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INDIAN POLITY

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Theory of Separation of Power

It was proposed by French philosopher Montesquieu. Theory of separation of power holds that the powers of three organs of government ie **executive, legislative and Judiciary,** must be separate and such separation must be water tight. It means one organ of the government shall not be allowed to exercise function of other organ under any circumstances.

The objective of separation of power are
1. To prevent the concentration of power in a single authority.
2. To safeguard individual liberty of the people.

If L + E : Liberty of the people will be compromised due to the tyranny of the State.
If J + L : Interpretation of law will become meaningless.
If J + E : Administration of justice will become meaningless.
If J + L + E : It will lead to concentration of power and the government will become despotic and the liberty of people will be compromised.

The US Constitution became the first Constitution in the world to give constitutional status to theory of separation of power by incorporating it in the Constitution. Since US Constitution provides for the presidential form of government, in which three organs are separated and independent of each other, the Theory of separation of power is fully incorporated in US. However in its incorporation, the Theory has been modified :

1. US Constitution has rejected the concept of water tight separation of power and it provides for the coordination of the three organs of the state in the interest of the effective administration.
2. It has also implemented doctrine of "checks and balances" along with the theory of separation of power. Under this doctrine the powers of each organ of government are so arranged that they allowed the one to exercise control over the other two organs and prevent them from exceeding the limits of the Constitution. Thus all the three organs are inter-checked and and forced to maintain a balance among themselves.

Since Indian Constitution provides for Parliamentary form of government in which executive and legislative are not completely separated from each other, the Indian constitution has incorporated theory of separation partially but not fully.

For example **Article 50 of Constitution (DPSP)** provides for the separation of judiciary from executive but not the legislative from the executive. Indian constitution has also rejected the water tight separation of power and has incorporated doctrine of "checks and balances".

The criminal procedure code in 1955 in order to implement Article 50 has taken away the judicial powers enjoyed by the "executive magistrate" such as bails to prisoners who are accused of petty crimes and such judicial powers are at present is enjoyed by only "judicial magistrate".

The Supreme Court in Keshavanand Bharti vs State of Kerala held that "separation of power" is the part of basic structure of the Constitution. Further in Kannadasan Bharti vs state of Tamil Nadu, Supreme Court held that Constitution incorporates the doctrine of "**checks and balances".**

Illustration of Checks and Balances :

1. **Legislative on**
   Judiciary : Through impeachment, removal of judges and power to amend laws declared ultra vires to constitution and revalidate it.
   Executive : Through no-confidence motion, question hour, zero hour etc.

2. **Judiciary on**
   Executive : Judicial review of executive actions.
   Legislative : Through Basic structure.

3. **Executive on**
   Judiciary : Through appointment of chief justice and other judges.
   Legislative : Through delegated legislation.

Classification of Fundamental Rights :

1. Right to equality (Art 14 to Art 18).
2. Right to freedom (Art 19 to Art 22).
3. Right against exploitation (Art 23 to Art 24).
4. Right to freedom of religion (Art 25 to Art 28).
5. Cultural and educational right (Art 29 and Art 30).
6. Right to constitutional remedies (Art 32).

Right to Equality

Article 14 :

a. Equality before law (EBL)
b. Equal protection of law (EPL)

a. The doctrine of equality before law (EBL)

It originated under English Constitution. It States that nobody is above law and every individual is equal before law. Same set of courts are for every individual. Rule of law is implicit under article 14 and the crux of this is "the absence of arbitrary use of power".

Rule of law as defined by A V Dicey means

1. No man shall be punished or made to suffer in body or boots except for the violation of law. Further such a violation of the law shall be established in the ordinary court.
2. All persons are equally amenable to the ordinary jurisdiction of the court.
3. Constitution is the result of the ordinary law of land. However this rule stands modified in India where it reads – the Constitution is the supreme law of the land and all other laws in order to be legally valid shall conform to the Constitution.

 # Rex Lex (King was Law) vs Lex Rex (Law is King)

Exceptions to rule of law given under article 361 :

1. President and Governor of the state is not answerable to work a court of law in so far as the discharge of its executive function.
2. No criminal proceedings whatsoever can be instituted against the President or governor of the state during his term of office.
3. No civil proceedings, in which relief is claimed, can be instituted against the President or governor of the state in any court of law except in case of two months notice served.
4. Visiting head of the state, heads of government, the officials of sovereign states and foreign diplomats posted in the country are not answerable to the local courts in the discharge of their official function.

b. The doctrine of Equal protection of law (EPL)

The principle of EPL originated under the US Constitution. It is regarded as positive concept. It is based on Aristotelian concept of equality which states that there can be equality of treatment only among equals.

There can be no equality of treatment among unequals. In fact, equality of treatment in dissimilar circumstances would amount to inequality in treatment of those who are placed in disadvantageous position.

Therefore equal protection of law (EPL) does not mean universal application of all laws. All laws may not apply uniformly among all the persons under all circumstances. Equal protection of laws only means equality of treatment in equal circumstances.

Among equals the law should be equal and equally administered – **Like** should be treated **alike** (similar) and **Unlike (**not similar) should not be treated **alike** (similar). It only demands that all persons who are similarly placed should be treated similarly.

Therefore it guarantees neither equality of treatment among unequals nor inequality of treatment among equals. It only guarantees equality of treatment among equals.

It recognises that all the individuals do not have equal talent but all individuals should have equal opportunity to develop that talent. This principle allows the state to classify people into different categories based on reasonable classification.

For example classification of a section of citizens as **Backward classes**, based on social and educational backwardness, is reasonable and the state can confer certain favours on the backward classes which may be denied to other citizens. Thus, the **reservation policy** of government in favour of backward classes is constitutionally protected under equal protection of law (EPL).

Similarly if **women and children** are provided with certain special favours, on the ground they belong to the weaker section of the society, then it is protected under equal protection of law (EPL).

However it is up to the judiciary to decide whether any such classification made by the state is reasonable or not.

Article 15

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

Article 15 (2) : no citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels and places of public entertainment and for the use of wells, tanks, bathing ghat, Road and places of public resort maintained wholly or partly out of state funds or dedicated to use of general public.

Case of Transgender Person :

The transgender has been treated differently by the society and were denied fundamental rights under article 14 and 15, where they were discriminated against on the grounds only of sex (gender identity). They were socially excluded and were not allowed to decide their sexual orientation.

The Supreme Court in the **National Legal Service Authority vs Union of India -2014** case acknowledged the transgender as the third gender for the purpose of safeguarding their rights and recognised their most basic human right - to decide their sexual orientation.

Supreme Court also upheld the transgender person's right to decide their self-identified gender and directed the government to grant legal recognition to their gender identities such as male, female or as a third gender.

The Supreme Court also recognised their following rights :

1. Right to have family by marrying each other and adopt children.
2. Right to inherit property.
3. Right to claim a formal identity through passport, driving license or ration card etc.
4. Right to be included in the mainstream of the society.

The Supreme Court also directed the state to formulate specific welfare programmes for the transgender and recognise them as socially and educationally backward class for the purpose of extending reservation facility in educational institutions and public employment. Further they should also have access to healthcare, housing and other public facilities like toilets.

[The Supreme Court decision in **NALSA case** also diluted the decision of Supreme Court in Naz foundation 2013 case that criminalised homosexuality (sec 377 of IPC).]

Ram Singh versus Union of India 2015 case the Supreme Court held that the new emerging groups such as transgender is must be identified for enjoying the reservation benefits.

Accordingly government enacted **Transgender Persons (Protection of Rights) Act 2019** which guarantee equal rights to transgender, right to have access to reservation benefits, social inclusion, healthcare etc. It also established a **National Council for Transgender (NCT)** to advise government, redress grievances, monitor policies and promote their interest.

While article 15 (1) and 15 (2) confer fundamental right on citizens against discrimination and speaks the language of equality before law (EBL); article 15 (3), (4), (5) do not confer any fundamental right on citizen.

These confer power on the state to make special provisions in favour of certain categories of citizen who are placed in disadvantageous position. Thus it speaks the language of Equal Protection of Law (EPL).

Article 15 (3) : It allows the state to make special provisions for the welfare of women and children. Thus under article 15 (3) "sex" can only be the ground on which discrimination can be done in favour of women.

The reservation of seats that have been provided to women in panchayats and municipalities and under the state government employment; various educational, social and economic welfare programme that have been launched in favour of women and children are constitutionally protected under article 15 (3).

Article 15 (4) : It was added in the Constitution by first Constitutional Amendment Act - 1951. It confers the power on the state to make special provisions for the advancement of socially and educationally backward classes of citizens including SC and ST.

Article 15 (5) : it was added in the Constitution by 93rd Constitutional amendment act 2005. It confers the power on the state to provide by law reserving seats in favour of socially and educationally backward classes of citizens including Sc & ST in educational institutions - including private educational institutions, whether receiving aid out of the state funds or not but excluding the minority educational institution.

The Parliament in exercise of its power under Article 15 (5) enacted the **Central Educational Institutions (reservation in admission) Act 2006** which provides for reservation of seats for students belonging to SC, ST and OBC categories to the extent of 15%, 7.5%, and 27% respectively in central educational institutions, established, maintained or aided by central government.

However, the Act does not apply to Institution of excellence, research institutions, institutions of national and strategic importance.

Article 16

Article 16(1) : There shall be equality of opportunity for all citizens in matters relating to public employment.

Article 16(2) : It prohibits the state from discriminating against the citizen on grounds only of religion, race, caste, sex, decent, place of birth, residence or any of them, in case of public employment.

While article 16(1) and 16(2) confer fundamental rights to the citizens and speaks the language of equality before law (EBL), article 16(3), 16(4) and 16(5) confer power on the state to make special provisions in favour of certain categories of citizens who are placed in disadvantageous position. Thus speaks the language of equal protection of law (EPL).

Article 16(3) : It confers the power on Parliament (not States) to provide by law prescribing "residence" as the ground for qualification in certain classes of public employment.

Similarly parliament in acted the **Public Employment (requirement as to residence) Act** - 1957 which aimed at abolishing all the existing residence requirements in the states and enacting exceptions only in the case of special instances of Andhra Pradesh, Manipur, Tripura and Himachal Pradesh.

Constitutionally, some states also have special protections under Article 371. Andhra Pradesh under section 371(D) has the power to have direct recruitment of locals in specified areas. Similarly in Uttarakhand, class III and IV jobs are reserved for locals.

Article 16(4) : It confers the power on the state to reserve seats in favour of backward classes of citizens in public employment if in the opinion of the state the backward classes are not adequately represented.

Indra Sawhney vs Union of India - 1992 case, the Supreme Court upheld the constitutional validity of reservation of seats in favour of backward classes including OBCs. The court described Article 16(4) as an enabling clause which confers the power on the state to extend reservation to the backward classes in public employment.

However article 16(4) does not confer any fundamental right to reservation to backward classes. Therefore the reservation policy formulated by the government is only at the discretion of the state and backward classes cannot legally demand reservation in public employment.

