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FUNDAMENTAL RIGHTS

INTRODUCTION

Part III, containing the Fundamental Rights, is undoubtedly the most significant provision of our Constitution. Of the Fundamental Rights, the Right to Constitutional Remedies, contained in Article 32, was termed by Dr. B R Ambedkar as the “**heart and soul**” of our Constitution.

INSPIRATION

Fundamental Rights, as incorporated in Part III of our Constitution, were inspired by the Bill of Rights of the US Constitution, as also by the Universal Declaration of Human Rights as declared by the United National General Assembly on December 10, 1948.

APPLICABILITY

While some Fundamental Rights are available only to Indian *citizens*, others are available to all ‘*persons*’, including corporations and foreign nationals.

- Only for citizens: Articles 15, 16, 19, 29, 30
- For all persons: Articles 14, 20, 21, 25, 32

PROTECTION AND SANCTITY

Article 13 of our Constitution specifically protects Fundamental Rights from legislative and executive encroachment.

Legislative and executive action in violation of Fundamental Rights is declared *null and void* by this Article by the following provisions:

Clause (1)

- All existing laws shall be void
 - *to the extent they are inconsistent with this Part*



Clause (2)

- **State shall not make any law**
 - **which takes away or abridges rights conferred by this Part**
- If any such law is made
 - it shall be void *to the extent it takes away or abridges these rights*

Scope and Effect of Article 13

- All pre-Constitutional laws are void *to the extent of inconsistency* with Fundamental Rights
- All post-Constitutional laws shall be void *to the extent they take away or abridge* Fundamental Rights

THE DOCTRINE OF ECLIPSE

Eclipse occurs when one object overshadows the other.

Doctrine of Eclipse is applied when any law violates a fundamental right. The fundamental right shall overshadow this law and make it ineffective but not void in toto. It can revive if the shadow cast by the fundamental right is removed.

Doctrine of Eclipse relating to an existing law:

- The existing law became void under article 13 (1) "to the extent of inconsistency".
- **The law became void not in toto or for all purposes or for all times or for all persons** but only "to the extent of such inconsistency", that is to say, to the extent it became inconsistent with the provisions of Part III.
- Such law existed for all past transactions and for enforcement of rights and liabilities accrued before the date of the Constitution.



- The law continued in force even after the commencement of the Constitution with respect to persons who could not claim the fundamental right.
- **The true position is that the impugned law became, as it were, eclipsed, for the time being, by the fundamental right.**
- All laws, existing or future, which are inconsistent with the provisions of Part III are by the express provision of article 13, rendered void "to the extent of such, inconsistency".
- **Such laws were not dead for all purposes.**
- They existed for the purposes of pre- Constitution rights and liabilities and they remained operative, even after the Constitution, as against non- citizens.
- **It is only as against the citizens that they remained in a dormant or moribund condition.**

Source: Bhikaji Narain Dhakras v. State of MP [1955 SC]

THE DOCTRINE OF SEVERABILITY

- *When a statute is in part void, it will be enforced as regards the rest, if that is severable from what is invalid.*
- The **doctrine of severability** rests on a presumed intention of the legislature that if a part of a statute turns out to be void, that should not affect the validity of the rest of it, and that that intention is to be ascertained from the terms of the statute.
- It is immaterial for the purpose of this rule whether the invalidity of the statute arises by reason of its subject-matter being outside the competence of the legislature or by reason of its provisions contravening constitutional prohibitions.



Rules of construction to determine the question of severability:

1. In determining whether the valid parts of a statute are separable from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test to be applied is whether the legislature would have enacted the valid part if it had known that the rest of the statute was invalid.
2. If the valid and invalid provisions are so inextricably mixed up that they cannot be separated from one another, then the invalidity of a portion must result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and separate that after striking out what is invalid, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become unenforceable.
3. Even when the provisions which are valid are distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole.
4. Likewise, when the valid and invalid parts of a statute are independent and do not form part of a scheme but what is left after omitting the invalid portion is so thin and truncated as to be in substance different from what it was when it emerged out of the legislature, then also it will be rejected in its entirety.
5. The separability of the valid and invalid provisions of a statute does not depend on whether the law is enacted in the same section or different sections; it is not the form, but the substance of the matter that is material, and that has to be ascertained on an examination of the Act as a whole and of the setting of the relevant provisions therein.
6. If after the invalid portion is expunged from the statute what remains cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, as otherwise it will amount to judicial legislation.



