Subject :

Constitutional Law - I

Paper : 1.2

10 YEARS CELEBRATION

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SUBJECT TOPICS

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CULTURAL AND EDUCATIONAL RIGHTS

India, being a diverse country with a myriad of ethnic backgrounds, religious influence and varied sub-cultures, also have minority groups. Articles 29 to 30 of the Indian Constitution effectively aim to eradicate this problem by making a provision in the article known as 'Right to Cultural and Educational rights of Minority groups'.

Treating unequals as equal is as bad as treating equals as unequals. Our Constitution provides for equality for equality of opportunity to all but meting out equal treatment to those who did not start off equally in the first place means treating unequals as equals. Minorities in India have had to face adverse discrimination and, therefore, do not stand on equal footing with others, which made the framers of the Constitution, through Artcile 29 and Article 30, accord special rights to the people who form religious or linguistic minority in India.

The idea of giving some special right to the minorities is not to hurt a privileged section of the population but to give to the minorities a sense of security. Special rights for minorities were designed not to create inequalities but to bring about equality by ensuring the preservation of the minority institutions and by guaranteeing autonomy in the matter of administration of these institution.

Under Articles 29 and 30, certain cultural and educational rights are guaranteed.

Section (1) of Article 29 guarantees the right of any section of the citizens residing in any part of the country having a distinct language, script or cultures of its own, to conserve the same. Section

(2) prohibits any discrimination based only on religion, race, caste, language or any of them in the matter of admission to State or State-aided educational institutions.

Section (1) of Article 30 provides that "all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice".

According to Section (2) the State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

Who is Minority ?

The Constitution does not define the term 'minority', nor does it lay down sufficient indicia to the test for determination of a group of minority. The U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities has defined minority as under :

(i) The term minority includes only those non-documents group of population which possess and wish to preserve stable ethnic, religious or linguistic traditions or characteristics markedly different from those of the rest of the population; (ii) such minorities should properly include a number of persons sufficient by themselves to preserve such traditions or characteristics; and (iii) such minorities must be loyal to the State of which they are nationals.

The definition refers to group of individual who are particularly smaller as the majority in a defined area. Definition however does not indicate as to what factor of distinction, subjective or objective are to be taken as the test of distinguishing a group from the rest. Thus, while considering 'minority,' a numerically smaller group, as against the majority in a defined area, some place emphasis upon certain characteristics commonly possessed by the members constituting the minority and, to them, these characteristics serves as objective factor of distinction.

The constitution of India does not define the term 'minority', but literally it means 'a non-dominant' group. In T.M.A.Pai Foundation v. State of Karnataka, [AIR 2003 SC 355], it has been stated that 'minority is a relative term and is referred to, to represent the small of two numbers, sections or group called majority. In that sense, there may be political minority, religious minority, and linguistic minority etc.

In A.M.Patorni v. E.C.Kesavan, [AIR 1965 Ker. 75, 76 (FB)], it has been observed that ,any community, religious or linguistic, numerically less than fifty percent of the population of the State is a minority community.

In re Kerala Education Bill, [AIR 1958 SC 956], it has been observed that while it was easy to say that minority meant a community which was numerically less that 50 per cent, the important question was 50 percent of what- the entire population of India, or of a State but in a minority in the whole of India. It is difficult to define 'minority'. However, where the effect of legislation extends to the whole of the State, minority must be determined with reference to the entire State population.

Article 29 : Protection of Interests of Minorities :—

1. Any section of the citizens residing in the territory of India or any part thereof having a district language,

script or culture of its own shall have the right to conserve the same.

2. No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

Article 29 : Right to Protection of Interests :—

- The constitution of India ensures equal to all the citizens of India liberty pertaining to conserving their culture, language and script under Article 29 (1).
- This provision simply states that the citizens have the right to preserve their language, heritage and backgrounds and cannot be stifled by major language groups.
- The second right under Article 29 (2), says that 'no minority groups will be denied admission into any educational system or institution of their choice, and will also not be deprived of any funds from the state purely based on religion, caste or language'.
- In this case, no minority or majority can be denied admission into any state or private institution on the basis of social factors such as language and religion. The institutions have the responsibility of accepting students on the basis of merit and talent, and not on the basis of language, class and religion.
- The institutions also have to make sure that the cultural diversity of the country is well-maintained in the form of multifarious languages and various religious groups.
- Although there appears to be overlapping of provisions in respect to Article 15 (1) and 29 (2), Article 15 (1) is a more general provision stating that there shall be no discrimination on the basis of sex, caste and religion. Article 29, however, is more specific pertaining to a particular species of the system in the form of gaining admission into educational systems and getting benefits from state funds like all other citizens.

Interpreting the scope of Article 29, the Bombay High Court in the case of ***Bombay Education Society vs State of Bombay*** AIR 1954 Bom 468, (1954) 56 held that it embodied two important principles :

"One is the right of the citizen to select any educational institution maintained by the State and receiving aid out of State funds. The State cannot tell a citizen, 'you shall go to this school which I maintain and not to the other'. Here we find reproduced the right of the parent to control the education of the child".

The scope of Article 29(2) came up for detailed interpretation before the Supreme Court in the case of The ***State of Madras vs Srimathi Champakam*** 1951 AIR 226, 1951 SCR 525 which was appeals from decisions of the Madras High Court, relating to admission to educational institutions maintained by the State. After analysing the facts in detail the Court said :

"It will be noticed that while clause (1) protects the language, script or culture of a sections of the citizens, clause (2) guarantees the fundamental right of an individual citizen. The right to get admission into any educational institution of the kind mentioned in clause (2) is a right which an individual citizen has as a citizen and not as a member of any community or class of citizens.

