Unit 1: Fundamental Rights

CONCEPT OF FUNDAMENTAL RIGHTS

The word fundamental suggests that these rights are so important that the Constitution has separately listed them and made special provisions for their protection. The Fundamental Rights are so important that the Constitution itself ensures that they are not violated by the government. Fundamental Rights are different from other rights available to us. While ordinary legal rights are protected and enforced by ordinary law, Fundamental Rights are protected and guaranteed by the constitution of the country.

Fundamental Rights are the basic rights of the common people and inalienable rights of the people who enjoy it under the charter of rights contained in Part III(Article 12 to 35) of Constitution of India. It guarantees civil liberties such that all Indians can lead their lives in peace and harmony as citizens of India.

The Fundamental Rights are defined as basic human freedoms that every Indian citizen has the right to enjoy for a proper and harmonious development of personality. These rights universally apply to all citizens, irrespective of race, place of birth, religion, caste or gender. Though the rights conferred by the constitution other than fundamental rights are equally valid and their enforcement in case of violation shall be secured from the judiciary in a time consuming legal process. However, in case of fundamental rights violation, the Supreme Court of India can be approached directly for ultimate justice

per Article 32. The Rights have their origins in many sources, including England's Bill of Rights, the United States Bill of Rights and France's Declaration of the Rights of Man.

These rights have been derived from the Constitution of USA and included in Part III of the Indian Constitution and rightly described as the "Magna Carta" and also sometimes the "Cornerstone" of the Indian Constitution. Originally, the Constitution had seven Fundamental Rights. Right to Property was been deleted by the 44th Amendment Act, 1978. Right to Property is now a legal right under Article 300-A in Part XII of the Constitution. Parliament has the power to amend any provision of the Fundamental Rights subject to the "Basic structure of the constitution". Fundamental Rights provides protection only against state action and not against a private individual except rights pertaining to abolition of untouchability & rights against exploitation.

Fundamental Rights which are enjoyed by both i.e. citizens as well as foreigners:

- the Right to Equality before Law
- Right to Freedom of Religion

These rights are justiciable which means that if these rights are violated by the government or anyone else, the individual has the right to approach the Supreme Court or High Courts for the

protection of his/her Fundamental Rights. Though justiciable these rights are

not absolute. The Constitution empowers the government to impose certain restrictions on the enjoyment of our rights in the interest of public good.

Difference between Fundamental Rights, Human Rights and Legal Rights Definition of Human Rights

Human Rights are universal, absolute and fundamental moral claims, in the sense that they belong to all human beings, they are inalienable and are basic to a real living.

These are essential for all the individuals, irrespective of their caste, creed, nationality, place of birth, citizenship and any other status. All individuals enjoy same human rights, without any discrimination.

Human Rights are basic rights of the people that advocate fairness, equality, freedom and respect for all. These are extremely important for the betterment of the society, as it abolishes various practices like injustice, exploitation, discrimination and inequality.

Some of the common human rights are, freedom from discrimination, right to life, equality before the law, liberty and personal security, right to education, freedom of thought, right to free movement, etc.

BASIS FOR COMPARISON	FUNDAMENTAL RIGHTS	HUMAN RIGHTS

Meaning Fundamental Rights means the primary rights of the citizens which are justifiable and written in the constitution.	Human Rights are the basic rights that all the human beings can enjoy, no matter where they live, what they do, and how they behave, etc.
Includes Basic Rights	Only Basic and Absolute Rights
Scope	It is country specific. It is universal.
Basic Principle	Right of freedom Right of life with dignity
Guarantee	Constitutionally guaranteed
	Internationally guaranteed
BASIS FOR COMPARISON	**FUNDAMENTAL RIGHTS** **HUMAN RIGHTS**
Enforcement	Enforceable by the court of law.
	Enforceable by United Nation Organization.
Origin	Originated from the views of democratic society.
	Originated from the ideas of civilized nations.

Legal Rights and Fundamental Rights

The legal rights are protected by an ordinary law, but they can be altered or taken away be the legislature by changing that law. Fundamental Rights are protected and Guaranteed by the Constitution and they cannot be taken away by an ordinary law enacted by the legislature. If a legal right of a person is violated, he can move to an ordinary court, but if a fundamental right is violated the Constitution provides that the affected person may move to High court or Supreme Court. Here we should note that the Rights to Property was a fundamental right before 1978. The Constitution (Forty-fourth Amendment) Act, 1978, taken away the Right to property (Article 31) as a Fundamental Right and was made a legal right under new Article 300 A.

- An ordinary right generally imposes a corresponding duty on another individual (and, state in some cases) but a fundamental right is a right which an individual possess against the state.
- Fundamental rights are protected against invasion by the executive, legislature and the judiciary. All fundamental rights are limitations on legislative power. Laws and executive actions which abridge or are in conflict with such rights are void and ineffective.
- Our constitution guarantees the right to move the Supreme Court for the enforcement of fundamental rights. Thus the remedy itself is a

fundamental right. This distinguishes it from other rights.

- The Supreme Court is the guardian of fundamental rights. Further, all constitution rights not fundamental rights e.g. right not to be subjected to taxation without authority of law (art. 265), right to property (art. 300a), and freedom of trade (art. 301). A fundamental right cannot be waived. An ordinary legal right can be waived by an individual.

Origin and Development of Fundamental Rights

The development of such constitutionally guaranteed fundamental human rights in India was inspired by historical examples such as England's Bill of Rights (1689), the United States Bill of Rights (approved on 17 September 1787, final ratification on 15 December 1791) and France's Declaration of the Rights of Man (created during the revolution of 1789, and ratified on 26 August 1789).

In 1919, the Rowlatt Act gave extensive powers to the British government and police and allowed indefinite arrest and detention of individuals, warrantless searches and seizures, restrictions on public gatherings, and intensive censorship of media and publications. The public opposition to this act eventually led to mass campaigns of non-violent civil disobedience throughout the country demanding guaranteed civil freedoms, and limitations on government power. Indians, who were seeking independence and their own government, were particularly influenced by the independence of Ireland and

the development of the Irish constitution. Also, the directive principles of state policy in Irish constitution were looked upon by the people of India as an inspiration for independent India's government to comprehensively tackle complex social and economic challenges across a vast, diverse nation and population.

In 1928, the Nehru Commission composing of representatives of Indian political parties proposed constitutional reforms for India that apart from calling for dominion status for India and elections under universal suffrage, would guarantee rights deemed fundamental, representation for religious and ethnic minorities, and limit the powers of the government. In 1931, the Indian National Congress (the largest Indian political party of the time) adopted resolutions committing itself to the defence of fundamental civil rights, as well as socio

economic rights such as the minimum wage and the abolition of untouchability and serfdom. Committing themselves to socialism in 1936, the Congress leaders took examples from the Constitution of the Soviet Union, which inspired the fundamental duties of citizens as a means of collective patriotic responsibility for national interests and challenges.

The task of developing a constitution for the nation was undertaken by the Constituent Assembly of India, composing of elected representatives. The Constituent Assembly first met on 9 December 1946 under the presidency of

Dr. Sachidanand. Later, Dr. Rajendra Prasad was made its president. While members of Congress composed of a large majority, Congress leaders appointed persons from diverse political backgrounds to responsibilities of developing the constitution and national laws. Notably, Bhimrao Ramji Ambedkar became the chairperson of the drafting committee, while Jawaharlal Nehru and Sardar Vallabhbhai Patel became chairpersons of committees and sub-committees responsible for different subjects. A notable development during that period having significant effect on the Indian constitution took place on 10 December 1948 when the United Nations General Assembly adopted the Universal Declaration of Human Rights and called upon all member states to adopt these rights in their respective constitutions.

The fundamental rights were included in the First Draft Constitution (February 1948), the Second Draft Constitution (17 October 1948) and final Third Draft Constitution (26 November 1949), prepared by the Drafting Committee.

Salient Features of the Fundamental Rights in the Indian Constitution

1. Integral part of the Constitution: Fundamental Rights have been made an integral part of the Constitution and hence cannot be taken away by ordinary legislation. Any law passed by any legislature in the country would be declared null and void if it is derogatory to the rights guaranteed by the Constitution.

2. Comprehensive and detailed: The rights enumerated in the Part III of

the Constitution are very elaborate. Each Article has been described with its scope and limitations.

3. Lack of social and Economic Rights: The Constitution guarantees only civil rights and freedoms. Rights like Rights to work, Right to Health, and Right to Social Security have not been included in the Fundamental Rights.

4. Rights are qualified: The fundamental rights of the people are not absolute except the right against untouchability. They are qualified with limitations and reasonable restrictions in the collective interest of the society. While describing the scope of each right, the Constitution also describes its limitations. These have been laid down for protecting public health, public order, morality and security of India. Some exceptions are also provided to Fundamental Rights through their non-applicability to members of security and law and order related forces, during martial law and, for certain laws necessary for socio-economic reforms.

5. Enforceability of Rights: Fundamental Rights have been made Justiciable. Justiciable rights means if any of these rights are violated by the government or anyone else, the individual has the right to approach the Supreme Court or High Courts for the protection and enforcement of his/her Fundamental Rights. Thus, the Constitution not only grants but also guarantees these rights. There are elaborate instruments to protect these rights, such as Right to Constitutional remedy, Public Interest Litigation, Human Rights

Commissions.

6. Fundamental Rights are amendable: Fundamental Rights are not sacrosanct and permanent. Parliament has the power to amend any part of the Constitution including Fundamental Rights. The Fundamental Rights, despite having inviolable nature, can be amended by the Parliament, subject to the 'basic structure' of the Constitution. The Parliament has, in practice, exercised this power on several occasions.

7. Constitutional superiority of Fundamental Rights: The Fundamental Rights of the citizens are superior to ordinary laws and the Directive Principals of State when the President withdraws it.

Initially, Seven Fundamental Rights were enshrined in the Constitution of India. Thereafter, the Right to Propertyhas been eliminated from the list of Fundamental Rights by the 44th Amendment Act of the Constitution in the year 1976. Since then, it has been made a legal right. There are now **six Fundamental Rights:**

1. **Right to Equality**
2. **Right to Freedom** – Recently by the 86th Amendment Act, the Right to Education has been included in the list of Fundamental Rights as part of the Right to Freedom by adding Article 21(A).
3. **Right against Exploitation**

4. **Right to Freedom of Religion**

5. **Cultural and Educational Rights**

6. **Right to Constitutional Remedies.**

Position In USA:

Though many fundamental rights are also widely considered human rights, the classification of a right as "fundamental" invokes specific legal tests courts use to determine the constrained conditions under which the United States government and various state governments may limit these rights. In such legal contexts, courts determine whether rights are fundamental by examining the historical foundations of those rights and by determining whether their protection is part of a longstanding tradition. Individual states may guarantee other rights as fundamental. That is, States may add to fundamental rights but can never diminish or infringe upon fundamental rights by legislative processes. Any such attempt, if challenged, may involve a "strict scrutiny" review in court.

In American Constitutional Law, *fundamental rights* have special significance under the U.S. Constitution. Those rights enumerated in the U.S. Constitution are recognized as "fundamental" by the U.S. Supreme Court. According to the Supreme Court, enumerated rights that are incorporated are so fundamental that any law restricting such a right must both serve a compelling state

purpose and be narrowly tailored to that compelling purpose.