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

Source: **M. D. Chamarbaugwalla v. Union of India** [1957 SC]

THE DOCTRINE OF WAIVER

Waiver of a right means relinquishment of that right by the individual.

- There could be no waiver not only of the fundamental right enshrined in Article 14 but also of any other fundamental right guaranteed by Part III of the Constitution of India.
- The Indian Constitution made no distinction between fundamental rights enacted for the benefit of the individual and those enacted in the public interest or on grounds of public policy.
- The fundamental rights have not been put in the Constitution merely for the individual benefit though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the 'doctrine of waiver' can have no application to those provisions of law which have been enacted as a matter of Constitutional policy.

Source: **Bashesar Nath v. Commissioner of Income Tax** [1959 SC]

Scope and Significance of the term 'Law' in Article 13

Clause (3)

- **Law** in this Article includes
 - ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law



Case 1: Shankari Prasad v. Union of India [1951 SC]

- "Although "law" must ordinarily include constitutional law, there is a clear demarcation between **ordinary law**, which is made in exercise of legislative power, and **constitutional law**, which is made in exercise of constituent power."
- "In the context of article 13, "law" must be taken to mean rules or regulations made in exercise of ordinary legislative power and not amendments to the Constitution made in exercise of constituent power, with the result that article 13(2) does not affect amendments made under article 368."
- "The terms of article 368 are perfectly general and empower Parliament to amend the Constitution, without any exception whatever. Had it been intended to save the fundamental rights from the operation of that provision, it would have been perfectly easy to make that intention clear by adding a proviso to that effect."

Case 2: Golaknath v. State of Punjab [1967 SC]

Question:

- **Whether a Constitutional Amendment is a "law" within the meaning of Article 13(2)?**

Ans:

- A constitutional amendment under Article 368 of the Constitution was an ordinary 'law' within the meaning of Article 13(2).
- There was no difference between ordinary legislative power of the parliament and the inherent constituent power of parliament to amend the Constitution.
- Since according to Article 13(3), Parliament could not make any law that abridges the Rights contained in Part III, a constitutional amendment, also being an ordinary law within the meaning of Article 13, could not be in violation of the fundamental rights.



- Therefore, all constitutional amendments thus far which were in contravention or which had made an exception to fundamental rights were said to be void.

The Supreme Court thus overruled its earlier decision in *Shankari Prasad v. Union of India* [1951].

At this stage, there was an **Amendment to the Constitution** [the 24th Amendment] in 1971 in the shape of a new clause to Article 13 to the following effect:

Clause (4)

- This article shall not apply
 - to amendments under article 368

Subsequent development

Case 3: Keshavanand Bharti v. State of Kerala [1973 SC]

- Parliament could amend any provision of Part III of the Constitution.
- However, *any feature of the Basic Structure of the Constitution could not be altered by Parliament even under its Constituent Power.*

Thus, the Supreme Court overruled its own decision in *Golaknath v. State of Punjab* [1967], though the power of Parliament to amend the Constitution was hedged with the doctrine of Basic Structure.



PROTECTION AGAINST WHOM?

Article 13 protects Fundamental Rights from violative actions by the “State”. But what is ‘State’? This term is defined in Article 12 to mean the Legislature as well as the Executive:

DEFINITION OF ‘STATE’:

- In this Part, **State** includes:
 - Government of India, Parliament of India
 - Government of each State, Legislature of each State
 - All local authorities in India, Other authorities in India or under control of Govt of India

Scope of this term “State” has been continuously expanded by the Supreme Court since 1967 through a long series of judgments:

Chronological Development of Law on Article 12 in Supreme Court:

Case 1: 1967: [Rajasthan SEB v. Mohan Lal](#)

Question:

- Whether the Electricity Board, which was a corporation constituted under a statute primarily for the purpose of carrying on commercial activities, could come within the definition of “State” in Article 12?

Decision

- Yes. “The expression ‘other authorities’ in Article 12 will include all constitutional or statutory authorities on whom powers are conferred by law. It is not at all material that some of the powers conferred may be for the purpose of carrying on commercial activities.”



Case 2: 1975: Sukhdev Singh v. Bhagatram Raghuvanshi

Question:

- Whether the Oil and Natural Gas Commission, the Industrial Finance Corporation and the Life Insurance Corporation, each of which were public corporations set up by statutes, were authorities and therefore within the definition of State in Article 12?

