Minorities to Establish and Administer Educational Institution**

Article 30 of the Constitution authorized the minorities, whether based on religion or language, to have the right to establish and administer educational institutions of their choice. In making any law providing for the compulsory acquisition of any property of an educational institution established and administered by a minority, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property would not restrict or abrogate the right guaranteed under that clause. The State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

### **Case Laws**

In *D. A. V. College v. State of Punjab*, AIR (1971) SC 1737 the Supreme Court held that any community having less than 50 % of population of the State in a State is the minority in that State.

In *T. M. A. Pai Foundation v. State of Karnataka* (2002) 8SCC 481 the Supreme Court held that the right of minority is not absolute and regulatory measures can be made.



## RIGHT TO CONSTITUTIONAL REMEDIES

### Remedies for Enforcement of Fundamental Rights (Writs)

Article 32 of the Constitution provides that the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

Without prejudice to the above powers conferred on the Supreme Court, Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court.

The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

Article 226 also gives such power to the High Courts.

### Power of Parliament to Modify the Fundamental Rights Applicable to Forces

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

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

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

### Power of the Legislation to give effect to the provisions for Fundamental Rights

Article 35 provides that notwithstanding anything in this Constitution,—

- (a) Parliament shall have, and the Legislature of a State shall not have, power to make laws—
  - (i) with respect to any of the matters which under clause (3) of article 16, clause (3) of article 32, article 33 and article 34 may be provided for by law made by Parliament; and
  - (ii) for prescribing punishment for those acts which are declared to be offences under this Part; and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub-clause (ii);

any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub-clause (i) of clause (a) or providing for punishment for any act referred to in sub-clause (ii) of that clause shall, subject to the terms thereof and to any adaptations and modifications that may be made therein under article 372, continue in force until altered or repealed or amended by Parliament.

### 'Ubi jus ibi remedium'

This Latin expression *Ubi jus ibi remedium* means where there is a right there is a remedy. A right without a remedy is useless. The fundamental rights guaranteed by the Constitution are protected by adequate remedial measures. No fundamental right is absolute. Reasonable restriction can be imposed in the interest of the State as was observed in the *People's Union for Civil Liberties v. Union of India* (2004) 2 SCC 476. The Constitution of India provides such remedial measures to all citizen of violation of any fundamental rights. Such remedies are available in the nature of (a) Habeas corpus; (b) Mandamus; (c) Prohibition; (d) Quo warranto; and (e) Certiorari. Article 32 of the Constitution gives such fundamental rights to a citizen to move to Supreme Court and Article 226 gives such rights to move to the High Court for any violation of fundamental rights. Article 33, 34 and 35 give supplementary rights for enforcement of the fundamental rights.



**Writs**

The Supreme Court or the High Courts have the power to issue writs under Article 32 and Article 226 of the Constitution of India respectively. These are discussed here.

**Article 32. Remedies for Enforcement of Fundamental Rights**

- (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.
- (2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.
- (3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).
- (4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

**Article 226. Power of High Courts to Issue Writs**

- (1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.
- (2) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

- (3) Where any party against whom an interim order, whether by way of injunction or stay or in any other manner, is made on, or in any proceedings relating to, a petition under clause (1), without—
  - (a) furnishing to such party copies of such petition and all documents in support of the plea for such interim order; and
  - (b) giving such party an opportunity of being heard, makes an application to the High Court for the vacation of such order and furnishes a copy of such application to the party in whose favour such order has been made or the counsel of such party, the High Court shall dispose of the application within a period of two weeks from the date on which it is received or from the date on which the copy of such application is so furnished, whichever is later, or where the High Court is closed on the last day of that period, before the expiry of the next day afterwards on which the High Court is open; and if the application is not so disposed of, the interim order shall, on the expiry of that period, or, as the case may be, the expiry of the said next day, stand vacated.
- (4) The power conferred on a High Court by this article shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.

**Different Types of Writs**

Sl. No.	Writ	Meaning	Nature	Origin
1.	<b>Habeas Corpus</b>	To have the body of	The words 'habeas corpus' means 'to have a body'. The writ of habeas corpus is the nature of an order calling upon the person who has detained another to produce the later before the Court in order to let the Court know the ground of his detention and to set	Latin



him free if there is no legal justification. This is a very powerful safeguard to the subject against arbitrary acts of private individuals and also executives.

The purposes for which the writs of *habeas corpus* are available are as under-

- For enforcement of fundamental rights;
- Where the order of imprisonment or detention is *ultra vires* the statutes which authorizes such imprisonment or detention.

The writ of *habeas corpus* are not issued under the following circumstances-

- (i) Where the person against whom the writ is issued is not within the jurisdiction of the Court.
- (ii) To secure release of a person imprisoned on a criminal charge.
- (iii) To interfere with the proceeding for contempt by a Court of record or by Parliament

A writ of *habeas corpus*

is used to compel a person who has detained another to produce such another before the court, so that the court can know the grounds on which the person has been confined, and to release the person if there is no legal justification for that person's confinement. A writ for *habeas corpus* would become infructuous if the detenu is produced before the magistrate.

2.