The original interpretation of the United States Bill of Rights was that only the Federal Government was bound by it. In 1835, the U.S. Supreme Court in *Barron v Baltimore* unanimously ruled that the Bill of Rights did not apply to the states. During post-Civil War Reconstruction, the 14th Amendment was adopted in 1868 to rectify this condition, and to specifically apply the whole of the Constitution to all U.S. states. In 1873, the Supreme Court essentially nullified the key language of the 14th Amendment that guaranteed all "privileges or immunities" to all U.S. citizens, in a series of cases called the Slaughterhouse cases. This
decision and others allowed post-emancipation racial discrimination to continue largely unabated.

Later Supreme Court justices found a way around these limitations without overturning the Slaughterhouse precedent: they created a concept called Selective Incorporation. Under this legal theory, the court used the remaining 14th Amendment protections for equal protection and due process to "incorporate" individual elements of the Bill of Rights against the states. "The test usually articulated for determining fundamentality under the Due Process Clause is that the putative right must be 'implicit in the concept of ordered liberty', or 'deeply rooted in this Nation's history and tradition.'" Compare page 267 Lutz v. City of York, Pa., 899 F. 2d 255 - United States Court of

Appeals, 3rd Circuit, 1990.

This set in motion a continuous process under which each individual right under the Bill of Rights was incorporated, one by one. That process has extended more than half a century, with the free speech clause of the First Amendment first incorporated in 1925 in Gitlow v New York. The most recent amendment completely incorporated as fundamental was the Second Amendment right to possess and bear arms for personal self-defense, in McDonald v Chicago, handed down in 2010 and the Eighth Amendment's restrictions on excessive fines in Timbs v. Indiana in 2019.

Not all clauses of all amendments have been incorporated. For example, states are not required to obey the Fifth Amendment's requirement of indictment by grand jury. Many states choose to use preliminary hearings instead of grand juries. It is possible that future cases may incorporate additional clauses of the Bill of Rights against the states.

The Bill of Rights lists specifically enumerated rights. The Supreme Court has extended fundamental rights by recognizing several fundamental rights not specifically enumerated in the Constitution, including but not limited to:

- The right to interstate travel
- The right to parent one's children
- The right to privacy

- The right to marriage
- The right of self-defense

Any restrictions a government statute or policy places on these rights are evaluated with strict scrutiny. If a right is denied to everyone, it is an issue of substantive due process. If a right is denied to some individuals but not others, it is also an issue of equal protection. However, any action that abridges a right deemed fundamental, when also violating equal protection, is still held to the more exacting standard of strict scrutiny, instead of the less demanding rational basis test.

During the Lochner era, the right to freedom of contract was considered fundamental, and thus restrictions on that right were subject to strict scrutiny. Following the 1937 Supreme Court decision in *West Coast Hotel Co. v. Parrish*, though, the right to contract became considerably less important in the context of substantive due process and restrictions on it were evaluated under the rational basis standard.

Who can avail Fundamental Rights?

Fundamental Rights: Citizen vs Non-Citizen

India was a signatory to the Universal Declaration of Human Rights, therefore great precaution was taken so that Fundamental Rights mentioned in Part 3 of Indian Constitution is concurrent with the provisions of the UN Declaration

of Human Rights.

While most Fundamental Rights are available for citizens and foreigners alike (Eg: Article 21), certain rights are exclusive only for Indian Citizens (Eg: Article 19).

Fundamental rights available to both citizens and foreigners except enemy aliens 1. **Article 14** – Equality before the law and equal protection of laws.

2. **Article 20** – Protection in respect of conviction for offences.

3. **Article 21** – Protection of life and personal liberty.

4. **Article 21A** – Right to elementary education.

5. **Article 22** – Protection against arrest and detention in certain cases.

6. **Article 23** – Prohibition of traffic in human beings and forced labour.

7. **Article 24** – Prohibition of employment of children in factories etc.

8. **Article 25** – Freedom of conscience and free profession, practice and propagation of religion.

9. **Article 26** – Freedom to manage religious affairs.

10. **Article 27** – Freedom from payment of taxes for promotion of any religion.

11. **Article 28** – Freedom from attending religious instruction or worship in certain educational institutions.

Fundamental Rights Available Only to Citizens of India

1. **Article 15** – Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth.

2. **Article 16** – Equality of opportunity in matters of public employment.

3. **Article 19** – Protection of six rights related to freedom – (a) of speech and expression; (b) to assemble peaceably and without arms; (c) to form associations or unions; (d) to move freely throughout the territory of India; (e) to reside and settle in any part of the territory of India; and (f) to practice any profession, or to carry on any occupation, trade or business.

4. **Article 29** – Protection of language, script and culture of minorities.

5. **Article 30** – Right of minorities to establish and administer educational institutions. **Against whom can Fundamental Rights be exercised?**

Fundamental rights available against state ; not against private individuals.---

Individual needs constitutional protection against state. The rights which are given to the citizens by way of fundamental rights as included in part-III of

the constitution are a guarantee against state action as distinguished form violation of such rights from private parties. Private action is sufficiently protected by the ordinary law of land.

In P.D. shamdasani vs .central bank of India, the petitioner, in applications under article 32 of the constitution, sought the protection of the court on the ground that his property right under articles 19 (1)(f) and 31 were infringed by the action of another private person--the central bank of India. The supreme court dismissed the petition and held : "neither article 19 (1) nor article 31 (1) was intended to prevent wrongful individual's acts or to provide protection against merely private conduct.....

The language and structure of article-19, and its setting in part-III of the constitution, clearly show that the article was intended to protect those freedoms against the state action other then in the legitimate exercise of its power to regulate private rights of property by individuals is not within the purview of the articles".

The conflict between individuals and state is as old as our history. The individuals need personal liberty and state has the power to decide those liberties. Thus, if the state has absolute power to cut down those liberties of an individual, it would be tyranny. Thus, the individuals need constitutional protection against the state. The rights which are given to the citizens by way of fundamental rights are a guarantee against state act ion as distinguished

from violation by the ordinary law of land. Thus, Fundamental rights are against the state for the protection of individual.

Nature of Fundamental Rights

1. Most of the Rights are Negative Obligations on the State (E.g. Article 14), with certain exceptions (E.g. Article 21A). **Negative Obligations** means that the State cannot do something that hurts or curtails people's rights.

2. Majority of Rights mentioned **in Part III** are enjoyed by citizens against the State. 3. These Rights are **Justiciable**.

4. Fundamental Rights are **not absolute** i.e. certain reasonable restrictions can be imposed upon them.

5. Fundamental Rights can be **suspended during emergency**.

6. Fundamental Rights of people occupying **sensitive positions** (Armed Forces, Intelligence Agencies etc.) can be restricted or even denied by Parliament by law.

7. Most of the Right are **self executory** i.e. the parliament need not make laws to implement these Rights. There are certain exceptions e.g. For Right to Education under Article 21A, a law was required by the parliament.

8. Some of these Rights are available to aliens (Foreigners).

When can Fundamental Rights be suspended?

fundamental righs can be suspended during emergency subject to the provision of article 352,358 and 359 of the Indian constitution.

- As per **article 352** ,the President of India can declare emergency throughout the territory of India or of any part thereof on the breaking out of any war,external aggression or armed rebellion.
- As per article 358,the moment the President declares emergency ,the fundamental right under article 19 gets automatically suspended.
- While Under article 359,the president may by order suspend the enforcement of all the fundamental rights except article 20 and 21 , in the court of law.

During national emergency, all the basic freedoms guaranteed by article 19 automatically get suspended. During emergency, President can suspend all other fundamental rights also except Article 20 (protection in respect of conviction for offences) and Article 21 (Protection of life and personal liberty). Such suspension needs parliamentary approval.

Article 33 empowers the Parliament to restrict or abrogate the application of the fundamental rights in relation to the armed forces, paramilitary forces, police etc.

RULE OF LAW, SECULARISM AND SOCIALISM

The term 'Rule of Law' is nowhere defined in the Indian Constitution but this term is often used by the Indian judiciary in their judgments. Rule of law has been declared by the Supreme Court as one of the basic features of the Constitution so it cannot be amended even by the constitutional amendment. Rule of law is seen as an integral part of good governance. As per rule of law, it is required that the people should be governed by the accepted rules rather than the decisions that are arbitrarily taken by the rulers. For this, it is essential to keep in mind that the rules that are made should be general and abstract, known and certain and it should apply equally to all individuals. Legal limitation on government is the essential attribute of constitutionalism. Rulers are not above law under the concept of constitutionalism, government power is divided with laws enacted by one body and administered by another and for that an independent judiciary exists to ensure laws.

In simple terms, Rule of Law is the restriction on the arbitrary exercise of power by subordinating it to well-defined and established laws. Law should govern the nation and not the arbitrary decisions by individuals. Thus, Rule of Law embodies the doctrine of supremacy of law.

Origin of Rule of Law

Rule of Law is as old as civilisation. Times and society have changed the perceptions of various authors resulting in different and varied definitions and approaches to Rule of Law. Many accounts of the rule of law identify its origins

to classical Greek thought, quoting passages from Plato and Aristotle. Greek ideas with respect to the rule of law are therefore best understood in the form of exemplary models, providing inspiration and authority for later periods. The Roman contribution to the rule of law tradition was negative as well as positive, with the negative tradition being of much greater consequence.

The Germanic customary law proposition that the king is under the law has been widely identified as an independent source of the rule of law in the medieval period. The Magna Carta, 1215 although it stands on its own as a historical event with reverberating consequences in the rule of law tradition, epitomized a third Medieval root of the rule of the law- the effort of nobles to use law to restrain kings. Then came the Liberalist and Federalist approaches to Rule of Law.

Dicey's Concept of rule of Law

following Montesquieu's approach, in the year 1885, A.V. Dicey on observing the UK model laid down three principles to be arising out of Rule of Law.

1. Supremacy of Law;
2. Equality before the law;
3. Predominance of Legal Spirit.

In France, Dicey observed that the government officials exercised wide discretionary powers and if there was any dispute between a government

official and a private individual, it was tried not by an ordinary court but by a special administrative court. The law applicable in that case was not ordinary law but a special law developed by the administrative court. From this, Dicey concluded that this system spelt the negation of the concept of rule of law. He felt that this was against the principle of equality before the law. He also stated that all English are bound by the Rule of Law and there is no external mechanism required to regulate them. Therefore, he concluded that there was no administrative law in England.

Dicey's concept of Rule of Law had its advantages and disadvantages. Rule of Law imposed and helped in imbibing a sense of restraint on administration. The government was bound to work within the legal framework. Further, by stating that the law is supreme, he made every law made by the legislature supreme, thus, promoting parliamentary supremacy. There cannot be self conferment of power as even an ordinary law is supreme. All laws, public or private, are being administered by the same set of independent and impartial judiciary. This ensures adequate check on the other two organs. Nonetheless, on the other hand, Dicey completely misunderstood the real nature of the French *droit administratif*. He thought that this system was designed to protect officials, but the later studies revealed that in certain respects it was more effective in controlling the administration than the common law system. The reality is that French *Conseil d' Etat* is widely admired and has served as model for other countries as well as for court of justice for European

communities. He also did not realise the need for codification of laws which could lead to more discretion, thus hampering Rule of Law.

Rule of Law in India

The concept of Rule of Law permeates into the Indian Legal System through the Constitution. Part III of the Constitution of India acts as a restraint on the various organs exercising powers. While conferring the rights on the citizens, it imposes restrictions on the power that can be exercised. Under our Constitution, we have adopted the British System of Rule of Law. Absence of arbitrary power is the first essential of Rule of Law upon which our whole constitutional system is based. Governance must be by rule, and not arbitrary, vague and fanciful. Under our Constitution, the Rule of Law pervades over the entire field of administration and every organ of the state is regulated by Rule of Law. The concept of Rule of Law cannot be upheld in spirit and letter if the instrumentalities of the state are not charged with the duty of discharging their function in a fair and just manner.