Any reservation policy in order to be constitutionally valid sell have to fulfil the following constitutional requirements :

1. The backward classes of citizen shall be socially and educationally backward.
2. The backward classes of citizen are not adequately represented in public employment in the opinion of the state.

3. Overall reservation in favour of backward classes including SC and ST is shall not exceed 50%. This rule will apply unless in "exceptional circumstances".
4. The reservation shall apply only at "entry level".
5. The concept of "creamy layer" shall apply to the OBCs and socially and educationally advanced section among OBCs shall be identified and removed from the benefits of reservation.
6. The reservation policy in favour of backward classes shall not affect overall efficiency in administration.

Jat Reservation Policy :

In 2014 union government issued a notification that included Jats in OBC list of central government.

National commission for backward classes in its report stated that Jats are NOT socially, educationally, culturally and economically backward and recommended against Jats' inclusion in the central list of OBCs.

The centre, however, overruled the opinion of National Commission for backward classes (NCBC) on the grounds that the opinion of NCBC is only advisory in nature and it is not mandatory on Centre. Centre included Jats in central list of OBCs.

Supreme Court in **Ram Singh vs Union of India 2015** case held that inclusion of Jats under the central list of OBC was unconstitutional and void.

Supreme Court by referring to Indra Sawhney case affirmed that although caste may be the prominent and distinguishing point for easy determination of socially backward group, yet caste cannot be the sole or absolute criteria while deciding the backwardness of any social group.

The Supreme Court further stated that backwardness is manifestation of caste as well as several other independent attributes such as social, cultural, economic and even political.

The Supreme Court therefore directed the government to continuously evolve new practices and methods to identify new social groups such as transgender to be included in BC list and move away from caste-centric approach for the identification of backwardness. Social groups that are the most deserving and needy must be brought into the fold of reservation policy

The court stated that the reservation policy cannot be blind to the present day realities - Government should not only evolve methods to identify the new social groups that are backward and bring them within the fold of reservation policy, but also identify those social groups that has advanced or progressed socially and educationally by making use of reservation policies and remove them from the benefits of reservation.

Reservation in promotion in favour of SC and ST :

Both the central and state government has extended reservation in favour of schedule castes and schedule tribes in promotion on the ground that the two communities are not adequately represented at the decision making the stage of bureaucracy.

However the Supreme Court in Indra Sawhney case held that reservation in promotion as unconstitutional and void on the ground that under article 16(4) the state was empowered to provide reservation in favour of the backward classes only at the entry level ie. at the time of recruitment into public employment but not subsequently.

However to circumvent this decision Parliament enacted the 77th Constitutional amendment act which introduced article 16 (4A) in the Constitution. Article 16 (4A) confers the power on the state to extend reservation facilities to SC and ST in promotion, if in the opinion of the state SC and ST are not adequately represented in the public employment.

M Nagaraj vs Union of India - 2006 case, Supreme Court held Article 16 (4A) as Constitutionally valid but insisted that any such reservation policy shall fulfil three constitutional requirements -

1. SC and ST are socially and educationally backward.
2. SC and ST are not adequately represented in public employment.
3. Reservation does not affect the overall efficiency of administration.

The court also stated that the government shall provide quantifiable data in support of above requirements. The court also suggested to exclude the "creamy layer" within SC and ST from the benefits of promotion.

This judgement made it more difficult for the government to grant reservation in promotion.

Jarnail Singh Case : The government urged the court to review the three conditions outlined in the Nagaraj verdict. It was contended that the conditions were contrary to the Indra Sawhney judgement and the concept of 'creamy layer' was not applicable to SC and ST.

However in Jarnail Singh case, the court upheld the applicability of 'creamy layer' to the affluent SC and ST. The court however modified the direction in Nagaraj case that required the government to show quantifiable data to prove backwardness, but retained the condition to prove that there was no adequate representation of SC and ST in the relevant public employment.

Special reservation policy of Tamil Nadu government :

Tamil Nadu is the only state that follows a reservation policy of 69% of the seats being reserved in favour of backward classes both in public employment and educational institution since 1970s.

It became unconstitutional and void when Supreme Court laid down vertical reservation rule in Indra Sawhney 1992 case. As a result of this Tamil Nadu legislature enacted **Tamil Nadu Backward classes, Schedule caste and Schedule tribe (reservation of seats) Act- 1993** (or Tamil Nadu Act) which reserved 69% of seats in favour of backward classes.

The Parliament placed the Tamil Nadu act under the 9th schedule of the Constitution, that could not be challenged before a court of law. The 9th schedule along with Article 31 (B) was introduced into the Constitution by first constitutional amendment act 1951.

Article 31 (B) stated that all those enactments of the states that are placed under the 9th schedule cannot be challenged before a court of law and 9th Schedule was made immune from judicial review.

I.R Coelho vs State of Tamil Nadu -2007 : In this case Supreme Court held that 9th schedule is "partially" open to judicial review. The court held at 9th schedule is also subject to "doctrine of basic structure" which emerge for the first time on 24th April, 1973 in Keshavananda Bharati case.

The Supreme Court here held that all those enactments which were placed under 9th schedule before 24th April,1973 are not subject to the "doctrine of basic structure" and cannot be challenged before a court of law. However all those enactments that were placed under the 9th schedule after 24th April, 1973 can not violate "doctrine of basic structure" and are open to judicial review.

Thus the reservation policy of Tamil Nadu government has been challenged before Supreme Court and disease and is still pending.

Carry Forward Policy (For SC & ST) :

It is followed by both central and state government in case of reservation to SC and ST in public employment. Under this policy those vacancies which are reserved for SC and ST that go unfilled because of nonavailability of suitable candidates, then such vacancies shall be carried forward to the following years and these shall be filled up only from SC and ST candidate.

The Parliament enacted 81st amendment act 2000 which introduced article 16 (4B) in the Constitution. It states that the vacancy under carry forward policy shall always remain separate from the regular vacancies for a particular year. These two categories of vacancies should not be clubbed together for finding out whether the ceiling of 50% has been exceeded or not.

Horizontal reservation policy :

When a section of backward class population is divided into sub-groups and the percentage of seats reserved for that section of backward class is distributed among the sub-group, it is called horizontal reservation.

The Supreme Court in the **State of Andhra Pradesh versus P Muralidhar Rao** 2010 case held horizontal reservation policy as constitutionally valid, provided it is done on a reasonable basis.

The court also mentioned that there can be no religion basis of reservation. It also stated that non-Hindu religions do not recognise caste as such but there exist "caste-like" social stratification in those religions as well.

Neither Minority nor any particular religious group enjoys reservation policy. Reservation policy is only on the basis of social and educational backwardness. For example "Backward" Muslims can be included in reservation policy but including "Muslim" as a whole is unconstitutional.

Article 17 : Right against untouchability

Article 17 abolishes untouchability in all forms and declares it as a punishable offence. In accordance with the law under article 35, the Parliament enjoys the power to provide by law prescribing punishment for the practice of untouchability.

Accordingly, Parliament enacted **Untouchability (offences) Act 1955** which was later amended and renamed Protection of civil rights act 1955. **Protection of civil rights act 1955** has made the offence of untouchability as cognizable and non-bailable offence and imposes stringent punishment for this.

In order to deal with the atrocities committed across SC& ST, the Parliament has enacted **Schedule Caste and Schedule Tribe (prevention of atrocities) Act 1989**.

With increasing number of offences committed against SC & STs (as per National Crime Records Bureau), government has **amended** the provisions of SC & ST (prevention of atrocities) Act -1989, and **strengthened the act** by adding new categories of actions to be treated as an offence under this Act -

1. Forcing SC & ST person to vote or not to vote for a candidate unlawfully.
2. Illegally occupying land belonging to SC and ST.
3. Neglect of duties by a non-SC or non-ST public servant in cases relating to SC and ST, for example non-registration of a FIR etc.
4. Establishment of a special court at district level to try cases involving the offences and crimes against SC and ST.
5. Appointment of special public prosecutor to each of the special court to ensure speedy trial of the cases.
6. The special court shall be presided by women judges while trying cases involving sexual offences against SC and ST people.
7. Imposing or threatening to impose social or economic boycott against SC and ST.
8. Compelling SC & ST person to provide menial services.

March 20 Judgement (2018) : The Supreme Court held that this law has become an instrument to "blackmail" innocent citizens and public servants. The court also mentioned how public administration has been threatened by the abuse of this Act. Public servant find it difficult to give adverse remarks against employees for fear that they may be charged under the Act.

The original 1989 Act even denies anticipatory bail. The court held that the law is therefore used to rob an individual's personal liberty, merely on the basis of unilateral complaint.

It has issued a number of guidelines to protect public servant and private employees from arbitrary arrest under the act.

The court held that public servant can only be arrested with the written permission of their appointing authority and in the case of private employees, SSP concerned should allow it.

Besides this, a preliminary enquiry should be conducted before the FIR is registered to check whether the case falls within the parameter of the atrocities Act or it is frivolous or motivated. Further the court also allowed "**anticipatory bail"** under this act.

The verdict saw a huge backlash and protest across the country and as a result the government filed a review petition in the Supreme Court and subsequently amended the 1989 Act back to its original form through **SC and ST (prevention of atrocities) Amendment act - 2018.**

February, 2020 : The Supreme Court refused to stay the **SC and ST (Prevention of Atrocities) Amendment Act - 2018**, which nullified the controversial March 20 Judgement (2018) diluting the stringent provisions of the Dalit protection law.

Opinion 1 : in the view of Government "The schedule caste and schedule tribe people continue to face the social stigma, poverty and humiliation that they have been subjected to for centuries. "The act of 1989" is the least which the country owes to this section of the society who have been denied several civil rights since generations and have been subject to indignities, humiliation and harassment.

Opinion 2 : The law should be enacted to facilitate their integration in the mainstream of the society. However such a stringent Dalit law can lead to further alienation of SC and ST whereby other caste may feel safe to be aloof from them, instead of intermingling. The law has been progressively made stricter and has led to over-empowerment as can be seen from the increasing number of frivolous complaints filed.

Article 18 : Abolition of titles

The objective of article 18 is to prevent artificial and social distinctions being created with the conferring of titles and to promote social equality in the country.

Article 18(1) : It prohibits the state from conferring any "title"on any individual. However article 18(1) allows the state to recognise Academic and Military distinctions, which are regarded as conferment of "Award" and not "titles".

An award is conferred by the state without any distinction based on religion, race, caste, sex or place of birth or any of them. However such a strict law may not be followed while conferring the titles. Further an awardee is not to misuse the award by using it as prefix or suffix to his name.

The Supreme Court in **Balaji Raghavan vs Union of India** 1986 case held that the theory of equality does not mandate that merit shall not be recognised. The court held that the Padma award are constitutionally valid and are in the nature of the state recognising academic distinctions. These are not titles as per the meaning of article 18.

In 2019 the government issued a guideline that Bharat Ratan and Padma awards are not titles and cannot be used as prefix or suffix to names and they can be withdrawn in case of misuse.