**Mandamus**

Command

*Mandamus* means 'command'. It is a writ under which the Court commands a person to whom it is addressed to perform some public or quasi-public duty which he has refused to perform and the performance of which cannot be enforced by any other legal remedy. The writ is also available against lower courts or other judicial bodies when they have refused to exercise their jurisdiction.

Latin

The purposes for which the writ of *mandamus* are available are as under-

- For enforcement of fundamental rights.



		<ul style="list-style-type: none"> <li>To enforce the performance of a statutory duty by any public officer, to compel a court or a judicial tribunal to exercise its jurisdiction etc.</li> <li>To direct any public official or Government not to enforce any law which is unconstitutional.</li> </ul> <p>The writ of mandamus are not issued under the following circumstances-</p> <p>(i) Against the President, or the Governors of States for exercise of their official duties.</p> <p>(ii) Against private individuals except where the State is in collusion with such private party.</p> <p>The word 'mandamus' translates literally into 'command'. This writ is issued to provide for remedies for the enforcement of rights where a fundamental right is infringed by a statute, statutory order, or a 'non-statutory' executive order. Writ of Mandamus can be</p>
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			<p>issued against any public authority in certain cases:</p> <p>(i) misuse of discretionary power;</p> <p>(ii) exceeding its scope of power;</p> <p>(iii) ignoring relevant factors;</p> <p>(iv) deciding on irrelevant factors;</p> <p>(v) acting with mala fide intentions.</p>	
3.	<b>Prohibi on</b>	To forbid	<p>This is a writ issued by the Supreme Court to an inferior court, forbidding the inferior court from continuing any proceedings which are in excess the inferior court's jurisdiction, or over which the inferior court does not have any jurisdiction at all. The writ of <i>prohibition</i> is only available against judicial or quasi-judicial authorities.</p>	English
4.	<b>Quo Warranto</b>	By what authority	<p>The Supreme Court may use this writ to inquire into the legality of a claim which a person asserts to a public office, and to remove such a person from the public office if the claim is not well-founded.</p>	Latin



			This is a procedure by which the Court enquires into the legality of the claim which a party asserts to a public office and to oust him. For this purpose, the office must be a public office and is created by a statute or by the Constitution. There must be a violation of the Constitution or the statute in appointing such person to that office. The basic thing is that the public has an interest to see that an unlawful claimant does not usurp a public office.	
5.	<b>Certiorari</b>	To be Informed or to be certified	The writ of <i>certiorari</i> is similar to the writ of <i>prohibition</i> , in that it is issued to a judicial or quasi-judicial authority acting in excess of, or without, jurisdiction. The difference, however, is that the writ of <i>certiorari</i> is used to quash an order of such an authority that is in excess of, or without, jurisdiction, whereas <i>prohibition</i> is used to prevent the authority from issuing such an order or decision.	Latin

			Writ of <i>certiorari</i> can be issued by the Supreme Court and High Court against any inferior court, tribunal, or quasi-judicial body on certain grounds: (i) exceeding the jurisdictional limit. (ii) violating the principle of natural justice. (iii) passing a wrongful order or judgement. (iv) overlooking the procedure established by law. This writ may not, however, be issued by a bench of the Supreme Court to quash a judicial order passed by another bench of the Supreme Court, or a High Court. <b>[A. R. Antulay vs. R. S. Nayak, AIR (1988) SC 1531]</b>	
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**Difference between Certiorari and Prohibition**

Sl. No.	Nature	Certiorari	Prohibition
1.	Purpose	Writ of <i>certiorari</i> is issued to quash an order wrongfully passed by an inferior court	Writ of <i>prohibition</i> is issued to stop the court from proceeding in the case.



2.	Time of issue	Writ of prohibition is issued while the proceedings are pending.	Writ of certiorari is issued when an order is passed.
3.	Nature	Writ of Certiorari is rather used as a cure by quashing a decision already given by the inferior court.	The object of the Writ of Prohibition is prevention rather than cure.
4.	Against whom	While Certiorari lies against a public authority which acts purely in an executive or administrative capacity or to a legislative body along with judicial and quasi-judicial bodies.	Prohibition lies only against judicial or quasi-judicial bodies.

### Difference between Writ Jurisdiction of Supreme Court (u/a 32) and High Courts (u/a 226)

Sl. No.	Nature	Supreme Court	High Court
1.	Purpose	Article 32 is a fundamental right.	Article 226 is a constitutional right.
2.	Discretion	Since, Article 32 is a fundamental right, the same cannot be refused by the Supreme Court.	Article 226 confers Discretionary power to the High Court which means it is at the discretion of the High Court to issue a writ or not.
3.	Suspension	Article 32 can be suspended if an emergency has been declared by the President.	Article 226 cannot be suspended even at the time of emergency.
4.	Jurisdiction	Article 32 empowers the Supreme Court to issue writ all over	Article 226 empowers the High Court to issue a writ in its own local jurisdiction

		India. Therefore, the Supreme Court has broader territorial jurisdiction.	only. Therefore, High Courts have narrower territorial jurisdiction as compared to the Supreme Court.
5.	Scope	Article 32 has a narrow scope as it is applicable only in case of violation of a fundamental right.	Article 226 has a broader scope as it is applicable not only in the case of violation of a fundamental right but also of a legal right

### Right to Privacy vis-a-vis Fundamental Right

A nine-judge bench of the Supreme Court in the case of *Puttuswamy v. Union of India* has declared that the right to privacy is a fundamental right protected under Part III of the Constitution of India. While primarily focused on the individual's right against the State for violations of their privacy, this landmark judgement will have repercussions across both State and non-State actors and will likely result in the enactment of a comprehensive law on privacy.