Judiciary and Rule of Law:

The Indian Judiciary has played an instrumental role in shaping Rule of Law in India. By adopting a positive approach and dynamically interpreting the constitutional provisions, the

courts have ensured that the Rule of Law and respect for citizens' rights do not remain only on paper but are incorporated in spirit too.

In the case of *A.D.M. Jabalpur* v. *Shiv Kant Shukla*, KHANNA, J. observed:

"Rule of Law is the antithesis of arbitrariness……..Rule of Law is now the accepted norm of all civilized societies……Everywhere it is identified with the liberty of the individual. It seeks to maintain a balance between the opposing notions of individual liberty and public order."

In *Bachhan Singh* v. *State of Punjab*, it was held that the Rule of Law has three basic and fundamental assumptions. They are:-

1) Law making must be essentially in the hands of a democratically elected legislature;

2) Even in the hands of the democratically elected legislature, there should not be unfettered legislative power; and

3) There must be independent judiciary to protect the citizens against excesses of executive and legislative power.

The first case which stirred a debate about Rule of Law was *Shankari Prasad* v. *Union of India*, where the question of amendability of fundamental rights arose. The question lingered and after witnessing the game play between the government and the judiciary, the issue was finally settled in the case of *Kesavananda Bharati* v. *State of Kerala*. In this case, the Hon'ble Supreme Court held that the Rule of Law is the "basic structure" of the Constitution. The Hon'ble Supreme Court by majority overruled the decision given in Golak

Nath's case and held that Parliament has wide powers of amending the Constitution and it extends to all the Articles, but the amending power is not unlimited and does not include the power to destroy or abrogate the basic feature or framework of the Constitution. There are implied limitations on the power of amendment under Art 368, which are imposed by Rule of Law. Within these limits Parliament can amend every Article of the Constitution. Justice H R Khanna played a vital role in preserving the Rule of law although he concurred with the majority decision.

In the case of *Indira Nehru Gandhi* v. *Raj Narayan*, the Apex Court held that Rule of Law embodied in Article 14 of the Constitution is the "basic feature" of the Indian Constitution and hence it cannot be destroyed even by an amendment of the Constitution under Article 368 of the Constitution. Article 329-A was inserted in the Constitution under 39th amendment, which provided certain immunities to the election of office of Prime Minister from judicial review. The Supreme Court declared Article 329-A as invalid, since it was clearly applicable only to the then current prime minister and was an amendment to benefit only one individual. It was decided that the law of the land is supreme and must prevail over the will of one person.

In the case of *Maneka Gandhi* v. *Union of India*, the Hon'ble Supreme Court established the Rule of Law that no person can be deprived of his life and personal liberty except procedure

establish by law under Article 21 of the Constitution. Thus, Article 21 requires the following conditions to be fulfilled before a person is deprived to his life and liberty:

1. That there must be a valid law.
2. The law must provide procedure.
3. The procedure must be just, fair and reasonable.
4. The law must satisfy the requirement of Article 14 and 19.

The Supreme Court observed in *Som Raj* v. *State of Haryana*, that the absence of arbitrary power is the primary postulate of Rule of Law upon which the whole constitutional edifice is dependant. Discretion being exercised without any rule is a concept which is antithesis of the concept.

Another facet of Rule of Law in India is the independence of judiciary and power to judicial review. The Supreme Court in the case *Union of India* v. *Raghubir Singh* that it is not a matter of doubt that a considerable degree of principles that govern the lives of the people and regulate the State functions flows from the decision of the superior courts. Rule of Law as has been discussed postulates control on power. Judicial review is an effective mechanism to ensure checks and balances in the system. Thus, any provision which takes away the right to judicial review is seen to go against the very fibre of Rule of Law. In the case of *S.P. Sampath Kumar* v. *Union of India*, the

courts have reiterated that judicial review is part of the basic structure of the Constitution.

In India, the meaning of rule of law has been expanded. It is regarded as a part of the basic structure of the Constitution and, therefore, it cannot be abrogated or destroyed even by Parliament. The ideals of the Constitution-liberty, equality and fraternity have been enshrined in the preamble. Constitution makes the supreme law of the land and every law enacted should be in conformity to it. Any violation makes the law ultra vires. Rule of Law is also reflected in the independence of the judiciary.

SECULARISM

Meaning:

The term “Secular” means being "separate" from religion, or having no religious basis. A secular person is one who does not owe his moral values to any religion. His values are the product of his rational and scientific thinking. Secularism means separation of religion from political, economic, social and cultural aspects of life, religion being treated as a purely personal matter. It emphasized dissociation of the state from religion and full freedom to all religions and tolerance of all religions. It also stands for equal opportunities for followers of all religions, and no discrimination and partiality on grounds of religion.

Secularism in the History of India

Secular traditions are very deep rooted in the history of India. Indian culture is based on the blending of various spiritual traditions and social movements. In ancient India, the **Santam Dharma (Hinduism)** was basically allowed to develop as a holistic religion by welcoming different spiritual traditions and trying to integrate them into a common mainstream.

The development of four **Vedas** and the various interpretations of the **Upanishads** and the Puranas clearly highlight the religious plurality of Hinduism. **Emperor Ashoka** was the first great emperor to announce, as early as third century B.C. that, the state would not prosecute any religious sect. In his **12th Rock Edict,** Ashoka made an appeal not only for the toleration of all religion sects but also to develop a spirit of great respect toward them.

Even after the advent of **Jainism, Buddhism** and later **Islam** and **Christianity** on the Indian soil, the quest for religious toleration and coexistence of different faiths continued.

In medieval India, the **Sufi and Bhakti movements** bond the people of various communities together with love and peace. The leading lights of these movements were **Khwaja Moinuddin Chisti, Baba Farid, Sant Kabir Das, Guru Nanak Dev, Saint Tukaram and Mira Bai** etc. In medieval India, religious toleration and freedom of worship marked the

State under **Akbar**. He had a number of Hindus as his ministers, forbade forcible conversions and **abolished Jizya**. The most prominent evidence of his tolerance policy was his promulgation of **'Din-i-Ilahi'** or the Divine Faith, which had elements of both Hindu and Muslim faith. Even before Akbar, Babar had advised Humayun to "shed religious prejudice, protect temples, preserve cows, and administer justice properly in this tradition."

The spirit of secularism was strengthened and enriched through the Indian freedom movement too, though the British have pursued the **policy of divide and rule**. In accordance with this policy, the British **partitioned Bengal** in 1905. Separate electorates were provided for Muslims through the Indian Councils Act of 1909, a provision which was extended to Sikhs, Indian Christians, Europeans and Anglo-Indians in certain provinces by the Government of India Act, 1919. However, Indian freedom movement was characterized by secular tradition and ethos right from the start. In the initial part of the Indian freedom movement, the liberals like Sir Feroz Shah Mehta, **Govind Ranade, Gopal Krishna Gokhale by and large pursued a secular approach to politics**. The constitution drafted by Pandit Moti Lal Nehru as the chairman of the historic **Nehru Committee in 1928,** had many provision on secularism as: 'There shall be no state religion for the commonwealth of India or for any province in the commonwealth, nor shall the state, either directly or indirectly, endow any religion any preference or impose any disability on account of religious beliefs or religious status'.

Gandhiji's secularism was based on a commitment to the brotherhood of religious communities based on their respect for and pursuit of truth, whereas, **J. L. Nehru's secularism** was based on a commitment to scientific humanism tinged with a progressive view of historical change.

At present scenario, in the context of Indian, the separation of religion from the state constitutes the core of the philosophy of secularism.

Philosophy of Indian Secularism

The term 'secularism' is akin to the **Vedic concept of 'Dharma nirapekshata'** i.e. the indifference of state to religion. This model of secularism is adopted by western societies where the government is totally separate from religion (i.e. separation of church and state). **Indian philosophy of secularism is related to "Sarva Dharma Sambhava"** (literally it means that destination of the paths followed by all religions is the same, though the paths themselves may be different) which means equal respect to all religions. This concept, embraced and promoted by personalities like Vivekananda and Mahatma Gandhi is called **'Positive secularism'** that reflects the dominant ethos of Indian culture. India does not have an official state religion. However, different personal laws - on matters such as marriage, divorce, inheritance, alimony varies with an individual's religion. Indian secularism is not an end in itself but a **means to address religious plurality** and sought to achieve peaceful

coexistence of different religions.

Secularism and the Indian Constitution

There is a clear incorporation of all the basic principles of secularism into various provisions of constitution. The term 'Secular' was added to the preamble by the **forty-second constitution Amendment Act of 1976,** (India is a sovereign, socialist, secular, democratic, republic). It emphasise the fact that constitutionally, India is a secular country which has no State religion. And that the state shall recognise and accept all religions, not favour or patronize any particular religion.

While **Article 14** grants equality before the law and equal protection of the laws to all, **Article 15** enlarges the concept of secularism to the widest possible extent by prohibiting discrimination on grounds of religion, race, caste, sex or place of birth.

Article 16 (1) guarantees equality of opportunity to all citizens in matters of public employment and reiterates that there would be no discrimination on the basis of religion, race, caste, sex, descent, place of birth and residence.

Article 25 provides 'Freedom of Conscience', that is, all persons are equally entitled to freedom of conscience and the right to freely profess, practise and propagate religion.

As per **Article 26,** every religious group or individual has the right to establish and maintain institutions for religious and charitable purposes and to manage its own affairs in matters of religion.

As per **Article 27**, the state shall not compel any citizen to pay any taxes for the promotion or maintenance of any particular religion or religious institution.

Article 28 allows educational institutions maintained by different religious groups to impart religious instruction.

Article 29 and **Article 30** provides cultural and educational rights to the minorities.

Article 51A i.e. Fundamental Duties obliges all the citizens to promote harmony and the spirit of common brotherhood and to value and preserve the rich heritage of our composite culture.

Threats to Secularism

While, the Indian Constitution declares the state being absolutely neutral to all religion, our society has steeped in religion.

- Mingling of **Religion and Politics** that is mobilisation of votes on grounds of primordial identities like religion, caste and ethnicity, have put Indian secularism in danger.
- **Communal politics** operates through communalization of social

space, by spreading myths and stereotypes against minorities, through attack on rational values and by practicing a divisive ideological propaganda and politics.

- Politicisation of any one religious group leads to the **competitive politicisation** of other groups, thereby resulting in inter-religious conflict.

• One of the manifestations of communalism is **communal riots**. In recent past also, communalism has proved to be a great threat to the secular fabric of Indian polity. • Rise of Hindu Nationalism in recent years have resulted into mob lynching on mere suspicion of slaughtering cows and consuming beef.

- In addition with this, forced closure of slaughterhouses, campaigns against 'love jihad', reconversion or ghar- wapsi (Muslims being forced to convert to Hinduism), etc. reinforces communal tendencies in society.
- Islamic fundamentalism or revivalism pushes for establishing Islamic State based on sharia law which directly comes into conflict with conceptions of the secular and democratic state.

• In recent years there have been stray incidences of Muslim youth being inspired and radicalized by groups like ISIS which is very unfortunate for both India and world.