Article 18(1) does not prohibit an individual or a private organisations from conferring titles.

Article 18(2) : It prohibits an Indian citizen from receiving any "title" from foreign state but they are free to receive "awards" such as "legion of honour" conferred by the French government etc.

Article 18(3) : It prohibits a foreigner, who is in the service of Centre or the state government, from receiving any title from any nation without prior permission of President of India. This is to ensure his loyalty to the state.

It is to be noted that Parliament so far has not enacted any law prescribing punishment for the violation of this article. Hence Article 18 remains a declarative provision under the Constitution.

Right to Freedom

Article 19 (1) : It confers a set of six fundamental rights which are collectively known as **democratic rights** as these are essential for the healthy functioning of democracy. These rights are available only to citizens.

The six rights are :

Article 19 (1) (a) : Freedom of speech and expression
Article 19 (1) (b) : Freedom of assembly
Article 19 (1) (c) : Freedom of association
Article 19 (1) (d) : Freedom of movement
Article 19 (1) (e) : Freedom of residence
Article 19 (1) (f) : omitted****
Article 19 (1) (g) : Freedom of profession

Article 19 (1) (a) : Freedom of speech and expression

It confers the right to freedom of speech and expression on all the citizens. It is the fundamental right under article 19 1(a) and under article 21 which has emerged as two most important fundamental rights.

According to Supreme Court the right to freedom of speech and expression is an inseparable part of right to live. It is not a single right, it is a composite right that has several meanings -

1. It means the right of a citizen to **express his own views and opinions** freely and openly ie. without any fear or favour and without any undue constraints imposed by the state, one can express his views in any communicable medium. As every citizen has the right to express his views, every other person has the right to listen or not to listen to the views of others.
2. It also includes the right of a citizen to express **others views and opinions.** It is from this interpretation that "**right to freedom of Press**" emerges as the fundamental right. The term "press" include print media, electronic media and medium of the internet as well.
3. It also confirms the "**right to access to information**" where sources of information can be both external or internal. It is from this interpretation "**right to information"** and "**right to know"** has emerged as fundamental rights.
4. During election, citizens enjoy the right to freedom of speech and expression in form of "right to make informed choices". Therefore the Supreme Court in **Union of India vs Association for Democratic reforms -2000** case held that all the contesting candidates shall disclose their asset and liabilities; educational qualification; criminal conviction and pending criminal cases, if any.
5. In **People's Union for civil liberties versus Union of India 2013** case the Supreme Court held that under article 19 1(a) citizen enjoy the right to negative vote whereby citizen can reject all the candidates. Therefore Supreme Court directed the Election Commission to include the choice of "NOTA" to enable the citizens to exercise negative vote.

6. Citizens enjoy the "**right to political dissent**" ie. right to have an independent political opinion which may differ from official opinion of the government. Under this right, citizen can criticise the government and public officials.

Citizens continue to enjoy these rights against the Indian State even while travelling abroad. The right is not restricted by Political and Geographical boundaries of India.

However it is **not an absolute right.** It is subject to reasonable restrictions that state may impose on grounds **mentioned under article 19 (2).** Since these rights are most prone to misuse the Constitution allows the state to impose reasonable restrictions on the largest number of grounds.

Right to freedom of speech and Information Technology Act - 2000

IT Act - 2000 regulates the use of internet and creates separate offences for the misuse of internet and confers higher punishment for similar offences under print and electronic media. For examples

Section 66 A of ITA 2000 : offence of defamation
Section 67 of ITA 2000 : offence of transmitting of obscene messages

ITA 2000 Confers higher punishment for the commission of above offences of defamation and transmitting obscene messages when compared to other penal provisions.

In **Shreya Singhal vs UOI 2015** case It was argued by internet service providers that there is no intelligible difference between those who use internet and those who use other mediums of communication such as print and electronic media. Therefore separate offences could not be created for the people using internet. Thus section 66 A and 67 violated the right to equality under article 14 and therefore it is unconstitutional and void.

However Supreme Court rejected the above arguments and held that there are **intelligible differences** between internet and other mediums of communication. Internet gives any individual a platform to express any view which travel at **lightning speed** and reach millions of people.

It requires very little or no payment to express one's views. Further unlike print and other media, internet exists and operate in the absence of well established institutional framework. Therefore the state is justified in creating a different mechanism of "**check and balance"** on this medium ie. internet. Thus the court held that **Section 67 as constitutionally valid.**

Section 69 A which confers the authority on the government to block the transmission of messages including the blocking of websites and public access to intermediaries (if necessary) on grounds mentioned under Article 19 (2) ie. in the interest of sovereignty and integrity of India, security of the state, defence of India, friendly relation with the foreign state of public order. the court held that **Section 69 A as constitutionally valid.**

Section 66 A – sending of any message through computer resource that are grossly offences, potential to cause annoyance, inconvenience, in danger, insult, injury and hatred, is a criminal offence.

The court held that these offences are excessively vague, open-ended, over-broad and undefined. It did not give enough indication what acts performed on internet can be regarded as a defamation. Its excessive vagueness has taken away the freedom of speech, right to dissent and right to know. It has a chilling effect on freedom of speech and expression. Thus, the Supreme Court held that **section 66 A is unconstitutional and void**

Section 79 of IT Act 2000 protects intermediaries (platforms like Facebook, WhatsApp, Twitter etc.) from criminal actions, if they unknowingly post illegal or unlawful content. When alerted about any objectionable content, through a court order or by the Centre, they are expected to remove it.

The new **Information Technology (intermediary guidelines and digital media ethics Code) rules, 2021** mandate the platform/intermediaries to appoint India-based nodal officers for compliance and grievance redressal, and adopt features such as traceability of messages, regulation of content etc.

The government also warned that non-compliance with the above rules will lead to unintended consequences including "**losing exemptions from liability**" under section 79 of IT Act 2000.

Government believes the new rules are for **protecting people from abuse** and establishing a fair mechanism to address their grievances and resolve their disputes. These rules will make **intermediaries more accountable to the people.**

However intermediaries/platforms believe that the new rules can be a potential threat to **freedom of speech & expression** and may lead to dangerous **invasion of users privacy**.

Constitutionality of Criminal Liability under section 499 and 500 of IPC

Defamation means destroying the reputation of an individual or organisation through slander or libel or both. At present defamation give rise to both - **criminal and civil liabilities.**

Under section 499 and 500 of IPC defamation is a punishable offence with not more than 2 years of imprisonment ie. **Criminal liability**. Further the victim of defamation can claim monetary compensation against defamer in a court of law ie. **civil liability.**

In a public interest litigation it was argued before Supreme Court that the "**criminalisation of defamation"** deter freedom of speech. Because of the fear of possible punishment citizens are not able to express their views freely and thus it checks the freedom of speech and expression.

Further the politicians may use defamation law as a weapon against criticism.

Moreover section 499 and 500 of IPC has been misused in the sense that multiple criminal cases can be filed against an individual based on a single defamatory statement made by the defamer. This amounts to harassment and prevents a person from using his free speech. Therefore section 499 and 500 must be declared as unconstitutional and void as **these violate article 19 (1) (a).**

The other view that was presented before the Court argued **against decriminalisation**. In the absence of criminal liability, individuals may not deter sufficiently from misusing the freedom of speech and expression. Civil liability alone may not impose sufficient deterrence on the poor people from misusing their free speech.

Further during election time it may lead to malicious and hate speeches delivered more frequently which will destroy a free and fair election.

If section 499 and 500 of IPC is misused, the approach should be to place the regulatory measures to prevent their misuse rather than declaring them unconstitutional and void.

Right to Freedom of Speech vs Hate Speech

"Freedom of Speech" comes with responsibility. A "**responsible speech**" is not just something that does not contain abuse or defamation. It is increasingly seen as expression that tends **not to discriminate** against or incite hatred towards groups based on race, gender, caste, religious belief, sexual orientation, nationality or immigration status.

Such a "**Responsible speech"** should neither target any vulnerable section nor should be detrimental to any individual or disadvantaged section of the society.

In a country like India, which has diverse castes, creed, religions and languages, "hate speech" poses a greater challenge. In this backdrop, the proposal to incorporate provisions against hate speech in the penal law and **make "hate speech" a separate offence, is a welcome step.**

The Bezbaruah Committee report had focused on the concerns of people of the northeast who are often subjected to such abuse.

TK Viswanathan Committee recommended that the IPC, CrPC and the IT Act needs to be amended to introduce stringent provisions to deal with hate speech and use of cyberspace to spread hatred and incitement.

The Law Commission's report also suggested amendment in IPC and CrPC by inserting "new section 153C (Prohibiting incitement to hatred) and section 505A (Causing fear, alarm, or provocation of violence in certain cases)" to effectively deal with the offence of hate speech.

The proposed Section 153C would target speech that gravely threatens any person or group with intention to cause fear or alarm, or incite violence towards them.

The Section 505A, proposes to punish speech or writing that causes fear or alarm among a group, or provokes violence against it, on grounds of race, religion, gender, sexual orientation, place of birth or disability.

However the government must define the "hate speech" narrowly and avoid vague and over-broad terms that would fall foul of the Constitution. **Section 66A** of the Information Technology Act 2000, was struck down by the Supreme Court because it failed to define some terms that sought to criminalise offensive and annoying messages.

Offence of Sedition under Sec. 124A of IPC

Section 124A of the IPC which deals with sedition was drafted by Thomas Macaulay and included in IPC in 1870. It is a pre-constitutional, draconian colonial law.

Section 124 a of IPC states - "whether by words, signs or visible representation - which brings or attempt to bring into hatred or contempt; or excite or attempt to excite disaffection towards the government established by law, shall be punished with imprisonment, ranging from 3 years to lifetime, and/or fine".

In Kedar Nath case, the Supreme Court has cautioned that even words indicating disaffection against the state will not constitute the offence, unless there is a call for violence or a pernicious tendency to create public disorder. Criticism of the government cannot be labelled as sedition.

Deviation from government's notion of nationalism cannot be treated as sedition. Dissent or difference of opinion or objection or disagreement with government cannot be considered as "sedition or treason". The line between "dissent" and "sedition" maybe thin but the ability to distinguish between the two is the constitutional duty of the state.

Despite the ruling, however, the sedition law has been **weaponised to cramp free speech and muzzle dissent**, and has been used to **criminalise protesters.** For example the nationwide protests against the citizenship amendment act attracted the serious sedition charges for mere slogan raising.

Mahatma Gandhi called section 124A, the **prince among the political sections** of the IPC designed to suppress the liberty of the citizen. Given the history of political misuse and it's incompatibility with the modern constitution and society, section 124A of IPC should be scrapped altogether.

Article 19 (1) (b) : Freedom of Assembly

It confers the fundamental right to assemble provided it is for peaceful purposes and without any arms. The right to assemble also includes the right to hold a meeting and take out a procession. Right to assemble is inherent under the right to freedom of speech and is implied under article 19 (1) (A). Therefore right to assemble is called **corollary of article 19 (1) (a).**

The right to assemble can be subject to reasonable restriction that maybe imposed by the state in the interest of maintenance of public order, morality and decency.

