CONSTITUTIONAL LAW

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I. CONSTITUTION

Definition:

Constitution is the legally documented fundamental or supreme law of a Stateand its primary objective is:

- to define the elementary features of the State
- to determine the relation between the State and its citizens
- to specify the provisions that determine the distribution of powers of all three organs of the govt.- the Executive, the Legislature and the Judiciary
- to lay down the principles of distribution of power among the Union and the State govts. in a federation
- to specify the rights and duties of the citizens

Classification of Constitutions:

Constitutions can be classified as:

1) Written or Unwritten

A Written Constitution is prepared and adopted by a Constituent Assembly, as well as specifically documented in the form of a book. The Constitutions of India, Japan, The United States of America, Germany are some examples of written Constitution.

Whereas, an Unwritten Constitution is not a document and is neither formulated nor enacted by a Constituent Assembly, in fact, it has evolved over the years. The most prominent example of such Constitution is the United Kingdom.

2) Unitary or Federal:

Unitary Constitution empowers the central govt. by investing all the powers in it, whereas, the units or states are its subordinates. The United Kingdom is the best example of a unitary govt.

Federal Constitution divides the powers between the central and state govts. as witnessed in the USA.

3) Flexible or Rigid:

A Constitution is termed as Flexible when the procedure for its amendment is simple; Great Britain can be quoted as the best example of it.

On the other hand, a Constitution is called Rigid when the procedure for its amendment is complex; Australia and India are two such countries.

b. Sources and Framing of the Indian Constitution

The Constitution of India, was adopted by The Constituent Assembly of India on 26th November 1949, and became effective from 26 January, 1950. It enjoys the exclusive distinction of being the lengthiest and most extensive one. It has been criticized as 'bag of borrowings' or 'a copy paste work' as its salient features have been borrowed from various Constitutions from world over. At the same time, there are others like Ivor Jennings, who considered it as a 'lawyer's paradise'.

A Constituent Assembly was set-up in November, 1946, for the purpose of framing the Constitution. The framers of the Constitution were compelled to refer to other Constitutions extensively as they had to keep in mind numerous factors like-

a) the geographical vastness of the nation
b) the social and religious diversity
c) cultural inheritance
d) historical influences

The Constituent Assembly comprised of representatives from all sections of society and their primary motive was to come up with a framework that would guarantee a balanced and working Constitution catering to the needs of a nation marred by various factors like imperial rule, religious incompatibility, caste wars, gender bias, etc. Therefore, the final draft of the Constitution turned out to be an amalgamation of many Constitutions.

Inspirational seedbed of Indian Constitution:

1) Government of India Act, 1935: A massive part of the Indian Constitution has been derived from the Government of India Act, 1935. So much so that, a critic

called it a ‘glorified edition of the 1935 Act’. The similarities can be drawn in the given provisions which have been modified to suit the needs of the nation.

- Judiciary
- Federal scheme
- Public Service Commissions
- Administrative System
- Governor’s Office
- Emergency Provisions

2) Impact of Foreign Constitutions

The framers of Indian Constitution borrowed heavily from various Constitutions in their aspiration to give India a text that would prove worthwhile in all situations. These are a few Constitutions from which certain aspects have been adopted with changes to suit Indian requirements.

a) Influence of British Constitution: Being under the imperial British rule for so long, it is not surprising to witness many aspects of the British Constitution incorporated in the Indian Constitution.

- Parliamentary form of Government
- Rule of law
- Cabinet System
- Legislative Procedure
- Single Citizenship

b) Stamp of US Constitution: There are various features of the Constitution that have been taken from American Constitution and improvised to suit the Indian requirement.

- Impeachment of the President
- Independence of the Judiciary
- Fundamental Rights

- Removal of Vice-President
- Removal of High Court and Supreme Court Judges

c) **Canadian Constitution's Mark:** Some relevant provisions can be traced to the Canadian Constitution.

- Advisory jurisdiction of the Supreme Court
- Federation with a Strong Centre
- Appointment of State Governors by Centre

d) **Australian Constitution'sInfluence:** A few provisions have been borrowed from the Australian Constitution too.

- Joint sitting of both the Houses of Parliament
- Concurrent List
- Freedom of Trade & Commerce

e) **Impact of Irish Constitution:** The influence of the Irish Constitution is evident in these provisions-

- System of President's election
- Directive Principles of State Policy
- Nomination of Rajya Sabha Members

f) **Soviet influence:** The features adopted from the Soviet Constitution were-

- Fundamental Duties
- The ideal of Justice in the Preamble

g) **Mark of South African Constitution:** A significant feature has been taken from the Constitution of South Africa.

- Procedure of Constitutional Amendment

Apart from these sources there were several other factors that helped in framing of the final draft of the Indian Constitution. A congregation of legal experts, thinkers, intellectuals, devoted nationalists, mass leaders, etc. contributed towards giving a concrete shape to the Constitution to suit the requirements of a nation which was in its infancy.

I. Deliberations and considerations of the Drafting Committee
II. Reports and suggestions of various minor & major Committees
III. Debates & discussions of the Constituent Assembly

c. Salient features of Indian Constitution:

The Indian Constitution is distinctively exclusive in innumerable ways and to understand them it is essential to have a look at the significant features that makes it stand apart from all others.

#1. Lengthiest Written Constitution: Indian Constitution is the most comprehensively written and documented Constitution in the world. Under the capable leadership of the legendary legal luminary B. R. Ambedkar, the Constituent Assembly framed the Indian Constitution in 2 years, 11 months and 18 days and was adopted on 26 November, 1949 and enforced from 26 January, 1950.

Indian Constitution comprised originally of 395 articles in 22 parts and 8 schedules and with various amendments over the years, in its present form consists of 448 articles, 25 parts and 12 schedules. It is a completely written document which comprehensively covers the constitutional law of the country. The length of the document can be assessed by comparing American Constitution which has only 7 articles whereas China also has only 138 articles.

#2. Preamble of the Constitution: The Preamble of the Indian Constitution declares India to be a Sovereign, Socialist, Secular, Democratic, Republic State.

- **Sovereign:**It means absolute independence thus declaring India to be free and not under the control or influence of any other State.
- **Socialist:** The term 'Socialist' did not exist in the original document but was an addition through the 42nd amendment of the Constitution in 1976. The term implies that the State believes in economic justice to all and shall work towards a system which will ensure equitable distribution of wealth.
- **Secular:** The term 'Secular' was also added to the Preamble of the Constitution by 42nd amendment of the Constitution, specifying that no State religion exists. This was done keeping the social fabric of the country in mind and all its citizens are free to follow and practice any religion, without facing any discrimination from the state.
- **Democratic:** The Indian Constitution declared India as a democratic State thereby, conferring the rights to elect representatives to govern. As a result, the govt. is liable to its citizens and their welfare.

- **Republic:** The Constitution declares India to be a Republic indicating that it is neither ruled by a monarch nor a nominated head, instead it indirectly elects a President as the head of State for a fixed tenure of 5 years.

#3. Unique Balance of Flexibility and Rigidity: Borrowing from various Constitutions, the Indian Constitution can be seen as a wonderful balance in its amending process. In parts, it is very flexible, just like the British Constitution but a few procedures are extremely rigid like the Constitutions of Australia and America.

#4. Parliamentary form of Government: Adopted from the British Constitution, Part V of the Constitution of India establishes a Parliamentary form of govt. The nominal head of State is the President, whereas, the real powers are invested in the Prime Minister, who heads the Council of Ministers.

#5. Blend of Unitary & Federal system: Although India has a federal system as there is distribution of power between the Union and State govts. but in actuality, there are certain provisions which are unitary in nature and give supremacy to the Union govt. For example, the States are dependent on the Center for grants and funds for their developmental programs.

#6. Fundamental Rights: Fundamental Rights are guaranteed under Part III C, Articles 12-35 of the Constitution. There were initially 7 rights described as fundamental but after the deletion of Right to Property[1] from the list of Fundamental Rights, the number has come down to 6. They are-

1. **Right to Equality**
2. **Right to Freedom**
3. **Right against Exploitation**
4. **Right to Freedom of Religion**
5. **Cultural and Educational Rights**
6. **Right to Constitutional Remedies (Art. 32)**

#7. Directive Principles of State Policy: Directive Principles of State policy is a striking feature of the Indian Constitution that has been adopted from the Irish Constitution. Part IV (Articles 36-51) of the Constitution lays down the principles that

[1] 44th Amendment Act, 1979.

aim towards making the country a welfare State; work towards economic and social justice.

#8. Single Citizenship: Unlike the federal States like America, which have double citizenships, the Indian Constitution mandates single citizenship for Indians. Part II (Articles 5-11) of the Constitution establishes a single and uniform citizenship. Hence, every Indian, irrespective of which state he/she is born, is an Indian citizen.

#9. Independent Judiciary: Indian Constitution has kept the Judiciary independent in addition to being impartial, one that cannot be influenced by the Executive or the Legislature.

#10. Universal Adult Franchise: Article 326 of the Indian Constitution mandates the policy of 'one person, one vote' and hence, every Indian who has attained the age of 18 is entitled to vote without any bias of caste, creed, gender, race, etc.

#11. Language Policy: Realizing the diversity of the country, the Constitution framers have included a language policy too. As per Articles 344(1) and 351 of the Constitution, the 8th schedule recognizes 22 languages. These languages can be adopted by the states accordingly for the convenience of the local population, whereas, Hindi and English were declared the official language of the Union.

#12. Fundamental Duties: Taking cue from the Soviet Constitution, the Fundamental Duties have been incorporated in the Indian Constitution. Part IVA Article 51A describes eleven duties that shall be abided by its citizens. Ten of these were added by 42nd amendment whereas, the eleventh was included by the 86th amendment. These are obligations that promote patriotism and helps preserve unity of the nation.

#13. Single integrated Judiciary: The Constitution provides a common judicial system for the Union as well as the States under which the Supreme Court holds the highest place (Article 141), followed by High Courts at the state level and Lower Courts under them.

#14. Judicial Review: The Supreme Court acts as the custodian and protector of the Constitution. Articles 32 and 136 of the Constitution empowers the Judiciary by providing the power of Judicial review in matters related to legislative and executive actions, to check the constitutional validity and based on the merits, may accept or

reject it. As an interpreter of the Constitution, Judiciary helps in defining the constitutional validity of all laws.

#15. Emergency Provisions: Part XVIII (Articles 352-360) of the Constitution has provisions to deal with various emergencies facing the country.

Article 352 states that emergency can be declared in situations like external aggression or armed rebellion or a war[2].

Article 356 of the Constitution is applicable when there is a failure of constitutional machinery in a state. The Governor of a state has the right to recommend President's Rule in such a state[3].

Article 360 of the Constitution deals with Financial emergency of the country and it needs the approval of the Parliament within two months. A situation leading to such a crisis has never arisen in India yet.

d. Is Indian Constitution Federal in Nature?

Since 26 January, 1950, when the Constitution came into effect, experts have questioned the Federal nature of the Constitution.

A debatable point: In principle, the Constitution has no mention of the term 'federation' yet many structural features are quite obviously incorporated. At the same time, there are important provisions adapted in the Constitution which relates to a Unitary State. Before conclusively concluding it is critical to examine the features laid down by the Indian Constitution.

Federalism and Indian Constitution: A federal government is one in which the powers are divided and distributed among the center and the states. In light of the framework of the Constitution of India, certain features conform to the federal nature.

I. Predominance of the Constitution
II. Written & documented Constitution
III. Rigidity in the Constitution
IV. Supremacy of the Judiciary
V. Division of power

[2] In 1962 during China War
[3] First time used in Uttar Pradesh, 1954

As opposed to these provisions there are certain defined features in the Indian Constitution that go against the doctrine of federal governance and conform more to the unitary nature of the Constitution.

I. Union possesses major powers
II. States don't have their own Constitution
III. Single Citizenship
IV. Parliament's supremacy over State Legislatures
V. Emergency powers of the President

The constitutional provisions are an indicator that the architects of the Constitution framed it keeping in mind the requirements of the country which is vastly diverse in nature. The States are deprived of complete autonomy and the Union has been invested with overriding powers as to preserve the unity of the nation and also to ensure less conflicts between Center and the States.

CONCLUSION: After analyzing the features of the Constitution it can be aptly concluded that the Indian Constitution can neither be called Federal nor Unitary in nature as it is a magnificent blend of both. The Center and the States function jointly, providing cooperation to each other, with the sole purpose of the well-being of the country and its people. Dr. Ambedkar himself had conceded to the fact that the Constitution has a blend of both based on the requirements of circumstances and time. Prof. K. C. Wheare refers to Indian Constitution as 'quasi federal' stating that it has the primary provisions of a Unitary State and subordinate features of a Federal State.

Whatever be the arguments, it is clear that the architects of the Constitution have consciously blended the salient features of both forms to suit the prerequisites of a nation that was in its infancy and in addition, cater accordingly to the changing times in future.

II. CONSTITUTIONAL ORGANS

The Indian polity is organized under three principal organs; the Legislature, the Executive and the Judiciary. The Constitution being federal, each organ exists at the central level and at the state level.

THE PARLIAMENT

The Legislature at the center is organized as the Union Parliament.

COMPOSITION

Article 79 states that the President of India along with Council of States (Rajya Sabha) and House of the People (Lok Sabha) constitute the Union Parliament.

Article 80 enumerates the composition of Rajya Sabha which has a maximum of 250 seats (238 for states and union territories, 12 for nominated by President). Article 81 lays down composition of the Lok Sabha with a maximum of 552 seats (530 representatives from states, 20 from union territories and 2 nominated by President from the Anglo-Indian community).

PARLIAMENTARY PRIVILEGES

To ensure independence of parliament, both the Houses of parliament, its members and participants taking part in the proceedings of each House are granted certain special rights and immunities by the Constitution. These are collectively called Parliamentary Privileges with the primary rationale behind them being elimination of all obstructions in the working of Parliament. Articles 105 and 122 list the privileges afforded.

For ease of study the privileges can be categorized as be below:

1.Collective Privileges- Enjoyed by the House as a whole:

a. Parliament is granted 'Freedom of Speech' (Art. 105 (1)) which is distinct from the Freedom of Speech guaranteed as a fundamental right under Article 19 (1) (a). The latter is restricted on numerous counts by Article 19 (2). Parliamentary freedom of speech is more absolute, debarring any suit, civil or criminal, filed for statements made during debates in the House or in any committee thereof.

   The only two restrictions on Parliamentary speech is Article 121 (Barring discussions on conduct of Judges of High Court and Supreme Court except discussions on motion for their removal) and Rules of Procedure laid down by the Parliament for each of its Houses

b. Right to publish reports, debates accounts of votes and proceedings, etc (Art. 105 (2))

c. Right to conduct 'secret sittings' of House with exclusion of strangers from such proceedings

d. Right to devise rules and to adjudicate on matters related to regulation of its own procedure and conduct of its business. The Parliament alone can punish its members for

e. 'breach of privilege' and 'contempt of House'. Courts are prohibited from enquiring into Parliamentary proceedings (Article 122)

f. No arrest can be made or legal process served within precincts of either House in absence of specific permission from presiding officer

2.Individual Privileges- These belong to Members of Parliament (MPs) in their individual capacity. Such privileges include bar on arresting an MP forty days before and after session and during session of Parliament in civil cases.