The judgement was pronounced in response to a reference made in connection with the legal challenge to India's national identity project 'Aadhaar' during which the Advocate General of India argued that the Indian Constitution does not include within it a fundamental right to privacy. His arguments were based on two cases decided by the Supreme Court: (i) *MP Sharma v. Satish Chandra* decided by an eight judge bench in 1954 and (ii) *Kharak Singh v. State of Uttar Pradesh*, decided by six judges in 1962. Both cases had held, in different circumstances, that the Constitution of India does not specifically protect the right to privacy.

The judgement was unanimous with all nine judges concurring with the final order. However, six judges - Justice Chandrachud, Justice Nariman, Justice Chimalashwar, Justice Kaul, Justice Sapre and Justice Bobde, wrote separate opinions covering a wide range of issues. The key points of the judgement are summarized below:

- (a) **Right to Privacy - A Fundamental Right** - The Supreme Court confirmed that the right to privacy is a fundamental right that does not need to be separately articulated but can be derived from Articles 14, 19



and 21 of the Constitution of India. It is a fundamental and inalienable right and attaches to the person covering all information about that person and the choices that he/ she makes. It protects an individual from the scrutiny of the State in their home, of their movements and over their reproductive choices, choice of partners, food habits, etc.

(b) **Not an Absolute Right Subject to Reasonable Restrictions** - The Supreme Court was at pains to clarify that the

fundamental right to privacy is not absolute and will always be subject to reasonable restrictions. It held that the State can impose restrictions on the right to privacy to protect legitimate State interests but it can only do so by following the three-pronged test summarized below:

- Existence of a law that justifies an encroachment on privacy;
- A legitimate State aim or need that ensures that the nature or the content of this law falls within the zone of reasonableness and operates to guard against arbitrary State action; and
- The means adopted by the State are proportional to the objects and needs sought to be fulfilled by the law.

Consequently, all State action that could have an impact on privacy will now have to be measured against this three-fold test. This is likely to have an impact on several ongoing projects including most importantly, the Aadhaar identity project.

(c) **Other Incidental Implications** - There are several additional implications of this judgement on matters incidental to the principal issue decided by the Court:

- By expressly recognising an individual's right to privacy regarding his sexual choices, the judgement is likely to have an impact on the petition pending before the Supreme Court on the decriminalisation of homosexuality in India.
- To the extent that the judgement has stated that the State cannot interfere in the food choices of an individual it will have an impact on the various cases protesting the ban on beef imposed by certain States.
- The judgement has also made several observations on the complex relationship between personal privacy and big data, particularly in the context of how the judicious use of these

technologies can result in the State achieving its legitimate interests with greater efficiencies.

- It has also recognized the impact that non-State actors can have on personal privacy particularly in the context of informational privacy on the Internet. While fundamental rights are ordinarily only enforced against actions of the State, given the broad language of the judgement and the extent to which informational privacy has been referred to in the judgement, there is concern amongst certain experts that these principles will extend to the private sector as well.
- Recognising the complexity of all these issues, the Court highlighted the need to enact a comprehensive legislation on privacy and noted that the government has already appointed a committee under the chairmanship of retired Justice BN Srikrishna to look into these matters. Given this strong direction from the Supreme Court, it is likely that the Government of India will double down on its efforts to enact a comprehensive privacy legislation.

### Amenability of the Fundamental Rights

The Constitution gives powers to the Parliament to amend the Constitution. Article 368 empowers the Parliament to amend the Constitution in accordance with the procedure laid down in the said Article. Earlier it was observed that no part of the Constitution was unamendable and Parliament may amend any provision in accordance with Article 368. But in *Golak Nath's* case the Supreme Court held that no authority including Parliament exercising the amending power under Article 368, was competent to amend the Fundamental Rights provided in the Constitution. Article 368 was amended by the 24<sup>th</sup> Amendment Act, 1971 making it clear that Fundamental Rights can also be amended.

### Case Laws

The Supreme Court in majority decision in *Kesavananda Bharati .v. State of Kerala AIR (1973) SC 1461* upheld that the Parliament is competent to amend the Fundamental Rights but the basic structure cannot be changed. The roots of the Basic Structure doctrine can be



traced to the arguments of eminent Supreme Court lawyer, M. K. Nambyar in the very first Fundamental Rights case, *A. K. Gopalan v. Union of India* in 1950. It kept appearing in limited forms in other landmark Fundamental Rights cases but was fully enunciated by the Supreme Court only in *Kesavananda Bharati* case. The Supreme Court held that there were some parts of the Constitution which constitute the very heart of the existence of the Indian State and Polity, such as democracy, judicial review of executive action, separation of powers, etc. This was based on the fact that some parts of the Constitution could not be amended as easily as others and this, meant that the framers originally intended for some parts to be more vital to the existence of the Indian State than others. The doctrine was extended, again by a majority to state that Fundamental Rights were included in this Basic Structure. Fundamental Rights could not be amended recklessly.