This right is not to be denied to the citizen on grounds only of religion, race, caste, language or any of them. If a citizen who seeks admission into any such educational institution has not the requisite academic qualifications and is denied admission on that ground, certainly he cannot be heard to complain of an infraction of his fundamental right under this Article.

But, on the other hand, if he has the academic qualifications but is refused admission only on grounds of religion, race, caste, language or any of them, then there is a clear breach of his fundamental right".

On behalf of the State it was contended that Article 46 charged the State with promoting, with special care, the educational and special interests of the weaker sections of the people and, in particular, of the Scheduled Castes and Scheduled Tribes and with protecting them from social injustice and all forms of exploitation.

But the Court rejected this argument on the ground that this was a Directive Principle a non-justifiable right and it could not override a Fundamental Right which was justifiable. It was the duty of the Court to enforce a Fundamental Right.

With the passing of the Forty-second Amendment of the Constitution this argument of the Court has lost much of its force. According to the Amendment where there is a conflict between a Fundamental Right and Directive Principle, Parliament may by law give precedence to the Directive Principle.

Right to conserve language, script or culture (Article 29(1) :— Clause (1) of Article 29 provides : "Any section of the citizen residing in the territory of India or any part thereof having a district language, script of culture of

its own shall have the right to conserve the same".

The "right to conserve" means the right to preserve and the right to maintain. The right to conserve one's own language, script of culture, thus, means and includes the right to preserve and to maintain own language, script or culture. It includes the right to preserve and maintain own language, script or culture. It includes the right to work for one's own language, script or culture and to agitate for the same.

The right contained in Article 29 (1) may be exercised by setting up educational institutions and by imparting instructions to the children of their own community in their own language.

In ***D.A.V. College, Bhatinala v. State of Punjab***, AIR 1971 SC 1731 - The Punjab University was established at Patiala under the Punjab University Act, 1961, after the reorganization of the State of Punjab in 1969, the Punjab Government issued a Notification providing for the compulsory affiliation of all the colleges situated within the area under the jurisdiction of the Punjab University, Patiala. Thereafter, the University issued the impugned circular to all the affiliated colleges requiring them to introduce Punjab in Gurmukhi script as the Court struck down the circular as well a examinations. The Supreme Court struck down the circular as violative of the right of the petitioner to conserve their script and language and to administer their institutions in their own way.

Article 29(2) : No citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them.

The minority people have the right to admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, language or any of them. The protection of Art. 29(2) is available to all citizens, whether they belong to a minority or majority group. Therefore school run by a majority, if it is aided by the State funds, cannot refuse admission to boys belonging to other communities. The State cannot direct such school to restrict admission to their own community.

In ***State of Madras v. Champakam Dorairajan***, [AIR 1951 SC 226], the order of Madras Government which had fixed the proportion of students of each community that could be admitted into the State Medical and Engineering Colleges was challenged on the ground that it denied admission to a person only on the ground of religion or caste. The Supreme Court held that the order was invalid for being violative of Art.29(2).

In ***State of Bombay v. Bombay Education Society***, [AIR 1954 SC 561], the Government by order directed the regulation of admission into the schools where the medium of instruction was English and the students whose language was not English were debarred from admission into English medium schools. The Supreme Court has held that the order is clearly in violation of Art.29(2) of the Constitution as the ground of denial of admission to the students was that their mother tongue was not English. Thus, refusal of admission only on the ground of language was disapproved by the Supreme Court being violative of Art.29(2) of the Constitution.

In ***St. Stephen's College etc. v. University of Delhi***, [AIR 1992 SC 1630], the Supreme Court has held that the minority aided educational institutions are entitled to prepare their community candidate to maintain the minority character of the institution but they cannot deny admission on ground only of religion, race, caste, language or any of them as laid down in Art.29(2) and will fall in line equally with all other educational institution in the matter of admitting students in such institutions and they are required to make available at least 50% of the annual admission to members of the communities other than the minority community.

Right of Minorities to establish and manage Educational Institutions :-

Article 30(1) guarantees to all linguistic and religious minorities the 'right to establish' and the 'right to administer' educational institutions of their own choice. The word 'establish' indicates the right to bring into existence, while the right to administer an institution means the right to effectively manage and conduct the affairs of the institution. Thus, it leaves it to the choice of the minority to establish such educational institution as will serve both purposes, namely, the purpose of conserving their religion, language or culture, and also the purpose of giving through general education to their children in their own language.

Bramchari Sidheswar v. State of West Bengal, (1995) 4 SCC 646,

This case is popularly known as Ram Krishna Mission Case. In this case the Supreme Court held that, Ram Krishna Mission established by Swami Vivekananda to propagate Vedenta values as expounded by Ramakrishna is not a minority, separate and distinct from Hindu Religion but a religious sect or denomination of Hindu Religion and therefore not entitled to claim the fundamental right under Article 30(1) of the Constitution.

Clause (2) of Article 30 prohibits the State from making discrimination in the matter of grant of aid to any educational institution on the ground that it is managed by a religious minority or linguistic minority.