Decision:

- Yes. The concept would include a public authority which “is a body which has public or statutory duties to perform and which performs those duties and carries out its transactions for benefit of the public and not for private profit. Such an authority is not precluded from making a profit for public benefit”.

Case 3: 1981: Ajay Hasia v. Khalid Mujib Sehravardi

Question:

- Whether a college established and administered by a **society** registered under the Jammu and Kashmir Registration of Societies Act, a State?

Decision:

- Yes. The Society was an authority falling within the definition of “State” in Art 12.

Case 4: 1981: Som Prakash Rekhi v. Union of India

Question:

- Whether Bharat Petroleum Corporation was a “State” under article 12?

Decision

- Bharat Petroleum Corporation was held to be a “State” within the “enlarged meaning of Article 12”.



Case 5: 2002: Pradeep Kumar Biswas v. Indian Institute of Chemical Biology

Question:

- Is CSIR a State within the meaning of Article 12 of the Constitution and if it is, should this Court reverse a decision which has stood for over a quarter of a century?

Decision:

- Yes. Control of the Government in CSIR is ubiquitous. Given the fact that President of CSIR is the Prime Minister, subjugation of the Governing Body to the will of the Central Government is complete. Non-governmental contributions are a pittance compared to the massive governmental input.

Case 6: 2005: Zee Telefilms v. Union of India

Question:

- Whether BCCI a State within the meaning of Article 12 of the Constitution ?

Decision:

- No.



THE FIRST FUNDAMENTAL RIGHT : RIGHT TO EQUALITY

EQUALITY BEFORE LAW

Article 14

- State shall not deny to any **person**
 1. equality before law
- State shall not deny to any **person**
 1. equal protection of laws within the territory of India

Explanatory Notes by DLA on Article 14

- Equality before the law, guaranteed by the first part of Article 14, is a **negative** concept while the second part is a **positive** concept.
- The gravamen of Article 14 is equality of treatment. The basic principle underlying Article 14 is that the law must operate equally on all persons under like circumstances.

THE DOCTRINE OF CLASSIFICATION

Question:

- Can there be different laws for different classes of people? Is classification permitted under Article 14?

Ans:

- It is well-established that while article 14 does not forbid reasonable classification for the purposes of legislation.
- In order to pass the test of permissible classification two conditions must be fulfilled:
 - i. the classification must be founded on an **intelligible differentia** which distinguishes persons or things that are grouped together from others left out of the group



- ii. the differentia must have a **rational relation** to the object sought to be achieved by the statute in question.
- What is necessary is that there must be a **nexus** between the basis of classification and the object of the Act under consideration.

Authority: Supreme Court in **Budhan Choudhry v. State of Bihar** [1954]

Question:

- Is a law conferring discretionary powers constitutionally valid in view of Article 14?

Ans:

- Every discretionary power is not necessarily discriminatory. Equality is not violated by mere conferment of discretionary power. It is violated by arbitrary exercise by those on whom it is conferred.

Authority: Supreme Court in **M Nagaraj v. Union of India** [2006]

Question

- How is arbitrariness viewed under Article 14?

Ans:

- Equality is antithetic to arbitrariness. In fact equality and arbitrariness are sworn enemies; one belongs to the rule of law in a republic, while the other, to the whim and caprice of an absolute monarch.
- Where an act is arbitrary, it is implicit in it that it is unequal and is therefore violative of Article 14.

Authority: Supreme Court in **E.P. Royappa v. State of Tamil Nadu** [1974]

Question

- Is reasonableness an essential element of Article 14?



Ans:

- Equality is a dynamic concept. Article 14 strikes at arbitrariness in State action and ensures fairness and equality of-treatment. The principle of reasonableness which is an essential element of equality or non-arbitrariness pervades Article 14 like a brooding omnipresence.

Authority: Supreme Court in **Maneka Gandhi v. Union of India** [1978 SC]

SCOPE OF ARTICLE 14

- Article 14 guarantees
 - **equal treatment to persons who are equally situated**
- Unequals are not only permitted to be treated unequally
 - but also they have to be so treated
- Equal treatment to unequals
 - is nothing but inequality
- Article 14 **allows reasonable classification**
 - on an objective basis having nexus with the object to be achieved



PROHIBITION OF DISCRIMINATION

Article 15(1)

- State shall not discriminate against any **citizen**
 - on grounds **only** of
 - Religion, Race, Caste, Sex, Place of birth

Clause (2)

- No citizen shall be subjected to
 - any disability, liability or restriction on these grounds only