Article 19 (1) (c) : Freedom of Association

It Confers the fundamental right to form Association, union or cooperatives. Right to form cooperative was introduced as a fundamental right by 97th Constitutional amendment act 2011.

Right to form Association includes the right to form or not to form; right to join or not to join; right to continue or not to continue with an association. Further it confers the fundamental right only to form Association but **does not confer a fundamental right to be admitted into an association.**

The right to form any kind of association including political and non political association. The right to form political association confers the fundamental right to form trade unions but it does not confer a fundamental right to strike**. Right to strike may be a legal right but not a fundamental right.**

The Supreme Court in **Bharat Kumar versus State of Kerala 1998** case held that "peaceful strike" is legitimate and not unconstitutional, where as "**bandh" is held to be unconstitutional,** being a gross violation of human and fundamental rights of others.

According to the court "bandh" threatens a total shut down of the society. It paralyses the normal functioning of the society. The court held that calling for "bandh" is clearly different from a call for a "general strike or hartal".

"Bandh" is associated with an **element of coercion/force**. It violates fundamental right to livelihood, right to freedom of movement and the right to freedom of speech. Therefore a "bandh" is illegal and any association or party that calls for a bandh can be held responsible for the consequences of "bandh". On the other hand hartal is not illegal because it is not a general strike and it is not associated with coercion or force.

Article 33 confers the power on Parliament to provide by law restricting the availability of the freedom to form Association to the members of the **armed forces, Paramilitary forces and police forces.** Accordingly Parliament has denied right to form political association to the members of the above forces. Thus they don't enjoy the right to form trade union and right to go on strike.

Article 19 (1) (d) : Freedom of movement

Conferred the fundamental right to move freely throughout the territory of India for all the citizens. The expression "throughout" means right of a citizen to move all over the country and no part of India shall be made in accessible to the citizen.

The expression "freely" means the right of a Citizen to move whenever, wherever and however he wants to.

This right includes three related aspects :
1. Right to move inside the country.
2. Right to travel abroad.
3. Right to return back to the country.

Article 19 (1) (d) protect first aspect while Article 21 protect second and third aspect.

However this right is subject to reasonable restrictions on the grounds of maintenance of public order, morality, decency and in the interest of general public.

Article 19 (1) (e) : Freedom to reside and settle

Freedom to reside and settle in any part of India is inherent in the right to freedom of movement. Therefore Article 19 (1) (e) is called corollary of Article 19 (1) (d).

Right to "**reside**" means right of a citizen to leave at a place for a temporary period and the right to "**settlement**" means right to live at a place permanently. This right is also subject to reasonable restrictions on the same ground as applicable to Article 19 (1) (d).

Inner Line Permit System

Inner line permit (ILP) is a **special, limited period travel permit** that people from other states need to carry to enter Nagaland, Mizoram, Arunachal Pradesh and Manipur. ILP system was extended to Manipur in January 2020.

ILP is an exception to the right to freedom of movement and right to reside and settle throughout the territory of India. It has been introduced in order to **protect economic, social and cultural interest** of schedule Tribes.

Under this system the citizens from outside of these four states does not enjoy the fundamental right to freedom of movement and fundamental right to reside & settle in the above four states if he hails from outside. He **requires prior permission** from the authority to travel and stay in these four states.

Recently, Meghalaya has been demanding the extension of ILP to their states as well.

Why northeastern states demand ILP ?

ILP is viewed as a **solution to the continued illegal immigration** that is taking place from the Bangladesh and other bordering countries (such as China, Myanmar & Bhutan) to these North Eastern states. Indigenous people of north-east view **ILP as a shield to protect** their land, identity, language and culture from the illegal migrants.

However imposition of ILP system in North Eastern states **may adversely impact tourism, investment and ultimately development** in these states. There are other methods to protect the cultural identity of indigenous people; for example Meghalaya has "**Meghalaya Residents Safety and Security Act" (MRSSA)** to regulate the entry of outsiders and tenants in the state.

Article 19 (1) (g) : Right to profession

It confers on all citizens right to choose any profession, occupation, business or trade. However the state is empowered to **prescribe necessary qualifications** in the form of educational and technical qualifications, mental alertness, physical fitness while a citizen chooses his profession.

Similarly the state can impose reasonable restrictions on the choice of business or trade made by the citizen where **state can take over partially or wholly any business or trade** to the exclusion of citizen provided it is in public interest. Thus the state can restrict the citizen from taking over a business or trade in the nature of liquor, money lending, gambling, lottery etc.

Article 301 is related to Article 19 (1) (g). It confers the right to freedom of inter-state trade and commerce whereby free movement of goods and commodities across the inter-state border is guaranteed by the Constitution.

Article 301 promotes cooperative federalism in the country and this is based on Australian Constitution. Article 301 facilitates a citizen to enjoy his fundamental right to choose a business or trade, hence Article 301 is complementary to Article 19 (1) (g).

Article 301 confer this right on any individual, citizen or non-citizen who is engaged in the act of moving goods and commodities across the state borders. However reasonable restrictions can be imposed by the state under Article 301.

Article 20 : Protection in respect of conviction for offences

Article 20 prohibits the state –

(1) From enacting ex-post facto criminal legislation.
(2) From practising double Jeopardy.
(3) From compelling an accuse to provide self-incrimination.

Under **Article 20 (1)**, state cannot enact a criminal law and give retrospect to the law. It provides that no person shall be **convicted for any offence except for the violation of law** enforced at the time of commission of the act which is declared as an offence under the law. Therefore an act which was not originally a criminal act cannot be subsequently made into an offence to punish the person.

Further under Article 20 (1) no person shall be **given punishment greater than what is provided** under the law at the time of it's commission.

Article 20 (2) states that no person shall be prosecuted and punished more than once for the commission of a single offence. If punishment imposed by a court becomes final in character, however lenient the punishment is, he cannot be punished for the second time for the commission of the same offence.

Article 20 (2) restricts only criminal courts or criminal Tribunals. Hence, if an act performed by an individual gives rise to both civil and criminal liability, pursuing the case in civil court along with the criminal prosecution does not amount to **double jeopardy.**

Similarly if a civil servant is convicted and sentenced to imprisonment in a court of law on charge of corruption and also his department dismisses him from service, it will not amount to double jeopardy.

Article 20 (3) states that no person who is accused of an offence shall be compelled to be witness against himself. Therefore **police cannot compel an accused to make a** confessional statement. If accused makes a confessional statement to the police under compulsion or voluntarily it will not be admissible as evidence in the court of law.

However the police **compelling an accused to provide a specimen** signature, handwriting, fingerprint, blood sample etc for verification is not prohibited under Article 20 (3) because outcome of the scientific results will not be different from whether the specimen was submitted voluntarily or under compulsion. Article 20 (3) protects only accused but not a witness or suspect.

Supreme Court in **Selvi versus State of Karnataka 2010 case** held that no individual can be compelled to undergo polygraph test, NARCO test, lie detector test or brain mapping test.

Supreme Court held that such tests are **cruel and inhumane**. Besides Supreme Court based its judgement on three aspects –

1. Reliability of the test.
2. Protection against self-incrimination.
3. Right to privacy.

However Supreme Court ruled that information discovered from the result of voluntary test may be admitted as evidence.

Article 21 : No person shall be deprived of his life or personal liberty except according to the "procedure established by the law".

Difference between "procedure established by law" & "due process of law"

"Procedure established by law" means according to the usage and practice as laid down by the statute/law. It originated under **English constitution.**

It confers **limited powers in the hands of judiciary**. Under this if the action of the executive that is depriving an individual of his life or personal liberty is challenged before the court of law, the court will examine the legality of the executive action by applying the **following three tests -**

1. Whether there exist any law that provides for deprivation of life or liberty of an individual.
2. Whether the law has been passed by a competent legislature.
3. Whether the legislature that enacted the law followed established procedure while enacting the law.

If the above three test has been found valid, the court would not go behind the law and examine whether the law is fair, just and reasonable. Even if the court finds the law to be **unfair, arbitrary or oppressive** it will not declared the law as unconstitutional and void and will not extend the protection to the individual against the arbitrary action of the legislature.

Thus this doctrine relies more on **good sense of legislature** and the strength of the public opinion. It provides protection to an individual only against the arbitrary action of executive **but not against the arbitrary action of legislature.**

On other hand the doctrine of "**due process of law"** which originated under American Constitution confers wider powers on the judiciary. In a similar situation as above if the action of the executive depriving an individual of his life and liberty is challenged before a court then apart from the applying above three tests, the court will also look at the law from the broader angle of inherent goodness of law by applying **Principle of Natural Justice (PNJ).**

PNJ demands that any decision taken shall be **fair, just and reasonable**. By applying Principle of Natural Justice (PNJ) the court will declare the law as unconstitutional and void if law is found to be **arbitrary, oppressive, whimsical and fanciful** and extend the protection to the individual not only against the arbitrary action of executive but **also against the arbitrary action of legislature.**

Indian Constitution under Article 21 provides for only "procedures established by the law". However the Supreme Court in **Maneka Gandhi versus Union of India - 1978** case interpreted the Constitution to include the doctrine of "due process of law" by incorporating Principle of Natural Justice (PNJ) in article 21.

Principle of Natural Justice (PNJ) :

The PNJ includes -

1. No man shall be punished without being heard.
2. No man shall be the judge of his own case.
3. Any authority shall act bona fide without any bias.

The PNJ has emerged out of the human ability to think and rationalise. These are not found in any official document, **these are universal principles**. These apply automatically whenever decisions are made.

Objective of PNJ is to **eliminate the chance of arbitrariness** and include a degree of fairness in the decision making. These emphasise that actions must be supported by reasons. These seek to humanise the decision making process.

According to Supreme Court, PNJ are not incorporated but are inherent in the Constitution. Being universal in application, these are binding on all authorities, executives, individuals, private organisation etc.

According to Supreme Court, **PNJ is inherently found under Article 21** but their influence is so pervasive that these encompass the whole Constitution. These are one of the pillars on which constitutional structure has been built. These are regarded as good as part of basic structure of the Constitution.

Scope of "Personal Liberty"

A.K Gopalan Case : In this case petitioner had been detained under Preventive detention act 1950. He challenged the validity of his detention on the ground it violates his fundamental right under article 19 (1) (d) which is very essence of "personal liberty" guaranteed under article 21. He argued Article 19 and 21 should be read together.

However the Supreme Court ruled that "**personal liberty**" in Article 21 meant nothing more than the "liberty of physical body" ie. freedom from arrest and detention without authority of law.

"Liberty" which has broader meaning than "Personal liberty" is part of Article 19. Also the court rejected that "law" should be just, fair and reasonable and Article 21 should not be tested on the ground of principle of natural justice.

Maneka Gandhi Case : The court held that "**personal liberty"** in article 21 is of the "widest" amplitude. The court held that Article 21 is controlled by Article 19 ie. it must satisfy the requirements of article 19.