In ***State of Bihar v. Syed Raza***, AIR 197 SC 2425 - It has been held that for creation of post in a minority

institution for appointment prior approval of the Vice-Chancellor is not necessary and the persons so appointed would be entitled to grant in aid in view of Art. 30(1) of the Constitution. Clause (2) of Art. 30 provides that the State shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority., whether based on religion or language.

Consequent upon the delivery of the judgment of the eleven judges bench in T.M.A. Pai Foundation) the Union of India, various state government and perspectives. The state governments framed different statues / regulations to implement the judgment. The respective state governments enforced the said statutes in respect of self - financing private institutions, minority or otherwise. The UGC, AICTE and Medical Council of India also issued provisional / adhoc guidelines covering the same subject purported to be in terms of the provisions. This led to litigations in several courts and the orders passed therein were assailed before the Supreme Court. When these matters came up before a bench of the Supreme Court, the parties to the write petitions and special leave petitions interpreted the majority decision in T.M.A. Pai Foundation in way which suited them and, therefore, at the request of all, these matters were placed before a bench of live judges in ***Islamic Academy of Education v. State of Karnatak***. 151 In this case the constitution bench was constituted so that doubts/anomalies, if any, in the T.M.A. Pai Foundation could be clarified.

Most of the petitioners/applicants were unaided professional educational institutions (both minority and non - minority). It was submitted on their behalf that (a) fixation of percentage of seats that could be filled in unaided professional colleges (both minority and non - minority) by the management was impermissible; (b) private unaided professional institutions had been given complete autonomy not only as regards the admission of students but also as regards the determination of their own fee structure and there could be no interference by the government; and (c) the right to admit students was an essential facet of the right to administer, and so long as admission to unaided educational institutions was on a fair and transparent basis and on the basis of merit the government had no right to interfere. On behalf of non-minority institutions it was contended that they had a fundamental right to establish and administer educational institutions and that the majority judgment in T.M.A. Pai Foundations put them on a par with the minority in T.M.A. Pai Foundations put them on a par with the minority institutes.

On the other hand, the Union of India, various state government and some students submitted that **(a)** the right to set up and administer an educational institution was not an absolute right. This was subject to reasonable restrictions and national interest; **(b)** The Union of India, the states and the universities had statutory rights to fix the fees and to regulate the admission of students in order to ensure that **(i)** there was no profiteering **(ii)** capitation fee was not charged; **(iii)** admission was based on the principle of merit, and **(iv)** persons from backward classes and poorer sections of the society also had an opportunity to receive education, particularly professional education. **(c)** Unless it was ensured that colleges admitted students strictly on the basis of merit at a common entrance test, it would be impossible to ensure that capitation fees were not charged and there was no profiteering: and **(d)** minority educational institutions could not claim any higher or better rights than those enjoyed by non- minority educational institutions.

In view of the rival submissions by the parties before the court the following core questions arose for consideration before the Supreme Court :

1. Whether educational institutions are entitled to fix their own fee structure;
2. Whether minority non-minority educational institutions stand on the same footing and have the same rights;
3. Whether private unaided professional colleges are entitled to fill in their seats, to the extent of 100%, and if not, to what; and
4. Whether private unaided professional colleges are entitled to admit students by evolving their own method of admission.

With regard to the first question, namely, whether educational institutions were entitled to fix their own fee structure, Khare C.J, delivering the majority judgment observed that in view of para 56 of T.M.A. Pai Founda- tion there could be no fixing of rigid fee structure by the government. Each institute must have the freedom to fix its own fee structure taking into consideration their need to generate funds to run the institution and to provide facilities necessary for the benefits of the students. They must also be able to generate surplus, to be used for the betterment and growth of those educational institutions. Profit surplus could not be diverted for any other use of purpose.

With regard to statues and regulation governing the fixation of fees it was observed that the respective state governments/authority concerned shall set up, in each state, committee headed by a retired high court judge who shall be nominated by the chief justice of that state. He shall nominate the other specified members as well. The committee should be free to nominate /co-opt another independent person of repute. Each educa- tional institution must place before this committee its proposed fee structure well in advance of the academic

year. The fee fixed by the committee shall be binding for a period of three years, at the end of which period the institution would be liberty to apply for revision. If it was found that the institution was charging fee more than that fixed by the committee then the said could be appropriately penalized and also face the prospect of losing affiliation. The court clarified that this direction for setting up of a committee was given under article 142 of the Constitution and it shall remain in force till appropriate legislation was enacted by Parliament.

There were several other decisions of the Supreme Court interpreting the scope of Article 29 and 30.

These decisions lead us to the following conclusions :

1. Articles 29 and 30 create two separate rights although it is possible that they may meet, in a given case.
2. Whether a particular community is a minority or not is to be judged on the basis of the entire population of the area to which the particular legislation applies.
3. A minority can effectively conserve its script, language and culture by and through the establishment and maintenance of educational institutions of its choice.
4. The language of Article 29 (2) is wide and unqualified and covers all citizens whether they belong to the majority or minority groups.
5. The right of getting admission to an educational institution is a right which an individual citizen has as a citizen and not as a member of a community or class of citizens. Hence this right cannot be denied to citizens on grounds only of religion, race, caste, language or any of them.
6. In the case of a minority based on religion or language, the right to impart instruction in their own institutions to the children of their community in their own language must be protected. In such a case, the power of the State to determine the medium of instruction must yield to the fundamental right of the minority to the extent it is necessary to give effect to the right.
7. The words establish and administer in Article 30 (1) must be read conjunctively and if done so the minority is entitled to the right to administer an educational institution provided the said institution has been estab- lished by the minority and not otherwise.
8. The protection implied in Articles 29 and 30 applies not only to educational institutions established after the commencement of the Constitution but also to those established before it.