Affirmative Action in favour of Women and Children:

Clause (3)

- This Article does not prevent the State
 - from making any *special provision*
 - *for women and children*

Affirmative Action in favour of SCs, STs and SEBCs:

Introduced by the 1st Amendment Act in 1951:

Clause (4)

- This Article does not prevent the State
 - from making any special provision for
 - socially or educationally backward class of citizens
 - Scheduled Castes, Scheduled Tribes

Special Provision for admission to educational institutions:

Introduced by the 93rd Amendment Act in 2005:



Clause (5)

- This Article does not prevent the State
 - from making any special provision, **by law**, for any
 - socially or educationally backward class of citizens
 - Scheduled Castes, Scheduled Tribes
 - for their admission to educational institutions including private institutions
 - whether aided or unaided by State

Exception:

- Minority educational institutions under Article 30(1)

DLA Note on Clause (5)

- The law passed by Parliament to implement article 15(5):
 - Central Educational Institutions (Reservation in Admission) Act, 2006

Constitutional Validity of the 93rd Amendment:

Ashok Kumar Thakur v. Union of India [2008 SC]

Issue 1

- Whether the Ninety-Third Amendment of the Constitution is against the “basic structure” of the Constitution?

Decision

- This Amendment does not violate the “basic structure” of the Constitution so far as it relates to the state maintained institutions and aided educational institutions.
- The question whether this Amendment would be constitutionally valid or not so far as “private unaided” educational institutions are concerned, is left open to be decided in an appropriate case.



Issue 2

- Whether exclusion of minority educational institutions from Article 15(5) is violative of Article 14?

Decision

- Exclusion of minority educational institutions from Article 15(5) is not violative of Article 14 as the minority educational institutions, by themselves, are a separate class and their rights are protected by other constitutional provisions.

Issue 3

- Whether “Creamy Layer” is to be excluded from SEBCs?

Decision

- “Creamy Layer” is to be excluded from SEBCs. The identification of SEBCs will not be complete and without the exclusion of “creamy layer” such identification may not be valid under Article 15(1).

Issue 4

- Whether the “creamy layer” principle is applicable to Scheduled Tribes and Scheduled Castes?

Decision

- “Creamy Layer” principle is not applicable to Scheduled Castes and Scheduled Tribes.

Affirmative Action in favour of economically weaker sections of citizens

Introduced by the 103rd Amendment Act of 2019

CLAUSE (6):

- This article or articles 19(1)(g) or 29(2) do not prevent the State



(a)

- from making any special provision
 - for advancement of any **economically weaker sections of citizens**
 - other than classes mentioned in clauses (4) and (5)

(b)

- from making any special provision
 - for advancement of economically weaker sections of citizens other than classes mentioned in clauses (4) and (5)
 - for their admission to educational institutions including private educational institutions
 - whether aided or unaided by State
 - other than minority educational institutions referred in article 30(1)
- which in case of reservation
 - would be in addition to the existing reservations and
 - **subject to a maximum of 10% of total seats in each category**

Explanation

- "economically weaker sections"
 - shall be such as may be notified by the State
 - on the basis of family income and other indicators of economic disadvantage

DLA Note on Clause (6)

- The Constitution 103rd Amendment Act 2019 enables reservation in educational institutions to economically weaker sections of citizens



EQUALITY OF OPPORTUNITY IN APPOINTMENTS AND PROMOTIONS:

Article 16(1)

- There shall be equality of opportunity for all **citizens**
 - in matters of employment or appointment
 - to any office under State

NO DISCRIMINATION IN EMPLOYMENT

Article 16(2)

- No citizen shall be discriminated against
 - in employment or office under State on grounds **only** of
 - Religion, Race, Caste, Sex
 - Descent, Place of birth, Place of residence

CONDITION OF RESIDENCE

Article 16(3)

- Parliament may by law
 - make **residence** within a State/UT a condition
 - for employment or appointment to an office under govt of that State/UT

RESERVATIONS IN INITIAL APPOINTMENTS:

Article 16(4)

- This Article does not prevent the State
 - from making a provision for **reservation of appointment**
 - in favour of a **backward class** of citizens



- which is **not adequately represented** in services under State

Supreme Court on Article 16(4):

Indra Sawhney v. Union of India [1992]

Issue 1

- Whether clause (4) of Article 16 is an exception to clause (1)?

Decision

- Clause (4) of Article 16 is not an exception to clause (1). It is an **instance** and an **illustration** of the classification inherent in clause (1).