In *Indiar Gandhi v. Raj Narain* AIR (1975) SC 2299 the Supreme Court held that democracy is an essential feature framing the basic structure of the Constitution. Exclusion of judicial review of election disputes damaged the basic structure of the Constitution.

In *People's Union for Civil Liberties v. Union of India* (2004) 2 SCC476 it was observed that no fundamental right is absolute and reasonable restrictions can be imposed in the interest of the State.

The fundamental rights listed in the constitution are confined to the Indian citizens. These have not extended to foreigners. There are reasonable restrictions, which means they are not absolute and depend on the conditions of national security, public influence, and relations with other countries. These rights include certain restrictions and limitations, which are briefed as follows:

- 1. Social And Economic Rights Are Not Included** - The fundamental rights do not include important social and economic rights that are also important for individuals to lead a quality life. The right to social security, the right to labor, and the right to employment are not considered fundamental rights. Other countries like China provide such rights.
- 2. Lack of Clarity** - Many experts have found that certain terms and phrases used to define the various fundamental rights lack clarity as their

explanation is not given in the constitution of India. This creates some confusion or vagueness in understanding the scope of these rights.

- 3. Subject to Changes or Abolishment** - The government of India has the authority to change, curtail, or abolish any fundamental rights. There are apprehensions and criticism against this because of the political motivations that may enjoy majority support in the parliament.
- 4. Suspension During Emergencies** - Fundamental rights are subject to suspension during the operation of a national emergency (except for the fundamental rights defined under Articles 20 and 21). Citizens of the country will be deprived of their fundamental rights if a national emergency is declared.
- 5. Preventive Detention** - Provisions for the concept of preventive detention where the state can impose reasonable restrictions on fundamental rights are criticized in many forums. This is considered critical as it undermines the value and significance of fundamental rights by conferring discretionary power on the state.
- 6. Expensive Judicial Process** - Ordinary people often don't have the experience or financial means to go through the judicial processes to have their fundamental rights enforced by the law. The judicial process is also expensive and complex and sometimes beyond the reach of ordinary people.
- 7. Restriction of Laws** - The parliament can restrict the application of fundamental rights to the members of armed forces, paramilitary forces, police forces, and intelligence agencies.

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## RULE OF LAW

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### Rule of Law

Rule of law means that no one is above the law and that everyone, regardless of their position or status, is subject to the authority of ordinary courts of law. The concept of the Rule of Law is one of the most fundamental principles of the British Constitution. It emphasizes that the law is supreme, and so the government must act in accordance with and



within the bounds of the law. The principle is well-established in all legal systems around the world, including the USA's and India's constitutions.

Around 350 BC, Greek philosophers such as Plato and Aristotle addressed the concept of the rule of law. The origins of the Rule of Law may be traced back to the 13<sup>th</sup> century A.D. Sir Edward Coke, the Chief Justice of England during the reign of King James I, was the first to criticise the maxims of **Divine Concept** (Divine Authority of God). He was certain that the King should be subject to the Rule of law as well. Later **A. V. Dicey** refined the Rule of Law idea in his work 'Introduction to the Law of Constitution (1885)'. According to Dicey, the Rule of Law states that no one is punished or may be legitimately made to suffer in body or property except for a clear violation of the law, and no one is above the law. Thus, the term **Rule of Law** refers to the supremacy of law over government.

In his work Dicey stated three implications of the rule of law philosophy:

- (i) **Absence of arbitrary authority**, i.e. no one is penalised until he violates the law
- (ii) **Equality before the law** entails the equal submission of all citizens (rich or poor, high or low, official or unofficial) to the ordinary law of the state as administered by ordinary law courts.
- (iii) **Individual rights take precedence**, which means that the constitution is the consequence of individual rights as established and enforced by courts of law, rather than the constitution being the source of individual rights.

### Rule of law and Indian Constitution

The Indian Constitution which is the law of the land is supreme in India. The Preamble of Indian Constitution expressly states the principles of the Rule of law via ideals of **Justice, Sovereignty and Equality**. They are unmistakable evidence of a fair administration in which there is no disparity among the population regardless of their social status.

Part III of the Constitution (Fundamental Rights) expands on these ideas and makes them enforceable. Furthermore, Article 13(1) states that every law made by the legislature must be consistent with the provisions of the Constitution. If a bill passed by the legislature violates the provisions of the Constitution, it will be deemed void. As a result, every new legislation must

comply with the criteria of the Constitution. It is frequently stated that planning and welfare systems fundamentally attacks on the rule of law since they impact individual liberties and liberty in a variety of ways. However, the rule of law plays an important role by promoting fair play and increased responsibility of the government.

Equality and equal treatment are essential to the Rule of law. Article 14 of the Indian Constitution provides the concept of equality before the law and equal legal protection.

The authority of judicial review in order to avoid any *ultra vires* law and safeguard the 'Rule of law'.

The rule of law is not directly stated in the Indian Constitution, but it has been assertively declared as an integral aspect of the Constitution by the Supreme Court in various decisions.