SOCIALISM

The word 'Socialism' is used in democratic and socialistic countries and has no definite meaning. In India there has always been an emphasis on mixed economy, i.e. along with a public sector, the private sector also has a role-play. The government accepts the policy of mixed economy where both public and private sector both exist side by side. The Supreme Court in a number of decisions referred to the concept of socialism.

According to the Supreme Court, the principal aim of socialism is to eliminate inequality of income and standards of life and to provide decent standard of life to working people. Democratic socialism aims to end poverty, inequality of income, disease and to provide a decent standard of life to working people. Socialist concept of society should be implemented in the true spirit of the constitution.

In **Samantha vs. State of Andhra Pradesh** the Supreme Court has stated while defining socialism "Establishment of the Egalitarian social Order through the rule of law is the basic structure of the constitution". The Court laid emphasis on social justice so as to attain substantial degree of social, economic and political equality. The court, to bring about the distribution of material resources of the country and to serve common good furthered the idea of distributive justice.

Definition: The word socialism has been defined as "such type of socialist economy under which economic system is not only regulated by the

government to ensure, welfare equity of opportunity and social justice to the people."

Main Features of Socialism:

A socialist economy has the following features:

1. Socialism is Social or Collective Ownership of Resources:

In such an economy, all the means of production are owned and operated by the state in the interest of society as a whole. This is to ensure equality of opportunity to all the citizens with regard to earning of income. This is also aimed at full and efficient utilisation of the country's resources.

2. It is a Fully Planned Economy:

A socialist economy is necessarily a fully planned economy otherwise the economic system cannot run. There is a choice between centralised and decentralised planning. All socialist economics were fully planned economics.

3. It is the Responsibility of the Central Planning Authority:

Planning is the responsibility of an authority at the centre. It may be known as the Planning Commission in India or the Gos plan in the U.S.S.R. The main task given to this body is to formulate long-term and short-term plans for the economy.

4. It has Definite Aims and Objectives:

Socialist economy has specified aims or objectives. Generally, they are

included in the constitution itself but these are given specific shape by the planners. As far as possible the objectives are clearly and quantitatively defined. The competitiveness on complementary among these objectives is explicitly noted. This is meant to bring planning nearer to reality.

5. Specific Long-Term Plans:

The Central Planning authority is given the responsibility to chalk out specific long-term plans for the country. These long-term plans are called "Perspective Plans". These may range from twenty to thirty years. These are in the nature of a blue-print of the path the economies have to follow in the near future. These perspective plans may be modified with changes in basic structure and objectives of the economy. This requires the use of input and output and activity analysis.

6. Central Control and Ownership:

A fully planned economy is by implication a controlled economy. Government controls the main aspects of all economic activity. There are controls on production through licensing. Consumption is also controlled indirectly through controlled production. There are existing controls generally operated through the Central Bank of the economy.

Then there are controls on distribution. Government may have a public distribution system. It may have direct procurement and sale of essential commodities through fair price shops. However, the nature of controls and

their intensity shall depend upon the economic conditions in the economy.

In short, a socialist economy is not run by the impersonal forces of supply and demand. It is a scientifically planned economy. As such its main features are quite different from those of capitalistic economy.

Merits of Socialism:

1. Social Justice is Assured:

The chief merit of socialism is that it assures of social justice. Under socialism the inequalities of income are reduced to the minimum and the national income is more equitably and evenly distributed. The socialist principle provides for a fair share for all. No one is permitted to have unearned income. Exploitation of man by man to put an end to. Every individual is assured of equal opportunities, irrespective of caste, creed and religion. Every child whether he is born in a poor family or in a rich family is given an equal opportunity to develop his latent faculties through proper education and training.

2. Rapid Economic Development:

A socialist economy is likely to grow much faster than a capitalist economy. The experience of the U.S.S.R. and other socialist countries amply proved this. The main factors making for the fast growth rate is the full use of resources, scientific planning and quick decisions.

3. Production According to Basic Needs:

In this economy the production is directed to satisfy the basic needs of the people first. As far as possible, the production of food, clothing or building materials is guided by the basic needs of the people and is not according to the purchasing power of the rich section

of the society. Therefore, the phenomenon of the poor going hungry while the rich feast cannot be seen in the socialist economy.

4. Balanced Economic Development:

Economic planning is meant to carry out balanced development of the economy. All the regions of the country are taken care of. Development of the backward areas is also given a priority. Similarly, agriculture and industry, heavy and small industry develops side by side. As a result there is no lop-sided development of the economy.

5. It has Economic Stability:

Another important merit is the economic stability which a socialist economy has. A capitalist economy is often suffering from economic fluctuations resulting in lot of unemployment and wastage of resources. There is a good deal of misery among the working classes in periods of depression in a socialist economy.

A socialist economy is able to control economic instability due to the planned nature of the economy. Pure changes are taken care of under a perspective plan. Private investment is given a minor role. Therefore, there are no economic fluctuations.

6. It has More Flexibility:

A socialist economy is much more flexible than a capitalist economy because of the control on market forces. The socialist economy can be geared to war times as early as it is operated during peace-time. Rather the state having ownership of means of production can meet the needed changes much better than the slow moving market mechanism of the capitalist economy.

7. Conservation of Natural Resources:

A socialist economy has a great advantage of planning for the future. Wasteful use of the country's natural resources is a common problem in all the capitalistic economies. Private enterprise does not care for the future. A planning authority can take the interest of future generations into account by preparing plans for conservation of the country's non renewable resources like coal, petroleum, forests and soil.

There are certain demerits of this system which are as follows:

1. No Suitable Basis of Cost Calculation:

Von Hayek and Bobbins have pointed out that there is not proper basis of cost calculation in a socialist economy. They say that the means of production being owned by the government, there is no market price for the factors of production. In the absence of market mechanism there is no standard way of calculating costs of production for different goods

and services.

2. Choice of Working Incentives:

The most difficult problem in this system is the choice and working of incentives in the absence of profit motive. The Russian Government has been using the policy of "Carrot and the Stick". Some national honours are given to those showing outstanding results. Those shirking work or proving irresponsible are punished.

There is decentralisation of authority along-with responsibility. This ensures freedom at the lower level and scope for initiatives. However, there is no comparable system of incentives and dis-incentives to the profit motive in a capitalist economy.

3. It Becomes Lack of Incentives:

In this system, it has also been seen that incentive of hard work and inclination to self improvement will dis-appear together when personal gain or self-interest is eliminated. People will not give their best. Incentive, ability, enterprising spirit and the go-ahead attitude will languish and creative work will become impossible. It is said that "a Government could print a good edition of Shakespeare's work but it could not get them written."

4. There is Loss of Economic Freedom:

A very important charge against socialism is that, when freedom to enterprise dis appears, even the free choice of occupation will go.

Workers will be assigned certain jobs and they cannot change them without the consent of the planning authority. Every workers will have to do work what he will be asked to do.

5. Lack of Data, Experts and Administrators for Planning:

Operating a socialist economy as a planned economy requires huge data, a good number of experts and an equal number of administrators at different levels for administering the plan. No doubt machine can help to process the data and experts can advise but there has to be decision-making at different levels of government. It is difficult to find out enough data with the result that decisions are delayed, mis-carried or wrongly implemented. Ultimately, the common people have to pay the price for these mistakes.

6. Loss of Economic Freedom and Consumer Sovereignty:

Under socialism all economic activity is directed by the central planning authority. There is no significant role given to private investment and initiative. Consumers are compelled to accept whatever public enterprises produce for them. Generally, there is limited variety of goods and restricted available choice. Prices are fixed by the government and consumers just cannot do anything about them. Consumer's preferences are just guessed by the planners who have no compulsion to study the people's preferences deeper.

7. Imperfections in Planning Lead to Dis-satisfaction on a Big

Scale:

Imperfection may creep in the formulations of the plan, its assumptions, statistics or analysis. Further, imperfection may enter at the stage of implementation of the plan. Further, there may be lack of adjustment between prices and wages. As a result of these imperfections there is lot of wastages of resources, slowing down of work, shortfalls in targets and the dis-satisfaction resulting there-from.

Mistakes made by individuals harm them only. National mistakes are costly for the common man. In fact, this has been the cause of dis-integration of the U.S.S.R., when the other economics of Europe were booming the U.S.S.R. could not provide the minimum comforts of life.

ARTICLE 12: STATE

The Constitution of India has defined the word 'State' for the purpose of Part -III and Part - IV. In **State of West Bengal v/s Subodh Gopal Bose** , the Supreme Court observed that the object of Part -III is to provide protection to the rights and freedoms guaranteed under this part by the invasion of 'State'.

Article 12 of the Indian Constitution states that,

"Definition in this part, unless the context otherwise requires, the State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within

the territory of India or under the control of the Government of India."

In other words, for the purposes of Part III of the constitution, the state comprises of the following:

1. Government and Parliament of India i.e the Executive and Legislature of the Union
2. Government and Legislature of each State i.e the Executive and Legislature of the various States of India
3. All local or other authorities within the territory of India
4. All local and other authorities who are under the control of the Government of India **Key terms discussed under the article**

1. Government (Union and state)
2. Parliament and state legislature
3. Local authorities
4. Other authorities
5. Territory of India
6. Control of the government of India

The above-mentioned terms are better explained in the following section along with relevant cases.

Government (Union and state), Parliament and State Legislature

- **Parliament:** The parliament comprises of the President of India, the lower house of the parliament that is the Lok Sabha as well as the upper house of the Parliament, that is the Rajya Sabha.
- **Executive:** It is that organ which implements the laws passed by the legislature and the policies of the government. The rise of the welfare state has tremendously increased the functions of the state, and in reality, of the executive. In common usage, people tend to identify the executive with the government. In contemporary times, there has taken place

A big increase in the power and role of the executive in every state. The executive includes the President, Governor, Cabinet Ministers, Police, bureaucrats, etc.

- **Legislature:** The legislature is that organ of the government which enacts the laws of the government. It is the agency which has the responsibility to formulate the will of the state and vest it with legal authority and force. In simple words, the legislature is that organ of the government which formulates laws. Legislature enjoys a very special and important in every democratic state. It is the assembly of the elected representatives of the people and represents national public opinion and power of the people.

- **Government:** The law-making or legislative branch and administrative or executive branch and law enforcement or judicial branch and organizations of society. Lok Sabha (the lower house) and Rajya Sabha (the upper house) form the legislative branch. Indian President is the head of the state and exercises his or her power directly or through officers subordinate to him. The Supreme Court, High Courts, and many civil, criminal and family courts at the district level form the Judiciary.
- **State Legislature:** The legislative body at the state level is the State Legislature. It comprises of the state legislative assembly and the state legislative council.

Local Authorities

Before understanding what a local authority is, it is important to define Authorities. According to Webster's Dictionary; "Authority" means **a person or body exercising power to command**. When read under Article 12, the word authority means the power to make laws (or orders, regulations, bye-laws, notification etc.) which have the force of law. It also includes the power to enforce those laws

Local Authority: As per Section 3(31) of the General Clauses Act, 1897,

"*Local Authority shall mean a municipal committee, district board, body of commissioner or other authority legally entitled to or entrusted by the*

Government within the control or management of a municipal or local fund."

The term Local authority includes the following:

1. **Local government:** According to Entry 5 of the List II of VII Schedule 'local government' includes a municipal corporation, improvement trust, district boards, mining
   settlement authorities and other local authorities for the purpose of local self-government or village administration.

2. **Village Panchayat:** In the case of *Ajit Singh v. State of Punjab*, it was held that within the meaning of the term local authority, village panchayat is also included.