The rights of the minorities however cannot be absolute. They must be subject to restrictions in the interest of education as well as in pursuance of socio-economic objectives embodied in the Constitution.

The purpose of these rights was not to create vested interests in separateness of minorities but to maintain their individuality as well as distinct identity of their language and culture. But the preservation of such distinctiveness should not result in the minorities remaining isolated from the mainstream of national life.

As the nation makes progress, the barriers that divide citizens into majority and minority compartments should gradually disappear and the tradition-bound, rigid society in India should become transformed into a compos- ite, dynamic and progressive society cherishing common: national ideals and aspirations. Educational and cultural institutions should become the agents of such change rather than perpetuating narrow barriers between citizen and citizen.

Article 30 has been criticised, among other things, that the right to establish and administer? Educational institutions of their choice available to the minorities are denied to the majority community.

Also since the term minority has not been defined in the Constitution anywhere and there are advantages in belonging to the minority, groups within the majority Hindu Community have started claiming minority status.

The Arya Samaj in Punjab and the Ramakrishna Mission in Bengal arc prominent examples. They claim that they are not Hindus but represent independent minority religious groups. It is possible that such demands from other groups in future might make the religious minority problem more complex.

The term 'linguistic minority group' has been interpreted by the Supreme Court to mean a group of people who are in a numerical minority in a State as a whole as distinguished from any particular area or region thereof (vide Kerala Education Bill - Supra).

Taking the rights guaranteed under religious, educational and cultural fields as a whole, it will be noted that these are couched in the most comprehensive language, and the maximum possible freedom is guaranteed to the minorities, religious and linguistic.

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DOCTRINE OF ECLIPSE

The prospective nature of Art. 13(1) has given rise 13(1) has given rise to the 'doctrine of eclipse'.

Article 13 (1) : All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

The doctrine of eclipse means that an existing law inconsistent with a Fundamental Right, though becomes inoperative from the date of the commencement of the Constitution, is not dead altogether. It is overshadowed by the Fundamental Right and remain dormant, but is not dead. It is a good law if a question arises for the determination of rights and obligations incurred before the commencement of the Constitution.

The doctrine, flowing from the prospective nature of Art. 13(1) of the constitution of India, was evolved by the Supreme Court in the case of ***Bhikaji Narain Dhakras And Others v. The State Of Madhya Pradesh And Another*** [AIR 1955 SC 781.]. This case also held that on and after the commencement of the Consti- tution, the existing law, as a result of its becoming inconsistent with the provisions of article 19(1)(g) read with clause (6) as it then stood, could not be permitted to stand in the way of the exercise of that fundamental right. Thereby meaning that a valid pre-constitutional law violating a fundamental right becomes inoperative treat- ing it as having been eclipsed by the relevant fundamental right. If this fundamental right is amended and the shadow is removed, the laws revive and operate.

In other words, a law which violates fundamental rights is not a nullity or void ab initio but are only unenforce- able in the court of law i.e. remains in a moribund condition. "It is over-shadowed by the fundamental rights and remains dormant, but it is riot dead".

Till the time a law violates a fundamental right provided by the Indian Constitution, it is dormant and inopera- tive. But if such fundamental right is amended and thereby, the law no more violates, then in such a situation the law becomes alive and operative.

In the case of ***Keshavan Madhava Menon v. The State of Bombay***, [1961] S.C.R. 288. the law in question was an existing law at the time when the Constitution came into force. That existing law imposed on the exercise of the right guaranteed to the citizens of India by article 19(1)(g) restrictions which could not be justified as reasonable under clause (6) as it then stood and consequently under article 13(1) that existing law became void "to the extent of such inconsistency".

The court said that 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 which conferred the fundamental rights on the citizens.

Article 13(1) by reason of its language cannot be read as having obliterated the entire operation of the incon- sistent law or having wiped it out altogether the statute, book. 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 were not citizens and could not claim the fundamental right".

The court also said that Article 13(1) had the effect of nullifying or rendering the existing law which had become inconsistent with fundamental right as it then stood, ineffectual, nugatory and devoid of any legal force or binding effect, only with respect to the exercise of the fundamental right on and after the date of the com- mencement of the Constitution.

"The true position is that the impugned law became, as it were, eclipsed, for the time being, by the fundamen- tal right".

Such laws are not dead for all purposes. They exist for the purposes of pre-Constitution rights and liabilities and they remain operative, even after the commencement of the Constitution, as against non-citizens. It is only as against the citizens that they remain in a dormant or moribund condition.

Thus the Doctrine of Eclipse provides for the validation of Pre-Constitution Laws that violate fundamental rights upon the premise that such laws are not null and void ab initio but become unenforceable only to the extent of such inconsistency with the fundamental rights. If any subsequent amendment to the Constitution removes the inconsistency or the conflict of the existing law with the fundamental rights, then the Eclipse vanishes and that particular law again becomes active again.

In the case of ***K.K. Poonacha v. State of Karnataka***, (2010)9 JT 517, it has been observed that the doctrine of eclipse is to apply only to the pre-Constitution laws which are governed by Article 13(1) and would not apply to post-Constitutional laws which are governed by Article 13(2) of the Constitution.