SOVEREIGNTY OF PARLIAMENT

The 'sovereignty' of Parliament connotes its supremacy in the polity. The Indian Parliament, unlike the British variant, is not completely sovereign. It functions within legal limitations on both its authority and jurisdiction. The following form effective checks on Parliament:

a. A written Constitution with elaborate procedure for its amendment (Article 368).

b. Federal system of government with a Union Parliament and State Legislatures. Division of subjects into Union, State and Concurrent Lists divides and limits the jurisdiction of Union Parliament.

c. Judicial Review by High Court and Supreme Court. The concept of 'judicial review' by an independent judiciary is implicitly embedded in various provisions of the Constitution (Articles 32, 136, 226, 227 etc.). Courts in India can declare a Parliamentary law as being *ultra vires* the Constitution. Such laws are struck down, especially if they violate fundamental rights, as provided under Article 13.

EXECUTIVE POWER

The Constitution lays down the scheme for the Union Executive under Part V Chapter I and the State Executive under Part VI Chapter II.

POWER OF THE PRESIDENT

Article 52-62 deal with the President. Article 53 deals specifically with the executive power of the President but it covers only certain powers. Additional powers enjoyed by the President are spread across other articles. The President is the nominal head of the Government with the real head being the Council of Ministers headed by the Prime Minister. The President is bound to follow the latter's advice in all matters (Article 74 (1)).

The executive powers of the President are listed below:

a. Article 77- All executive actions of the Government of India are formally taken in the name of President.
b. Article 75- He appoints the Prime Minister and the other ministers who hold office during his pleasure.
c. Article 76 (1)- He appoints the Attorney General of India and determines his remuneration. The Attorney General also holds office during his pleasure.
d. He appoints the following offices:

- Article 148- The Comptroller and Auditor General of India
- Article 324 (2)- The Chief Election Commissioner and other election commissioners
- Article 316- The Chairman and members of the Union Public Services Commission
- Article 155- The Governors of states
- Article 280-The Chairman and members of Finance Commission, etc.

e. Article 338- He can appoint a commission to investigate conditions of the SC's, ST's and other Backward Classes

The President also performs various legislative functions out of which the most important are summoning, proroguing or dissolving the Lok Sabha, giving assent to bills passed by the parliament (Article111), and promulgates ordinances during parliamentary recess (Article 123). He is also the supreme commander of the defense forces (Article 53(2)). He assumes extraordinary powers during emergencies (Article 352-360). He also has the power to grant pardon and remit punishments (Article 72).

POWER OF THE GOVERNOR

Article 153-162 provide for the office of Governor in all states. The Governor is the representative of the Centre in the states which results center- state conflicts manifesting in the form of tussle between office of Governor and the Chief Minister.

His powers are *parimateria* with powers of the President but exercised at the state level. For example, the state government conducts business under his name. He appoints the Chief Minister and his council, the state Election Commission, Chairman and members of State Public Service Commission, etc.

An additional power of the Governor is that he can reserve certain bills for consideration by the President.

THE JUDICIARY

Part V Chapter IV deals with the Supreme Court. Part VI Chapter V deals with high courts.

JURISDICTION OF THE SUPREME COURT

The Supreme Court is the highest institution in the judiciary and is the chief guardian and interpreter of the Constitution. The jurisdiction of the Supreme Court may be studied under the following heads:

1.Original Jurisdiction (Article 131)-The following disputes can be filed only before the Supreme Court, in the first instance:

a. Between the Central Government and one or more states
b. Between the Central Government and one or more states on one side and other state/s on the other side
c. Between 2 or more states on either side

2.Writ Jurisdiction (Article 32)- The Supreme Court has original, non-exclusive jurisdiction to issue writs in the nature of *habeas corpus, mandamus, quo-warranto, certiorari* and prohibition for the enforcement of fundamental rights of the citizens. It is original as citizens may directly approach the court in cases of fundamental right violation. It is not exclusive but is concurrent with jurisdiction of high court. Aggrieved may approach either court for enforcement.

3.Appellate Jurisdiction- Being the highest court, final appeals in following matters may be filed before the Supreme Court:

a. **Constitutional matters (Article 132)-** After obtaining a certificate from the High Court certifying that the case involves a substantial question of law which requires interpretation of the Constitution, party may appeal to the Supreme Court stating that matter has been wrongly decided

b. **Civil matters (Article 133)-** For civil appeal to be allowed in the Supreme Court, a certificate from the said high court must be obtained stating that:

1. The case involves a substantial question of law of general importance and
2. Such question needs to be decided by the Supreme Court

Parliament may enlarge this jurisdiction by passing a law.

c.Criminal Matters (Article 134)- The Supreme Court hears an appeal from the concerned high court in the following cases:

1. Where the high court has on appeal reversed an order of acquittal of an accused person and sentenced him to death, or life imprisonment or for 10 years
2. Where the high court has taken before itself a case from a subordinate court and has convicted the accused person and sentenced him to death or life imprisonment or for 10 years
3. Where the high court certifies that case is fit for appeal to Supreme Court

Under the first two cases, the jurisdiction was restricted to death sentences but was later enlarged by the Parliament.

Case Law: *Mohd. Ahmad Khan* v. *Shah Bano Begum*[4]

The Case: Ahmad Khan married Shah Bano Begum under Sharia law (Muslim personal law) in 1932. They had five children from the marriage. Later, Ahmad Khan married a younger woman and lived with both the wives and families for some time. In 1978, he divorced and abandoned Shah Bano and her five children. Shah Bano initiated legal proceedings for maintenance of herself and their five children under Section 125 of Criminal Procedure Code (Cr. P. C.), 1973. Ahmad Khan contended that he was not required to pay any money to his wife under section 125 other than the amount required by the Muslim personal law. The Madhya Pradesh High Court allowed the plea. The matter was escalated to the Supreme Court where a five-judge bench of the court decided the issue whether section 125 of Cr.P.C applies to Muslims or not.

Date of Verdict: 23 April, 1985, Supreme Court

Judges: Five Judges Constitutional Bench

The Verdict: The Supreme Court declared that section 125 of Cr. P.C. is maintainable against a Muslim husband. The personal law was settled with respect to marriage and divorce but not maintenance.

Crux of the Verdict: The Holy book of Quran did not expressly bar maintenance to a Muslim wife by a Muslim husband. The Supreme Court made endeavors to interpret

[4] 1985 AIR 945.

the Holy book of Quran which expressly mentions that fair maintenance must be provided to Muslim women by Muslim husbands even after divorce. The court also said that if rest of the communities in India are allowed to avail maintenance through section 125 of Cr. P. C. and the Muslim women are forbidden, then it shall leave the Muslim women at a lower pedestal. This shall violate the principles of secularism and equity. The court also emphasized on Article 44 (uniform civil code) of the Indian Constitution and asked the legislature to contemplate over a Uniform Civil Code to prevent such clashes between the secular law and personal law.

Impact of the case: The case attracted furious protests from the Muslim community. The judgment was criticized as an intrusion into the Muslim personal law. The erstwhile Congress government, led by Rajiv Gandhi enacted a law to mitigate the tension and pacify the protestors. This law was called The Muslim Women (Protection of Rights on Divorce) Act, 1986. The law provided that a husband's liability to maintain his wife after divorce terminates at the end of Iddat. Iddat is a time period that a Muslim woman must observe before remarrying after a divorce or death of her husband. The purpose of Iddat is to confirm the male parentage of a child born after divorce. The time period may vary based on circumstances. This law practically overturned the Supreme Court's judgment which guaranteed maintenance for life if the woman was unable to maintain herself.

The constitutionality of The Muslim Women (Protection of Rights on Divorce) Act, 1986, was challenged by Shah Bano's lawyer in the landmark case of ***Danial Latifi* v. *Union of India***[5]. The court did not strike down the entire law but reiterated that Muslim women are entitled to maintenance beyond the period of Iddat.

Case Law:*Om Prakash* v. *State of Uttar Pradesh*[6]

The Case: This case dealt with the sensitive issue of rape laws in India. It is considered as a legal milestone in this area. The accused was a relative of the prosecutrix. The

[5] AIR 2001 SC 3958.

[6] AIR 2006 SC 2214.

prosecutrix went with the accused and her brother in law to the local court where husband was to appear in a case. On finding a secluded place, the accused tried to overpower the will of prosecutrix and rape her. The accused immediately raised alarm and was rescued by the people in the vicinity including her brother in law. A case of raping a pregnant woman was lodged against the accused under section 376 (2)(e) of the Indian Penal Code (IPC). The accused maintained his innocence throughout the trial. It was also maintained that the accused was unaware of the fact the prosecutrix was pregnant. The court considered two important questions of law in this landmark case. Firstly, whether the accused can be considered an accomplice in a case of section 376 of IPC read with section 114 (Illustration (b)) of the Indian Evidence Act. Secondly, the court examined the question if Section 376(2)(e) can be applied where it cannot be established from facts and evidences that the accused knew the victim to be pregnant.

Date of Verdict: 11 May, 2006, Supreme Court

Judges: Justice ArijitPasayat, Justice S.H. Kapadia

Verdict: The apex court elucidated that a rape victim cannot be considered an accomplice and her sole evidence as a witness can be used to convict.

However, the court rejected the notion that section 376(2)(e) applies to the case. It laid down that 376(2)(e) specifically mentions the words "knowing her to be pregnant". The accused must know that the woman is pregnant. The fact that it is evident from external appearance will not suffice for the application of 376(2)(e). Therefore, the accused was convicted under section 376(1) and his sentence was commuted from imprisonment of 10 years to 7 years.

Crux of the Verdict: The court laid great emphasis on the fact that a victim's witness statement is sufficient to convict an accused under section 376. Medical reports are not mandatory as corroborative evidence. Therefore, a victim is a material witness under section 118 of Indian Evidence Act in a rape case.

The court also laid down that when a law specifically mentions something, it should not be read in a manner which leaves room for presumptions. Therefore, section 376(2)(e) applies only in a case where the accused has definite knowledge of the victim being pregnant.

Impact of the case: The court highlighted the plight of Indian women and observed that it takes a lot of courage for a woman to file a rape case against a man. The court observed that the conservative culture in India forces them to think that reporting such an incident will bring a bad name to their family. This judgment was a much needed ethical boost to rape victims. Medical reports are corroborative evidence. These reports cannot be accorded a central role in a rape case as it shall defy the purpose of the rape laws, which seeks to subject sexual offenders to due process established by law.

Case Law: *Yakub Abdul RazakMemon* v. *State of Maharashtra*[7]

The case: Yakub Memon was a prime accused in the 1993 Bombay bomb blasts case. He was the brother of Tiger Memon who is considered to be one of the masterminds behind the plot of Bombay blasts. His involvement was proved and he was convicted for criminal conspiracy and supporting terrorist activities by a Special Terrorist and Disruptive Activities court. The court sentenced him to death. An appeal and mercy petition followed in the Supreme Court. They were all rejected. The President also rejected a mercy plea in this regard. The petitioner eventually filed a curative petition (a petition to cure any defect in process prescribed by law) in the Supreme Court on the ground that due process prescribed by law was not followed when Maharashtra Government issued a death warrant against him on 30th April, 2015. A mercy plea was still pending in the office of the governor of the State of Maharashtra. The lawyers of Yakub Memon contended that the rejection of their mercy petition was not properly conveyed to them. They became aware of the rejection through media reports. It was contended that as per the guidelines laid down by the Supreme Court, a minimum time period of 14 days must be given to the convict after a death sentence is confirmed so that he can prepare to meet his Maker.

Date of the Verdict: 30 July, 2015, Supreme Court

Judges: Justice Dipak Misra, Justice Prafulla C. Pant and Justice Amitava Roy

Verdict: The apex court held that no defect of law occurred in the case. The accused was accorded ample time to meet his maker. The accused further did not challenge the

[7] SC/0816/2015.

rejection of his mercy plea by the President of India, before the apex court. This showed that the accused had accepted his fate.

Crux of the Verdict: The judgment is a landmark judgment due to more than one factors. Firstly, it reaffirmed that a minimum time period of 14 days must be awarded to any person sentenced to death by a court. This period is given for the purpose of enabling the convict to notify his family and make preparations to meet his Maker.

The case is a rare case where curative petition was preferred under Article 32. Curative petition is a relatively new concept and the court gave more clarity to the concept. The Supreme Court held that precedents set by the court must be read in a manner to interpret the underlying intent of the court. It should not be read like a law. Curative petitions should not be used as a device to delay the process established by the rule of law.

Impact of the case: The Curative petition was rejected on 30th July, 2015 and Tiger Memon was hanged the same day. His plea pending before the governor of the state of Maharashtra was also rejected before this. Many eminent personalities from the field of law expressed their disapproval of the judgment. But the disapproval was not about the death sentence. The disapprovals sprouted from the differences in opinion about the defects in legal processes prescribed by rule of law.

c. **Appeal by Special Leave (Article 136)-** Supreme court has been granted a residuary, discretionary jurisdiction where it may grant leave for appeal from any judgment in any matter passed by any court or tribunal. Here the court hears two petitions. The first is a petition for permission to file appeal, and subject to the decision, a second petition which is the actual appeal.

4.Advisory Jurisdiction (Article 143)- The President can seek an opinion of the Supreme Court in two categories of matters. The opinion rendered is mere advice and not a judicial order that is binding. The categories are:

a. On any question of law or fact of public importance which has already risen or can arise. The court may either render advice or can refuse.
b. On any dispute arising out of any pre-constitutional treaty, agreement, covenant, or other similar instruments. In these cases, the court must render advice.

JURISDICTION OF HIGH COURTS

The high court's jurisdiction is covered by the Constitution together with the Code of Civil Procedure, the Code of Criminal Procedure, the Letters Patent and other acts and codes. Article 214 of the Constitution sets up a high court in each state. Article 226 covers the writ jurisdiction of the high courts, empowering them to issue writs including the ones issued by Supreme Court. Writ jurisdiction of high courts in however wider, for writs may be issued to both fundamental rights and any other legal rights.

The high courts are also the primary courts of appeal with wider appellate jurisdiction in comparison to Supreme Court.

Article 227 awards high courts with supervisory jurisdiction giving it power of superintendence over all courts and tribunals (except military courts) functioning within its territorial jurisdiction. It may- call for returns from them, make and issue general rules and prescribe forms for regulating their proceedings and practice, prescribe forms in which books, entries and accounts are to be kept by them and also settle the fees payable to the sheriff, clerks, officers and legal practitioners operating in such courts and tribunals.