Test to determine Local Authorities

In *Mohammad Yasin v. Town Area Committee*, the Supreme Court held that to be characterized as a 'local authority' the authority concerned must;

1. Have a separate legal existence as a corporate body

2. Not be a mere government agency but must be legally an independent entity 3. Function in a defined area

4. Be wholly or partly, directly or indirectly, elected by the inhabitants of the area 5. Enjoy a certain degree of autonomy (complete or partial)

6. Be entrusted by statute with such governmental functions and duties as are usually entrusted to locally (like health, education, water, town planning, markets, transportation, etc.)
7. Have the power to raise funds for the furtherance of its activities and fulfilment of its objectives by levying taxes, rates, charges or fees

Other Authorities

The term 'other authorities' in Article 12 has nowhere been defined. Neither in the Constitution nor in the general clauses Act, 1897 nor in any other statute of India. Therefore, its interpretation has caused a good deal of difficulty, and judicial opinion has undergone changes over time.

The functions of a government can be performed either the governmental departments and officials or through autonomous bodies which exist outside the departmental structure. Such autonomous bodies may include companies, corporations etc.

So, for the purpose of determining what 'other authorities' fall under the scope of State, the judiciary has given several judgements as per the facts and circumstances of different cases.

In the *University of Madras v. Shanta Bai,* the Madras High Court evolved the principle of *'ejusdem generis'* i.e. of the like nature. It means that only those authorities are covered under the expression 'other authorities' which perform

governmental or sovereign functions. Further, it cannot include persons, natural or juristic, for example, Unaided universities.

In the case of *Ujjammabai v. the State of U.P*., the court rejected the above restrictive scope and held that the '*ejusdem generis'* rule could not be resorted to the in interpreting 'other authorities'. The bodies named under Article 12 have no common genus running through them and they cannot be placed in one single category on any rational basis.

Lastly, in *Rajasthan Electricity Board v. Mohan Lal*, the Supreme Court held that 'other authorities' would include all authorities created by the constitution or statute on whom powers are conferred by law. Such statutory authority need not be engaged in performing government or sovereign functions. The court emphasized that it is immaterial that the power conferred on the body is of a commercial nature or not.

Territory of India

Article 1(3) of the Constitution of India states that;

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

In the case of *Masthan Sahib v. Chief Commissioner,* the court held that the territory of India for the purposes of Article 12 means the territory of India as

defined in Article 1(3).

Control of the government of India

Under Article 12, the control of the Government does not necessarily mean that the body must be under the absolute direction of the government. It merely means that the government must have some form of control over the functioning of the body. Just because a body is a statutory body, does not mean that it is 'State'. Both statutory, as well as non-statutory bodies, can be considered as a 'State' if they get financial resources from the government and the government exercises a deep pervasive control over it.

For example- State includes Delhi Transport Corporation, ONGC and Electricity Boards, but does not include NCERT as neither is it substantially financed by the government nor is the government's control pervasive.

The test laid down in the case of Ajay Hasia is not rigid and therefore if a body falls within them, then it must be considered to be a State within the meaning of Article 12. It was discussed in the case that– "*whether in the light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of Government. Such control must be particular to the body in question and must be pervasive.*

Whether State includes Judiciary?

Article 12 of the Constitution does not specifically define 'judiciary'. This gives

the judicial authorities the power to pronounce decisions which may be contravening to the Fundamental Rights of an individual. If it was taken into the head of 'State', then as per the article, it would be

by the obligation that the fundamental rights of the citizens should not be violated. Accordingly, the judgements pronounced by the courts cannot be challenged on the ground that they violate fundamental rights of a person. On the other hand, it has been observed that orders passed by the courts in their administrative capacity (including by the Supreme Court) have regularly been challenged as being violative of fundamental rights.

The answer to this question lies in the distinction between the judicial and non-judicial functions of the courts. When the courts perform their non-judicial functions, they fall within the definition of the 'State'. When the courts perform their judicial functions, they would not fall within the scope of the 'State'.

So, it can be noted that the **judicial** decision of a court cannot be challenged as being violative of fundamental rights. But, an **administrative** decision or a **rule made** by the judiciary can be challenged as being violative of fundamental rights, if that be supported by facts. This is because of the distinction between the judicial and non-judicial functions of the courts.

In the case of ***Naresh Shridhar Mirajkar v. State of Maharashtra*, AIR 1967 SC 1**, a 9-judge bench of the Supreme Court held that a judicial decision pronounced by a judge of competent jurisdiction in or in relation to a matter

brought before him for adjudication cannot affect the fundamental rights of the citizens since what the judicial decision purports to do is to decide the controversy between the parties brought before the court and nothing more. Therefore, such a judicial decision cannot be challenged under Article 13.

Article 13 : Laws inconsistent with or in derogation of the fundamental rights

(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void. (2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void. (3) In this article, unless the context otherwise required, – (a) "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law; (b) "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas. (4) Nothing in this article shall apply to any amendment of this Constitution made under article 368.

- The Article 13 not only asserts the supremacy of the Indian Constitution

but also makes way for judicial review. This legislation creates scope for reviewing preconstitutional and existing laws. Although the legitimacy of judicial interventions in Constitutional matters has sparked debates, yet in most cases, the power of judicial review is evoked to protect and enforce the fundamental rights guaranteed in Part III of the Constitution.

Meaning and Scope of Article 13

- It is through Article 13 that the Constitution prohibits the Parliament and the state legislatures from making laws that "may take away or abridge the fundamental rights" guaranteed to the citizens of the country. The provisions under Article 13 ensure protection of the fundamental rights and consider any law "inconsistent with or in derogation of the fundamental rights" as void.
- The Article 13 provides a constitutional basis to judicial review since it gives the Supreme Court or High Courts the authority to interpret the pre-constitutional laws and decide whether they are in sync with the principles and values of the present Constitution. If the provisions are partly or completely in conflict with the legal framework, they are deemed ineffective until an amendment is made. Similarly, the laws made after the adoption of the Constitution must prove their compatibility, otherwise they will be deemed as void.
- Under Article 13, the term 'law' includes any "Ordinance, order, bye-law, rule, regulation, notification, custom or usage" having the force of law

in India. The 'laws in force' include "laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed." The Supreme Court has observed that the Article 13 refers to a 'legislative' law (made by a legislature) and does not include a 'constituent' law (made to amend the Constitution).

Judicial Review as Mentioned in Article 13

- It is to be noted that judicial review as a norm has evolved over the years to uphold the principles of 'natural justice.' The Supreme Court of India and the High Courts are vested with the power to rule on the constitutionality of both legislative and administrative actions. In most cases, the power of judicial review is exercised to protect and enforce the fundamental rights.
- The Article 13 has expanded the scope of judicial review. The Indian judiciary is approached not just to ensure fairness in administrative action but also to rule on questions of legislative competence, mainly in the context of Center-state relations.

Amendments to Article 13

- The 24th amendment to the Indian Constitution was enacted by the then Indira Gandhi government in November 1971. The objective was to nullify the Supreme Court's ruling that had left the Parliament with no

power to curtail the Fundamental Rights. Clause (4) was inserted in Article 13, which states: "Nothing in this article shall apply to any amendment of this Constitution made under article 368." This provision added more power to the Parliament when it comes to amending the Constitution. It brought

Fundamental Rights within the purview of amendment procedure and judicial intervention or review of those amendments was prohibited.

- The amendment evoked sharp reactions from the media fraternity and they explained this move as "too sweeping." The amendment faced equal criticism from the jurists and the members of the Constituent Assembly. The draconian nature of the amendment was further reflected in the fact that the new provision made it obligatory for the President to give his assent when a Constitution Amendment Bill is submitted to him.

The Supreme Court Shankari Prasad v. Union of India (1951) case held that Constitutional Amendment Act is not a law and thus Parliament can amend any Fundamental Right by using Constitutional Legislative Power. It gave a similar verdict in Sajjan Singh v. State of Rajasthan Case (1965) case.

However in Golaknath v. State of Punjab (1967) case the Supreme Court held that Fundamental Rights had been given transcendental position by the Constitution and even Parliament cannot amend Fundamental Rights.

The 24th Constitutional Amendment Act amended Article 13 and 368 which

made it clear that Parliament has the power to amend Fundamental Rights through Constitutional Amendment. This was challenged in the Supreme Court in Keshavananda Bharati v. State of Kerala (1979) case. The Supreme Court upheld the validity of 24th Amendment Act. However, the Supreme Court held that the Parliament's amendment power is limited and is subject to "Basic Structure" of the Constitution. The Supreme Court has not explicitly defined the term "Basic Structure". However, in various judgments, the Supreme Court has held that the following concepts form a part of Basic Structure Supremacy of the Constitution

- Secular character of the Constitution
- Federalism
- Separation of Powers
- Power of Judicial Review
- The mandate to build a welfare state

Doctrines under Article 13:

1. Doctrine of Eclipse

Meaning: The Doctrine of Eclipse is based on the Principle that a law which violates Fundamental Rights is not nullity or void ab initio but becomes only unenforceable. It is overshadowed by the Fundamental Rights and remains dormant, but it is not dead. According to Article 13(1) of the Indian

Constitution, 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. Such laws are not dead

they come alive if the restrictions posed by the fundamental rights of the constitution are removed. Also, such eclipsed laws are operative for cases that arose before the commencement of the Constitution. Hence, the Current Fundamental Rights eclipse the Contravening part of those laws, rendering that part of the law as dormant.

- **Relevant Case Law -**

1) Bhikaji Narain Vs State of Madhya Pradesh (AIR 1955 SC 781)

In this case provision of C.P. and Berar Motor vehicles Amendment Act, 1947 authorized the State Government to make up the entire motor transport business in the province to the exclusion of motor transport operators. This provision, though valid when enacted, became void on the be coming into force of the Constitution in 1950 as they violated Article 19 (1) (G) of the Constitution. However, 1951, clause (6) of Article 19 was amended by the constitution first Amendment Act, as so to authorize the Government to monopolies any business. The Supreme Court held that "the effect of the amendment was to remove the shadow and to make the impugned Act free from all blemish or infirmity".

It became enforceable against citizens as well as non-citizens after the constitutional impediment was removed. This law was merely Eclipsed for the time being by the fundamental rights. As soon as the eclipse is removed the law begins to operate from the date of such removal.

2) Deep Chand V. State of Uttar Pradesh

In this case, the supreme court held that a post-constitutional law made under article 13 (2) which contravenes a fundamental right is nullity from its Inception and a stillborn law. It is void ab initio. The doctrine of eclipse does not apply to post-constitutional laws and therefore, a subsequent Constitutional Amendment cannot revive it. The Doctrine of eclipse applies only to pre-constitutional law and not post-constitutional law.

b. Doctrine of Severability:

According of A. 13(2). It is not the whole Act which would be held invalid by being inconsistent with Part III of the Constitution but only such provisions of it which are violative of the fundamental rights, provided that the part which violates the fundamental rights is separable from that which does not isolate them. But if the valid portion is so closely mixed up with invalid portion that it cannot be separated without leaving an incomplete or more or less mingled remainder the court will declare the entire Act void. This process is known as doctrine of severability or separability.