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DOCTRINE OF SEVERABILITY

The doctrine of severability or separability means that if an offending provision can be separated from that which is constitutional then only that part which is offending is to be declared as void and not the entire statute. This is related to article 13 of the constitution of India. Article 13 of the Constitution says that : 13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void. The words "to the extent of such inconsistency be void : in the above articles means that only the repugnant provisions of the law in questions shall be treated by courts as void and not the entire statute.

Doctrine of Severability or Separability states that when a part of the statute is declared unconstitutional, then the unconstitutional part is to be removed and the remaining valid portion will continue to valid. The idea is to retain the Act or legislation in force by discarding / deleting only the void portion and retaining the rest.

The provision of Art. 13 means that an Act may not be void as a whole, only a part of it may be void and if that part is severable from the rest which is valid, then the rest may continue to stand and remain operative. The Act will then be read as if the invalid portion was not there. If, however, it is not possible to separate the valid from the invalid portion, then the whole of the statute will have to go.

In State of Bombay v. Balsara, AIR 1951, SC 318 a case under Bombay Prohibition Act, 1949, it was observed that the provisions which have been declared as void do not affect the entire statute, therefore, there is no necessity for declaring the statute as invalid.

A K Gopalan v State of Madras [AIR 1950 SC 27], Section 14 of Preventive Detention Act, 1950 is stuck down by the Supreme Court because it is in violation of Fundamental Rights. The principles of severability was discussed in this case, wherein the Court observed that what we have to see is, whether the omission of the impugned portions of the Act will "change the nature or the structure or the object of the legislation".

Doctrine of severability provides that if an enactment cannot be saved by construing it consistent with its constitutionality, it may be seen whether it can be partly saved [State of U.P. & Ors vs Jai Prakash Associates Ltd., SLP (C) No. 11305 of 2013.].

R.M.D. Chamarbaugwalla v. The Union of India (UOI), [AIR 1957 SC 628], is considered to be one of the most important cases on the Doctrine of Severability. In this case, the court observed that :

"The doctrine of severability rests, as will presently be shown, 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 the true nature of the subject-matter of the legislation that is the determining factor, and while a classification made in the statute might go far to support a conclusion in favour of severability, the absence of it does not necessarily preclude it".

The court further said that :

"When a statute is in part void, it will be enforced as regards the rest, if that is severable from what is invalid".

In the above-mentioned case, it was also said that :

"Another significant canon of determination of constitutionality is that the Courts would be reluctant to declare a law invalid or ultra vires on account of unconstitutionality. The Courts would accept an interpretation, which would be in favour of constitutionality rather than the one which would render the law unconstitutional.

The court can resort to reading down a law in order to save it from being rendered unconstitutional. But while doing so, it cannot change the essence of the law and create a new law which in its opinion is more desirable".

Following explanations are also relevant for the purpose of understanding the Doctrine of Severability and its application in complex legal situations.

1. Cooley's Constitutional Limitations :

A. 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.

B. 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.

2. **Crawford on Statutory Construction :** 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.

Applying the afore-stated principles and reasoning in the case of ***Suresh Kumar Koushal and another v.***

Naz Foundation and Others [Civil Appeal No. 10972 OF 2013., the court observed that while the High Court and the Supreme Court are empowered to review the constitutionality of Section 377 IPC and strike it down to the extent of its inconsistency with the Constitution, self-restraint must be exercised and the analysis must be guided by the presumption of constitutionality.

Hence, in the Naz Foundation Case, the court finally held that unless a clear constitutional violation is proved, the Court is not empowered to strike down a law merely by virtue of its falling into disuse or the perception of the society having changed as regards the legitimacy of its purpose and its need.

There are many important cases that have discussed about the Doctrine of Severability. Some of them are:

1. In the case of ***Kihoto Hollohan vs Zachillhu And Others***, [1992 SCR (1) 686], it was said that the doctrine of severability envisages that if it is possible to construe a statute so that its validity can be sustained against a constitutional attack it should be so construed and that when part of a statute is valid and part is void, the valid part must be separated from the invalid part.
2. Reading Down : In the case of ***D.S. Nakara & Others v. Union of India***,[AIR 1983 SC 130], the court said that whenever a classification is held to be impermissible and the measure can be retained by removing the unconstitutional portion of classification or by striking down words of limitation, the resultant effect may be of enlarging the class. In such a situation, the Court can strike down the words of limitation in an enactment. That is what is called reading down the measure.

It appears that it is difficult to evolve a clear cut principle as much depends on the facts of each case, the determining factor being whether, on the provision being sustained to the extent it falls within the permissible limits, is there any danger of its being misused for the purpose not permitted ? If the Court has the ultimate control to decide whether a particular application of the law goes beyond the permissible limits, then there may not be any danger of misuse of the provision. If, however, the matter has been left to the subjective satisfaction of the Executive, and the Court can not scrutinise the basis of such satisfaction to see whether the law has been applied to a purpose not permitted, then it will be safer to declare the whole provision bad.

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DOCTRINE OF WAIVER

Doctrine of Waiver says that Fundamental Rights are not absolute and are subject to certain reasonable restrictions and hence an individual cannot chose to get his fundamental rights waived, relinquished or abandoned.

RELATED CASES / RECENT CASES / CASE LAW

- Basheshar Nath v Commissioner of Income Tax, AIR 1959 SC 149

DOCTRINE OF WAIVER

Definition :

The Doctrine of Waiver seems to be based on the premise that a person is his best judge and that he has the liberty to waive the enjoyment of such rights as are conferred on him by the state.