Case Law: *Ayodhya Ram Mandir* v. *Babri Masjid Case*[8]

The Case: This case is originally a title dispute. Babri Masjid was allegedly constructed in the reign of the Mughals. It is alleged by some factions of the Hindu

[8] *Gopal Singh Visharad and Ors.* v. *Zahoor Ahmad and Ors.* (30.09.2010 - ALL HC) : MANU/UP/1185/2010.

community that the mosque was built over a Ram temple. The disputed property in which the mosque is located is also believed by some Hindu factions to be the birthplace of Lord Ram, the seventh incarnation of the Hindu deity Vishnu. Several title suits have been preferred by factions of Hindu and Muslim community to determine the title of the disputed property. The dispute has been a cause of perpetual friction between some Hindu and Muslim factions since a long period. It has triggered several communal riots. In 1990 the Bhartiya Janta Party gave the dispute a political shade when it commenced Rath Yatras and rallies to support the construction of a Ram

Mandir at the disputed site. The movement ended up in the demolition of the Babri Masjid. This demolition was an outright violation of a commitment given by the Uttar Pradesh government to the Supreme Court that no harm shall come to the mosque unless the title suit is decided by the appropriate forum. Hindus also installed idols of Lord Ram in the campus. The Allahabad High Court pronounced its famous judgment on the issue in 2010.

Date of Verdict: 30September, 2010, Allahabad High Court

Judges: Justice S.U. Khan, Justice Sudhir Agarwal and Justice Dharam Veer Sharma

The Verdict: The High Court distributed the property into 3 parts-

1. First part was awarded to the Hindu Mahasabha, who represented the birthplace of Lord Ram.
2. The second part was awarded to the Sunni Central Board of Waqfs, who represented Babri Masjid. The court added that the share of Muslim area shall not be less than one-third of the total area of the land under any circumstance.
3. The third part was allotted to Nirmohi Akhara, the cult which claims to have been worshipping the deities in disputed property since ancient times.

Crux of the verdict: The court relied heavily on the findings made by Archaeological Survey of India (ASI) with respect to the disputed property. The findings revealed that there used to be a structure identical to a Hindu temple in the disputed property. However, ASI did not confirm that it was a Ram temple. The evidences disclose more resemblance to a Shiva temple. But the fact that a temple existed at the disputed property was settled by the ASI. Documentary records have shown that the disputed property has been a place of religious importance for both, Hindu and Muslim faiths.

Thus, the court tried to strike a middle ground between the two communities through its decision.

Impact of the case: The judgment has been challenged in the Supreme Court. The pro Hindu political parties have used the subject matter of this dispute as an agenda in their election manifestos. The BJP discussed the construction of Ram temple in its manifesto for 2014 Lok Sabha elections to appease the Hindu population.

Case Law; *Aarushi Talwar Murder Case*[9]

The Case: This is an unsolved murder case which attracted heavy media attention. A 13 year old girl, Aarushi Talwar and her family's servant, HemrajBanjade who lived with the family, were found murdered at Aarushi's home. The facts are true only to the extent that both were murdered. The investigations gave birth to several theories but none of them could be established due to lack of evidence. The police initially found only Aarushi's body and suspected Hemraj to be the perpetrator until they found his body on the terrace. Initially, previous servants who served as domestic helpers in the Talwar family were suspected. When the investigation did not reveal any substantial evidence against them, the suspicion shifted towards Aarushi's parents- Rajesh Talwar and Nupur Talwar. It was alleged by the police that Rajesh Talwar caught his daughter and Hemraj in an objectionable position. This provoked him to murder both of them. Furthermore, the police added that Rajesh Talwar was enraged when his daughter confronted him about his extra marital affair. Nupur Talwar allegedly helped Rajesh in covering up the heinous crime. These theories received heavy criticism and were termed as desperate measures adopted by the police to cover up a failed investigation. The case was transferred to CBI for further investigation. The CBI also adopted a similar approach. Initially, it suspected close professional and personal staff of the Talwar family. Later, they fixated on Aarushi's parents. The parents categorically denied all the allegations raised against them. In 2013, special CBI court sentenced the Talwars to life imprisonment for murdering Aarushi and Hemraj. An appeal was

[9] 2017/10/Aarushi-judgment-Allahabad-HC.

preferred by the couple against the judgment in the Allahabad High Court. The High Court primarily considered the question whether there was enough evidence against the couple to convict them.

Date of Verdict: 12 October, 2017, Allahabad High Court

Judges: Justice Bala Krishna Narayana, Justice Arvind Kumar Mishra

Verdict: The High Court exonerated Rajesh Talwar and Nupur Talwar from the charge of murdering their daughter Aarushi and their domestic helper Hemraj due to lack of evidence.

Crux of the Verdict: The High Court heavily criticized the trial court's approach in its judgment. It observed that the trial judge prejudged the case and did not apply cogent reasoning to the materials at hand. The cardinal rule of a criminal case is that the commission of an offence by the accused must be proved beyond any reasonable doubt. However, in this case the trial judge inferred a different story from the one which facts apparently disclosed.

Impact of the Case: The media was heavily criticized for pitching theories which were not backed by sufficient evidence and conducting a media trial of Rajesh and Nupur Talwar.

INDEPENDENCE OF JUDICIARY

A judiciary insulated from legislative and executive interference is crucial for Indian polity where the former act as a check and balance over the latter organs. To remove all scope for exercising influence over judiciary, the Constitution guarantees the following:

1.Mode of appointment (Article 124, 217) - The judges of the Supreme Court are appointed by the President in consultation with a collegium consisting of members of the judiciary. This curtails executive discretion in appointments.

2.Security of tenure- The above articles ensure that offices of judges are secure to the extent that they may be removed from office by President alone on limited grounds laid down by the Constitution. Their removal is not subject to pleasure of President.

3.Fixed service conditions (Article 125, 146, 221, 229)- The salaries, pensions, privileges, allowances and leaves of the judges are determined by the Parliament but

cannot be altered to their disadvantage post appointment. Moreover, the above expenses are charged to the Consolidated Fund and are closed to parliamentary voting.

4.Ban of post-retirement practice (Article 220)- The retired judges are prohibited from acting as advocates or judges in any Court (high court judges are allowed to practice in Supreme Court and other high courts) to avoid temptation of securing future favors. However, such judges serve in government offices which threatens judicial independence.

III:DISTRIBUTION OF POWERSBETWEEN CENTRE AND STATES

A- LEGISLATIVE RELATIONS BETWEEN THE UNION AND THE STATES

Chapter I (**Articles 245-255**) of Part XI of the Constitution elucidates the legislative relations between the Union and the states. A clear demarcation between the powers of center and state, enhances smooth functioning of the respective governments. It also validates the concept of federalism in India which has been described as a part of the basic structure of the Indian Constitution in numerous case laws.

JURISDICTION-

Article 245 empowers the Parliament to make laws for the whole or any part of India. Similarly, State Legislatures can exercise their law making power over the whole or any part of the state.

SCHEDULE 7 OF THE INDIAN CONSTITUTION-

The 7th Schedule of the Indian Constitution segregates the subject matters which are exclusive to the law making powers of the Parliament (List I- Union List) and the States (List II- State list) respectively. The Schedule features a third list (List III- Concurrent List) which enumerates subject matters over which both, the Union and the States exercise concurrent jurisdiction.

Residuary Powers of the Parliament (Article 248 read with Entry 97 of the Union List) - Any subject matter which is not explicitly mentioned in any of the three lists of the 7th Schedule, falls within the legislative purview of the Parliament.

Conflicts between laws made by the Parliament and laws made by State Legislatures-Unless the President reserves the respective state law for consideration and further grants assent to the same, a conflict between central and state laws with respect to an entry in the Concurrent List, always ends with the central law prevailing over the state law (**Article-254**).

INSTANCES WHEN THE PARLIAMENT CAN LEGISLATE WITH RESPECT TO ANY MATTER IN THE STATE LIST-

The Parliament can legislate with respect to subject matters in the State List under the following circumstances-

- **Article 249 -**Parliament can legislate on a State List entry, if the Rajya Sabha, declares through a resolution that it is necessary to safeguard national interest. A precondition to this resolution is that it must be supported by two-thirds of the members present in the Rajya Sabha.
- **Article 250 –** The Parliament can legislate on any State List entry during a Proclamation of National Emergency. Nevertheless, such law shall cease to have effect after six months from the date of termination of the Emergency.
- **Article 252 –** If two or more state legislatures pass a resolution to the effect that the Parliament is empowered to frame laws with respect to a State List entry (eg- to resolve inter-state issues), the Parliament can pass a law to that effect.
- **Article 253 –**The Parliament enjoys the power to frame laws for the whole or any part of India, to implement an international treaty, agreement or convention.

B- ADMINISTRATIVE RELATIONS BETWEEN THE UNION AND THE STATES

Chapter II (**Articles 256-263**) of Part XI of the Constitution of India delineates the center-state administrative relations. However, on the perusal of the entire Constitution,

we will find that there are certain other provisions also, which clarify and regulate center-state administrative relations.

EXTENT OF POWERS OF CENTER AND STATE EXECUTIVES (ARTICLES 256 AND 257)-

The State executive is required to discharge its functions in adherence to the following conditions -

- **Compliance with law (Article 256)** - The actions of State executives must not be repugnant to a Parliamentary law or any law effective in that state
- **Compatibility with Union executive (Article 257)** - The actions of the State executives must not impede or cause any prejudice to any executive functions of the

Union (Article 257(1)). This Article also empowers the Union executive to issue directions to a State to-

a. Construct and maintain any means of communication deemed by the Union to be of national or military importance (Article 257(2)).
b. Take measures for protection of railways within the State (Article 257(3)).

If the states fail to comply with the above mentioned conditions, the Union executive is vested with the power (by virtue of Articles 256 and 257) to issue directions to the respective State Governments to cure such anomalies.

Article 365 lays down that if a State disobeys the directions issued by the Union executive, then the President has the power to hold that the Government of the State cannot be carried on in accordance with the provisions of the Indian Constitution. As a corollary, Article 356 (President's Rule) can be invoked and the Union may take over the administration of that particular state.

DELEGATION OF POWERS (ARTICLES 258 AND 258A)

- **Center to State (Article 258)** - The center may entrust any powers of the Union executive to a State executive in a prescribed manner by two methods-

a. By agreement between the President (Executive Head of the Union) and the Governor (Executive Head of a State) of the respective State (258 (1)).
b. If the Parliament passes a law to that effect (258(2)).

➢ **State to Center (Article 258A) –** Subject to the consent of the Government of India,the Governor of a State may entrust any executive function of the State to the Union executive.

ALL INDIA SERVICES (ARTICLE 312) -

The members of these services (Indian Administrative Services, Indian Police Services and Indian Forest Services) are selected and appointed by the Union Public Service Commission. These members are appointed to executive posts in different states. Hence, they work for the State governments but are subject to the authority of the Union government. They can be perceived as conduits between the executive machineries of the Union and the State.

INTER-STATE WATER DISPUTES (ARTICLE 262)

Inter-state water disputes can be resolved in accordance with laws made by the Parliament in that regard.

INTER-STATE COUNCIL (ARTICLE 263)

The President may order the formulation of an Inter-State Council which shall –

a. Work for resolution of inter-state disputes.
b. Discuss subjects in which some or all of the states, or the Union and one or more states, share a common interest.
c. Make recommendations for better coordination of policy and action with respect to such subjects.

C- FINANCIAL RELATIONS BETWEEN THE UNION AND THE STATES

Articles 268 to 293 describe the financial relations between the center and the states. The Union can levy taxes on entries enumerated in the Union list and likewise, the state can levy taxes on subject matters enumerated in the State list. The center also has the power to delegate to states, collection and appropriation of taxes which can be levied by the Union.

LEVYING, COLLECTION, APPROPRIATION OF MAJOR TAXES

➢ **Income tax**- Levied, collected and appropriated by the center.

- **Stamp duties and excise duties on medicinal and toilet preparations (Article 268)**-Levied by the center, collected and appropriated by states.
- **Service tax (Article 268A)-** Levied by the center, collected and appropriated both, by the center and states
- **Sales tax (which includes consignment of goods but excludes newspapers) in the course of inter-state trade (Article 269)-** Levied and collected by the center and appropriated by states.
- **All taxes and duties on Union List entries except those referred in 268, 268A, 269, surcharge in 271 and any cess (Article 270)-**Levied and collected by the center and appropriated by states.
- **Surcharge on tax and duties (269, 270), corporate tax and custom duties (Article 271)-** Levied, collected and appropriated by the center.

GRANTS-IN-AID TO STATES

- **Statutory Grants (Article 275) -** The Parliament may by law, provide for financial grants to the states which need financial assistance. Additional grants shall be sanctioned by the Parliament to enable implementation of schemes for Scheduled tribes in a state.
- **Discretionary Grants (Article 282)-** Both, the center and the states may sanction any grant for any public purpose (which may or may not fall within their jurisdiction).

FINANCE COMMISSION (ARTICLE 280)

The Finance Commission aims to make recommendations with respect to financial issues (viz. distribution of revenue between the Union and the states, determination of grants-in-aid to be provided to states by the center etc.) in order to provide a solid, definite and uniform structure to financial governance. The commission has a tenure of 5 years and comprises of a chairman and 4 other members.

D- RELEVANT DOCTRINES

I. DOCTRINE OF TERRITORIAL NEXUS

The doctrine of territorial nexus underlies in Article 245 of the Indian Constitution. Article 245 (2) empowers the Parliament to make laws which can operate

extraterritorially. The doctrine lays down that a law can operate extraterritorially as long as a reasonable nexus can be established between the territory and the object on which the law in question is sought to be applied. This rationale applies to state laws as well with respect to inter-state transactions. The object need not be physically present within the territory to invoke this doctrine.

In the landmark case of ***State of Bombay*** **v.** ***R.M.D.C***[10], the Respondent who was a resident of Bangalore, conducted competitions through advertisements in a newspaper which was published in Bangalore, but was widely circulated in Bombay. All the proceedings of the competitions were conducted in Bombay. Consequently, it was held that a reasonable territorial nexus was established between the State of Bombay and the Respondent and it would be lawful for the State of Bombay to tax the Respondent.

II. DOCTRINE OF HARMONIOUS CONSTRUCTION

This doctrine deals with interpretation of statutes. It lays down that if two or more statutes or two or more parts of the same statute are in conflict with each other, then the conflicting provisions should be read in such a manner that they coexist in harmony with each other.

CIT **v.** ***Hindustan Bulk Carriers***[11] is a landmark case in this regard. It was laid down that a statute should be read as a whole and the legislative intent of the framers should be viewed as the focal point of interpreting the said statute. The parts in conflict should be harmoniously read in such a fashion that they fulfill the purpose and intent of the legislation and reconcile the differences between the conflicting provisions.

III. DOCTRINE OF PITH AND SUBSTANCE

This doctrine intends to provide more clarity to the interpretation of Article 246 read with Schedule 7. Where a question arises with respect to a legislation as to which subject matter in which list does it deal with, the court must look into the substance of the subject matter. Thus, if the substance falls within the ambit of one list, an incidental clash with a subject matter in another list does not render the legislation bad in law.