The Supreme Court considered this doctrine in A.K. Gopalan v. State of Madras, A.I.R. 1950 S.C. 27 and held that the preventive detention minus section 14 was valid as the omission of the Section 14 from the Act will not change the nature and object of the Act and therefore the rest of the Act will remain valid and effective. The doctrine was applied in D.S. Nakara v. Union of

India, AIR 1983 S.C. 130 where the Act remained valid while the invalid portion of it was declared invalid because it was severable from the rest of the Act. In State of Bombay v. F.N. Balsara, A.I.R. 1951 S.C. 318 it was held that the provisions of the Bombay Prohibition Act, 1949 which were declared as void did not effect the validity of the entire Act and therefore there was no necessity for declaring the entire statute as invalid.

The doctrine of severability has been elaborately considered by the Supreme Court in R.M.D.C. v. Union of India, AIR 1957 S.C. 628, and the following rules regarding the question of severability has been laid down:

(1) The intention of the legislature is the determining factor in determining whether the valid part of a statute are severable from the invalid parts.

(2) If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from the another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid what remains is

itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest had become unenforceable.

(3) Even when the provisions which are valid, are distinct and separate from those which are invalid if they form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole.

(4) Likewise when the valid and invalid parts of a Statute are independent and do 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 legislature, then also it will be rejected in its entirety.

(5) The severability of the valid and invalid provisions of a Statute does not depend on whether provisions are enacted in same section or different section, 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 provisions therein.

(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 as otherwise it will amount to judicial legislation.

(7) In determining the legislative intent on the question of severability, it will

be legitimate to take into account the history of legislation, its object, the title and preamble of it.

c. Doctrine of Waiver. - Can a person waive his fundamental right ? A reference to the doctrine of waiver was first made in Behram v. State of Bombay, AIR 1955 S.C. 123. While discussing the question of legal effect of a statute being declared unconstitutional, Justice Venkatarama Aiyer gave the opinion that a law, unconstitutional by reason of its repugnancy to a fundamental

right which is enacted for the benefit of individuals and not for the benefit of the general public, is not a nullity but merely enforceable and such an unconstitutionality could be waived, in which case the law becomes unenforceable for that individual e.g. the right guaranteed under Article 19(1)(f) is for the benefit of the owners of property and when a law is found to infringe that provisions, it is open to any person whose right has been infringed to waive it, and when there is a waiver there is no legal impediment to the enforcement of the law.

The question of waiver directly arose in Bashesher Nath v. Income Tax Commissioner, AIR 1959 S.C. 149. The petitioner whose case was referred to the Income Tax Investigation Commissioner under Section 5(1) of the Act, was found to have concealed large amount of income. He thereupon agreed at a settlement in 1954 to pay Rs. 3 lacs in monthly installments by way of

arrears of tax and penalty. In 1955, the Supreme Court in other cases declared Section 5(1) ultra vires Article 14. The petitioner thereupon challenged the settlement between him and the Commissioner. The main question that arose for consideration was whether or not, the assessee had waived his fundamental right under Article 14 by entering into the settlement. In this case the Supreme Court held "A large majority of our people are economically poor, educationally backward and politically not conscious of their rights. Individually or even collectively, they cannot be pitted against the State Organisations and institutions, nor can they meet them on equal terms. In such circumstances it is the duty of the court to protect their rights against themselves." In the end, the court upheld unanimously that the petitioner could not waive his rights under Article 14 of the Constitution.

 Circumstances under which Fundamental Rights can be curtailed or suspended. – The fundamental rights can be suspended or curtailed in the following circumstances :

1. The Parliament can restrict or abrogate by law the fundamental rights in their application to the members of the Armed Forces, of Forces charged with the maintenance of public order with a view to ensure proper discharge of their duties and maintenance of discipline among them. (Article 33).

2. Fundamental Rights can be curtailed or restricted when Martial Law is in force in any area (Article 34).

3. During the period in which the proclamation of emergency is in operation, the rights conferred by Article 19 are suspended (Article 358). Also where a proclamation of emergency is in operation the President may, by order, declare that the right to move any court for the enforcement of such rights conferred by Part III (except Articles 20 and 21) as may be mentioned in the order and all proceedings pending in any court for the enforcement of rights so mentioned shall remain suspended for a period during which the proclamation of emergency is in force or for such shorter period as may be specified in the order. An order made as aforesaid may extend to the whole or any part of the territory of India. Every such order shall, as soon as be may be after it is made, be laid before each House of Parliament. (Article 359).

4. All or any of the fundamental rights can be curtailed, suspended or modified by an amendment of the Constitution itself under Article 368.

Following are the six fundamental rights guaranteed by the Indian Constitution:

a. Right to Equality b. Right to Freedom c. Right against Exploitation d. Right to Freedom of Religion e. Cultural & Education Rights f. Right to Constitutional Remedies

ARTICLE 14

Art 14 Declares "the State shall not deny to any person equality before the law orthe equal protection of the laws within the territory of India."

Article 14 guarantees to every person the right to equality before the law or the equal protection of laws. The first expression 'equality before the Law' which is taken from English Common Law, is somewhat a negative concept. It is a declaration of equality of all persons within the territory of India, implying thereby the absence of any special privilege in favor of any individual. Every person, whatever be his rank or position, is subject to the jurisdiction of the ordinary courts. It means no man is above law and that every person, high or low, is subject to the ordinary law of the land.

The second expression, "equal protection of laws", which is rather a corollary of the first expression, and is based on the last clause of the first section of the Fourteenth Amendment to the American Constitution, directs that equal protection shall be secured to all persons within the territorial jurisdiction of the Union in the enjoyment of their rights and privileges without favouritism or discrimination. It is a more positive concept (as it expects a positive action from the state) implying equality of treatment in the equal circumstances. In other words, all persons who are in the same circumstances will be governed by the same set of rules. It is a guarantee of equal treatment. An equal law should be applied with an equal hand to all persons who are the equals.

In State of West Bengal v. Anwar Ali Sarkar[AIR 1952 SC 75], the Court rightly observed that the second expression is the corollary of the first and it is difficult to imagine a situation in which the violation of equal protection of laws

will not be the violation of the equality before the law. Thus, in substance, the two expressions mean one and the same thing.

In Re Special Courts Bill, 1978[AIR 1979 SC 478], Chandrachud, J., observed: "The underlying principle of the guarantee of Art. 14 was that all persons similarly circumstanced should be treated alike both in privileges conferred and liabilities imposed."

Prof. Dicey gave three meanings to Rule of Law, they are –

1. The absence of Arbitrary Power or Supremacy of Law – in other words, a man may be punished for a breach of law but he can be punished for nothing else. It
   means the absolute supremacy of Law as opposed to the arbitrary power of the Government.
2. Equality before the Law – it means subjection of all classes to the ordinary law of the land administered by ordinary law courts. This means that no one is above law with the sole exception of the monarch who can do no wrong.
3. The Constitution is the result of the ordinary law of the land – it means that the source of the right of individuals is not the written Constitution but the rules as defined and enforced by the Courts.

The first and second aspects apply to the Indian system but the third aspect of the Dicey's rule of law does not apply to Indian system as the source of

rights of individuals is the Constitution of India. The Constitution is the supreme Law of the land and all laws passed by the legislature must be consistent with the provisions of the Constitution

- **Exception to the Rule of Equality -**

Under Art. 359, when the proclamation of emergency is in operation, the enforcement of Art. 14 may be suspended during that period. Art. 361 provides that president and governors shall not be answerable to any Court for the exercise and performance of the powers and duties of the office. They also enjoy immunity from criminal and civil proceedings until certain conditions are fulfilled.

Members of Parliament and of State Legislature are not liable in respect of anything done or said within the House (Arts. 105 and 194). Foreign Diplomats are immune from the jurisdiction of Courts. Art. 31 C forms an exception by excluding some laws [for implementing any of the directive principles specified in Art. 39(b) or (c)] from the purview of Art. 14.

In the case of Indra Sawhney the right to equality is also recognized as one of basic features of Indian constitution. Article 14 applies to all person and is not limited to citizens. A corporation, which is a juristic person, is also entailed to the benefit of this article. This concept implied equality for equals and aims at striking down hostile discrimination or oppression of inequality. In the case of Ramesh Prasad v. State of Bihar, AIR 1978 SC 327 It is to be noted that aim

of both the concept, ' Equality before law' and ' Equal protection of the law' is the equal Justice.

Underlying principle:-

The Principle of equality is not the uniformity of treatment to all in all respects. It only means that all persons similarly circumstanced shall be treated alike both in the privileges conferred and liabilities imposed by the laws. Equal law should be applied to all in the same situation, and there should be no discrimination between one person and another.

Article 14 Permits Reasonable Classification but Prohibits Class Legislation

Article 14 does not mean that all laws must be general in character or that the same laws should apply to all persons or that every law must have universal application, for, all persons are not, by nature, attainment or circumstances, in the same positions. The State can treat different persons differently if circumstances justify such treatment. In fact, identical treatment in unequal circumstances would amount to inequality. The legislature must possess the power to group persons, objects and transactions with a view to attaining specific aims. So, a reasonable classification is not permitted but necessary if society is to progress.

By the process of classification, the State had the power of determining who should be regarded as a class for purposes of legislation and in relation to a

law enacted on a particular subject. Classification meant segregation in classes which had a systematic relation, usually found in common properties and characteristics. It postulated a rational basis and did not mean herding together of certain persons and classes arbitrarily [Re Special Courts Bill, 1978 AIR 1979 SC 478].

The class legislation is that which makes an improper discrimination by conferring particular privileges upon a class of persons arbitrarily selected. And no reasonable distinction can be found justifying the inclusion of one and exclusion of other from such privilege. While Art. 14 forbids class legislation, it permits reasonable classifications of persons, objects, and transactions by the legislature for the purpose of achieving specific ends. In other words, what Art. 14 prohibits is class legislation and not a classification for the purpose of the legislation.

ARTICLE 15

The guarantee under Article 15 is available to citizens only and not to every person whether citizen or non-citizen as applicable under Article 14 of the Constitution.

Article 15 directs that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them. Any law discriminating on one or more on these grounds would be void. The word, "only" has been purposely used In the Article.

Discrimination based on one or more of these grounds and also on other grounds or grounds will not be affected by Article 15 (1). It means that if one or more of the specified grounds is combined with a ground not mentioned In Article 15 (1); the laws will be outside the prohibition contained in Article 15 (1). Article 15 (1) prohibits discrimination on the ground of birth and not that of residence. A State can, therefore, grant concessions to its residents in matters of fees in an educational institution.

In D.P. Joshi v. State of Madhya Bharat, AIR 1955 S.C. 334, a rule of medical colleges provided that all students who are bona fide residents of Madhya Bharat, no capitation fee should be charged but for non-resident students, capitation fee should be retained.

The validity of this rule was challenged on the ground that it contravened Articles 14 and 15 (1) of the Constitution. It was held that the rule was not open to attack as infringing Article 15 (1). The ground for exemption from payment of capitation fee is bona fide residence in the State.

Residence and place of birth are two distinct conceptions with different connotations both in law and fact. Article 15 (1) prohibits discrimination on the ground of place of birth but not on the ground of residence.

Similarly, the requirement of a test in the regional languages for State employment does not contravene Article 15, as a test in the regional language for State employment does not contravene Article 15, as the test is

compulsory for all persons seeking employment. It has been held so in P. Raghunandha Rao v. State of Orissa AIR 1955 Orissa 1131.

In Air India v. Nargesh Miija, AIR 1981 S.C. 1829, the Supreme Court struck down Regulations 46 and 47 of the Air India and Indian Airlines. Regulation 46 provided that an air-hostess shall retire from the service of the corporation upon attaining the age of 35 years or on marriage, if it takes place within 4 years or on first pregnancy whichever is earlier.