### Case Laws

**A.K Gopalan v. State** - The Supreme Court was asked to rule on whether there is any rule of law in India other than Article 21 of the Constitution. The majority bench in the case rendered a negative decision, but Justice Khanna issued a dissenting opinion. He noticed that the Rule of Law is acknowledged in all civilised societies and is seen as a symbol of freedom. He went on to say that the Rule of Law is the only way to preserve the balance between individual liberty and public order. As a result, he believed that even if there was no such Article as Article 21 in the Indian Constitution, the state had no jurisdiction to deprive a person of his life and liberty without the permission of the law.

**Indra Nehru Gandhi v. Raj Narayan** - In this case, the 39<sup>th</sup> amendment to the Constitution was challenged, rendering the election of the President, Prime Minister, Vice-President, and Speaker of the Lok Sabha illegitimate in court. Chief Justice Ray ruled that the amendment was invalid because it violated the core framework of the Constitution, namely the Rule of Law. Because the rule of law is opposed to arbitrariness, parliament does not have the authority to make a retrospective statute confirming an illegitimate election. Such abuse of authority runs counter to the fundamental ideals of the rule of law.



**Yusuf Khan v. Manohar Joshi** - The Supreme Court ruled that the constitution imposes a duty on the State to protect and preserve peace and order, as well as to ensure that no act of violence exceeds the mandate granted by the rule of law.

### Rule of Law: Exceptions

The concept of the rule of law has however some exceptions. Rule of law is not an accurate representation of any condition of circumstances, but it is a complicated idea that gets even more complex when it comes to reality. For example, without evidence a criminal is set free by law, even if he has committed a crime.

'Equality of law' does not have the literal meaning that all individuals have the same rights. For example, a District Magistrate has the authority to issue legal verdicts, but a private individual does not.

The rule of law does not exclude some kinds of individuals from being subject to special regulations. For example, the President or a Governor of a State shall be immune from having any criminal proceedings instituted against them.

### All laws in force in India shall be void if they are inconsistent with the provisions of the Constitution

Article 13 of the Constitution provides rules for interpretation of laws with regard to fundamental rights. The Article provides that all laws in force in India shall be void if they are inconsistent with the provisions of the Constitution. The State shall not make any law which takes away or abridges the fundamental rights. Any law made in contravention of the provisions of the Constitution shall be void.

Various doctrines have been evolved after judicial review of the Article. These are discussed here.

- **Doctrine of severability** - There are certain situations where it is found that the valid and invalid portion of any law cannot be separated from one another. In such case the valid portion will be valid if it expresses the intention of the legislatures. This is called the doctrine of severability. In *A. K. Gopalan v. State of Madras* AIR (1950) SC 27 the Supreme Court applied this doctrine.

- **Doctrine of eclipse** - As per Article 13 all laws in force in India before the commencement of the Constitution shall be void if they are inconsistent with the provisions of the Constitution. Such law becomes inoperative on commencement of the Constitution but does not become dead. It is overshadowed by the fundamental rights. The law remains a valid law in order to determine any question of law incurred before commencement of the Constitution. Such law only becomes eclipsed to the extent it comes under the shadow of the fundamental rights. The doctrine was applied in *Bhikaji Narayan Dhakras v. State of Madhya Pradesh* AIR (1955) SC 781.
- **Doctrine of waiver** - The fundamental rights cannot be waived by any person. The Supreme Court shall see that the fundamental rights are enforced even if any one might have waived it. In *Bhadeshwar Nath v. I. T. Commissioner*, AIR (1959) SC 49 it was held that the fundamental rights cannot be waived. The doctrine of waiver is not applicable to suppress the fundamental rights.

### Riders for Saving of Laws Providing for Acquisition of Estates

Article 31A of the constitution provides that notwithstanding anything contained in article 13, no law providing for -

- the acquisition by the State of any estate or of any rights therein or the extinguishment or modification of any such rights, or
- the taking over of the management of any property by the State for a limited period either in the public interest or in order to secure the proper management of the property, or
- the amalgamation of two or more corporations either in the public interest or in order to secure the proper management of any of the corporations, or
- the extinguishment or modification of any rights of managing agents, secretaries and treasurers, managing directors, directors or managers of corporations, or of any voting rights of shareholders thereof, or
- the extinguishment or modification of any rights accruing by virtue of any agreement, lease or licence for the purpose of searching for, or winning, any mineral or mineral oil, or the premature termination or



cancellation of any such agreement, lease or licence, shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19.

Where such law is a law made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

Where any law makes any provision for the acquisition by the State of any estate and where any land comprised therein is held by a person under his personal cultivation, it shall not be lawful for the State to acquire any portion of such land as is within the ceiling limit applicable to him under any law for the time being in force or any building or structure standing thereon or appurtenant thereto, unless the law relating to the acquisition of such land, building or structure, provides for payment of compensation at a rate which shall not be less than the market value thereof.

'Estate' shall, in relation to any local area, have the same meaning as that expression or its local equivalent has in the existing law relating to land tenures in force in that area and shall also include -

- (i) any *jagir*, *inam* or *muafi* or other similar grant and in the States of Tamil Nadu and Kerala, any *janmam* right;
- (ii) any land held under ryotwari settlement;
- (iii) any land held or let for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, land for pasture or sites of buildings and other structures occupied by cultivators of land, agricultural labourers and village artisans;

'Rights', in relation to an estate, shall include any rights vesting in a proprietor, sub-proprietor, under-proprietor, tenure-holder, *raiyat*, *under-raiyat* or other intermediary and any rights or privileges in respect of land revenue.