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[10] 1957 AIR 699, SCR 874

[11] (2003) 3 SCC 57.

The Privy Council, in the case of ***Prafulla* v. *Bank of Commerce***[12], held that a state law regulating money lending (State List, Entry 30) is not invalid because it incidentally affects promissory notes (Union list, Entry 46).

IV. DOCTRINE OF REPUGNANCY

This doctrine articulates the purpose and intent behind Article 254 of the Constitution. When a state law is inconsistent with a central law, the central law shall prevail over the state law. As a result, the state law shall become invalid in view of repugnancy. The doctrine applies to the legislations involving subject matters enumerated in the Concurrent list.

V. DOCTRINE OF COLOURABLE LEGISLATION

The fundamental concept imbibed in this doctrine is that, what is prohibited directly cannot be done indirectly by a legislature. This was affirmed in the landmark case of

K.C. Gajapati Narayan Deo* v. State of *Orissa[13].The governments have to respect the demarcations laid down in Article 246. They cannot make such legislations which in the guise of a law made on an entry in their authorized list, aim to affect a subject matter which the said government is not authorized to legislate on. Hence, a state government cannot frame a law on an entry in state list, with the intention to indirectly affect a subject matter enumerated in the Union list.

CONCLUSION-

On a meticulous scrutiny of the legislative, administrative and financial power dynamics of the Union and the states, the Union clearly emerges as the dominant polity. Nevertheless, the legislative intent of the Fathers of Indian Constitution has been to implement the notion of cooperative federalism as opposed to competitive federalism. Hence, the idea is that the two sets of polities work in harmony with each other for a common cause- welfare of the people of India.

IV: Other Provisions

[12] AIR 1947 PC 60.

[13] AIR 1953 SC 375.

a. Emergency Provisions: Articles 352- 360

Part XVIII of the Indian Constitution includes Articles 352-360 which covers the 'Emergency Provisions'.

According to the Constitution the Emergency Provisions are –

➢ **Article 352- Proclamation of Emergency:** The various clauses in this Article are as under-

1. If the President is satisfied of an imminent danger of threat of war or external aggression or armed rebellion[14] whereby the security of India or any part of the territory is endangered, he may make a Proclamation of Emergency on whole of India or any part of the territory[15] as may be specified in the Proclamation.
2. [16]A Proclamation under clause (1) may be revoked or varied by a subsequent Proclamation.
3. The President shall not issue a Proclamation under clause (1) or revoke any such Proclamation without the written communication about the decision from the Union Cabinet, consisting of the Prime Minister and other ministers of Cabinet rank.
4. Every Proclamation under the clause (1) shall be approved within one month by the Parliament with a majority of two-third of the members present and voting.
5. Such Proclamation shall be in force for six months after which it shall cease to exist, unless revoked earlier.
6. The President may extend the Proclamation for another six months with the approval of the Parliament.
7. If the House of People passes a resolution disapproving any such Proclamation, the President shall revoke it.

[14] Substituted by the Constitution (Forty-fourth Amendment) Act, 1978, section 37, for "internal disturbance" (w.e.f. 20-6-1979).
[15] Inserted by the Constitution (Forty-second Amendment) Act, 1976, section 48 (w.e.f. 3-1-1977).
[16]Substituted by the Constitution (Forty-fourth Amendment) Act, 1978, section 37, for clauses (2), (2A) and (3) (w.e.f. 20-6- 1979).

1) A notice signed by not less than one-tenth of the total number of members of the House of People has been given in writing for a resolution, disapproving of a Proclamation or the continuance of a Proclamation. The notice shall be given to-

a) The Speaker; if the House is in session; or

b) To the President; if the House is not in session.

Within fourteen days of receipt of such notice, a special sitting of the House shall be held.

2) For a Proclamation or the continuance of a Proclamation, the President shall have the power to issue different Proclamations based on different grounds.

National Emergency has been proclaimed four times in India-

I. In 1962, during the period of Chinese aggression,

II. In 1965, during the war with Pakistan,

III. In 1971, during the war with Pakistan, and

IV. In June, 1975, due to internal disturbances.

Article 353- Effect of Proclamation of Emergency: When a Proclamation of Emergency is in operation, then-

A. The executive power of the Union shall direct any state as to the manner in which to exercise the executive power; notwithstanding anything in this Constitution.

B. The Parliament shall be empowered to make laws; including power to make laws granting powers and imposing duties upon the Union, or authorities and officers of the Union; notwithstanding that it does not exist in the Union list. It shall also extend to other states if security of the country is under threat[17].

➢ **Article 354- Application of provisions relating to distribution of revenues while a Proclamation of Emergency is in operation:**

[17]Inserted by the Constitution (Forty-second Amendment) Act, 1976, section 49 (w.e.f. 3-1-1977)

1) While a Proclamation of Emergency is in operation, the president shall by order direct that any or all provisions under Articles 268-279 shall be subject to modifications or exceptions as he deems fit.

2) Every order made under clause (1) shall be laid before both the houses of the Parliament, as soon as it is made.

➢ **Article 355- Duty of the Union to protect states against external aggression and internal disturbance:**

To protect each State against internal disturbance as well as external aggression shall be the duty of the Union in accordance with the provisions of the Constitution.

➢ **Article 356- Provisions in case of failure of constitutional machinery in States:**

1) On receipt of report from the Governor, if the President is satisfied that the State govt. apparently shall not be able to carry in accordance with the provisions of the Constitution, in such a situation, the President may by Proclamation;

A. Assume any or all the powers of the State govt. either to himself or the Governor or any authority in the State, other than the State Legislature;

B. The Legislature of the State shall be under the Parliament's authority;

C. May make provisions that shall be deemed desirable or necessary by the President to implement the Proclamation, provided they shall not encroach on the powers or constitutional provisions of the High Courts.

1) Any such Proclamation may be varied or revoked by a subsequent Proclamation.

2) Under this Article, within a period of two months, both the Houses of the Parliament shall approve the Proclamation of Emergency.

3) A Proclamation thus approved, shall expire after six months from the date of Proclamation, unless revoked.

 # Case Law: *S. R. Bommai* v. *Union of India*[18]:

[18] AIR 1994 SC 1918.

The Case: A nine-judges Constitutional Bench of the Supreme Court heard the case of S. R. Bommai vs. Union of India, in 1994, and examined and discussed at great length the provisions of Article 356.

S. R. Bommai, a leader of Janta Dal, was the Chief Minister of Karnataka from 13 August, 1988 to 21 April, 1989. On 21 April, 1989, his govt. was dismissed on grounds of losing majority owing to large scale defections; and on the recommendation of the then Governor, President's Rule was imposed, under Article 356 of the Constitution.

Later, some defectors returned, affirming support to the Chief Minister. S. R. Bommai met the Governor with a request to prove majority in the Assembly, which the Governor refused. A writ petition was filed in Karnataka High Court which was dismissed; then S. R. Bommai moved to the Supreme Court.

Date of Verdict: 11 March, 1994, Supreme Court

Judges: Nine-judges Constitutional Bench

The Verdict:After in-depth critical scrutiny and analysis of the provisions under Article 356 for almost 5 years, the Bench concluded that the President's power to dismiss a State govt. is not absolute. The President shall impose his rule only after the Proclamation gets approval by both the houses of the Parliament; till then he shall only suspend the Legislative Assembly.

Crux of the Verdict:

A landmark judgement by 9 learned Judges took nearly five years to reach to a logical conclusion but turned out to be a historic order of the Supreme Court as it spelled out restrictions on use of Article 356 arbitrarily.

- A floor test of the House shall be taken for proving majority

- A Presidential Proclamation is open to judicial review under Article 356.
- Article 356 shall be applied only in case of constitutional breakdown not in times of administrative failure.
- If the Proclamation is not approved by the Parliament, it shall lapse in two months and the dismissed govt. shall be revived.

Impact of the Verdict:

In 1999, Rabri Devi govt. was dismissed on 12 February, but was consequently reinstated on 8 March by the Vajpayee govt. in apprehension of suffering a defeat in the Rajya Sabha.

In later instances, the Apex Court annulled the imposition of President's rule on a number of instances citing the case of S. R. Bommai.

- **Article 357- Exercise of legislative powers under Proclamation issued under article 356:**

1. Where by Proclamation of Emergency is issued under clause (1) of Article 356, the Parliament shall confer the legislative powers of the State on the President and the President shall delegate the power to any person or authority he deems fit. Furthermore, making laws granting powers and imposing duties upon the officers or authorities shall be done thereof. The President shall authorize expenditure from the consolidated fund when the House is not in session and while the Parliamentary sanction is pending.
2. Any law here with made for the issue of a Proclamation under Article 356, shall continue to be in force until amended or altered or repealed by the Legislature or a competent authority even after the Proclamation shall cease to operate.

- Article 358- Suspension of provisions of Article 19 during emergencies:
- When a Proclamation of Emergency is in operation, declaring threat of war or external aggression, leading to danger to security of India or any territory of the country, the fundamental rights under Article 19 shall remain suspended. The State shall take any executive action or make any law that shall be inconsistent with the fundamental rights under Article 19.
- Article 359- Suspension of provisions of the enforcement of the rights conferred by Part III during emergencies:

The President shall suspend the right to move any court for the enforcement of any right bestowed by Part III (except Articles 20 & 21), where a Proclamation of Emergency is in operation. These rights shall remain suspended during the period in

which the Proclamation of Emergency is in force or otherwise any shorter period that is specifically stated in the order.

➢ **Article 360- Provisions as to financial emergency:**

If the President is satisfied that the financial stability or credit of India or any part of its territory is threatened, he may by a Proclamation of Emergency declare it. It shall be laid before both the Houses of Parliament and be approved within two months of such a Proclamation, otherwise it shall cease to operate on expiration of two months.

During the Proclamation of Emergency of financial nature, the executive authority of the Union shall give directions related to financial propriety to any state, as the President may deem necessary. These may include directions of reduction of salaries or allowances of all those in service of the state, or those connected to affairs of the Union including judges of High Courts and the Supreme Court.

A Financial Emergency has never been declared in India.

Amendment of Constitution

Being aware of the need to evolve, adopt and adapt in accordance with the changing times, the framers of the Constitution had incorporated procedure of its amendment. In this they have tried to keep a balance between rigidity as well as the flexibility; thereof, some amendments shall be made easily, like an ordinary law of the land; whereas, there are a few which shall need to follow a complex procedure.

Part XX, Article 368 of the Constitution deals with amendment and enumerates the procedures by which the Parliament can add, amend or repeal any provision of the Constitution.

Procedure of Amendment of the Constitution:

1) **Additional Amendment by a simple majority of the Parliament:** Maintaining flexibility in its nature, there are certain provisions in the Constitution that can be

2) amended with great ease, by a simple majority in both the houses. Some of such provisions are-

- Citizenship provisions
- Formation of new state
- Privileges, salary and allowances of the of the MPs
- Appointment of Judges and jurisdiction of Supreme Court
- Elections in the country
- Creation or abolition of the Upper House in any State

Amendment by two-third majority of the Parliament: Most of the changes through amendments in the provisions (barring a few specific provisions) of the Constitution are put in place by following this method. An amendment bill may be initiated in any House of the Parliament; after it passes in both Houses by a majority of not less than two-thirds of the Members present and voting, it shall be presented before the President. Thereupon, the Constitution shall stand amended, after the assent of the President.

This kind of amendment is a blend of rigidity and flexibility, it is rigid in as far it prescribes a special majority, more than two-thirds; yet flexible in nature as it demands the approval of the Union Parliament only.

Amendment by two-third majority of the Parliament and ratification by at least half of the State Legislatures: An exceptionally rigid process of amendment has been prescribed for a few specified provisions. It involves these steps-

A. The Amendment Bill shall be passed by both houses of the Parliament by not less than two-third majority of Members present and voting.
B. Thereafter, it shall in addition require to be ratified by not less than half of the State Legislatures.
C. After the above two procedures are completed, the Bill shall be presented to the President and after his signature it shall be incorporated.

Some of the provisions that can thus be amended are-

- Election of the President (Articles 54 & 55)
- Scope of the executive power of the Union as well of a State (Articles 73 & 162)

- Provisions regarding Supreme Court of India and High Courts in States (Chapter IV of Part V & Chapter V of Part VI)
- Provisions regarding High Courts in Union Territories (Article 241)
- Legislative relations between the Union and the States (Chapter 1 of Part XI and Seventh schedule)

ii. <u>Doctrine of Basic Structure:</u>

The Doctrine of Basic Structure refers to a judicial principle that Constitutional amendments shall not alter or change the basic norm and features of the Constitution of India through the amendments passed by the Parliament. To conserve and protect the essence of the Constitution the Supreme Court has laid down the doctrine of basic structure; a term which finds no mention in the Constitution but evolved gradually over the time. The need for it arose to safeguard the fundamental rights of the individuals and basic ideals of the Constitution. The Judiciary can review, strike down amendments to the Constitution by the Parliament which are against the basic structure of the Constitution and may tend to alter them.

Case Law: Kesavananda Bharti v. State of Kerala19:

<u>The Case:</u>The concept of Basic Structure was for the first time recognized in this historic case which upheld the supremacy of the Constitution over the Parliament. The petitioner challenged Kerala Land Reforms Act, 1963, as amended in 1969 (IX Schedule) and 24, 25 & 29 amendments to the Constitution, against imposition of restrictions on the management of his properties.

The Indira Gandhi govt. through the Parliament had enacted major amendments to the Constitution (24th, 25th, 26th& 29th) to nullify the judgements in the cases of R. C. Cooper v. Union of India20, H. H. Maharajadhiraja Madhav Rao v. Union of India21

[19](1973) 4 SCC 225
[20]1970 AIR 564
[21]1971 AIR 530

and I. C. Golaknath& Others v.State of Punjab22. In the first case, the Court nullified nationalization of banks, in the second judgement it invalidated the abolition of privy

purses of former rulers and in the third one, concluded that the Fundamental Rights could not be amended. Kesavananda had challenged all these amendments in this case.

Date of Verdict: 24 April, 1973, Supreme Court

Judges: Thirteen Judges Constitutional Bench

a. **The Verdict:** As the Golaknath case was determined by a bench of 11 judges, hence, the need of a larger bench led to formation of a 13 judges' bench to test the correctness of the concerned matter. It was heard for 68 days with extensive arguments from both sides and citations of as many as 71 countries Constitutions. The primary question was if the Parliament had absolute power to amend the Constitution. On 24 April, 1973, a 703-page landmark judgement with a majority of 7:6 concluded that the Parliament could amend any part of the Constitution but could not alter the 'basic structure' of the Constitution. The list of 'basic structure included-
b. Supremacy of the Constitution
c. Sovereignty of India
d. Republican and democratic nature of the govt.
e. Unity and integrity of the country
f. Federal character of the Constitution
g. Social, economic & political justice

Crux of the Verdict: The Supreme Court reiterated that the Constitution was supreme and the Parliament's power to amend under Article 368 was subject to certain limitations as it couldn't destroy or damage the basic framework of the Constitution. Furthermore, it opined that constitutional amendment cannot be used in the same sense as 'law' in context of Article 13, thus over ruling Golaknath verdict. The 24th amendment was declared constitutional.