Issue 2

- Whether Article 16(4) is exhaustive of the concept of reservations in favour of backward classes?

Decision

- Article 16(4) is exhaustive of the subject of reservation in favour of backward class of citizens.

Issue 3

- Whether Article 16(4) is exhaustive of the very concept of reservations?
Whether clause (1) of Article 16 does not permit any reservations?

Decision

- Reservations can also be provided under clause (1) of Article 16. It is not confined to extending of preferences, concessions or exemptions alone.

Issue 4

- What is the meaning of the expression “backward class of citizens” in Article 16(4)?



Answer

- A caste can be and quite often is a social class in India. If it is backward socially, it would be a backward class for the purposes of Article 16(4).
- Among non- Hindus, there are several occupational groups, sects and denominations, which for historical reasons, are socially backward. They too represent backward social collectivities for the purposes of Article 16(4).

Issue 5

- Should 'creamy layer' be excluded?

Answer

- 'Creamy layer' can be and must be excluded.

Issue 6

- To what extent can the reservation be made? Whether the 50% rule enunciated in Balaji a binding rule or only a rule of caution or rule of prudence?

Decision

- The reservations contemplated in clause (4) of Article 16 should not exceed 50%. While 50% shall be the rule, it is necessary not to put out of consideration certain extraordinary situations inherent in the great diversity of this country and the people.

Issue 7

- Whether clause (4) of Article 16 provides reservation only in the matter of initial appointments or does it provide for reservations in promotions as well?

Decision

- **Article 16(4) does not permit reservations in matters of promotions.**



RESERVATIONS IN PROMOTIONS:

Introduced by the 77th Amendment Act of 1995

Article 16(4A)

- This Article does not prevent the State
 - from making a provision for **reservation in matters of promotion**
 - with consequential seniority
 - in favour of **SCs and STs**
 - which are **not adequately represented** in services under State

Reserved Unfilled Vacancies as Separate Class of Vacancies:

Introduced by the 81st Amendment Act of 2000

Article 16(4B)

- This Article does not prevent the State
 - from considering any reserved unfilled vacancies of a year
 - as separate class of vacancies for subsequent years
- Such vacancies are not to be considered
 - for determining ceiling of 50% reservation for those subsequent years

Supreme Court on Articles 16(4A) and 16(4B):

M. Nagaraj v. Union of India [2006]

- The constitutional amendments by which Articles 16(4-A) and 16(4-B) have been inserted flow from Art 16(4). They do not alter the structure of Art 16(4).
- They retain the controlling factors or the compelling reasons, namely, backwardness, inadequacy and efficiency.
- They do not obliterate any of the constitutional requirements, namely, ceiling limit of 50% (quantitative limitation), the concept of creamy layer (qualitative



exclusion), the sub-classification between OBCs on one hand and SCs and STs on the other hand.

- *The State concerned will have to show in each case existence of the compelling reasons, namely, backwardness, inadequacy of representation and overall administrative efficiency.*
- The impugned provision is an enabling provision. The State is not bound to make reservation for SCs/STs in matters of promotions. However, if they wish to exercise their discretion and make such provision, *the State has to **collect quantifiable data** showing backwardness of the class and inadequacy of representation of that class in public employment in addition to compliance with Article 335.*
- Even if the State has compelling reasons, the State will have to see that its reservation provision does not lead to excessiveness so as to breach the ceiling of 50% or obliterate the creamy layer or extend the reservation indefinitely.

Supreme Court in [Jarnail Singh v. Lachhmi Narain Gupta \[2018\]](#)

- The 2006 directions on collecting quantifiable data on the backwardness of SC/STs was contrary to the 1992 judgment by a nine-Judge bench.
- The states were not required to "collect quantifiable data" reflecting the backwardness among these communities.
- SCs and STs were the "most backward or the weakest of the weaker sections of society" and **presumed to be backward.**



RESERVATION FOR ECONOMICALLY WEAKER SECTIONS OF CITIZENS:

Introduced by the 103rd Amendment Act of 2019

ARTICLE 16(6):

- This article does not prevent the State
 - from making reservation of appointments
 - in favour of **economically weaker sections of citizens** other than classes mentioned in clause (4)
 - in addition to existing reservation and subject to a **maximum of 10%** of posts in each category

Note

- The Constitution 103rd Amendment Act 2019
 - enables reservation in public appointments to economically weaker sections of citizens