**Action of the State and rule of law.**— It is trite law that every action of the State must be informed by reasons and should be free from arbitrariness which is the very essence of rule of law and its bare minimum requirement. Any decision taken in an arbitrary manner contradicts the principle of legitimate expectation relating to procedural fairness in decision making. Such action also amounts to denial of administrative fairness, which is the constitutional anathema.

Every action of the State or its instrumentalities should not only be fair, legitimate and above-board, but should be without any affection or aversion, impression of bias and favouritism.

"In the context, it is important to emphasize that absence of arbitrary power is the first essence of the rule of law, upon which our whole Constitutional System is based. In a system governed by rule of law, discretion, when conferred upon Executive Authorities, must be confined within the clearly defined limits. Rule of law, from this point of view, means that the decision should be made by the application of known principle and rules and in general such decision should be predictable and the citizen should know where he is, if a decision is taken without any principle or without any rule, it is unpredictable and such a decision is antithesis to the decision taken in accordance with the rule of law."

### Saving of Laws Giving Effect to Certain Directive Principles

Article 31C provides that notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing all or any of the principles laid down in Part IV shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by article 14 or article 19. No law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy. Where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent.

### Validation of certain Acts and Regulations

Article 31B provides that without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or Tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force.



## SEPARATION OF POWERS

### Concept

The concept of separation of power was first seen in the works of Aristotle, in the 4<sup>th</sup> century BCE, wherein he described the three agencies of the government as General Assembly, Public Officials and Judiciary. In the Ancient Roman Republic too, a similar concept was followed. The purpose of the separation of power is to prevent abuse of power by a single person or a group of individuals. It will guard the society against the arbitrary, irrational and tyrannical powers of the state, safeguard freedom for all and allocate each function to the suitable organs of the state for effective discharge of their respective duties.

In modern times, it was 18<sup>th</sup> century French philosopher Montesquieu who made the doctrine a highly systematic and scientific one, in his book *De l'esprit des lois* (The Spirit of Laws). His work is based on an understanding of the English system which was showing a propensity towards a greater distinction between the three organs of government. In the strictest sense, the doctrine of separation of powers is very rigid. This became a doctrine in law.

### Montesquieu's Doctrine of Separation of Powers

The theory of doctrine of separation of power was first propounded by the French philosopher **Baron De Montesquieu** in the 18<sup>th</sup> century. In 1747 he published his book '*Espirit des Louis*' (The spirit of the laws). He found that if the power is concentrated in a single person's hand or a group of people then it results in a tyrannical form of government. As per Montesquieu, liberty cannot be protected unless and until there is a separation of power. With a view to checking the arbitrariness of the government he suggested that in the power of governance there should be clear cut division of power between the three organs of the state i.e. executive, legislature and the judiciary.

Montesquieu explained the doctrine in his own words: '*When the legislature and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty if the judicial power is not separate. Form the legislature and executive power. Where it joined with the legislative power, the life and liberty of the subject would be exposed to arbitrary control. For the judge would then be the legislator where it*

*joined with the executive power, the judge might behave with violence and oppression. There would be an end of everything where the same man or the same body to exercise these three powers.'*

He observed the oppressive and despotic rule of French King Louis XIV who enjoyed the absolute powers of State, and the prevailing dictum was, 'I am the State'. Liberty of the people was suppressed under the King. The doctrine of the separation of powers emerged as a distinct doctrine in his book.

### Basic Features of Montesquieu's Doctrine

The following are the basic features of Montesquieu's Doctrine:

- (i) *Division of powers* - Division of power is necessary in between the legislative, the executive and the judicial system.
- (ii) *Limitation of power* - Unless limitations are imposed on its exercise, any authority to abuse powers.
- (iii) *Independent work* - The different departments must exercise their powers with their respective personnel.
- (iv) *Safeguarding the liberty of people* - Each organ of the Government shall have the obligation to act within its own sphere and not beyond it for safeguarding the liberty of people.
- (v) *Check and balance* - If the authority acts beyond the permitted limits, it would be checked by the other organs.

Each department must exercise its powers with its own personnel. When the legislative and executive powers are united in the same persons, there cannot be liberty. Similarly, where judicial powers are combined with the legislative, the life and liberty of the subjects would be exposed to arbitrary control, as the Judge would be the legislator and where the judicial power is combined with the executive power, the Judge might behave in a violent and oppressive manner.

### Indian Concept of Separation of Power

In India, a separation of functions rather than of powers is followed. Unlike in the US, in India, the concept of separation of powers is not adhered to strictly. However, a system of checks and balances have been put in place in such a manner that the judiciary has the power to strike down any unconstitutional laws passed by the legislature. There is a risk of poor



management, corruption, nepotism, and the misuse of power when the government's power is concentrated in a single hand. Therefore, the separation of powers is necessary to prevent authoritarian rule in the nation, foster efficient government, stop the legislature from passing arbitrary or unconstitutional legislation, and protect individual liberty.