Black's Law Dictionary defines Waiver as "the voluntary relinquishment or abandonment (express or implied) of a legal right or advantage". It also says that the party alleged to have waived a right must have had both knowledge of the existing right and the intention of forgoing it.

Various Legal luminaries and scholars have also tried to explain the Doctrine of Waiver.

1. **William R. Anson :** The term waiver is one of those words of indefinite concoction in which our legal literature abounds; like a cloak, it covers a multitude of sins.
2. Restatement (Second) of Contracts - Waiver is often inexactly defined as the 'voluntary relinquishment of a known right'. When the waiver is reinforced by reliance, enforcement is often to rest on 'estoppel'. Since the more common definition of estoppel is limited to reliance on a misrepresentation of an existing fact, reliance on a waiver or promise as to the future is sometimes said to create a 'promissory estoppel'. The common definition of waiver may lead to the incorrect inference that the promisor must know his legal rights and must intend the legal effect of the promise. But it is sufficient if he has reason to know the essential facts.
3. Keeton - Waiver is often asserted as the justification for a decision when it is not appropriate to the circumstances.
4. Farnsworth on Contracts - Although it has often been said that a waiver is 'the intention relinquishment of a known right', this is a misleading definition. What is involved is not the relinquishment of a right and the termination of the reciprocal duty but the excuse of the non-occurrence of or delay in the occurrence of a condition of a duty.

American Conception of Doctrine of Waiver :

In the famous case of ***Miranda v. Arizona*** [384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).], the Supreme Court laid down certain requirements known as the Miranda Rights. These requirements include stipulations such as the right to remain silent and that they may have an attorney present questioning.

However, in USA, a Criminal Defendant may waive the right to remain silent as well as the other Miranda Rights and make a confession, but the Prosecution must demonstrate to the court that the 'waiver' was the product of a free and deliberate choice rather than a decision based on intimidation, coercion, force or deception. It must also be proved that the defendant was fully aware of the Miranda rights being abandoned and the consequences thereof.

Doctrine of Wavier in India :

Doctrine of Waiver says that Fundamental Rights are not absolute and are subject to certain reasonable restrictions and hence an individual cannot chose to get his fundamental rights waived, relinquished or abandoned.

There have been plethora of cases that have discussed the doctrine of Waiver. Some of the important ones are.

1. ***Jaswantsingh Mathurasingh & Anr. v. Ahmedabad Municipal Corporation & Ors.***[(1992) Supp. 1 SCC 5.]- In this case, the court said that everyone has a right to waive an advantage or protection which seeks to give him/her. For e.g. In case of a Tenant-Owner dispute, if a notice is issued and no representation is made by either the owner, tenant or a sub-tenant, it would amount to waiver of the opportunity and such person cannot be permitted to turn around at a later stage.

2. ***Krishna Bahadur v. M/s. Purna Theatre & Ors.***[AIR 2004 SC 4282.] - This case made a differentiation between the principle of Estoppel and the principle of Waiver. The court said that "the difference between the two is that whereas estoppel is not a cause of action; it is a rule of evidence; waiver is contractual and may constitute a cause of action; it is an agreement between the parties and a party fully knowing of its rights has agreed not to assert a right for a consideration".

The court also held that :

"A right can be waived by the party for whose benefit certain requirements or conditions had been provided for by a statute subject to the condition that no public interest is involved therein. Whenever waiver is pleaded it is for the party pleading the same to show that an agreement waiving the right in consideration of some compromise came into being. Statutory right, however, may also be waived by his conduct."

3. ***Municipal Corporation of Greater Bombay v. Dr. Hakimwadi Tenants' Association & Ors.*** [AIR 1988 SC 233.] : This case said that even though Waiver and Estoppel are two different concepts, still the essence of a Waiver is an estoppel and without Estoppel, there cannot be any Waiver. The court also said "Estoppel and waiver are questions of conduct and must necessarily be determined on the facts of each case".

Doctrine of Waiver and Fundamental Rights in India :

Fundamental Rights are the most special of the rights in Indian Context. These rights though sacrosanct are not absolute in nature. Our Constitution imposes various imposes various reasonable restrictions upon the exercise of fundamental rights.

As stated above, we saw that a right can be waived subject to the condition that no public interest is involved therein. However, the scope of the Doctrine of Waiver with respect to Fundamental rights is a bit different. It was discussed in the case of ***Basheshr Nath v. Income Tax Commissioner*** [AIR 1959 SC 149.]. The petitioner's case was referred to the Income-tax Investigation Commissioner under 5(1) of the relevant Act. After the Commissioner had decided upon the amount of concealed income, the petitioner on May 19, 1954, agreed as a settlement to pay in monthly instalments over Rs. 3 lacs by way of tax and penalty. In 1955, The Supreme Court declared S. 5(1) ultra vires Art. 14. The petitioner thereupon challenged the settlement between him and the Commission, but the plea of waiver was raised against him. The Supreme Court however upheld his contention.

The Court said that :

"Without finally expressing an opinion on this question we are not for the moment convinced that this Doctrine has any relevancy in construing the fundamental rights conferred by Part III of our Constitution. We think that the rights described as fundamental rights are a necessary consequence of the declaration in the preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty, of thought, expression, belief, faith and worship; equality of status and of opportunity. These 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 provisions of law which have been enacted as a matter of Constitutional policy. Reference to some of the articles, inter alia, Articles 15(1) 20, 21, makes the proposition quite plain. A citizen cannot get discrimination by telling the State 'You can discriminate', or get convicted by waiving the protection given under Articles 20 and 21."