[22]1967 AIR 1643

Impact of the Verdict: In 1975, in the case of Indira Gandhi v. Raj Narayan23the Supreme Court applied the doctrine of basic structure during the emergency period. Clause 4 & 5 of Article 329A was struck down by the Apex Court on the grounds that it violated the 'right of equality' conferred by Article 14 which was fundamental to the structure of the Constitution. It added a) judicial review, b) the rule of law and c) Democracy which ensures free & fair elections, into the 'basic structure' list.

Case Law: *Indira Nehru Gandhi* v. *Shri Raj Narain*[24]

The Case: Indira Gandhi and Raj Narain competed as opponents in the 1971 general elections to secure a Lok Sabha seat from the constituency of Rae Bareilly, Uttar Pradesh. Indira Gandhi emerged as the winner. Raj Narain preferred an election petition against this outcome and alleged that Indira Gandhi resorted to electoral malpractices to win the elections. The High Court found Indira Gandhi guilty of using electoral malpractices and unseated her. Indira Gandhi swiftly moved the Supreme Court against the Allahabad High court's decision. Meanwhile, the Congress government in power, with their Prime Minister Indira Gandhi at the forefront, used their numerical superiority in the Parliament to enact laws which aimed to shield the election of a Prime Minister from judicial review.

Date of Verdict: 7 November, 1975, Supreme Court

Judges: Five Judges Constitutional Bench

The Verdict: The Supreme Court declared that Clause 4 of the 39th Constitutional Amendment Act was null and void. This clause imposed restrictions on the judiciary and prevented it from judging a case related election of the Prime Minister and some other important posts of the Indian democracy. Article 368 (deals with amendments) of the Constitution must not be used as a tool by the Parliament to surpass checks imposed by the Constitution itself.

The election of Indira Gandhi was held to be valid by the bench. The grounds accorded were that, the gazetted officer who was alleged to have assisted her in winning the election had resigned before he commenced any kind of assistance.

[23](AIR (1975) SCC 2299).
[24] AIR 1975 SC 2299.

Crux of the Verdict: The judgment holds immense importance in the judicial history of India. The bench elaborated the components of basic structure of the Indian Constitution laid down in the Kesavanada Bharti case and concluded that-

- Democracy- Democracy is the epicenter around which the Indian Constitution was structured. The legislature must adhere to the basic tenets of democracy while exercising its powers. Equal status and opportunity must be accorded to every candidate in an election.

- Separation of powers- The doctrine of separation of powers is a basic feature of the Constitution. The legislature, in the garb of exercising its power to make laws cannot denude the judiciary of its Constitutional powers.

Impact of the case- The challenge to Indira Gandhi's election triggered the imposition of the infamous National Emergency imposed by the Congress government in 1975. Even though the court absolved Indira Gandhi of the allegations of using government machinery to win elections, the people of India convicted her in the elections conducted after the termination of national emergency. The Congress government was overthrown in the center and Indira Gandhi lost her Lok Sabha seat to Raj Narain in Rae Bareilly.

#Case Law: Minerva Mills v. Union of India[25]:

The Case: This case takes the doctrine of basic structure further as some more feature were added to its list. Minerva Mills, a textile unit in Karnataka, was nationalized and taken over in 1971, by the Central govt. under the provisions of Sick Textile Undertakings Act, 1974, after a committee under Section 15 of the Industries Act, 1951, formed to assess the health of the Mill, submitted an adverse report. The constitutionality of Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976, was challenged by the petitioners.

Date of Verdict: 31 July, 1980, Supreme Court

[25] AIR (1980) SC 1789.

Judges: Five Judges Constitution Bench

The Verdict: A milestone judgement was delivered on 31st July, 1980, when Sections 4 and 55 of the Constitution (42nd Amendment) Act, 1976, was pronounced unconstitutional on the ground of violation of basic structure.

Crux of the Case: Citing from Kesavananda Bharti's case, the Court recapitulated the argument that Parliament enjoyed complete right to amend all parts of the Constitution as long as they don't disturb its basic framework. Article 368 does not confer unlimited amending powers to the Parliament and any damage or desecration to the basic essence of it, shall be unconstitutional. They further ascertained that Judicial review is a basic feature of the Constitution and hence, the Courts cannot be deprived of this power.

Thus, it can be very aptly commented that the provisions to amend the Constitution are there to embrace changes as we grow; but the limitations on certain features is indispensable to keep the democratic elements intact.

V- FUNDAMENTAL RIGHTS

Part III of the Indian Constitution comprising of Articles 12-35 lay down the Fundamental Rights. Inspired by the American Bill of Rights, Fundamental Rights are called 'Fundamental' for two reasons. One is because they are part of the 'fundamental law of the land' (the Constitution) and the second, because the rights are fundamental to the all-round development of individuals. These rights promote the ideal of political democracy. All the rights are guaranteed to citizens of India with some being guaranteed to all persons (including foreigners, artificial legal persons like corporations, etc.).

DEFINITION OF THE 'STATE'

Fundamental rights are claimed against the State. Article 12 defines the institution of 'State' for the purposes of Part III. State includes:

1. The Parliament of India and the central government
2. The State Legislatures and the state government of each state

3. All local authorities (like municipal corporations, district boards, panchayats, etc.)
4. And other authorities within the territory of India or under the control of Government of India

While the first three components of State are clear, the last component proved to be controversial in the Indian context. The grounds for admission of an institution within the envelope of State has been laid down by the Courts in a long line of cases. In ***Electricity Board, Rajasthan SEB* v. *Mohan Lal*** [26]the Supreme Court confirmed that 'other authorities would include all authorities created by the Constitution and statutory authorities created by law. Taking note of Articles 19 (1) (g) and 298, the Court noted that governments in India are also involved in commercial activities in addition to performing sovereign and statutory functions. The final rules to determine where an institution is State or not were laid down in ***Ajay Hasia*v. *Khalid Mujib Sehravardi***.[27] In the case, the Supreme Court laid down that any institution which proves to be an agency or instrumentality of State shall be State under Article 12. The Court laid down following conditions to determine agencies or instrumentalities of State:

1. Where the entire share capital of the institution is held by Government
2. Where the financial assistance by State almost meets the entire expenditure of the Corporation
3. Where the corporation enjoys monopoly, which is either State conferred or State protected
4. Existence of deep and pervasive State control
5. Where the functions performed by the institution are of public importance and closely related to government functions
6. Where a department of government is transferred to a corporation

Based on the above conditions various authorities have been declared 'State' like Indian Council of Agricultural Research, Indian Oil Corporation, Steel Authority of India, public sector banks like Central Bank of India, etc.

[26] AIR 1967 SC 1857.
[27] AIR 1981 SC 487.

Institutions outside Indian territory but under control of Indian Government are also State. The Indian judiciary has not been included in the definition. However, it is now clear that judiciary, when discharging its administrative and rule-making functions, will be part of State. But when it is discharging its judicial function of determining disputes, it will not be State.

A. JUSTICIABILITY OF FUNDAMENTAL RIGHTS

Article 13 (1) and (2) read together with Article 32 make the fundamental rights justiciable. This means that the courts are empowered to hear suits which allege a fundamental right violation. In fact, the right to approach the Supreme Court for enforcement of fundamental rights is itself a fundamental right. This is in direct contrast to Directive Principles of State Policy which are not justiciable (cannot be enforced), as is expressly declared by Article 37

B. DOCTRINE OF SEVERABILITY

Article 13 (1) and (2) declare that laws which abridge or take away fundamental rights are inconsistent with Part III. Such laws will be void to the extent of such inconsistency. Therefore, in a particular law, only those clauses which violate fundamental rights will be declared void, as opposed to the entire law being declared void. Doctrine of Severability is used to severe the void parts of the law from the whole law. Sometimes, the valid and invalid parts of the law are intertwined to an extent that it is impossible to separate them. In such cases, the invalidity of a portion results in invalidity of the entire law.

C. DOCTRINE OF ECLIPSE

The doctrine states that laws (or parts of law), which are declared invalid due to inconsistency with fundamental rights, remain dormant or eclipsed under the shadow of the right they are inconsistent with. Once the right itself is amended by a Constitutional amendment in such a way that, post amendment, the inconsistency does not remain, then the eclipsed portion of the law becomes operative and effective once again.

D. DOCTRINE OF WAIVER

Though fundamental rights are guaranteed to all citizens, a question arises on whether the citizens, by choice, can opt to not exercise (or waive off) a particular right. This doctrine, in the Indian context, means that no citizen can waive off fundamental rights, even if they voluntarily choose to do so with full knowledge of what they are foregoing. In case of other non-fundamental rights, they may waive it off if they are clear on the implications. Not having knowledge of a right does not amount to waiving off of the right.

RIGHT TO EQUALITY (ARTICLES 14-18)

The Constitution calls for equality before law and equal protection of law under Article 14. This article is similar to the provision of equality in the American Bill of Rights. However, the Constitution makers, being aware of deeply entrenched inequality in Indian society, felt the need to ensure equality in certain specific areas.

Under Article 15, discrimination based only on religion, race, caste, sex, and place of birth is prohibited. Under Article 16 equality in opportunity for public employment is guaranteed. Article 17 abolishes untouchability and Article 18 abolishes titles.

A. DOCTRINE OF REASONABLE CLASSIFICATION AND THE PRINCIPLE OF ABSENCE OF ARBITRARINESS

Article 14 expounds two aspects of the concept of equality. It prohibits State from denying ‘equality before law’ and ‘equal protection of law’.

‘Equality before law’ is a part of ‘Rule of Law’ where no individual is above the law of the land. All persons,irrespective of status, socio-economic standing or position, are subject to the law without any special privilege to evade application of any law.

‘Equal protection of law’ is a concept of equity, where person placed in similar circumstances are treated equally and those placed in dissimilar circumstances are treated differently. It stems from the logic that above sets of persons, if treated in the same fashion, would still remain unequal. For example, it the State were to impose 30% tax equally on all citizens (including millionaires and daily wage workers) there will be no real equality. True equality can be effected only through positive discrimination imposed by State where the citizens are divided into classes. High income earners can

be charged 30%, middle income earners can be charged 10% and daily wage earners can be exempted.

The Courts use the doctrine of reasonable classification and the principle of absence of arbitrariness to test whether the 'positive discrimination' or the legislative classification made by the State is indeed reasonable and non-arbitrary.

For a classification to be valid it must fulfil two conditions:

1. The classification must be based on intelligible differentia which distinguishes the persons or things grouped together from others who are left out of the class
2. The above differentia should have a rational nexus with the object that is sought to be achieved by the law in question

This is the doctrine of reasonable classification. Principle of absence of arbitrariness has emerged as an additional test of classification. In the ***Ajay Hasia Case*** (mentioned above), the supreme court bench ruled that arbitrariness in State action is a direct violation of Article 14. Actions that do not fulfil the reasonable classification tests are arbitrary. The court thereby expanded the application of reasonable classification test,

erstwhile used to test classification made by legislations, to executive-made delegated legislations and executive actions.

B. DOCTRINE OF LEGITIMATE EXPECTATIONS

This doctrine finds its application in reviewing administrative action. It deals directly with the relationship between an individual and a public authority. As per the doctrine, the action of a public authority can be reviewed on the ground of diverging from a 'legitimate expectation'. A person can claim to harbour a reasonable or legitimate expectation of being treated in a certain way by the administrative authorities because of an express promise made by the concerned authority or owing to some consistent practice in the past.

In order to obtain relief from a claim of denial of legitimate expectation, the petitioner has to prove:

1. Existence of legitimate expectation
2. The denial of legitimate expectation was an unreasonable and arbitrary action of state which thereby violates Article 14

C. PRINCIPLE OF COMPENSATORY DISCRIMINATION

Compensatory Discrimination refers to the policy or programs that give preference to a group or groups of people. The rationale behind extending such preference is to counter and compensate for the past or ongoing atrocities, excesses, injustice, or discrimination faced by the group in question.

1. Article 15 (3) allows the state to make special provisions for women and children

Vishakha*v. *State of Rajasthan[28]

The Case: Bhanwari Devi was a social worker in an initiative of the state government of Rajasthan aiming to curb the evil of child marriage. She protested to stop a child marriage in one Ramakant Gujjar's family. However, the marriage took place despite widespread protest. In 1992, to seek vengeance, Ramakant Gujjar along with 5 men gang-raped her in front of her husband. The police department at first tried to dissuade them on filing the case but she lodged a complaint against the accused. Post this, both

the husband and wife were subjected to harassment by the female police attendants. The trial court acquitted the accused.

To challenge the situation all female social workers got together to file a writ petition in Supreme Court of India under the name *'Vishakha'*.

Date of Judgement: 13 August, 1997

Judges: Three-judge Bench comprising of J.S. Verma C.J., Sujata V. Manohar & B.N. Kirpal JJ

The Verdict: The Supreme Court held that gender equality is part of fundamental rights enshrined under Article 14, 19 & 21. Sexual Harassment at Workplace is a clear violation of gender equality which in turn violates these integral rights of the female class. Such harassment also results in abrogation of the freedom provided under Article 19(1)(g). The Court recognised 'sexual harassment' as an offence for the first time in the absence of any law declaring it to be so.

The apex court found authority in filling the legislative gap by devising guidelines specially for women under Article 15 (3).

[28] (1997) 6 SCC 241.

Today the Parliament has filled the gap by enacting The Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act, 2013.

Article 15 (4) allows the state to make special provisions for backward classes in education and other fields

Article 16 (4) allows the state to reserve vacancies in govt. employment for backward classes

Indra Sawhney* v. *Union of India[29]

The Case: On January 1, 1979, the Government headed by the PM Sri Morarji Desai appointed the Second Backward Classes Commission under Article 340 of the Constitution to investigate the Socially and Economically Backward Classes (SEBC's) within the territory of India and recommend steps to be taken for their advancements. The commission submits its report in December 1980 and identified 3743 castes as SEBC and recommended a reservation of 27 % in government jobs for them. This is famously known as the Mandal Commission Report. In 1991, the Congress

Government finally implemented the report, providing for 27% for SEBC's and an additional 10% reservation for economically backward in higher castes.

Date of Judgment: 16 November, 1992

Judges: Nine-judge Constitutional Bench

The Verdict: The Supreme Court penned down a landmark judgment with respect to reservations. It upheld the 27% reservation for SEBC's but ruled that preference must always be given to the economically backward within the SEBC's. It devised the 'creamy layer' concept to exclude the children of those OBC's who had progressed through reservation, from availing benefit of reservations. The Court struck down the 10% reservation for economically disadvantaged among higher castes. It also capped the total reservation limit (OBC, SC and ST) to 50% in all areas.

Article 17 abolishes untouchability.

RIGHT TO FREEDOM (ARTICLE 19)

The article provides six rights:

[29] AIR 1995 SC 477.