It held that even if there is law prescribing a procedure for depriving a person of "personal liberty" and there is no infringement of FR under Article 21, such a law in so far as it abridges any FR under Article 19 would have to meet the challenges of that article also.

Thus a law depriving a person of personal liberty not only has to stand the test of Article 21 but also must stand the test of article 19 and article 14 of the Constitution.

The court ruled that mere existence of an enabling "law" was not enough to restrain personal liberty. Law should not be fanciful, oppressive or arbitrary. **Such a law must also be fair, just and reasonable.**

The **extended view of article 21** in the aftermath of Maneka Gandhi case has expanded the scope of article 21. In its widest sense article 21 also includes - right to education, right to privacy, right to livelihood, right to speedy trial, right to free legal aid, right to clean environment, right against delayed execution etc.

Article 14, 19 and 21 : The golden triangle

These articles need to be read together (triangle) and are considered as golden because these are important for protection of "freedom/liberty" of an individual against arbitrary action of State.

Article 14 strikes at arbitrariness in the state action and ensure fairness and equality of treatment. Article 19 calls for "reasonable restrictions". Hence article 21 must be read in the light of article 14 and 19 as well.

Right to Die : Validity of section 309 of IPC

Section 309 of IPC criminalises attempt to suicide and prescribes a punishment of not more than one year of simple imprisonment with or without fine. Section 306 similarly prescribe the punishment for abetment to suicide.

The Supreme Court in **Rathinam versus Union of India 1994 case** held that right to life under article 21 also conferred fundamental right to die. Thus the court held section 309 as unconstitutional and void as it violates right to die under article 21.

However Supreme Court in **Gian Kaur versus State of Punjab 1996** overruled its earlier decision and held that there is no fundamental right to die under article 21. Thus section 309 of IPC got revived.

Right to Die with Dignity : Euthanasia

It involves the question of legality of practice of Euthanasia (mercy killing). Euthanasia is the termination of very sick person's life in order to relieve him of his sufferings. There is no law in India which regulates the practice of Euthanasia and **initially the Indian courts treated all forms of euthanasia illegal and right to die with dignity was denied** to any individual.

Euthanasia is of two types :

1. **Passive Euthanasia**: The patient is brain dead or he is in permanent vegetative state of life where his life is artificially prolonged with external life support or life saving drugs. In such case Passive euthanasia is performed by withdrawal of life saving drugs or external support.

2. **Active Euthanasia:** The patient is mentally active, capable of living on his own and is able to think for himself but suffers from a terminal illness like cancer and undergoes from unbearable pain. In such case Active Euthanasia is performed by administering lethal drugs.

The Supreme Court in **Aruna Shanbaug versus Union of India - 2011** case held that passive Euthanasia may be allowed to be practised on a case by case basis. If patients relatives give her consent and a team of doctors consisting of neurologist, physician and a psychiatrist certifies that even with the use of most **modern treatment the patient cannot be revived**, then a bench of High Court consisting of not less than two judges may allow passive Euthanasia to be practised on such patients. The court further clarified that active Euthanasia remains illegal.

The guidelines laid down by court shall continue till Parliament enacts a law regulating the practice of Euthanasia in the country.

The Supreme Court judgement allowing for passive Euthanasia or the right of Citizens to refuse life support and die with dignity kick-started a **"living will" debate.**

Right to execute a "Living will" : Passive Euthanasia

In **Common Cause versus Union of India case** it was argued before Supreme Court that the right to life under article 21 confers the fundamental right to die with dignity. No person can be compelled to live when he is on his deathbed.

Therefore every individual enjoys the right to execute "**living will"** under which he can leave an advance-consent, when he is in his normal state of health, to perform **passive Euthanasia** on him if he ever gets into a permanent vegetative state of life or he becomes brain dead.

Supreme Court in 2018 said that the **Right to die with dignity was a fundamental right** and that an advance directive by a person in the form of a "living will" could be approved by the courts. **Thus facilitating Passive Euthanasia.**

Update 2021 : However despite this ruling people are struggling to register a "living will" in the absence of standard procedures available to implement the Supreme Court guidelines.

Constitutionality of Santhara

Santhara is the religious practice among Jains in which a person undertakes a fast unto death by refusing to take water and food. It is seen by Jains as a **spiritual decision to abandon one's body and purify his soul.** It is seen as an attempt to break from the cycle of rebirth and achieve salvation.

It is undertaken by a person who is convinced that life has served his purpose and he should willingly depart. Therefore Santhara death should not be mourned.

The protagonist argue that Santhara cannot be compared with suicide. **Suicide is an act of desperation taken at haste** when a person is not in his normal emotional state of mind. It is an impulsive act.

On other hand an individual takes the decision to undergo Santhara after a prolonged period of reflection in consultation with others. It is a **voluntary decision** taken by him when he feels he has discharged all his duties in the world.

While suicide is the **unnatural and untimely termination of life,** Santhara is the peaceful and gradual path to the extinguishing of life. It is not unnatural or sudden.

Further under article 26 and 27 of Constitution an individual has the right to practise his religion and Santhara is age-old practice of Jainism. Hence practising **Santhara is a form of fundamental right.**

Article 29 also confers Fundament Right on any section of citizen having a distinct culture of its own to conserve its culture.

The antagonist argue that Santhara is inhumane practice and it goes against the very nature of human life. It is a fundamental **breach of Right to life under Article 21. I**t is nothing but a prolonged attempt to commit suicide. It is illegal and is **prone to be highly misused**. It may be forced upon an individual directly or indirectly by family members.

Rajasthan High Court in **Nikhil Soni versus Union of India 2015** case equated Santhara to "Suicide" under section 309 of IPC. Also held that Santhara is violation of Article 21. The court held that no practice which is abhorrent to public order, morality and health and violative of other rights of part III (Article 21), can protect the religious practice, **no matter how ancient the practice is.**

The judgment not only affects a religious group’s freedoms guaranteed in the Constitution (Under Article 25, 26 and 27) but also negatively impacts the "Right to die with dignity".

On appeal the Supreme Court has granted **interim stay** on the decision of Rajasthan High Court.

Section 377 of IPC : Unnatural offences

The Section 377 of the Indian Penal Code (IPC) is an act that criminalises homosexuality and was introduced in 1861 during the British rule of India.

Naz Foundation vs Government of NCT of Delhi - 2009 : The court declared Section 377 of the IPC as violating Article 21 (right to life), 14 (right to equality) and 15 (non-discrimination on grounds of sex and gender) of the constitution. Thus the court held that treating homosexual sex between consenting adults as a crime was a violation of their fundamental rights. Hence the judgment "**decriminalised**" homosexuality.

However in **Suresh Kumar Kaushal vs Naz Foundation case -2013,** the court referred LGBTQ+ community as a '**minuscule' minority** group and re-criminalised homosexuality.

NALSA case - 2014 : The court recognised transgender's most basic human right - to decide their sexual orientation. This case further diluted Naz foundation case - 2013 judgement.

In **K.S Puttaswamy vs Union of India 2017**, the SC had upheld the **Right to Privacy as a fundamental right** protected under **Article 21**. The Court held that privacy is an attribute of human dignity and it includes one's freedom (autonomy) to make personal choices including sexual orientation.

Navtej Singh Johar vs Union of India 2018 case : The court held that Section 377 discriminates against individuals based on their sexual orientation and/or gender identity, violating Article 14 and 15 of the Constitution. Equality demands that the sexual orientation of each individual in society must be protected. Also, sexual orientation is an essential attribute of privacy.

Further, it stated that Section 377 **violates the rights to life, dignity, and autonomy** of personal choice under Article 21. Finally, section 377 inhibits LGBT individual's ability to fully realize their identity, by violating the right to freedom of expression under Article 19(1)(a).

Homosexuality has been decriminalized but the reaction of society and different organisations is still a challenge for the LGBT community. Though there are organisations such as All India Muslim Personal Law Board who expressed their disappointment. There also exist organisations like Amnesty International and UN who are satisfied with the judgement. **Every society needs time to accept any change**. The time is not so far when the society will accept the LGBT community and their rights.

Article 21A : "The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine."

Unnikrishnan Vs State of Andhra Pradesh 1993 case the apex court held: "Every child/ citizen of this country has a right to free education until he completes the age of 14 years. Thereafter, his right to education is subject to the limits of economic capacity and development of the State."

Following the 1993 judgment, several attempts were made by governments to incorporate the right to free and compulsory education as fundamental right under Article 21. Finally in 2002, Parliament passed the **86th Constitutional Amendment** inserting a new article, 21A in the Constitution.

Finally the **Right of Children to Free and Compulsory Education Act or RTE ACT** was enacted in 2009. Few features of RTE ACT are -

- No child shall be held back, expelled or required to pass a board examination until the completion of elementary education.
- 25% reservation for economically disadvantaged communities in schools.
- Call need to be taken for a fixed student–teacher ratio.
- Improvement in the quality of education is important.
- School teachers will need adequate professional degree within five years.
- School infrastructure (where there is a problem) need to be improved in every 3 years, else recognition will be cancelled.
- Financial burden will be shared between the state and the central government.

Analysis of RTE ACT :

The RTI act is criticised on the ground that it guarantees right to schooling but not right to education. The act is **heavily input oriented** in prescribing norms for providing infrastructure, teacher-student ratio etc, but it is deficit on learning output of children. Many private schools in the rural areas have shut down because of difficulties in meeting the infrastructure norms set by the act.

The **continuous comprehensive evaluation (CCE)** scheme and no detention policy of children in same class has failed to impose accountability on teachers.

Education is in the **concurrent list** and the division of financial responsibilities in implementation of the act between Centre and state has been an issue. The states have been clamouring that they lack financial capacity to implement RTE act.

Also the various survey has highlighted the **poor quality and outcome** of the Act. 52% of the children in the fifth standard was not able to read the text book of second standard.

Further teachers and staffs were not sensitised to handle schedule caste and schedule **tribe students with empathy.**

As with almost all welfare policies in India, **feedback mechanism** has often been ignored which led to several **well-intended policies turning into implementation failures**. RTE ACT also lacked Feedback mechanism which was required for continuous updation to make the system robust.

Article 22 : Protection against arrest and detention

Article 22 does not confer any fundamental right against arrest and detention. Therefore it comes into play only after a person is arrested and detained. Article 22 extends the following protections to all individuals if they are arrested and detained.

1. No person who is arrested can be detained in custody without informing him the ground of his arrest. According to Supreme Court this right means -

    A. Relative, friend or a known person to the arrested person shall be informed of the ground of arrest so that he can organise his legal defence.
    B. No person shall be arrested merely on the ground of suspicion.
    C. The police officer who makes the arrest shall record in his official diary, the ground and time of arrest.
    D. Generally speaking no women shall be arrested after 10 PM and before 6 AM.
    E. At least one woman police officer must be present at the time of arrest of women.