### Separation of powers — Doctrine of —

There are three organs of the State — Legislature, Executive and Judiciary. Of course, the Indian Constitution has not indeed recognized the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another — the three organs of democracy under our Constitution. Although the doctrine of separation of powers has not been recognized under the Constitution in its absolute rigidity but the Constitution makers have meticulously defined the functions of various organs of the State. Legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another. The Constitution trusts to the judgment of these organs to function and exercise their discretion by strictly following the procedure prescribed therein. The functioning of democracy depends upon the strength and independence of each of its organs. Legislature and executive, the two facets of people's will, they have all the powers including that of finance. Judiciary has no power over sword or the purse nonetheless it has power to ensure that the aforesaid two main organs of State function within the constitutional limits. It is the sentinel of democracy. Judicial review is a powerful weapon to restrain unconstitutional exercise of power by the legislature and executive. The expanding horizon of judicial review has taken in its fold the concept of social and economic justice. While exercise of powers by the legislature and executive is subject to judicial restraint, the only check on our own exercise of power is the self-imposed discipline of judicial restraint."

### Evaluation of the Doctrine of Separation of Powers

The doctrine of separation of power is accepted by most jurists across the world and also by some countries but yet there are exceptions to its acceptance which are going to be discussed here. To name a few USA,

Britain and India are some examples which are discussed in this project and also how the practice is different in each of these nations.

The doctrine of separation of powers can be better understood in two forms.

- (i) It implies that concentration of powers in the same person or same body of persons should be avoided.
- (ii) It implies division of those powers which essentially and primarily belong to one organ and not the other.

Emphasis must be laid on modification of the concentration of powers. The doctrine can be better evaluated after studying its key merits or demerits.

### Significance of the Doctrine

The doctrine of separation of power ensures that autocracy does not creep into a democratic system. It protects citizens from arbitrary rules. The importance of the doctrine of separation of powers can be summed up as follows:

- Keeps away autocracy
- Safeguards individual liberty
- Helps create an efficient administration
- Judiciary's independence is maintained
- Prevents the legislature from enacting arbitrary or unconstitutional laws.

### Organs of Government

Generally, there are three organs of a government. These are discussed here.

- (i) **Legislature** - The chief function of the legislature is to enact laws. It is the basis for the functioning of the other two organs, the executive and the judiciary. It is also sometimes accorded the first place among the three organs because until and unless laws are enacted, there can be no implementation and application of laws.
- (ii) **Executive** - The executive is the organ that implements the laws enacted by the legislature and enforces the will of the state. It is the administrative head of the government. Ministers including the Prime/Chief Ministers and President/Governors form part of the executive.
- (iii) **Judiciary** - The judiciary is that branch of the government that interprets the law, settles disputes and administers justice to all citizens. The judiciary is considered the watchdog of democracy, and



also the guardian of the Constitution. It comprises of the Supreme Court, the High Courts, District and other subordinate courts.

Under the Indian Constitution the three organs are:

**Legislature** - Parliament ( Lok Sabha and Rajya Sabha), State legislative bodies

**Executive** - At the central level- President, At the state level- Governor

**Judiciary** - Supreme Court, High Court and all other subordinate courts.

### Specific Powers of the Three Organs

The constitution provides specific provisions:

**Article 50** - This article puts an obligation over the State to separate the judiciary from the executive. But, since this falls under the Directive Principles of State Policy, it is not enforceable.

**Article 53** - It provide that the executive power of the Union shall be vested with the President and he shall enjoy immunity from civil and criminal liability. The executive power of the Union shall be vested in the President and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution. Without prejudice to the generality of the provision, the supreme command of the Defence Forces of the Union shall be vested in the President and the exercise thereof shall be regulated by law. Nothing in this article shall—

- (a) be deemed to transfer to the President any functions conferred by any existing law on the Government of any State or other authority; or
- (b) prevent Parliament from conferring by law functions on authorities other than the President.

**Article 154** - It provide that the executive power of the State shall be vested with the Governor and he shall enjoy immunity from civil and criminal liability. The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution. Nothing in this article shall -

- (a) be deemed to transfer to the Governor any functions conferred by any existing law on any other authority; or
- (b) prevent Parliament or the Legislature of the State from conferring by law functions on any authority subordinate to the Governor.

**Article 121** - This article provides that the legislatures cannot discuss the conduct of a judge of the Supreme Court. They can do so only in case of impeachment. No discussion shall take place in Parliament with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties except upon a motion for presenting an address to the President praying for the removal of the Judge as hereinafter provided.

**Article 211** - This article provides that the legislatures cannot discuss the conduct of a judge of the Supreme Court. They can do so only in case of impeachment. No discussion shall take place in the Legislature of a State with respect to the conduct of any Judge of the Supreme Court or of a High Court in the discharge of his duties.

**Article 123** - The President, being the executive head of the country, is empowered to exercise legislative powers (Promulgate ordinances) in certain conditions.

If at any time, except when both Houses of Parliament are in session, the President is satisfied that circumstances exist which render it necessary for him to take immediate action, he may promulgate such Ordinances as the circumstances appear to him to require. An Ordinance promulgated under this article shall have the same force and effect as an Act of Parliament, but every such Ordinance -

- (a) shall be laid before both Houses of Parliament and shall cease to operate at the expiration of six weeks from the reassembly of Parliament, or, if before the expiration of that period resolutions disapproving it are passed by both Houses, upon the passing of the second of those resolutions; and
- (b) may be withdrawn at any time by the President.