1. Right to Freedom of Speech and Expression
2. Right to assemble peacefully without arms
3. Right to form associations
4. Right to move freely throughout the territory of India
5. Right to reside and settle in any part of the territory of India
6. Right to practice any profession or carry on any occupation, trade or business

A. FREEDOM OF SPEECH AND EXPRESSION- FREEDOM OF PRESS

Article 19(1)(a) of Indian Constitution states that citizens have the right to freedom of speech and expression. Freedom of speech and expression means the right to express one's own convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode. It thus includes the expression of one's idea through any communicable medium or visible representation, such as gesture, signs, and the like.

Freedom of press is not specifically mentioned in article 19(1) (a). In the Constituent Assembly Debates, Dr. Ambedkar, Chairman of the Drafting Committee, clarified that no special mention of the freedom of press was necessary as the press and a citizen were the same as far as their right of expression was concerned. Freedom of Press

includes absence of pre-censorship and freedom of circulation to ensure propagation of ideas.

B. REASONABLE RESTRICTIONS (ARTICLE19 (2)-(5))

All freedoms enumerated in Article 19 (1) are subject to reasonable restrictions.

1. Freedom of Speech and Expression can be restricted on grounds of sovereignty and integrity of India, security of the State, friendly relations with Foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence
2. Freedom to assemble can be restricted in the interest of sovereignty and integrity of India or public order
3. Freedom of association can be restricted in the interest of sovereignty and integrity of India or public order or morality
4. Freedom of movement and residence can be restricted in the interest of general public or for protection of Scheduled Tribes
5. Freedom of Trade can be restricted in the interest of general public

RIGHT TO LIFE AND PERSONAL LIBERTY (ARTICLES 20-22)

These articles are available to citizens, foreigners and corporations.

A. **ARTICLE 20** provides for Protection in Respect of Conviction for Offences. It contains provisions pertaining to the following:

1. It prevents punishment under criminal laws enacted after commission of offence and applied retrospectively.

2. It prevents judicial prosecution and punishment for the same offence more than once (called double jeopardy). The same is not available for departmental or administrative proceedings.

3. It prevents compelling of a person to act as witness against himself (self-incrimination)

B. **ARTICLE 22** offers Protection Against Arrest and Detention. It provides protection in cases of both punitive detention (awarded after trial and conviction in court) and preventive detention (precautionary step taken before trial and conviction). In the first case the arrested person has following rights:

1. Right to be informed of the grounds of arrest

2. Right to consult and be defended by a legal practitioner

3. Right to be produced before a Magistrate within 24 hours after arrest and to be released after 24 hours unless further detention is authorized by him

In case of preventive detention, period of detention cannot exceed more than three months unless authorized by an advisory board. Grounds of detention are to be communicated to detenu unless disclosure is against public interest. The detenu is to be given opportunity to make representations against detention order. Both the Parliament and state legislatures have the right to make preventive detention laws within their territorial jurisdictions.

C. **ARTICLE 21** reads that no person shall be deprived of his life and personal liberty except according to procedure established by law. In ***A.K. Gopalan*** **v.** ***State of Madras***[30] which was the first case filed on Article 21, the Supreme Court interpreted the Article verbatim to the effect that enactment of a law was the only condition required to

[30] AIR 1950 SC 27.

deprived a person of his life and personal liberty. Therefore, only executive actions could be held to violate the article. However, this judgment was overruled by ***Maneka Gandhi* v. *Union of India***[31] where the Court, through the Golden Triangle, changed the very understanding of the right. The Court observed that fundamental rights are a body of complementary rights to be read together. They are not individual standalone rights. Therefore, the 'procedure established by law' which deprives life and personal liberty, must conform to the reasonableness and non-arbitrariness enshrined in Article 14 and must qualify as a reasonable restriction under Article 19, if it takes away freedoms enumerated therein. Article 14, 19 and 21 form the Golden Triangle.

The Courts have interpreted 'life' and 'personal liberty' in the broadest fashion which has led to article 21 becoming a spring head for a multitude of rights. The following rights are part and parcel of Article 21:

1. Right to Privacy- ***Justice K. S. Puttaswamy (Retd.)* v. *Union of India***[32]

The Case: The petition was initiated by 91-year old retired High Court Judge K.S. Puttaswamy against the Indian Government of India in the Supreme Court. The main

petition challenged the government's Aadhaar scheme (a biometrics-based unique identity card) which was being made mandatory for accessing government services and benefits. The grounds for challenge was the violation of right to privacy. The petition was placed before a three-judge bench of the Supreme Court. The bench referred the question on whether the right to privacy was guaranteed as an independent fundamental right, to a higher bench due to conflicting judgments from other Supreme Court benches.

Date of Verdict: 24 August, 2017

Judges: Constitutional Bench of nine judges

The Verdict: By its order the Supreme Court ruled that the right to privacy is protected as part of the right to life and personal liberty under Article 21. It declared privacy to be an integral component of Part III of the Constitution of India, which lays down our fundamental rights.

Crux of the Verdict: The following was laid down by the court:

[31] AIR 1978 SC 597.
[32] Writ Petition (Civil) No 494 Of 2012.

- The eight-judge bench decision in ***M P Sharma* v. *Satish Chandra***,[33] which held that the right to privacy is not protected by the Constitution stands over-ruled
- The Court's subsequent decision in ***Kharak Singh* v. *State of UP***[34] also stands over-ruled to the extent that it holds that the right to privacy is not protected under the Constitution
- The right to privacy is protected as an intrinsic part of the right to life and personal liberty under Article 21 and as a part of the freedoms guaranteed by Part III of the Constitution
- Right to privacy is not an "absolute right". Subject to the satisfaction of certain tests and benchmarks, a person's interests for privacy can be overridden by competing state and individual interests.

Impact of the Verdict: The judgment is landmark and historic.

- The main petition on Aadhar was decided by a 5-judge bench on 26September, 2018. The Court upheld the Aadhar Project but read down some of the provisions of the

Aadhaar (Targeted Delivery of Financial and Other Subsidies, Benefits and Services) Act 2016 and struck down a few (mainly Section 33(2), 47 and 57).

- The judgment also proved crucial in determining the outcome in ***Navtej Singh Joharv. Union of India*** [35]which struck down Section 377 of the IPC thereby decriminalizing homosexuality.
- The Srikrishna Committee Report on Data Protection which will inspire the data protection laws soon to be enacted, will also be influence this judgment.

1. Decriminalization of Homosexuality- ***Navtej Singh Johar* v. *Union of India***

The Case: Section 377 of the IPC was challenged in ***Naz Foundation* v. *Government of NCT of Delhi***[36]. The Delhi High Court read down provisions of section 377 of IPC that it deemed violative of Articles 14, 15 and 21 of the Constitution of India. However, the Naz Foundation judgment was overturned by the Supreme Court of India in ***Suresh***

[33] AIR 1954 SC 300.
[34] AIR 1963 SC 1295.
[35] W. P. (Crl.) No. 76 of 2016.
[36] (2009) 111 DRJ 1.

Kumar Koushalv. Naz Foundation [37] which was not received well by the civil society and the LGBTQ communities. Large sections of media and international agencies demanded a reconsideration of the decision by a larger Supreme Court Bench.A writ petition challenging judgment was referred to a larger constitution bench.

Date of Verdict: 6 September, 2018

Judges: Five-judge Constitution Bench

The Verdict: The Court overruled *Suresh Kumar Koushal* and upheld the reading down of Section 377 by the Delhi High Court in the *Naz Foundation case.*

Crux of the Verdict: Violation of Article 21- Section 377 abridges both human dignity as well as the newly articulated fundamental right to privacy. As sexual orientation is an essential and innate facet of privacy, the right to privacy takes within its sweep, the right of every individual including that of LGBT to express their choices in terms of sexual inclination without fear of prosecution or criminal prosecution. Section 377 IPC, in its present form, is violative of the right to dignity and the right to privacy under Article 21 of the Constitution.

1. Transgender Rights- ***National Legal Services Authority* v. *Union of India***[38]

The Case: It dealt with the legal gender recognition of transgender people, and whether the lack of legal measures to cater for the needs of persons not identifying clearly as male or female contradicts the Constitution. The gender of a person (male or female) is assigned at birth and determines his or her rights in relation to marriage, adoption, inheritance, succession, taxation and welfare. Due to non-recognition of a third gender, the community faced discrimination in various areas of life.

Date of Verdict: 15 April, 2014

Judges: Two-judge bench of Justice K.S.Radhakrishnan and Justice A.K.Sikri

The Verdict: The Court declared that the Centre and State governments must grant legal recognition of gender identity as male, female or third gender. A full recognition is to be given even in the absence of any existing statutory regime.

Crux of the Verdict: The Court held that the right to choose one's gender identity is integral to the right to lead a life with dignity and therefore falls within the scope of the

[37] (2014) 1 SCC 1.
[38] (2014) 5 SCC 438.

right to life (Article 21). The Court emphasized the need to read the provisions of the Constitution in line with present day conditions, based on a factual and social reality that is constantly changing. Safeguarding the rights of transgender people was especially called for due to the increasing universal recognition and acceptance of transgender issues. The Court noted that Article 21 has been broadly interpreted to include all aspects that make a person's life meaningful. It protects the dignity of human life, personal autonomy and privacy. As recognition of one's gender identity lies at the heart of the right to dignity and freedom, it must be protected under Article 21 of the Constitution.

2. Right to pollution free environment- ***MC Mehta* v. *Union of India***[39] (Oleum Gas Leak case)

The Case: Shriram Food and Fertilizer Industry was engaged in the manufacture of dangerous chemicals. The original petition was filed by MC Mehta for the closure of various units of Shriram as they were hazardous for the community. While the petition was pending, a huge amount of oleum gas spilled from one of the units that resulted in the death of many people. The spillage was a result of human blunders.

Date of Verdict: 20 December, 1986

Judges: Five-judge Bench

The Verdict: The Court upheld the Right to clean and pollution-free environment as part of Article 21 and upheld it without going into the question of whether Shriram was 'State' under Article 12.

RIGHT TO EDUCATION (ARTICLE 21A)

The article declares that State shall provide free and compulsory education to all children between the ages six to fourteen in a manner decided by the State. Higher or professional education is excluded from the purview. The article was added by the 86th Amendment Act, 2002. Previously, the same article existed as Article 45 under Directive Principles of State Policy (DPSP). Being a DPSP, it could not be enforced as a right but continued to exist as the aim of the State. The same Amendment Act also changed Article 45, making early childhood care and education till the age of six, a

[39] 1987 SCR (1) 819.

State endeavor. The Act also added Article 51A making it a fundamental duty of every citizen to provide to his child an opportunity to avail elementary education.

The journey of compulsory elementary education from a DPSP to a Fundamental Right is testimony to the vision of constitutional forefathers who laid down Part III and IV of the Constitution, separately, to guide governance in India. To enforce Article 21A, the Indian parliament enacted the Right of Children to Free and Compulsory Education (RTE) Act, 2009.

RTE ACT, 2009- An Overview

The main object of the Act is to ensure that every child can exercise a right to full time elementary education of satisfactory and equitable quality in a formal school which satisfies certain essential norms and standards.The Act casts an obligation on the appropriate Government and local authorities to provide and ensure admission, attendance and completion of elementary education by all children in the 6-14 age group.

Some of the important provisions of the Act are as follows:

- The RTE Act defines "appropriate government" as –

i. The Central government, for schools owned or controlled by the Central government or a Union Territory (UT) Administration without legislature; and

ii. The State and UT government with legislature, for schools established in the territory of that State/UT.

- The appropriate government or the local authority (meaning a municipal corporation or municipal council or equivalent body in urban areas or a Panchayati Raj Institution – PRI – in rural areas) has to provide a school within 1 km walking distance for children in classes I to V and within 3 kms for those in classes VI to VIII. These schools are termed 'neighborhood schools'
- No school fees, capitation fees, charges or expenses are to be paid by a child to get elementary education. The Central and State governments have joint responsibility to provide funds for implementation of the RTE Act.
- The child or his parents are not to be subjected to any screening procedure for admission to school.

- When a child of above six years has not been admitted to any school or, if admitted, is unable to continue studies, that child shall be admitted to a class appropriate to his age. He will be also given special training (minimum of 3 months; maximum 2 years) to bring him at par with his class. He can continue beyond 14 years in order to complete receiving elementary education.
- All private schools (those that do not seek any govt. grants to impart education) in a neighborhood are required to enroll 25% students from the weaker and disadvantaged sections of society and provide free education to them. These schools can then claim reimbursement from the government for the expenditure incurred, provided that, per child expenditure does not exceed the amount a government school spends to educate a child.
- It lays down the norms and standards relating inter alia to Pupil Teacher Ratios (PTRs), qualification for teachers, buildings and infrastructure, school-working days, teacher-working hours.
- It prohibits (a) physical punishment and mental harassment; (b) screening procedures for admission of children; (c) capitation fee; (d) private tuition by teachers and (e) running of schools without recognition, etc.
- It provides for development of curriculum in consonance with the values enshrined in the Constitution, and which would ensure the all-round development of the child,

- building on the child's knowledge, potentiality and talent and making the child free of fear, trauma and anxiety through a system of child friendly and child centered learning.

RIGHT AGAINST EXPLOITATION (ARTICLES 23-24)

A. ARTICLE 23 prohibits traffic in human beings, *begar* and other forms of forced labor. Practice of the above is punishable as per law. The right is available to citizens and non-citizens and can be enforced against both the State and private organizations.

'Traffic in human beings' include:

1. Selling and buying of men, women and children like goods
2. Immoral traffic in women and children including prostitution
3. Devadasi system
4. Slavery

To prevent traffic the Parliament has enacted the Immoral Traffic (Prevention) Act, 1956.

'Begar' is a uniquely Indian form of forced labor resulting out of Zamindari system where zamindars forced the tenants to render mandatory services without payment. Forced labor means compelling a person to work against his will. The compulsion may arise from physical force, legal force or economic force (compulsion to work for less than minimum wages). To prohibit forced labor the parliament has enacted the Bonded Labor System (Abolition) Act, 1976, the Minimum Wages Act, 1948, etc.

The provision makes an exception for State imposed compulsory military, social, and other services for public purposes, for which it may not pay, provided that such services are imposed without discrimination only on grounds of religion, race, class or caste.

B. **ARTICLE 24** prohibits employment of children in factories, etc. It prohibits employment of children below the age of 14 years in factories, mines or other hazardous activities. It does not speak of employment of child labor in harmless or innocent work. The Parliament has enacted a number of legislations to prevent child labor and to promote child education. The chief among them is the Child and Adolescent Labor (Prohibition and Regulation) Act, 1986.