2. He shall be allowed to consult legal practitioners of his choice.
3. He shall be produced before the nearest judicial magistrate within 24 hours of his arrest. However, the 24 hour period excludes the time taken to travel and the holidays.
4. No person shall be detained in custody beyond the period for which detention has been authorised by a judicial magistrate. According to Supreme Court the general principle is "Bail is the norm and Jail is the exception".

However the above protection are not available to enemy alien and a person arrested under preventive detention.

Detentions are of two types namely punitive and preventive -

1. **Punitive detention : I**t means detention on a proper trial where the person has been found guilty of an offence in the court of law.

2. **Preventive detention : I**t means detention without trial. In preventive detention the person might not have created any offence or crime but he has been arrested barely on ground of suspicion. The aim of such arrest is to prevent him from going ahead and committing a crime which is socio-economic in nature such as indulging in narcotics smuggling, trafficking human, money laundering, terrorism, arms smuggling etc.

Rights of Undertrials :

An undertrial is a person who is accused of an offence and he is languishing in jail awaiting for his trial to be completed in the court of law. His guilt is yet to be proved in court of law.

Undertrials are often subjected to **undue delay** in disposing off their cases in the court where some of them may be imprisoned for what the law provides as the maximum punishment if he is found guilty.

Two third of the inmates in Indian prisons are undertrials. It is the major reason for overcrowding of Indian jails. The undertrials don't get bail because of their ignorance about law or **economically poor** status to arrange a lawyer for themselves or cannot furnish a personal Bond or third-party surety to get out on bail. Mostly people belonging to **lower strata of the society** are found as undertrials in jail.

When he is confined to imprisonment he **virtually undergoes punishment** without his guilt having been proved. That is his basic human rights are violated. He is denied the **right to fair and speedy trial and right to free legal aid** which is covered under the broader interpretation of article 21.

Article 21 confers a fundamental right for every person not to be deprived of his life or liberty except in accordance with the procedure established by law. The procedure should be reasonable, fair, and just **(Maneka Gandhi case).** Hence, the procedure cannot be fair unless it ensures a speedy trial for determination of the guilt of the accused.

Justice delayed is justice Denied. Hence to expedite the disposal of cases of Undertrials diverse measures are being taken -

1. On the recommendations of the 11th Finance Commission, the Central Government has decided to establish 1734 **Fast Track Courts** especially for clearance of lingering cases in district and subordinate Courts and cases involving undertrials in jails. The main objective of fast-track courts is to **expedite the process of conviction,** reduce the burden on regular courts and decrease the backlog of cases.
2. Further the Supreme Court directed session courts in 2013 to **hold "courts" in prison** and grant bail to the undertrials on the basis of personal bond furnished by them if they have completed at least half of the maximum punishment.
3. Parliament amended the IPC and provided for "**Plea Bargaining"** as a means of disposing of the pending cases. Under this if the accused pleads guilty, the prosecution argues for a lesser punishment. Undertrials could take advantage of this system.

Right against exploitation

Article 23 : Prohibition of traffic in human beings and forced labour

Article 23 prohibited traffic in human beings, begar and other similar forms of forced labour. These are punishable under law. Traffic in human beings means engaging in **slavery, servitude,** and forcing people into **immoral activities**.

The **modern slavery** may be practised in various forms including forced marriage, child marriage, payment of wages below the minimum wages fixed by the law etc.

Servitude means creating bondage of any kind including forcing people to go on exile on political or religious grounds and providing labour as punishment by the government in the form of establishing labour camps.

However persons punished with rigorous imprisonment may be compelled to provide physical labour in jail provided they are paid reasonably. But persons punished with simple imprisonment, undertrials and persons arrested under preventive detention cannot be compelled to provide physical labour.

Parliament has enacted **Immoral Traffic (Prevention) Act 1956** which prescribes punishment for indulging in immoral activities. Under this act Prostitution as such is not an offence but it becomes an offence when there is a "**commercial sexual exploitation or abuse"** of a person and any person gains out of the same. However running a brothel or prostitution in or around public place is an offence under this act.

[***Note : The court has repeatedly observed that prostitution as such is not a criminal offence and an adult woman has the right to choose her vocation/profession.]***

"Begar" means involuntary labour with or without payment. No person can be compelled to provide service even with higher payment. Bonded labour is a form of "Begar" and the **Bonded Labour System (Abolition) Act - 1976** abolished all forms of forced labour.

Article 23 (2) is an exception to article 23 (1), where State can compel individuals to provide service, provided it is in the **public interest** and it is done by enacting a law. Further state cannot show any discrimination in this regard based on religion, caste, class etc.

State can **compel people to join relief work** in the events of earthquakes, cyclones etc. Similarly during emergency people may be compelled to join **auxiliary units** like fire brigade, home guards etc. State also enjoys the power to introduce conscription ie. **compulsory military service** by the citizens by joining the armed forces to defend the country.

Article 24 : Prohibition of Child Labour

Article 24 prohibits the employment of children below 14 years of age in hazardous industries. It allows children below the age of 14 years to be employed in non-hazardous industries.

Parliament enacted **Child Labour (Prohibition and regulation) Act 1986** that prohibits employment of children below the age of 14 years in hazardous. The act further regulates the employment of children in **non-hazardous industries** by fixing the minimum wages, working hours and responsibility of employer towards the welfare of children.

The 1986 Act was substantially amended by child labour amendment act in year 2016. The 2016 Amendment **completely prohibits** employment of child (person below age of 14 years) in any establishment whether hazardous or not.

A child is permitted to **work only to help family, in family enterprise or as a child artist** after school hours or during vacations. It has been done in accordance with the right to education act (Article 21A) that provides for free compulsory education of child within age group 6 to 14 years.

The 2016 amendment has introduced the concept of "**adolescent labour**" for the first time and adolescent has been defined as a person between the age of 14 and 18 years. The amendment permits employment of "adolescent labour" except in hazardous processes or occupations.

Analysis of 2016 Amendment :

It has **reduced the list of hazardous occupations** for children from 83 to include just mining, explosives, and occupations mentioned in the Factory Act. This means that work in chemical mixing units, battery recycling units, brick kilns etc have been dropped.

Further, even the the ones listed as hazardous can be removed— not by Parliament but by government authorities at their own discretion.

The exemption to family enterprises effectively will mean children are made to contribute **economically while studying.** It will have a **deleterious effect on the children's health** as well as their aptitude for learning.

Regulation will be a challenge, as it will be difficult to determine whether a particular family is running an enterprise, or whether some **faceless owner** has employed a single family to circumvent the law.

The Amendment complies with International Labour Organisation Conventions 138 & 182.

Convention 138 : compulsory schooling till the age of 15, but permits countries with inadequate education facilities to reduce it to 14.

Convention 182 : prohibits employment of children "in the worst forms of labour"

However, **bare compliance with international norms** is not enough. Children from the poor and marginalised sections, especially Dalits, are still in danger of being deprived of both the joys of childhood and their constitutional right to education.

It is yet another stark reminder that the country is far from achieving the complete elimination of child labour.

Right to freedom of religion

Article 25 : Right to freedom of religion

Article 25 guarantees to all individuals the right to freedom of religion which also includes **right to freedom 'from' religion.** Therefore the right to **reject all religion** and right not to believe in any religion is also a fundamental right protected under article 25.

Article 25 confers to fold of freedom of religion :

1. Right to freedom of conscience.
2. Right to profess, practice and propagate religion of one's choice.

Right to **freedom of conscience** is an absolute inner freedom to mould one's religious belief and faith and state cannot interfere with this right.

However when his inner freedom takes an **outward expression it is called right to profess, practice and propagate** a religion. This right is subject to reasonable restrictions that the state may impose in the interest of public order, morality or health.

Right to profess means right to follow one's religion freely and openly and one does not have to follow his religion in secrecy.

Right to practice means right to follow the rituals, rites, symbols, signs, colours etc that are associated with one's religion.

Right to propagate means right to transmit or spread one's religion by explaining the tenets of his religion for the edification of others.

Supreme Court in Stanislaus versus State of MP held that the "**right to propagate"** does not confer a "**fundamental right to convert**" others to one's own religion. Any religious conversion in order to be legally valid shall have to be **voluntary**.

The court held that the state can restrict these rights by enacting laws to prevent the forceful conversion of religion.

The court made a distinction between "**religious belief and opinion"** on one hand and "**religious conducts and practices"** on other. The first right is absolute and state cannot interfere in it, whereas state can interfere in the second right in the interest of public order, morality or health.

Article 26 : Freedom to manage Religious Affairs

Article 26 recognises the religious freedom of religious domination. Any section of religious community enjoys the following rights -

1. Right to establish and maintain religious institutions including religious endowments, charitable trust etc.
2. Right to manage its own affairs.
3. Right to own and acquire movable and and immovable property ie. such institutions enjoy right to property as a fundamental right.
4. Right to administer such property in accordance with the law.

However the right under article 26 is subject to reasonable restrictions that may be imposed by the state in order to maintain public order, morality or health.

Sabarimala Temple Entry Case :

Women between the age of 10 years and 50 years (menstruating age) were not allowed entry into Lord Ayyappa's temple in Sabarimala, Kerala. The temple authority held that under article 26 it has right to manage its own affairs.

However the Court held that restricting women entry is gender discrimination and violation of article 25 of women whose freedom to practise religion is restricted.

Also the court earlier held that a "**religious denomination**" is a sub-group within a larger religious organisation. However, the court held that religious entity cannot claim to have "religious denomination" simply on account of differences from the mainstream practices. It must have following three features -

1. A common faith
2. A common organisation
3. Designation by a distinct name

For example - Catholic, orthodox and Protestant are considered as religious denomination under larger religious group Christianity.

The Court in Sabarimala case held that "**Lord Ayyappa's devotee" are not a "religious denomination"** as these devotees are not a separate followers of this temple rather these are general Hindu followers. So it cannot be granted freedom to manage its own affairs available to "religious denominations".

Article 27 : Freedom as to payment of taxes for promotion of any particular religion

Article 27 prohibits the state from spending the tax collection for the promotion of any particular religion. Article 27 truly spells out the secular nature of the Indian state. Secularism means the state does not recognise any religion as the official religion and the state is neutral on all religious matters.

It recognises the right of the individual to choose their own religion and the right of all religions to coexist in the country. Therefore a secular state is not opposed to any religion. A secular state is **neither religious nor anti-religious nor irreligious but only non-religious in character**.

The greatest benefit secularism confers on the state is that it **prevents the subjugation of state to a particular religion**. Indian secularism is not a borrowed concept of the Constitution. It is a part of cultural ethos of the country and originated in ancient Indian past.

Generally, in western secularism the state is strictly separate from religion and state cannot patronise any religion at all. Where as in Indian secularism state can patronise all religions provided it does not discriminate against any religion.

Indian secularism is a positive concept, taking along and encouraging all the cultural practices while **instilling a scientific temper against superstitions** and harmful practices.