Under Regulation 47, Managing Director had discretion to extend the age of retirement by one year at the time up to the age of 45 years, if the air-hostess is found medically fit. The court held that termination of service on the basis of pregnancy is unfair and clearly violates Article 14. The power of managing director for the extension of age of retirement is also unconstitutional.

Article 15 (2) applies to States as well as private actions while Article 15(1) refers to the obligation of the States only.

Clauses (3) and (4) of Article 15 embodies exception to the general rule enunciated above. They empower the State to make special provisions for women and children and for the advancement of any socially and educationally backward classes of citizens for the Scheduled Castes and Scheduled Tribes.

In M.R. Balaji v. State of Mysore, AIR 1963 S.C. 649, the government reserved seats in the Medical and Engineering colleges in the State as follows:

Backward classes 28%; more backward classes 22%; Scheduled Castes and Tribes 18%. The court held that the sub-classification made by the order between backward classes, was not justified under Article 15 (4). Caste is not the sole criteria for determining backwardness. Reservation up to 68% is a fraud on the Constitution. Article 15 (4) only enables the State to make special provision and not exclusive provision for the backward classes.

In State of Madhya Pradesh v. Nivedita Jain, AIR 1981 S.C. 2045, the Supreme Court upheld the validity of an executive order of the Government of Madhya Pradesh completely relaxing the condition of qualifying marks for the candidates of Scheduled Castes and Scheduled Tribes in Pre-Medical Tests. The court observed that in the absence of any law to the contrary, it is open to the government to impose such conditions which would make the reservation effective for the advancement of candidates of such classes.

The court held that the executive order completely relaxing the minimum qualifying marks was not volatile of the Regulation and Article 15 (4) of the Constitution.

In Mandal Commission case, the Supreme Court by a majority of 6-3 has held that the subclassification of backward classes into more backward castes and backward castes for the purposes of Article 16(4) can be made. But as a result of sub-classification the reservation cannot exceed more than 50%. The distinction should be on the basis of degrees of social backwardness.

Article 16. Equality of Opportunity in matters of public Employment.

Article 16 deals with the equality of opportunity in matters of public employment. Equal opportunity is a term which has differing definitions and there is no consensus as to the precise meaning. The Constitution of India has given a wide interpretation of this article.

Equality of opportunity in matters of public employment.-

(1) There shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. The rule applies only in respect of employments or offices which are held under the state. i.e., the person holding office as subordinate to the state. The clause accordingly, does not prevent the state from laying down the requisite qualifications for recruitment for government services, and it is open to the authority to lay down such other conditions of appointment as would be conducive to the maintenance of proper discipline among the servants.

The qualification pointed may, besides mental excellence, include physical fitness, sense of discipline, moral integrity and loyalty to the state. The expression ' Matters relating to employment and appointment' must include all matters in relation to employment both prior and subsequent to the employment which are incidental to the employment and form parts of the terms of the conditions of the such employment.

Thus the guarantee in clause (1) will cover the (a) initial appointments, (b) Promotions, (c) Termination of employment, (d) Matters relating to the salary, periodical increments, leave, gratuity, pension, Age of superannuation etc. Principle of equal pay for equal work is also covered in section 16(1). In the light of the case of ***M Thomas v State of Kerala***, Justice V.R Krishna Iyer, rightly pointed out that the experience of reservation in practice showed that the benefits were, by and large, snatched away by the top creamy layer of the backward classes or classes, thus keeping the weakest amongst weak always weak and leaving the fortunate layers to consume the whole cake. Substantially lightened by the march of time, measures of better education and more opportunities of employment.

(2) No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State. The prohibited grounds of discussions are religion, race, caste, sex, descent, place of birth, residence, or any of them. Thewords, any employment or office under the State make it clear that **Article 16(2)** also applies only to public employment.

In ***K.C. Vasanth Kumar v. State of Karnataka***, AIR 1985 S.C. 1495, the Supreme Court has suggested that the reservations in favor of backward classes must be based on the mean test. It has been further suggested that the policy of reservations should be reviewed every five years or so and if a class has reached up to that level where it does not need the reservation. Its

name should be deleted from the list of backward classes.

Supreme Court in ***Indira Sawhney & Ors. v. Union of India*** (AIR 1993 SC 477)

1. Upheld Implementation of separate reservation for other backward classes in central government jobs.
2. Ordered to exclude Creamy layer of other backward classes from enjoying reservation facilities.
3. Ordered to restrict reservations within the 50% limit.
4. Declared separate reservations for economically poor among forward castes as invalid.

(3) Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory prior to such employment or appointment. ***M R Balaji v Mysore*** AIR 1963 SC 649 Court put 50% cap on reservations in almost all states except Tamil Nadu (69%, under 9th schedule) and Rajasthan (68% quota including 14% for forward castes, post-Gujjar violence 2008) has not exceeded 50% limit. Tamil Nadu exceeded the limit in 1980. Andhra Pradesh tried to exceed the limit in 2005 which was again stalled by the High Court.

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

The scope of Article 16 (4) was considered by the Supreme Court in *Devadasan v. Union of India*, AIR 1964 S.C. 179. In this case "carry forward rule" made by the Government to regulate the appointment of persons of backward classes in government services was involved.

The Supreme Court struck down the "carry forward rule" as unconstitutional on the ground that the power vested in the government cannot be so exercised so as to deny reasonable equality of opportunity in matters of public employment for the members of classes other than backward classes. In this case, the reservation of posts to the members of backward classes had exceeded 50% and had gone up to 68% due to "carry forward rule."

The Supreme Court held that each year of recruitment must be considered by itself and the reservation for each year should not be excessive so as to create ma monopoly or interfere unduly with the legitimate claims of the rest of the society. So the court held that reservation should be less than 50%, but how much less than 50% should depend upon the prevailing situations.

This was overruled in ***Indira Sawhney & Ors v. Union of India*** AIR 1993

SC 477 : 1992 SCC 217 and held that Reservations cannot be applied in promotions.

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

This clause does not affect the decision as regards other backward classesbut makes it inapplicable to the scheduled castes and the scheduled tribes. Justifying reservations for the Scheduled Castes and Scheduled Tribes candidates in the promotion, the Court had at one point held that even their seniority acquired by the promotion of the general class candidates could not be affected by the subsequent promotion of the general class candidates. ***S. Vinodkumar vs. Union of India*** 1996 6 SCC 580 Relaxation of qualifying marks and standard of evaluation in matters of reservation in promotion was not permissible.

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

vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent. Reservation on the total number of vacancies of that year.

(5) Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination. ***UOI v/s. S. Kalugasalamoorthy*** held that when a person is selected on the basis of his own seniority, the scope of considering and counting him against reserved quota does not arise.

T.M.A. Pai Foundation v. State of Karnataka (2002) 8 SCC 481, ***P.A. Inamdar v. State of Maharashtra*** 2005 AIR (SC) 3226

Supreme Court ruled that reservations cannot be enforced on Private Unaided educational institutions.

When is the reservation allowed to the backward class?

Other Backward Class (OBC) is a collective term used by the Government of India to classify castes which are educationally and socially disadvantaged. It is one of several official classifications of the population of India, along with Scheduled Castes and Scheduled Tribes (SCs and STs). The more important question is to what extent the affirmative action programmes based on irrelevant criteria such as caste and religion should be allowed to override merit

and efficiency criteria.

Aristotle writes, "Injustice arises when equals are treated unequally and also when unequals are treated equally". Choosing the proper basis of distribution for making preference is not free from problems. It has been suggested that individual need, status, merit or entitlement are all in appropriate circumstances, proper bases of distribution of benefits.

In shedding light on the true content of equality of opportunity, Bernard Williams adds: "It requires not merely that there should be no exclusion from access on grounds other than those appropriate or rational for the good in question, but that the grounds considered appropriate for the good should themselves be such that people from all sections of society have an equal chance of satisfying them."

In defining a "section of society", we cannot include sections of the population identified just by the characteristics which figure in the grounds for allocating the good since it will further exclude some section of the population. Everyone will agree that for getting admissions in a medical college – where seats are limited – merit is an appropriate criterion. Now, exclusion of potential candidates on grounds other than merit is *prima facie* denial of equality of opportunity.

In Achill Bharitaya Soshit Karamchari Sangh it has been emphasiszed that the categorization of scheduled caste and scheduled tribes as a class on the basis

of which the classification could be justified as just and reasonable within the meaning of **Articles 15(1) and 16(1)** because these classes stand on a substantially different footing from the rest of the Indian community in our Constitution.

Other weaker section in this context, in his opinion, would mean not other 'backward class' but dismally depressed categories comparable economically and educationally to Scheduled Castes and Scheduled Tribes. In other words, in his opinion, classification of Scheduled Castes and Scheduled Tribes as a special category could be justified within the meaning of Article 15(1) and Article 16(1),whereas classification on the basis of backward classes may have to be confirmed on the basis of Article 15(4) and 16(4).

Are Articles 15(4) and 16(4) Exceptions?

On a plain reading of Articles 15 and 16 one is likely to form the impression that clause (4) of Article 15 is an exception to the rest of the provisions of that article and to clause (2) of Article 29 and that clause (4) of Article 16 is an exception to the rest of the provisions of that article. In other words, while clause (4) of Article 15 permits what the rest of that article or clause (2) of Article 29 prohibits, clause (4) of Article 16 permits what the rest of that article prohibits.

This, indeed, was the initial impression of the Supreme Court also. This impression continued to rule until some of the judges in *the* ***State of Kerala***

v. N.M. Thomas opined that clause (4) of Article 16 was not an exception to clause (1) or (2) of that article. Thus clause (4) of Article 16 is not an exception to the rest of that article, but rather it is a facet of equality of opportunity guaranteed in clause (1) of that article and an effective method of realising and implementing it. Clause (4) does not derogate from anything in clauses (1) and (2) of Article 16 but rather gives them positive support and content. It serves the same function, i.e. securing of equality of opportunity, as do clauses (1) and (2). Obviously, therefore, it is as much a fundamental right as clauses (1) and (2) or any other provision of that article.

ARTICLE 17

Article 17 of the Indian Constitution talks about abolition of Untouchability Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with the law.

This article enacts two declarations. Firstly, it announces that ”untouchability” is abolished and its practice in any form is forbidden, and secondly, it declares that the enforcement of any disability arising out of ”untouchability” shall be an offence punishable in accordance with the law.

Untouchability under Article 17 of the Indian Constitution

It may be noticed that the word ***”untouchability”*** is enclosed in inverted

commas. This clearly indicates that the subject-matter of the article is not untouchability in its literal or grammatical sense but the practice as it has developed historically in this country. The word, it is reasonable to suppose, refers to those who are regarded as untouchables in the course of historical development. The literal construction of the term would include persons who are treated as untouchables either temporarily or otherwise for various reasons, such as their suffering from an epidemic or contagious disease or on account of social observances such as are associated with birth or death or on account of social boycott resulting from caste or other disputes. The imposition of untouchability in such circumstances has no relation to the causes which relegate certain classes of people beyond the pale of caste estimate.

State v. Gulab Singh, the Allahabad High Court was asked to hold the UP. Removal of Social Disabilities Act, 1947, ultra vires the Constitution since it dealt with a matter which was reserved

for Parliament under Article 35. The High Court rejected the contention and held that Article 35 refers to future laws and does not render past laws in the matter void.