FREEDOM OF RELIGION AND CULTURAL AND EDUCATIONAL RIGHTS OF MINORITIES (ARTICLES 25-30)

A. RIGHT TO FREEDOM OF RELIGION

- Article 25 states that all persons are entitled to freedom of conscience and the right to freely profess, practice and propagate religion. The right is available to individuals, both citizens and non-citizens. However, these rights are subject to public order, morality, health, and other provisions of fundamental rights. Further, the State has the right to:

1. Regulate or restrict economic, financial, political or other secular activity associated with religious practice
2. Provide for social welfare, reform and to open Hindu religious institutions having public character to all classes and sections of Hindus

- Article 26 lays down rights for all religious denominations or its sections. It speaks of collective freedom of religion. They are entitled to the following rights:

1. Right to establish and maintain institutions for religious or charitable purposes
2. Right to manage its own affairs in the matters of religion
3. Right to own and acquire movable and immovable properties
4. Right to administer above properties as per law

These rights are also subject to public order, morality and health.

- Article 27 states that no person can be compelled to pay taxes for promotion or maintenance of any particular religion or religious denomination. However, taxes pay be used for promotion and maintenance of all religions. This article is an explicit expression of the secular nature of Indian State.
- Article 28 provides freedom from attending religious instructions. It distinguishes between four types of educational institutions:

1. Institutions wholly maintained by the State, where religious instruction is completely prohibited
2. Institutions administered by the State but established under a trust or endowment, where religious instruction is permitted
3. Institutions recognized by the State, where religious instruction is permitted on a voluntary basis
4. Institutions receiving aid from the State, where religious instruction is permitted on a voluntary basis

B. CULTURAL AND EDUCATIONAL RIGHTS

- Article 29 provides that any section of citizen living in any part of India having a distinct language, script or culture of its own, has the right to conserve the same. It also provides against denial of admission into educational institutions maintained by the State or aided by State funds only on grounds of religion, race, caste, language
- Article 30 grants the following rights to religious and linguistic minorities:

1. Right to establish and administer educational institutions of the choice of all minorities
2. The compensation fixed by the State for compulsory acquisition of any property of a minority educational institution shall not restrict or abrogate the right guaranteed to them

3. When granting aid, the State should not discriminate against any educational institution managed by a minority

VI: RIGHT TO CONSTITUTIONAL REMEDIES

A- WRIT PETITIONS

A writ is a written order issued by a court of competent jurisdiction, directing a person or an authority to commit or omit an action. In India, only the Supreme Court **(Article 32)** and all the High Courts **(Article 226)** possess the competence to issue writs.

The writ jurisdiction must be exercised meticulously by the courts to safeguard the rights and liberties of the people. The power to issue writs is supervisory and not appellate. The Indian legal regime recognizes the five writs of Habeas Corpus, Mandamus, Certiorari, Prohibition and Quo Warranto.

HABEAS CORPUS

The Latin term habeas corpus literally translates to "you shall have the body". Thus, this writ aims to protect a person from unlawful detention. A writ of habeas corpus shall cause the release of a person who has been unlawfully detained.

Article 22 of the Constitution explicitly deals with protection against unlawful detention. If the detention of a person results in contravention of Article 22, then such detention shall be unlawful. An authority vested with the power of arrest and detention, must not exceed or abuse that power.[40]

An illegal detention is an attack on a person's right to life and liberty guaranteed by Article 21 of the Constitution. If the authorities exceed the stipulated period of detention, a writ of habeas corpus can be enforced as a matter of right, unless a cogent reason is submitted by the respective authority for the delay.[41]

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[40] *G. Sadanandan*v. *State of Kerala*, AIR 1966 SC 1925.
[41] *Union of India v. Paul Manickam*, AIR 2003 SC 4622.

Case Law: *ADM Jabalpur* v. *Shivakant Shukla*[42]

The Case: The aftermath of the Supreme Court judgment in Indira Nehru Gandhi vs. Raj Narain was the imposition of a national emergency under Article 352. Article 359 became operative immediately which implied that the fundamental rights of the people could be suspended by the government during the period of emergency. The government imprisoned many influential political leaders in the name of national security. This gave rise to a lot of hue and cry. High Courts of different states were approached under Article 226 to save people from preventive detention. In some of these cases, the High courts issued a writ of habeas corpus and ordered release of the detained persons. Aggrieved by the stand of the High Courts, the government took the battle to the Supreme Court. This gave rise to the instant- Additional District Magistrate, Jabalpur vs. Shivakant Shukla. The issue before the Supreme Court was to decide if the Fundamental Rights can be suspended through a Presidential Order to that effect during a Proclamation of Emergency under Article 352.

Date of Verdict: 18 April, 1976, Supreme Court

Judges: Five Judges Constitutional Bench

The Verdict: The Supreme Court enunciated that if a law permits the President to pass an order which shall prohibit a writ petition seeking a writ of habeas corpus for release of a detained person, then such writ petition shall not be maintainable. The President's actions were said to be in consonance with the laws laid down in Article 359 of the Constitution. The Court also opined that Article 21 is the sole repository of right to life and liberty. Relief to preventive detention is guaranteed by Article 22.

Crux of the verdict: The rationale furnished by the apex court to its decision was that during a period of emergency submission of evidences which corroborate further detention of a detenu might compromise the case against him. Such a compromise cannot be permitted in a grave situation such as a national emergency.

Impact of the case: The judgment carried a dissenting opinion delivered by Justice H.R. Khanna. His disagreement paved way for today's legal stand on the issue and the verdict stands overruled as of now. He vehemently contended that life and liberty are

[42] AIR 1976 SC 1207.

basic tenets of the society. The people cannot be stripped of these rights without a cogent reason even during national emergency. It is a fascinating fact that Justice D.Y. Chandrachud, the son of Justice Y.V. Chandrachud (who was a part of the majority in this case), overruled his father's opinion and called it flawed in the recent judgment of ***K. Puttaswamy* v. *Union of India***[43].

QUO WARRANTO

The Latin term quo warranto literally means "by what warrant". Various statutes may provide for the constitution of different types of public offices to enable smooth governance. This writ is issued when a person who is appointed to a public office, lacks the necessary qualifications to assume that office. If the court opines that the appointment in question, contravenes statutory stipulations, then it shall direct the removal of the usurper of an office. In a writ of quo warranto, the question which the court seeks to answer is whether the person holding a public office possesses the requisite statutory qualifications with respect to that office. The writ applies only to public offices of substantive nature. A person filing a writ of quo warranto need not be personally wronged.[44] Any wrongful appointment to any public office can be challenged by any person. The writ aims to ensure the right to equality guaranteed by the Constitution, in letter and spirit.

MANDAMUS

In Latin, mandamus translates to "we command". In context of the writ jurisdiction of the Indian courts, here "we" refers to the courts and "command" refers to their orders in this regard. The writ of mandamus is a tool which can be resorted to effectuate performance of a public duty by a public authority which is required to be performed by the said authority. The writ can be preferred against all kinds of public authorities (administrative, judicial etc.) where they decline the performance of a statutory duty. Discretionary duties do not fall within the purview of mandamus as long as the non-performance does not result in a flagrant violation of principles of natural justice.

CERTIORARI AND PROHIBITION

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[43] MANU/SC/1044/2017.

[44] *Satish Chander* v. *Rajasthan Univ.*, AIR 1970 Raj 184.

These two writs can be issued on identical grounds. These grounds are enumerated below-

a. **Jurisdictional defect-** There has to be a prima facie case, where the court or tribunal acted in excess of its jurisdiction accorded to it by appropriate legislation or statute.

b. **Flagrant violation of natural justice-** Any forum vested with the power of adjudication must adhere to the principles of natural justice, viz. the adjudicating forum must not be biased, it should give both the parties a fair hearing and accord both the parties an equal opportunity to be heard. These examples are supposed to grant a better understanding of the concept of natural justice and do not constitute an exhaustive list of the principles of natural justice.

c. **Prima facie error of law-** The error of law must be obvious. A mere technical or procedural defect does not attract the application of certiorari or prohibition. The error of law must be an apparent one. For instance, a case where one party has procured an order by committing fraud attracts the writ jurisdiction of competent courts.[45]

Certiorari means "to inform". This writ is used to quash a decision or order given by a lower court. Prohibition, on the other hand prohibits or puts a stay on further proceedings by the inferior court. Hence, a party may seek a writ of certiorari when the proceedings have terminated, while a writ of prohibition may be sought if the proceedings are still in progress. Therefore, prohibition is a prevention and certiorari is a cure.

B- ARTICLE 32 AND ARTICLE 226

Article 32 and Article 226 both, confer writ jurisdiction on the Supreme Court and all the High Courts respectively. As mentioned earlier, writ jurisdiction is a supervisory power vested in courts. Hence, Article 32 should not be confused as a device to treat the apex court as an appellate forum for directions passed by a High Court under Article 226. Both the articles exist parallel to each other.

Article 226 commences with a non obstante clause which reads as **–"Notwithstanding anything in Article 32"**. This clause makes Article 226 independent of Article 32. The

[45] *United India Insurance Co. Ltd* v. *Rajendra Singh*, AIR 2000 SC 1165.

mere fact that Article 226 grants power to a High Court does not render it inferior to Article 32.

Article 32 is a fundamental right in itself. It is contained within Part III of the Constitution. Article 226 is not a fundamental right.

In fact, Article 226 creates a wider purview for the High Courts to operate. The High Courts can issue writs in case of violation of **Part III (Fundamental Rights)** of the Constitution as well as **"for any other purpose"** (mentioned in **Article 226(1)**). Thus, Article 226 does not limit the High Courts' writ jurisdiction to the adjudication of fundamental rights only. On the contrary, Article 32 can be invoked strictly in a case where fundamental rights are violated.

Article 32	**Article 226**
It is a fundamental right.	It is a constitutional right.
It has a limited purview (can only decide on violation of fundamental rights).	It has a wider purview (questions on violation of fundamental rights + additional questions of law)
Can be suspended during national emergency.	Cannot be suspended during national emergency.

C- JUDICIAL REVIEW

Judicial review is the process where an appropriate forum from the judiciary examines any law or an administrative step, in the light of Constitutional principles. The Supreme Court and all the High Courts (Articles 32 and 226 respectively) can exercise this extraordinary power of judicial review to ensure that the legislature and executive do not exceed their powers.

SEPARATION OF POWERS

The Indian democracy stands on the three pillars of legislature, executive and judiciary. The rule of law accords the power to interpret the Constitution to the judicial wing. The doctrine of separation of powers is an underlying principle in our Constitution which lays down that all three wings of a democracy should function in their respective domains. Thus, such legislations which curb the power of one wing and facilitate the intrusion of any other wing in the domain of the former, would be unconstitutional. The legislature must be cautious while framing laws and it should not make such laws which would facilitate such intrusion. Similarly, the executive must be cautious that it is not exceeding its power in the course of discharging its functions. Likewise, the judiciary must be careful that in the course of interpreting the principles of Constitution, it is not indulging in law making (except incidental law making) or administrative activities. Whenever an intrusion is brought to the notice of the court, it is the duty of the court to cure such intrusion by reviewing the policy or act which constituted such intrusion.

BASIC STRUCTURE OF THE CONSTITUTION

The Indian Constitution has a basic structure. This structure comprises of the fundamental building blocks of the Constitution. Judicial review is one such block. Basic structure is the soul of the Constitution and cannot be amended. The body might undergo metamorphosis over the course of time, but the soul must remain intact. Any amendment which tends to revamp the basic structure is ultra vires the Constitution.

The concept of basic structure was coined in the landmark case of ***Kesavananda Bharti* v. *State of Kerala***[46] and was reiterated in a plethora of subsequent cases. Hence, the judiciary is duty-bound to thwart any attempt by the legislature or executive to reshape the basic structure of the Constitution. The judiciary in the discharge of this duty shall elucidate which provisions of the Constitution are affected by the impugned law or action and state cogent reasons for the same. This process of judicial interpretation of the Constitution is termed as judicial review.

[46] (1973) 4 SCC 225

JUDICIAL ACTIVISM

Judicial activism refers to a scenario where the judiciary assumes the role of an activist and expresses its views on matters of public interest. It can be said to be an aggravated version of judicial review where the court not only decides upon the validity of the issue in question, but also directs or compels the appropriate authorities to deal with the said issue in a prescribed manner.

Public interest litigations have been granted judicial validation where a person can seek redress on behalf of the aggrieved persons, in the name of public interest. The landmark case of ***HussainaraKhatoon (I)*** **v.** ***State of Bihar***[47]is a popular case in the field of judicial activism. In this case, a famous newspaper published a series of articles highlighting the anguish of under trial prisoners in Bihar. Some instances showed that many under trial prisoners had served a maximum sentence possible without even being charged. An advocate took note of this situation and filed a public interest litigation. As an outcome, the apex court opined that a right to speedy trial is a fundamental right embedded in Article 21 of the Constitution. The court further assumed the role of a judicial activist and directed the state to facilitate free legal aid to under trial prisoners and resolve the issue.

In the case of ***Sheela Barse*** **v.** ***State of Maharashtra***[48] , the Supreme Court took a bold step and treated a letter addressed to it by a journalist as a writ petition (public interest litigation). This letter discussed custodial violence against women prisoners. The Supreme Court directed the concerned authorities to take quick and effective action in this regard.

D- WRIT JURISDICTION AND PRIVATE SECTOR

Article 12

Article 12 defines state. All the entities which are government instrumentalities would fall within the ambit of the definition of "state". Primarily, writ petitions are viewed as sentinels meant to safeguard the fundamental rights granted by the Constitution. These fundamental rights are guaranteed by the state and hence a cure to violation of these rights can be demanded from the state only. Thus, it is well settled that writ petitions are maintainable against public entities.

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[47] (1980) 1 S.C.C. 81.
[48] 1983 AIR 378.

In the landmark case of ***Zee Telefilms* v. *Union of India***[49], the Supreme Court decided that BCCI does not fall within the definition of state. BCCI is a registered society under Tamil Nadu Societies registration Act. The reason accorded was that it is an autonomous body which does not receive administrative, financial or functional support from the government or state (these are the parameters for an entity to fall within the definition of state under Article 12). Hence, BCCI does not pass as a government instrumentality and is a private body.

ARE WRIT PETITIONS AMENABLE TO PRIVATE ENTITIES?

The apex court, in the case of ***Shri Anadi Mukta Sadguru S.M.V.S.J.M.S. Trust* v. *V.R. Rudani***[50]opined that it is not important if the authority is public or private as long as the authority in question is discharging a public duty. In this case, the writ petition was held maintainable under Article 226. The private entity in question was a college. The court held that even though the college is private, it is discharging a public duty of imparting education. Therefore, the college can be subjected to writ jurisdiction.

However, the court also observed that Article 226 has a wider ambit where the High Court can adjudicate matters beyond Part III of the Constitution also. Therefore this judgment affirms the application of writ jurisdiction to private entities under Article 226 only. The court remained silent on writ jurisdiction conferred on Article 32 of the Constitution.

LAW COMMISSION RECOMMENDATIONS

The Law Commission in its 275th report has vehemently supported the notion of declaring the BCCI as a public authority. The main reasons accorded are-

a. It is the national body which regulates cricket throughout India. It operates in the public domain.
b. It receives monetary assistance from several state governments.
c. It enjoys tax exemptions in discharging some of its functions.