We find that the primary objective of Fundamental Rights is based on Public Policy. Thus, individuals are not allowed to waive off such fundamental rights. Also, it is the constitutional mandate of the Courts to see that Fundamental Rights are enforced and guaranteed even if one might wish to waive them.

Conclusion : It means "a person from denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth, either by the acts of judicial or legislative officers, or by his own deed, acts, or representations, either express or implied.

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DOUBLE JEOPARDY

I. Introduction

Fundamental right which is guaranteed under Article 20(2) of Constitution of India incorporates the principles of "autrefois convict" or Double jeopardy which means that person must not be punished twice for the offence. Doctrine against Double Jeopardy embodies in English common law's maxim "nemo debet bis vexari, si constat curice quod sit pro una iti eadem causa" (no man shall be punished twice, if it appears to the court that it is for one and the same cause). It also follows the "audi alterum partem rule" which means that no person can be punished for the same offence more than ones. And if a person is punished twice for the same offence it is termed Double jeopardy.

Meaning of Jeopardy

The word Jeopardy refers to the "danger" of conviction that an accused person is subjected to when one trial for a criminal offence.

Meaning of Double Jeopardy

The act of putting a person through a second trial of an offence for which he or she has already been prosecuted or convicted.

This means that if a person is prosecuted or convicted ones cannot be punished again for that criminal act. And if a person is indicated again for the same offence in the court then he has the plea of Double Jeopardy as a valid defense.

II. Indian Law and Double Jeopardy

The Double Jeopardy principle was existed in India prior to the enforcement of the Constitution of India. It was enacted under in Section 26 of General Clauses Act, 1897. Section 26 states that "provision as to offences punishable under two or more enactments,- where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted or punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence.

III. Constitutional Implication

In Constitution of India, Double Jeopardy is incorporated under Article 20(2) and it is one of fundamental right of the Indian Constitution. And the features of fundamental rights have been borrowed from U.S. Constitution and the concept of Double Jeopardy is also one of them. Principle of Double Jeopardy is incorporated into the U.S. Constitution in the Fifth Amendment, which says that "no person shall be twice put in Jeopardy of life or limb".

Article 20 of the Indian Constitution provides protection in respect of conviction for offences, and article 20(2) contains the rule against double jeopardy which says that "no person shall be prosecuted or punished for the same offence more than once". The protection under Clause (2) of Article 20 of Constitution of India is narrower than the American and British laws against Double Jeopardy.

Under the American and British Constitution the protection against Double Jeopardy is given for the second prosecution for the same offence irrespective of whether an accused was acquitted or convicted in the first trial. But under Article 20(2) the protection against double punishment is given only when the accused has not only been 'prosecuted' but also 'punished', and is sought to be prosecuted second time for the same offence. The use of the word 'prosecution' thus limits the scope of the protection under clause (1) of Article 20. If there is no punishment for the offence as a result of the prosecution clause (2) of the article 20 has no application and an appeal against acquittal, if provided by the procedure is in substance a continuance of the prosecution, ***Smt. Kalawati v. state of H.P.***,[AIR 1953 SC 131.]

IV. Can Different Charge Is Laid For The Same Action Or Same Offence?

Doctrine against Double Jeopardy in Constitution of India, Article 20(2) says that "no person shall be prosecuted and punished for the same offence more than once." But it is subjected to certain restrictions. And it is to be noted that Article 20(2) of Constitution of India does not apply to a continuing offence.

There are some examples of cited cases mentioned below which throw light on the above question :

In ***Venkataraman v. Union of India***,[AIR 1954 SC 375,] An enquiry was made before the enquiry commissioner on the appellant under the Public Service Enquiry Act, 960 & as a result, he was dismissed from the service. He was later on, charged for committed the offence under Indian Penal Code & the Prevention of

Corruption Act. The court held that the proceeding held by the enquiry commissioner was only a mere enquiry & did not amount to a prosecution for an offence. Hence, the second prosecution did not attract the doctrine of Double Jeopardy or protection guaranteed under Fundamental Right Article 20 (2).

It is to be noted that Article 20 (2) will applicable only where punishment is for the same offence, in ***Leo Roy v. Superintendent District Jail***,[AIR 1958 SC119,] The Court held: if the offences are distinct the rule of Double Jeopardy will not apply. Thus, where a person was prosecuted and punished under sea customs act, and was later on prosecuted under the Indian Penal Code for criminal conspiracy, it was held that second prosecution was not barred since it was not for the same offence.

Maqbool Husain v. State of Bombay, AIR 1953 SC 325, the appellant brought some gold into India. He did not declare that he had brought gold with him to the Customs Authorities on the airport. The customs authorities confiscated the gold under the Sea Customs Act. Under the Foreign Exchange Regulation Act, he was later on charged for having committed an offence. The appellant contended that second prosecution was in violation of Article 20(2) as it was for the same offence, i.e., for importing gold in contravention of Government Notification for which he had already been prosecuted and punished as his gold had been confiscated by the Customs Authorities. The Court held that the Sea Custom Authorities were not a court or judicial tribunal and the adjudging of confiscation under the Sea Custom Act did not constitute a judgment of judicial character necessary to take the plea of the double jeopardy. Hence, the prosecution under the Foreign Exchange Regulation Act was not barred.