Constitutional Secularism

It is marked by at least two features -

1. **Respect for all religions** - State is not anti-religion and respects all religions.
2. **India abandons strict separation of state from religion** but keeps principled distance from all religions - There is virtual impossibility of distinguishing the religious practices from the social practises and hence while respecting all the religions, state can also intervene when religious groups promote communal disharmony or discrimination or untouchability on grounds of religion.

Article 28 : Freedom as to attendance at religious instruction or religious worship in certain educational institutions

Article 28 deals with the issue of imparting religious instruction in educational institutions. For this purpose it divides the educational institutions into **four categories -**

A. Educational institutions that are **wholly owned and maintained by state**. In such educational institutions no religious instructions whatsoever can be imparted.

B. Private educational institutions that are receiving aid out of the state funds.

C. Private educational institutions that are recognised by the state.

   Under category B and C of educational institutions, religious instructions can be imparted but **cannot be made compulsory.**

D. Educational institutions that have been established under an endowment or charitable trust but are administered by state. In such institutions religious instructions can be **imparted and these can be made compulsory.**

Cultural and Educational right

These rights are available only to citizens and are commonly referred to as "**minority rights**", although only Article 30 deals exclusively with minority rights.

Article 29 (1) states that any section of the citizen resident in India, having a distinct language, script or culture of its own has the right to conserve its separate identity.

According to Supreme Court the expression "**any section of citizen**" includes majority community as well. Since each religion has its distinct culture, the various religious communities also enjoy the right under article 29 (1).

Such separate identities of various communities shall be protected by any means provided it is not illegal.

Article 29 (1) by recognising the fundamental right of all the communities to conserve their separate identities endorses the principle of **"unity in diversity"** but not the principle of "unity in uniformity".

It seeks to establish a layer of common identity for the nation, not through the process of "assimilation" but by the process of **"integration"** of various communities of India. It also endorses the "**composite culture**" of the country as the common culture of the country.

Article 29 (2) states that no citizen shall be denied admission in educational institutions that are maintained by the state and educational institutions that are receiving aid out of the state funds on ground only of religion, race, caste, language or any of them.

Article 30 : the right under article 30 is available **only to the minority communities** and majority community does not enjoy protection of Article 30.

Article 30 (1) recognises two types of minorities - **religious and linguistic minorities.** A minority community is defined as a **non-dominant community** that possesses and is willing to maintain its separate identity, where its identity is stable and markedly different from other communities.

Minority status of a community is recognised at both - **national and state levels.**

Union government so far has recognised the Muslims, Christians, Sikhs, Buddhist, Zoroastrian (Parsi) and Jains as minority communities.

The backward classes according to the Supreme Court do not constitute a minority within the meaning of Article 30 (1).

Minority community enjoys the **fundamental right to establish and administer educational institution** - which is considered as the most effective means by which a minority community can preserve its separate identity.

Such a minority educational institution enjoys the following protection exclusively -

1. Under **Article 30 (1A),** it enjoys fundamental right to property. Such a property can be taken over by the state but the state shall pay due compensation so that it is able to relocate and administer itself.

2. The reservation policy under article 15 (5) in favour of backward classes does not apply to a minority educational institutions.

3. Under Right to Education Act a minority educational institution is not legally obliged to admit a certain percentage of students coming from the deprived section of the society.

4. The Supreme Court in **Saint Stephens College versus University of Delhi 1992** held that a minority educational institution has the right to reserve seats up to not more than 50% in the favour of children coming from its own community.

5. **TMA Pai foundation versus State of Karnataka 2002** case Supreme Court held that an unaided minority educational institution has the right to follow its own admission policy independent of the government, provided it is transparent and merit-based. Similarly it can fix its own fee structure provided it does not charge capitation fee.

Where as the above protections are available to both religious as well as linguistic minorities, the following rights which are provided in form of special directives under **article 350 A and has 350 B are available only to linguistic minorities** -

1. Under article 350 A the state government shall have to make available facilities to children of linguistic minorities to get education in their **mother tongue** up to at least the primary school level.

2. Under article 350 B the president shall appoint a **special officer** for the linguistic minorities to protect and promote their interest.

Regulation of Minority Institutions: Gujarat Education Amendment Act

Gujarat government has amended education act and made it mandatory to clear **teachers aptitude test (TAT)** to become teachers and principals in minority educational institutions - religious as well as linguistic minorities. This has been cited as violation of Minority Rights protected under Article 30 and called "unconstitutional".

The Supreme Court in **TMA Pai Foundation and Others vs state of Karnataka 2002 case** held that the academic standard cannot be lowered in any minority educational institutions. Regulations can be framed in "national interest" and to ensure "**standard of excellence"** of these institutions while preserving the "**right of the minorities"** to establish and administer their educational institutions.

In 2020, the court ruled that the **essence of Article 30(1) is to ensure equal treatment** between the majority and minority institutions and a minority institution can object to unfavourable treatment, if any.

If the objective of "**regulation**" by State is to ensure academic excellence in educational institutions, minority institutions can not shield itself from the "regulation".

The court suggests to **strike a "balance"** between the two objectives of excellence in education and the preservation of the minorities' right to run their educational institutions.

For this, the court broadly divides education into two categories – **secular education** and **education "directly aimed at preservation and protection** of the heritage, culture, script etc. of a religious or a linguistic minority."

Latter could be ensured with "**teachers" who believe in the religious ideology** of the concerned minority; and hence minority institutions must be given the maximum possible autonomy in this regard.

However, **"secular education"** in minority institutions must be imparted with quality teachers to ensure academic excellence and to further "national interest".

Hence, with mandatory teachers' aptitude test (TAT), minority schools will get quality teachers and principals that will benefit students and will ensure academic excellence.

Article 32 : Right to Constitutional Remedies

Article 32 (1) guarantees to all individuals the fundamental right to approach the Supreme Court directly by filing appropriate proceedings for the enforcement of their fundamental right.

It is this "**guaranteed remedy"** that makes fundamental right real and enforceable. If there is no remedy then there is no right at all. It is article 32 that makes all other fundamental right real and enforceable that is why Article 32 itself has been made a fundamental right.

Article 32 (1) also imposes a constitutional duty on the Supreme Court to enforce the fundamental rights if these are found violated. It is this duty that has made Supreme Court the protector of fundamental right.

Although the High Court enjoys the right to enforce the fundamental right, yet since there is **no constitutional duty** on them to enforce the fundamental rights, they are not the protectors of fundamental right of an individual.

Article 32 (2) confers the writs jurisdiction on Supreme Court for the enforcement of the fundamental right of individuals by issuing appropriate writs in the nature of Habeas corpus, mandamus, Certiorari , prohibition and Quo warranto.

It is for the above reasons **Dr Ambedkar** described Article 32 as fundamental of all fundamental rights and the heart & soul of the Constitution. It is the most important article of the Constitution without which whole constitution would be a nullity.

Both the High Courts and the Supreme Court can be approached for violation or enactment of fundamental rights through **five kinds of writs:**

1. **Habeas corpus -** related to personal liberty in cases of illegal detentions and wrongful arrests.
2. **Mandamus** — directing public officials, governments, courts to perform a statutory duty.
3. **Quo warranto** — to show by what warrant is a person holding public office.
4. **Prohibition** — directing judicial or quasi-judicial authorities to stop proceedings which it has no jurisdiction for.
5. **Certiorari** — re-examination of an order given by judicial, quasi-judicial or administrative authorities.

In civil or criminal matters, the first remedy available to an aggrieved person is that of trial courts, followed by an appeal in the High Court and then the Supreme Court.

However, **when it comes to violation of fundamental rights**, an individual can approach the High Court under Article 226 or the Supreme Court directly under Article 32. Article 226, however, is not a fundamental right like Article 32.

In **Romesh Thappar vs State of Madras (1950)**, the Supreme Court observed that Article 32 provides a "guaranteed" remedy for the enforcement of fundamental rights. SC is the protector and guarantor of fundamental rights, and it cannot refuse to entertain applications seeking protection against infringements of Fundamental rights.

During the Emergency the citizen loses his right to approach the court under Article 32.

Difference in the writs jurisdiction of SC and HC :

1. The supreme court can issue the writs only for the enforcement of fundamental rights and not for the enforcement of other legal rights. Where as the High Court can issue the writs not only for the enforcement of fundamental rights but also for the enforcement of other legal rights.
2. Supreme Court does not enjoy the discretionary power to implement or not to implement the fundamental rights, if they are found violated. Where as the High Court enjoys the discretionary power to implement or not to implement the fundamental rights.
3. The writs jurisdiction of Supreme Court extends all over the country where as the writs jurisdiction of High Court are limited to the specified states and UTs.

Amendability of Fundamental Rights

Article 13 (2) provides that the state shall not enact any "law" that takes away or abridges one or more of the fundamental rights. If any such law is made the law shall be unconstitutional and void to the extent of its violation.

The parliament enacted first Constitutional amendment Act in 1951 which amended fundamental rights given under article 19 and 31. It was challenged by in Supreme Court as violation of article 13 (2) in **Shankari Prasad versus Union of India 1951** case.

The Supreme Court held that the parliament enjoyed two types of legislative power namely - constitutional legislative power under Article 368 and ordinary legislative power outside article 368.

Therefore any enactment made by Parliament in exercise of its power under Article 368 is known as constitutional amendment act which does not fall within the meaning of expression "**law**" has given under article 13 (2).

Therefore the Parliament can amend any part of the Constitution including fundamental rights in exercise of its constitutional legislation power and upheld the constitutional validity of first amendment act 1951.

However, the court qualified that any enactment made by the Parliament in exercise of its ordinary legislative power is called an "**ordinary law"** which falls within the meaning of expression "law" as given under article 13 (2). Therefore Parliament cannot amend the Constitution in exercise of its ordinary legislative power.

However in **GolakNath versus State of Punjab 1967** case the Supreme Court overruled its earlier decision and held that the parliament in joyed only "**ordinary legislative power**" and it did not enjoy the "**constitutional legislative power**" on the ground that the title of Article 368 contained "only the procedure to amend the Constitution" but did not confer the power on Parliament to amend the Constitution.

Therefore any enactment made by Parliament would fall under the scope of article 13 (2) and thus it cannot amend the Constitution. The court further held that the Constitution has conferred a "**transcendental position"** that is overriding position to fundamental rights.

Therefore no authority functioning under the Constitution including the Parliament can amend the fundamental rights and fundamental rights were beyond the amending power of Parliament.

The Parliament responded by enacting the **24th Constitutional amendment act 1971**. It amended the title of article 368 which now reads as "power of Parliament to amend the constitution and the procedure thereof".

Also it added **clause 3 to article 368** which reads that "nothing in article 13 shall apply to any amendment made under article 368". It also included **clause 4 to article 13** which says "nothing in this article shall apply to any amendment under article 368".

Supreme Court in **Keshavananda Bharati versus State of Kerala 1973** case upheld the constitutional validity of **24th Constitutional amendment act** and accepted that the parliament in enjoyed constituent legislative power as well under article 368, with which it can amend any part of Constitution including the fundamental rights.