Thus, the question with respect to treating a private entity as a public entity under Article 32 cannot be fit in a definite bracket. Though, the apex court has admitted writ

[49](2005) 4 SCC 649.
[50] A.I.R. 1989 S.C. 1607.

petitions against private entities, it has not explicitly opined that Article 32 applies to private entities when they are discharging public duties.

CONCLUSION

Writ jurisdiction is a special supervisory power of adjudication which must be sparingly exercised by the courts to ensure justice and equity. The power has a very wide scope which ranges from judicial review to judicial activism.

Writ petitions have also paved way for public interest litigations which enables unaffected parties to initiate legal proceedings on behalf of others. However, the purpose of this jurisdiction is to ensure that the fundamental rights guaranteed by the Constitution remain protected. In order to fulfill this purpose, the apex court must settle the position of Article 32 and its applicability to private entities which discharge public functions.

VII. DIRECTIVE PRINCIPLES OF STATE POLICY (DPSP) AND FUNDAMENTAL DUTIES

Part IV of the Constitution comprising of Articles 36-51 lay down the Directive Principles of State Policy. Article 36 states that 'State' shall be construed to mean same as under Part III.

NATURE AND JUSTICIABILITY OF DIRECTIVE PRINCIPLES

DPSP's can be described as positive obligations of the State. It provides a blueprint or guidelines that guide the State towards achieving a social order in which social,

economic and political justice informs all institutions of national life. The Directive Principles of State Policy are 'directive' in nature, directing the policy of the State.

The Principles have two characteristics as stated by Article 37. Firstly, they are not enforceable in any court of law. Therefore, if the State fails to obey or implement a DPSP, the citizens cannot compel it to do so through judicial proceedings. The rationale behind making DPSP's non-justiciable is that implementation of DPSPs largely depend on the level of socio-economic development achieved by the State in any given time

period. Therefore, it is the State which must decide and take steps to implement DPSPs, looking into the need of the hour and the resources available. For example, the RTE Act, 2009 has been enacted and Article 21A was added to Fundamental Rights in 2002. Elementary education, till then, was part of DPSP. In 1947, with the literacy rate in the country being 12%, the State could not have taken on the obligation to educate all children with the resources then available. However, in 2002, the State could take on the obligation which was made justiciable (a right that could be enforced by people).

Secondly, the DPSP are fundamental in the governance of the country and it is the duty of the State to apply these Principles when making laws. Therefore, the DPSPs act as a 'common political manifesto' for all ruling parties. The parties may have different ideologies but they all must work for the same objectives, when acting as the government. They also serve as a crucial test to evaluate performance of each government. Citizens can examine the government programs and policies in light of the DPSP. The DPSP's also serve as guiding lights for the judiciary. When the judiciary reviews a law which restricts Fundamental Rights, the DPSP's shed light on what might qualify as a 'reasonable restriction' for the greater good of the country. A law implementing a DPSP invokes a presumption of constitutionality (within constitutional limits) of the impugned law.

ANALYSIS OF DIRECTIVE PRINCIPLES

The DPSP are listed one after the other in the Indian Constitution. One criticism invited by the DPSP's is that they are not logically and systematically arranged. For ease of study, the DPSP's may be grouped under three broad categories:

A. Socialistic Principles- The Preamble to the Indian Constitution declares India as a Socialist State. The 'socialist' character of the State is enshrined in the DPSPs. It provides for social and economic justice, thereby making the Indian State a 'Welfare State'. The DPSP under this head are:

1. Article 38- To promote the welfare of the people by securing a social order permeated by social, economic and political justice and to minimize inequalities in income, status, facilities and opportunities.

2. Article 39- to secure (a) the right to adequate means of livelihood for all citizens; (b) the equitable distribution of material resources of the community for common good; (c) prevention of concentration of wealth and means of production; (d) equal pay for equal work for men and women; (e) preservation of the health and strength of workers and children against forcible abuse; and (f) opportunities for healthy development of children.
3. Article 39A- to promote equal justice and to provide free legal aid to the poor.
4. Article 41- to secure the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement. (Art 41)
5. Article 42- to make provision for just and humane conditions for work and maternity relief. (Art 42)
6. Article 43- to secure a living wage, a decent standard of life and social and cultural opportunities for all workers (Art 43)
7. Article 43A- to take steps to secure the participation of workers in the management of industries (Art 43A)
8. Article 47- to raise the level of nutrition and the standard of living of people and to improve public health. (Art 47)

B. <u>Gandhian Principles</u>- These Principles ensure that the Indian State abides by some aspects of Gandhian ideology. The Mahatma, being the Father of the Nation, left behind his thoughts on the organization of the Indian State. These thoughts are captured in the following principles:

1. Article 40-to organize village Panchayats and endow them with necessary powers and authority to enable them to function as units of self-government.
2. Article 43- to promote cottage industries on an individual or co-operation basis in rural areas.
3. Article 43B- to promote voluntary formation, autonomous functioning, democratic control, and professional management of co-operative societies.
4. Article 46- to promote the educational and economic interests of SCs, STs and other weaker sections of the society and to protect them from social injustice and exploitation.

5. Article 47- to prohibit the consumption of intoxicating drinks and drugs which are injurious to health.
6. Article 48- to prohibit slaughter of cows, calves and other milch and draught cattle and to improve their breeds.

C. <u>Liberal- Intellectual Principles-</u> These Principles capture the liberal ideology of the Indian State. They direct the State to:

1. Article 44- to secure for all citizens a uniform civil code.
2. Article 45- to provide early childhood care and education for all children until they complete the age of 6 years.
3. Article 48- to organize agricultural and animal husbandry on modern and scientific lines.
4. Article 48A- to protect and improve the environment and to safeguard forests and wildlife.
5. Article 49- to protect monuments, places and objects of artistic or historic interest which are declared to be of national importance**.**
6. Article 50- to separate the judiciary from the executive in the public services of the state.
7. Article 51- to promote international peace and security and maintain just and honorable relations between nations; to foster respect for international law and treaty obligations, and to encourage settlement of international disputes by arbitration.

D. <u>New Directives-</u> Certain Principles were added in recent times. The first set were added by the 42nd Constitutional Amendment of 1976. These are:

1. To secure opportunities for healthy development of children (Article 39).
2. To promote equal justice and to provide free legal aid to the poor (Article 39A).
3. To take steps to secure the participation of workers in the management of industries (Article 43A)

4. To protect and improve the environment and to safeguard forests and wildlife (Article 48A)

   The 44th Amendment Act of 1978 added the directive which requires the State to minimize inequalities in income, status, facilities and opportunities (Article 38).

The 86th Amendment Act of 2002 changed the subject matter of Article 45 as enumerated in the Article 21A section under Fundamental Rights.

The 97th Amendment Act of 2011 added the Directive related to co-operative societies. It requires the State to promote voluntary formation, autonomous functioning, democratic control and professional management of co-operative societies (Article 43B).

RELATIONSHIP BETWEEN DPSP AND FUNDAMENTAL RIGHTS

The curious positioning of DPSP, as non-justiciable yet fundamental principles in the governance of the country vis-à-vis the justiciable fundamental rights, has been a source of constant confrontation between the two.

It began with ***State of Madras* v.*ChampakamDorairajan***[51] where the Supreme Court held that Directive Principles, being non-justiciable, have to conform to and run as subsidiary to the Fundamental Rights Chapter, which are justiciable. A law giving effect to the Directive Principles must satisfy the constitutional limitations, Fundamental Rights being the most important amongst them. If it violates the limitations, the law must be held unconstitutional. The case involved challenging a Madras government order which fixed quotas for admission to medical and engineering colleges for different communities including Harijans. The order was sought to be defended under Article 46. The Court held Fundamental Rights to be supreme over Directive Principles but observed that Fundamental Rights could be amended by Constitutional Amendment Acts.

The Case: With regard to admission of students to the Engineering and Medical Colleges of the State, the Province of Madras had issued an order (known as the Communal G. O.) that seats should be filled in by the selection committee strictly on the following basis, i.e., out of every 14 seats, 6 were to be allotted to Non-Brahmin (Hindus), 2 to Backward Hindus, 2 to Brahmins, 2 to Harijans, 1 to Anglo-Indians and Indian Christians and 1 to Muslims.

On 7.6.1950, Smt. ChampakamDorairajan made an application to the High Court of Judicature at Madras under Art. 226 of the Constitution for protection of her

[51] AIR 1951 SC 226.

fundamental rights under Art.15 (1) and Art.29 (2) of the Constitution and prayed for the issue of a writ of mandamus or other suitable prerogative writ restraining the State of Madras and all officers and subordinates thereof from enforcing, observing, maintaining or following or requiring the enforcement, observance, maintenance or following by the authorities concerned of the notification or order generally referred to as the Communal G. O. in and by which admissions into the Madras Medical Colleges were sought or purported to be regulated in such manner as to infringe and involve the violation of her fundamental rights.

Date of Judgment- 9 April, 1951

Judges- Seven-judge Constitutional Bench

The Verdict- It was held that the communal G.O. constituted a violation of the fundamental right guaranteed to the citizens of India by Article 29(2) of the Constitution of India and was therefore void under Article 13. The directive principles of State Policy laid down in Part IV of the Constitution cannot in any way override or abridge the fundamental rights guaranteed by Part III. On the other hand, they have to conform to and run as subsidiary to the fundamental rights laid down in Part III.

The next landmark came in the ***I.C. Golaknathv. State of Punjab***[52] where the Supreme court held that the Parliament cannot take away or abridge any of the Fundamental Rights which are 'sacrosanct' in nature. This meant that Fundamental Rights could not be amended to implements DPSP's. In response to the judgment, the Parliament enacted the 25th Amendment Act which inserted Article 31C. The Article contains two provisions:

1. No law that seeks to implement the socialistic DPSP's (in Article 39 (b) and (c)) could be declared void on grounds of contravention of Fundamental Rights under Article 14, Article 19 or Article 31.

2. No law containing a declaration for giving effect to above policy could be questioned in any court of law on the ground that it does not give effect to such policy.

The Case- The immediate facts surrounding the case were that the family of one William Golak Nath had over 500 acres of property in Punjab. Acting under Punjab

[52] AIR 1967 SC 1643.

Security and Land Tenures Act, 1953 which was placed in 9th Schedule by the 17th Constitutional Amendment Act, 1964, the state government intimated to petitioner that he can now only possess 30 acres of land & rest will be treated as surplus. Aggrieved by this intimation of the state government petitioner filed a writ petition under Article 32 of Indian Constitution and pleaded the violation of his Fundamental Rights mentioned under Articles 19(1)(f) (Right to hold & acquire property), 19(1)(f) (Right to practice any profession) and 14 (Equality before Law & Equal protection of laws).

Date of Judgment- 27 February, 1967

Judges- Eleven-judge Constitutional Bench

The Verdict- The majority opinion in the judgment reflects the uneasiness &scepticism in the judiciary's mind about the then course of Parliament. Since 1950's Parliament, through invoking Article 368, had passed numerous legislations that had in one pretext or another violated the Fundamental Rights. They suspected that soon a time could come when all the Fundamental Rights adopted by the Constituent assembly would be diluted through amendments and finally extinguished. Keeping this probable annihilation in mind and fearing the gradual transfer of democratic India into totalitarian India, the majority held that Parliament cannot amend Fundamental Rights.

In ***Kesavananda Bharti***[53] the Supreme Court declared the second provision of the 25th Amendment Act unconstitutional, for judicial review was held to be part of the basic structure of the Constitution which could not be taken away. The first provision was held to be valid. Through the 42nd Amendment Act, the Parliament sought to enlarge the first provision to include all DPSP's (not just Article 39 (b) and (c). This firmly put DPSP above Fundamental Rights.

This provision of the Act was challenged in ***Minerva Mills* v. *Union of India***[54]. DPSP were again made subordinate to Fundamental Rights except Articles 14 and 19 which

were accepted as subordinate to Article 39 (b) and (c). However, the Supreme Court went a step further in to settle the supremacy debate. It held that the Indian Constitution rested on 'the bedrock of the balance between the Fundamental Rights and the

[53] (1973) 4 SCC 225.
[54] AIR 1980 SC 1789.

Directive Principles. They together constitute the core of commitment to social revolution.' The Court further held that the harmony and balance between the DPSP and Fundamental Rights was one essential feature of the basic structure of the Constitution. The goals set out by the DPSP have to be achieved without abrogation of the means prescribed by Fundamental Rights. The current position is that Fundamental Rights, being justiciable, are supreme over DPSP. But the Parliament has full liberty to make laws to implement DPSP. To do so they may amend Fundamental Rights as long as the amendment does not destroy the 'harmony and balance' between the two.

FUNDAMENTAL DUTIES

Fundamental Duties under Part IV-A with a single Article 51A was added as an afterthought, to the Indian Constitution. Ten fundamental duties were added by the 42nd Amendment Act of 1976 pursuant to the recommendations made by the Swaran Singh Committee set up by the Congress Government. The Fundamental Duties are a feature borrowed from the Constitution of the erstwhile USSR. They were amended once in 2002 to add an additional fundamental duty which rounds up the number to eleven.

Article 51A says that it shall be the duty of every citizen of India:

1. To abide by the constitution and respect its ideal and institutions; the National Flag and the National Anthem
2. To cherish and follow the noble ideals which inspired our national struggle for freedom;
3. To uphold and protect the sovereignty, unity and integrity of India;
4. To defend the country and render national service when called upon to do so;
5. To promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities, and to renounce practices derogatory to the dignity of women;
6. To value and preserve the rich heritage of our composite culture;
7. To protect and improve the natural environment including forests, lakes, rivers, and wildlife and to have compassion for living creatures;
8. To develop the scientific temper, humanism and the spirit of inquiry and reform;
9. To safeguard public property and to abjure violence;

10. To strive towards excellence in all spheres of individual and collective activity, so that the nation constantly rises to higher levels of endeavor and achievement.
11. To provide opportunities for education to his child or ward between the age of six and fourteen years.

The Duties have often been criticized for many reasons. The first among many being that they are non-enforceable. The State cannot compel citizens to perform these duties. The Fundamental Duties are meant only for citizens of India and are not for foreign nations, unlike the Fundamental Rights. Further, the Duties are criticized for not being exhaustive and missing out on detailing vital responsibilities of citizens like paying taxes, voting in elections, family planning, etc. They are also vague and ambiguous, often beyond understanding of the common man who is to discharge them. Phrases like 'noble ideals', 'composite culture', 'scientific temper', etc, are not easily decipherable.

However, the Duties also have a vital significance. As part of the Constitution, the Duties remind the citizens of a simple legal and moral principle that 'where there is a right, there is a correlative duty'. They also help the Courts in determining the constitutionality of certain laws. The Parliament has the power to enact laws to compel citizens to perform duties. For example, the Prevention of Insults to National Honor Act, 1971, certain provisions of the Indian Penal Code, etc, provide for sanctions if certain Fundamental Duties are not discharged.

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Thankyou