Where the Houses of Parliament are summoned to reassemble on different dates, the period of six weeks shall be reckoned from the later of those dates for the purposes of this clause. If and so far as an Ordinance under this article makes any provision which Parliament would not under this Constitution be competent to enact, it shall be void.

**Article 361** - The President and Governors enjoy immunity from court proceedings., they shall not be answerable to any court for the exercise and performance of the powers and duties of his office. The President, or the Governor or Rajpramukh of a State, shall not be answerable to any



court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties. The conduct of the President may be brought under review by any court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under article 61. Further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State.

No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor of a State, in any court during his term of office. No process for the arrest or imprisonment of the President, or the Governor of a State, shall issue from any court during his term of office.

No civil proceedings in which relief is claimed against the President, or the Governor of a State, shall be instituted during his term of office in any court in respect of any act done or purporting to be done by him in his personal capacity, whether before or after he entered upon his office as President, or as Governor of such State, until the expiration of two months next after notice in writing has been delivered to the President or the Governor, as the case may be, or left at his office stating the nature of the proceedings, the cause of action therefor, the name, description and place of residence of the party by whom such proceedings are to be instituted and the relief which he claims.

### Checks and Balances

There is a system of checks and balances wherein the various organs impose checks on one another by certain provisions.

- The judiciary has the power of judicial review over the actions of the executive and the legislature
- The judiciary has the power to strike down any law passed by the legislature if it is unconstitutional or arbitrary as per Article 13 (if it violates Fundamental Rights).
- It can also declare unconstitutional executive actions as void.
- The legislature also reviews the functioning of the executive.

- Although the judiciary is independent, the judges are appointed by the executive.
- The legislature can also alter the basis of the judgment while adhering to the constitutional limitation.

Checks and balances ensure that no one organ becomes all-too-powerful. The Constitution guarantees that the discretionary power bestowed on any one organ is within the democratic principle. The Indian Constitution's Doctrine of Checks and Balance was introduced by the Supreme Court in the 1993 decision of **P. Kannadasan v. Tamil Nadu State**.

### Functional Overlap

The legislature besides exercising law-making powers exercises judicial powers in cases of breach of its privilege, impeachment of the President and the removal of the judges. The executive may further affect the functioning of the judiciary by making appointments to the office of Chief Justice and other judges. Legislature exercising judicial powers in the case of amending a law declared *ultra vires* by the Court and revalidating it. While discharging the function of disqualifying its members and impeachment of the judges, the legislature discharges the functions of the judiciary. Legislature can impose punishment for exceeding freedom of speech in the Parliament; this comes under the powers and privileges of the parliament. But while exercising such power it is always necessary that it should be in conformity with due process. The heads of each governmental ministry is a member of the legislature, thus making the executive an integral part of the legislature. The council of ministers on whose advice the President and the Governor acts are elected members of the legislature. Legislative power that is being vested with the legislature in certain circumstances can be exercised by the executive. If the President or the Governor, when the legislature or is not in session and is satisfied that circumstances exist that necessitate immediate action may promulgate ordinance which has the same force of the Act made by the Parliament or the State legislature.

The Constitution permits, through Article 118 and Article 208, the Legislature at the Centre and in the States respectively, the authority to make rules for regulating their respective procedure and conduct of business subject to the provisions of this Constitution. The executive also exercises law making power under delegated legislation.



Articles 118 provides the rules procedure. It says that each House of Parliament may make rules for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business. Until rules are made, the rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the Legislature of the Dominion of India shall have effect in relation to the Parliament subject to such modifications and adaptations as may be made therein by the Chairman of the Council of States or the Speaker of the House of the People, as the case may be. The President, after consultation with the Chairman of the Council of States and the Speaker of the House of the People, may make rules as to the procedure with respect to joint sittings of, and communications between, the two Houses. At a joint sitting of the two Houses the Speaker of the House of the People, or in his absence such person as may be determined by rules of procedure shall preside.

Article 208 says that a House of the Legislature of a State may make rules for regulating, subject to the provisions of this Constitution, its procedure and the conduct of its business. Until rules are made, the rules of procedure and standing orders in force immediately before the commencement of this Constitution with respect to the Legislature of the corresponding Province shall have effect in relation to the Legislature of the State subject to such modifications and adaptations as may be made therein by the Speaker of the Legislative Assembly, or the Chairman of the Legislative Council, as the case may be. In a State having a Legislative Council the Governor, after consultation with the Speaker of the Legislative Assembly and the Chairman of the Legislative Council, may make rules as to the procedure with respect to communications between the two Houses.

The tribunals and other quasi-judicial bodies which are a part of the executive also discharge judicial functions. Administrative tribunals which are a part of the executive also discharge judicial functions. Higher administrative tribunals should always have a member of the judiciary. The higher judiciary is conferred with the power of supervising the functioning of subordinate courts. It also acts as a legislature while making laws regulating its conduct and rules regarding disposal of cases.

Besides the functional overlapping, the Indian system also lacks the separation of personnel amongst the three departments.