In**"*State of Karnataka v. Appa Balu Ingales***"**, the first case to have come before the Supreme Court under the Act, the court upheld the conviction of the accused respondents by the two lower courts but reversed by the High Court. Disagreeing with the assessment of evidence by the High Court that

there was discrepancy in the evidence of the witnesses about the actual words used by the accused, the court noted that the "High Court lost sight of the fact that the social disability of the Harijan community was enforced on a threat of using a gun." In a concurring opinion going into the sociological angularities of the evil of untouchability and the constitutional resolve to remove it lock, stock and barrel at the earliest, K. Ramaswamy said that the evil is not founded on mens rea and in appreciating the evidence the courts should adopt a psychological approach and should not be influenced by deep-seated prejudices or predilections covertly found in other walks of life about this evil.

ARTICLE 18: ABOLITION OF TITLES

Article 18(1) Clause (1) prohibits the conferment of titles. Military and academic distinctions are exempted from the prohibition.

Article 18(2) prohibits a citizen of India from accepting any title from a foreign State.

Article 18(3) provides that a non-citizen who holds any office of profit or trust under the State shall not accept, without the consent of the President, any title from any foreign State.

Article 18(4) provides that no person citizen or non-citizen holding any office of profit or trust under the State, shall, without the consent of the President,

accept any present or emolument or office of any kind from or under any foreign State.

The eminent constitutional lawyer, Sir Ivor Jennings, describing the nature of obligation created by **Article 18 of Indian Constitution**, observes:

The rule in Article 18, incorrectly summarised by the marginal note as the abolition of titles, that no title, not being a military or academic distinction, shall be conferred by the State, is apparently part of a 'right to equality. It seems to be no breach of the right to equality if Sri John Brown becomes Dr. John Brown, or General John Brown, or Pandit John Brown, or Mr. Justice Brown or Rotarian John Brown, or even Sri John Brown, M.B.E., or if he rolls around a gold plated car or loads his wife with jewelry and silk sarees; but if like the present lecturer, he becomes an impecunious knight, the right to equality is broken. In whom is this right vested? It cannot be Sir John Brown; it is neither in rem nor in personam, neither corporeal nor incorporeal. It is in fact not a right at all, but a restriction on executive and legislative power.

Sir Jennings was looking at ***"Article 18* of the Indian Constitution"** only in terms of jural relations. He did not realize the amount of cleavage and division that was created in the Indian

Society by the conferment of titles on Indians by British rulers. The Constitution, as its Preamble states, wanted to rebuild a cohesive and integrated society by providing for equality of status.

ARTICLE 19

The Right to Freedom in Article 19 guarantees the following six freedoms: **Right to freedom of Speech and Expression [Articles 19(1)(a)]:**

Freedom of speech and expression is a very important aspect of democracy. The freedom of speech and expression means the right to express one's convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode. The right to speech and expression includes right to make good or bad speech. One may express oneself even by sign. It also includes the expression of idea through dramatic performance, cinematographic and any other mode of expression. It enables a citizen to participate in public activities.

The freedom of speech and expression is, however, not absolute and it allows Government to frame laws to impose reasonable restrictions in the interest of sovereignty and integrity of India. This freedom is subject to reasonable restrictions imposed by the State relating to (a) defamation; (b) contempt of court; (c) decency or morality; (d) security of the State; (e) friendly relations with foreign State; (f) incitement to an offence; (g) public order; (h) maintenance of the sovereignty and integrity of India. (as per clause 2). For example, the censorship of movies by Censor Board is done to maintain public order or decency or morality. Further restrictions have been imposed on the

freedom of speech and expression by Article 51A defining fundamental duties of a citizen.

Freedom of Press:

Freedom of expression means the freedom to express not only one's own views but also the views of others and, by any means, including printing or broadcasting. Under the Freedom of Speech and Expression, there is no separate guarantee of freedom of the press and the same is included in the freedom of speech and expression. Freedom of the press under Article 19(1)(a) has also to be secured so as to allow the public to be well informed. The freedom of press has three essential elements:

1. freedom of access to all sources of information,
2. freedom of publication, and
3. freedom of circulation.

It is to be noted that, the freedom of press is guaranteed by both freedom of speech and expression (Art.19(1)(a)) and freedom to practise any profession, or to carry on any occupation, trade or business (Art.19(1)(g)). The freedom of press is subjected to same limitations as are provided by Article 19(2). Thus imposition of pre-censorship on publication of views, ideas,
analysis, etc is violative of freedom of speech and expression. The constitutionality of censorship has to be judged by the test of 'reasonableness'

within the meaning of clause 2. Indian Press (Emergency) Act of 1931, the Press Objectionable Material Act of 1951 imposing restriction on freedom speech and expression of press have been repealed. The media is today subject to Press council of India regulations. The time to time government orders on regulation of content in individual cases have to be determined by the test of reasonableness as described wove. The Official Secrets Act of 1923, Contempt of Court Act of 1952 and it's amendment in 2006 (truth as defence), Representation of People's Act of 1955 (incitement to an offence), various sections of Indian Penal Code such as section 124 (public disorder), 499 and 500 (defamation), section 144 of Criminal Procedure Code, etc are some of the acts imposing restrictions on freedom of press.

Some other forms of freedom of speech and expression

Right to freedom of speech and expression also includes the right to acquire and import ideas and information about the matters of common interests such as telecasting. It also includes publication of advertisement and commercial speech. The freedom of speech and expression on New Media (on demand digital sources of information such as online news, social networking sites, etc) too comes under Article 19(1)(a), the regulation of which is done under Information Technology Act, 2000 and it's amendment in 2008.

Art. 19(1)(a) also covers the right to hold telephonic conversation in privacy. The freedom of speech and expression also includes the right to remain silent.

It was decided that a person cannot be compelled to sing a National Anthem if he does not want to do so because of some religious objections. Art. 19(1)(a) covers the right to fly the national flag as it is also a symbol of freedom of speech and expression. The right to get information is also a part of freedom of speech and expression. It is a natural right flowing from the concept of democracy [Article 19(1)(2)] of the International Covenant of Civil and Political rights, of which India is a signatory. It speaks as under: -

1. Everyone shall have the right to hold opinions without interference.

2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice."

According to the Supreme Court, the voters have the right to know the antecedents of candidates for election to the Parliament or State legislature.

Freedom of Assembly [Art.19 (1)(b)]

Art.19 (1)(b)] guarantees citizens the right to meet each other. In order to claim this right the assembly of people has to be a) peaceful, and b) without arms. The state may further impose

reasonable restrictions in the interest of — a) public order, and b) sovereignty and integrity of India. It is nowadays widely known that the magistrate can

put reasonable temporary restrictions on the freedom of assembly of citizens under section 144 of Cr.P.C. to prevent imminent threat to public order or peace. Thus freedom of assembly gives people the right to hold public meetings and take out processions. But it does not mean that citizens can hold public meeting on anybody's property. The government can impose restrictions if such meetings or processions disturb the road traffic or peace in restricted areas.

Picketing and demonstrations: Demonstrations and processions usually involve three Fundamental Rights – freedom of speech, freedom of assembly, and freedom of movement. Picketing and demonstrations can be regarded as forms of freedom of speech and expression. They are non-violent acts of persuasion. The rights to make peaceful demonstration or taking out a procession or holding out banners or arranging Public meeting, etc are democratic rights which the Constitution of India has recognized, with reasonable restrictions.

Freedom to form associations or unions or co-operatives [Art.19 (1)(c)]

Article 19(1)(c) confers on citizens the right to form associations or unions. The right guaranteed under Article 19(1)(c) is not merely to form association but also to continue with the association as such. The freedom to form association implies also the freedom to form or not to form, to join or not to join an association or union.

The State can impose reasonable restrictions on freedom of association or union in Interest of — a) public order, b) morality, and c) the sovereignty and integrity of India.

Strike is a temporary stoppage of work by a group of employees in order to express a grievance or to enforce a demand concerning changes in work conditions. In the Indian Constitution, the right to strike is not an absolute right but it flows from the Fundamental Right to form union. It is subject to reasonable restrictions. The Supreme court has stated that "no person has the right to destroy another's property in the guise of bandh, or hartal or strike or to cause inconvenience to others or to create a risk; to life, liberty or property of any citizen or to public property". Central Civil Sarvices Conduct Rules, 1955 reads: "No Government servant shall participate in any demonstration or resort to any strike in connection with any matter pertaining to his conditions of service". In private sector, the right to strike or the right to declare lock-out is allowed in limited forms, controlled or restricted by appropriate industrial legislations such as Trade Unions Act of 1926, Industrial Disputes Act of 1947 etc. The right to form co-operatives was introduced under Article 19(1)(c) by the 97th Constitution (Amendment) Act, 2011.

Right of Association and Armed Forces

The Constitution empowers the Parliament, under Article 33 to modify the rights conferred by Part Iii of the Constitution in their application to members

of the Armed Forces or other forces

engaged with the maintenance of public order. Exercising this power, Parliament has banned the formation of trade unions to the members of the Armed Forces, Police etc.

Freedom of movement [Art. 19(1)(d)]

Art. 19(1)(d) guarantees freedom to move freely throughout the territory of India; though reasonable restrictions can be imposed on this right in the interest of the — a) general public, or b) for protection of the interests of any Scheduled Tribe. For example, restrictions may be imposed on movement and travelling, so as to control epidemics or for that matter to protect environment or biodiversity or to protect tribal culture such as Jarawas in Andaman. Similarly, restrictions may be put by an order of the District Magistrate or Police Commissioner to remove a person from a particular area (Tadipar) for a temporary period of up to three months. Supreme Court has also ruled that the right of movement of prostitutes may be curbed. The freedom of movement has two dimensions viz. internal (right to move inside the country) and external (right to move out of the country and the right to come back to the country). Article 19 protects only the first dimension while the second dimension is dealt by Right to life and personal liberty guaranteed by Article 21.

Freedom to reside and settle [Art. 19(1)(e)]

[Art. 19(1)(e)] guarantees citizens the right to reside (temporary stay) and settle anywhere in the territory of India. The freedom of movement and freedom to reside and settle are complementary to each other. Their object is to remove the barriers within India. They promote national unity and integrity of India. The right is subject to reasonable restrictions by the State in the interest of the — a) general public or b) for the protection of the scheduled tribes, from exploitation and coercion. The freedom to travel and reside or settle in North-eastern states of India, Jammu and Kashmir, Uttarakhand, etc. has been restricted for the same reasons mentioned above.

Freedom to practise any profession or to carry on any occupation, trade or business [Art. 19(1)(g)]

[Art. 19(1)(g)] guarantees a citizen the right to choose a source of livelihood of his choice. The right covers the right to not to choose a business or right to close a business. The second right comes with certain conditions such payment of workers' compensation, pension, etc. Citizen's right to carry on a profession is basic to the life of a man and state imposes no particular restriction on it, except the interest of the general public. Of course, there is no right to carry on a business which is dangerous or immoral.

Two conditions have been put on the freedom of citizens to practice any profession

1. The State may prescribe requisite professional or technical qualifications

for carrying on any occupation, trade or business.

2. The State may exclude, completely or partially, the citizens or other entities from carrying on any trade, business, industry or service, where the State or a corporation owned or controlled by the State is involved.

Restrictions on Article 19

1. Each of the above right to freedom has been qualified by restrictions. The Courts have the power to review the reasonableness of any of the restrictions and strike them down if they are not justified.

2. It should be noted that when a Proclamation of Emergency is made under Art. 352, then Art. 19 is suspended [Art. 3581, so that pre-censorship on the freedom of speech and expression, inter alia, freedom of press may be imposed, without any restraint.