However the court stated that such an **amending power of Parliament is not unlimited** but it is limited to the extent of not destroying the basic structure of the Constitution. The doctrine of basic structure is not mentioned anywhere in the Constitution. It is the judicial innovation made by the Supreme Court in 1973 in order to **place a limitation on the amending power of Parliament** and to maintain the supremacy of Constitution.

The supreme court has not defined the precise term what the basic structure means. However it can be defined as those parts of Constitution without which the Constitution would lose its "**basic character"**. But the Supreme Court in number of cases has identified the following provisions of the Constitution as a part of **basic structure** of the Constitution:

1. Sovereignty of the country.
2. The mandate to build a welfare state.
3. Secularism
4. Democratic and republic form of government.
5. Fair and free elections.
6. Judicial review
7. Balance among three organs of the state
8. Balance between fundamental right and the DPSPs.
9. Rule of law
10. Separation of powers
11. Federalism etc.

The parliament in 1976 enacted the **42nd constitutional amendment act** which among the other things amended article 368 and introduced clause 4 and 5. **Article 368 (4)** stated that no amendment made under article 368 can be challenged before the court of law. In other words the courts **shall not enjoy judicial review** with regards to that of the constitutional amendment act.

Article 368 (5) stated that there shall be no limitation, whatsoever, on the amending power of the Parliament. This would have established the supremacy of Parliament over the other two organs of the government.

The Supreme Court in **Minerva Mills vs Union of India 1980** case struck down clauses 4 and 5 of article 368 as unconstitutional and void on the ground that they took away the power of judicial review of the courts and disturbed the balance among the three organs of the government which of the part of basic structure of the Constitution.

The **present position** is that Parliament can amend any part of the Constitution including fundamental rights but such an amending power of Parliament is not unlimited and it is limited to the extent of not destroying the basic structure of the Constitution.

Judicial Review

Judicial review as a concept originated under **US Constitution**. It means the power of higher judiciary ie. Supreme Court and High Court to declare a law made by the State as on unconstitutional and void **if it is inconsistent** with one or more provisions of the Constitution to an extent of such inconsistency.

Power of judicial review is available to courts not only against the legislature but also against the executive. The court while declaring a law as void does not suggest remedies or alternatives.

The power of judicial review has not been provided in the Constitution explicitly. It is more implicit under **Article 32 and Article 226** under which the Supreme Court and High Court respectively enjoys the writs jurisdiction.

However when it comes to fundamental right the Constitution explicitly conferred the power of Judicial Review on higher judiciary under Article 13(2).

The principles of judicial review are as follows :

1. It is based on doctrine of limited government.
2. Where there are two interpretation possible to a law passed by the state, where first interpretation would make the law valid and second interpretation would make the law invalid, the court shall prefer the second interpretation and uphold the constitutional validity of the law.
3. Ordinarily, the court should not pronounce on the validity of a law that has not been brought into legal enforcement.
4. Ordinarily, the court shall not apply judicial review "suo motu" ie. on its own.
5. Judicial review has helped **in legitimisation of government's action**, protecting the fundamental rights against encroachment of powers by legislature and executive, safeguarding the supremacy of Constitution, ensuring separation of powers & division of power, rule of law, balance among three organs of the government etc.
6. Because of its importance Supreme Court in **Keshavananda Bharati versus State of Kerala 1973** case held that judicial review is the part of basic structure of the Constitution. It cannot be taken away, even by the means of an amendment to the Constitution.

Directive Principles of State Policy (DPSP)

The DPSP epitomise the ideals of the people of India. DPSP have evolved along with the emergence of concept of welfare state. A welfare state is opposed to **laissez-faire** or regulatory state.

A regulatory state performs only one function which is "**regulatory function"** of maintenance of law and order, security of the country and carrying out day to day administration.

However a welfare state performs dual function - **regulatory as well as development** function. Under development function the state activity helps an individual (more importantly the poor) in their economic development.

Thus a welfare state seeks to establish and an **egalitarian or classless society**. The DPSPs are unique blend of principles of socialism, Gandhism, Western liberalism and ideals of freedom struggles of India.

The socialist principle dominates the DPSP and two directives given under article 39 (B) and article 39 (C) are socialistic in nature.

Article 39 (B) : The material resources of the country shall be so utilised that they benefit all the sections of the society.

Article 39 (C) : State shall take measures to prevent the concentration of wealth in few hands.

This article 39 B and 39 C seeks to extend **distributive justice** to the people in the form of equitable distribution of resources.

However DPSP, unlike the fundamental rights, are **non-justiciable rights**. These cannot be enforced in a court of law. These become legally enforceable only when these are incorporated into the laws made by the Parliament or state legislature.

Therefore DPSP are mere **instructions to the states**. These guide but do not control the state. These are enforceable at the option of the state.

Further these are called **positive obligation** on the state and are positively worded. DPSP are dynamic in the sense that their implementation leads to creation of new legal rights in the form of **economic and social rights** in the favour of the citizen.

Importance of DPSP

DPSP has not been given the legal enforceability, not because these are inferior to any other part of the Constitution, but only because these being the positive obligations of the state requires material resources and time for their implementation.

If the ruling party does not implement DPSPs, it will be answerable to the people in next general election. Therefore DPSP may not be enforceable in a "**court of law"** but these are enforceable in the "**court of people**".

These may not enjoy legal sanction but these enjoy political sanction. DPSPs have been included in the constitution without legal enforceability so that it can **act as a beacon** - constantly reminding the government of the day of its responsibility to achieve the welfare goals.

The enjoyment of fundamental rights by citizen becomes meaningful only if these are delivered out of want and hunger. Unless people enjoy **right to freedom 'from' want** and **right to freedom 'from' hunger,** which can be conferred not by implementing fundamental rights but by enforcing various DPSP, they cannot truly enjoy fundamental rights.

The first **CJI Justice Harilal Kania** has observed that the inclusion of DPSP in the Constitution was not the reflection of the "**will of a temporary majority"** in the constituent assembly but considered "**wisdom of entire country"** expressed through constituent assembly.

Relationship between Fundamental Rights and DPSPs

Article 37 states that the DPSPs are not enforceable in a court of law but the principles laid down in DPSP are fundamental in the governance of the country and it shall be the duty of the state to implement the DPSP by incorporating these in the laws made by the State.

The Supreme Court in **State of Madras versus Champakam Dorai Rajan 1951** case held that the DPSP cannot override the fundamental rights. The DPSP had to conform to the FRs. DPSP shall be subsidiary to FRs. In case of any conflict between these, FRs shall prevail over DPSP.

However the growing realisation of the importance of DPSPs in bringing about social transformation in the society, the Supreme Court started interpreting fundamental rights and the DPSP liberally and change in its approach was reflected in its decision in **re Kerala education Bill 1958.**

In this case the Supreme Court observed that though DPSP cannot override fundamental right, nevertheless in deciding the **scope and ambit of fundamental rights,** the courts may not entirely ignore DPSP. Rather they should adopt the **"principle of harmonious construction"** and should attempt to give effect to both - fundamental rights and the DPSP as much as possible.

Under the "**theory of Harmonisation**" Supreme Court held that there is no inherent conflict between the FRs and the DPSPs. These together constitute and integrate the scheme of establishing **political, social and economic democracy** in the country. In this regard these are complementary and supplementary to each other.

Therefore the courts have the responsibility to interpret the Constitution in such a way that it **harmonises the social objectives underlined in the DPSP with the individual's liberty** that are guaranteed by the fundamental rights. This is the mandate of the Constitution not only to the executive and legislature but also to the judiciary.

Therefore fundamental rights should be interpreted having regard to the DPSP. FRs should be **interpreted in the light of the DPSP.** However if the harmonious construction is not possible between these, then the **courts have no choice** but to implement the fundamental right in preference to DPSP.

The parliament enacted **25th Constitutional amendment act** which included Article 31 (C) in the Constitution. In its earlier part Article 31 (C) stated that if the state enacted any law to **give effect to the two directives given under Article 39 (B) and Article 39 (C)** and in the process if the law violated any of the fundamental rights given under article 14, 19 and 31, the law shall not be held unconstitutional and void merely on this ground.

In the later part Article 31 (C) stated that any such law, that it is to give effect to the above two directives, **cannot be challenged before court of law**.

The Supreme Court in **Keshavananda Bharati versus State of Kerala 1973** case held first part of Article 31 (C) as constitutionally valid but it struck down the later part of Article 31 (C) as unconstitutional and void on the ground that it took away the power of judicial review of court which was the part of basic structure of the Constitution.

Thus, the two directives under **Article 39 (B) and Article 39 (C)** where allowed to take precedence over the fundamental right 14, 19 and 31.

Subsequently the parliament enacted **42nd constitutional amendment act 1976** which among other things amended under Article 31 (C).

In it is amended form Article 31 (C) provided that if the state enacted any law to give effect **to all or any of the DPSPs** and in the process if the law violated any of the fundamental rights given under article 14, 19 and 31, then the law shall not be declared as unconstitutional and void merely on this ground.

Thus, the 42nd constitutional amendment act attempted to provide precedence for all of the DPSPs over three fundamental rights. In the meanwhile **44th Constitutional Amendment act 1978** removed Article 31 from the list of fundamental rights.

The Supreme Court in **Minerva Mills versus Union of India 1980** case held changes introduced by the **42nd constitutional amendment act** in Article 31 (C) as unconstitutional and void on the ground that it disturbed the balance between **Part III (FRs) and Part IV (DPSP)** of the Constitution which was the part of the basic structure.

Thus the present position is that two directives given under **Article 39 (B) and Article 39 (C)** can take precedence over two fundamental rights given under Article 14 and 19.

FR vs DPSP : Ban on beef and alcohol

The **justiciability of FR** and **non justiciability of DPSP** on one hand, and the moral obligation of state to implement DPSPs on the other, has led to frequent to tussle between the two.

With states imposing ban on beef and ban on alcohol consumption, a new debate has come into play between FRs and DPSP (Article 47 - prohibit consumption of Intoxicating drink & Article 48 prohibit slaughter of calves and other drought cattle).

Argument that DPSP can be implemented and it doesn't violate FR :

1. States view it as a reasonable restriction on livelihood in public interest. Since India is agrarian economy, preserving cattle is important. Also, prohibiting alcohol is in larger public health & society.
2. Constitution makers did not see these as FRs, else it would not be a part of DPSP that allows State to prohibit such activities.

Arguments that it violates FRs:

1. It is violative of Article 19 (g) - Freedom to profession of one's choice.
2. It violates Article 25 - Right to practice one's religion.
3. With the broadening scope of Article 21, ban on such activities violates Right to life as long as he/she is not a nuisance to society.
4. It also violates of Right to privacy under Article 21, since drinking and eating within confines of homes is part of privacy and State's interference violates individual's privacy.

With states, trying to achieve the ideals of welfare state by implementing DPSP, along with expansion of ambit of FR due to judicial interpretations, it is imperative to apply the "doctrine of Harmonious construction" that calls to achieve balance between the FRs and DPSPs which is also a part of basic structure of one constitution (**Minerva Mills case).**