Conclusion :

The rule against Double Jeopardy stipulates that no one may be put in peril twice for the same offence. It is a concept originated from "Natural Justice System" for the protection of integrity of the "Criminal Justice System". The concept of Double Jeopardy follows the "audi altermn partum rule" which means a person cannot be punished twice for the same offence. But it is to be noted that there are some restrictions too in the Indian laws related to Double Jeopardy.

In ***The State of Bombay v. S.L. Apte and anr.***,[AIR 1961 SC 578] The Constitution Bench of this Court while dealing with the issue of double jeopardy under Article 20(2), held : To operate as a bar the second prosecution and the consequential punishment there under, must be for "the same offence". The crucial requirement therefore for attracting the Article is that the offences are the same i.e. they should be identical. If, however, the two offences are distinct, then notwithstanding that the allegations of facts in the two complaints might be substantially similar, the benefit of the ban cannot be invoked. It is, therefore, necessary to analyze and compare not the allegations in the two complaints but the ingredients of the two offences and see whether their identity is made out.

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EQUAL PROTECTION OF LAW

"Equal protection of law" has been given in article 14 of our Indian constitution which has been taken from section 1 of the 14th amendment act of the constitution of the united state.

Meaning of equal protection of law: here, it means that each person within the territory of India will get equal Protection of laws.

In ***Stephen's College v. University of Delhi*** 1992 AIR 1630 under The court held that the expression "Equal protection of the laws is now being read as a positive Obligation on the state to ensure equal protection of laws by bringing in necessary social and economic changes so that everyone may enjoy equal protection of the laws and nobody is denied such protection. If the state leaves the existing inequalities untouched laws d by its laws, it fails in its duty of providing equal protection of its laws to all persons. State will provide equal protection to all the people of India who are citizen of India and as well as non citizen of India.

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

The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, and place of birth or any of them. No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to- access to shops, public restaurants, hotels and places of public entertainment; or the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. Nothing in this article shall prevent the State from making any special provision for women and children. Nothing in this article or in clause (2) of article 29 shall prevent the State from making any special provision for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. Nothing in this article or in sub-clause (g) of clause (1) of article 19 shall prevent the State from making any special provision, by law, for the advancement of any socially and educationally backward classes of citizens or for the Scheduled Castes or the Scheduled Tribes in so far as such special provisions relate to their admission to educational institutions including private educational institutions, whether aided or unaided by the State, other than the minority educational institutions referred to in clause (1) of article 30.

Article 15 prohibits the state from discriminating any citizen on ground of any religion, race, caste, sex, place of birth or any of them. It provides that there shall be no restriction on any person on any of the above bases to access and use the public places. The Article 15(3) empowers the state to make special laws regarding the women and children in the context of discrimination. Article 15.4 was added by Constitution First amendment Act 1951 and Article 15.5 was added by Constitution 93rd amendment act 2005. Article 15.3, 15.4 & 15.5 make special notable exceptions. The first exception I that it permits the state to make special provisions for women and Children as provided by Article 15.3. The second and third exceptions as per Article 15.4 & 15.5 empower the state to make special provisions for socially/ educationally backward classes of the country and Schedule castes and scheduled tribes. Similarly Article 16(4) also empowers the state to make laws for protec- tion of SC and ST. We should note here that Article 15(4) and 15(5) are the foundation bricks of reservation policy in India. It appears that article 15(4) and 15(5) violate Article 14. However, Reservation under Article 15(4) , 15(5) and 16(4) is not the violation of right to equality guaranteed under Article 14 because protective discrimination is also a facet of equality. Equality is the basic feature of the Constitution of India and any treatment of equals unequally and unequal equally is the violation of basic structure of the Constitution. The Articles 15(4) and 16(4) take into account the de facto inequalities which exist in the society. In order to bring about the real equality, preference given to the socially and economically disadvantaged groups is justified. Under Article 14, 15 and 16, the protective discrimination is a facet of quality. Therefore, when competing rights between general and reserved candidates require adjudication and adjustment with the right of the general category candidates, the doctrine of violation of Article 14 has no role to play.

New Concept of Equality For The Protection of People of India :

In the case of the ***Air India v. Nargesh Meerza Regulation Air India Etc. Etc vs Nergesh Meerza & Ors. Etc.*** 1981 AIR 1829, 1982 SCR (1) 438, 46 of Indian Airlines regulations provides an air Hostess will be retire from the service upon attaining the age of 35 years or on marriage within 4 years of Service or on first

pregnancy, whoever found earlier but regulation 47 of the regulation act the managing director had the discretion extend the age of retirement one year at a time beyond the age of retirement up to the age of 45 years at his option if an air hostess was found medically fit .it was held by the court that an air hostess on the ground of pregnancy was unreasonable and arbitrary, it was the violation of article 14 under constitution law of India. The regulation did not restrict marriage after four years and if an air hostess after having fulfilled the condition became pregnant, there was no ground why first pregnancy should stand in the way of her running service. of the court said that the termination of service on pregnancy was manifestly unreasonable and arbitrary on the basis of this it was violation of article 14 of Indian constitution.

In John Vallamattom v. union of India, section 118 of the Indian succession Act, 1925 court invalidated which prohibited the right of a Christian to make valid will for a religious or charitable purpose only if he made it at least 12 months before his death. The court occurred the prescription of time and the application of the provision only to Christian artificial having no nexus with the object of law. In P. Rajendan v. state of Madras, court said that there was district wise distribution of seats in state medical colleges on the ground of proportion of population of a district to the total population of the state. classification will be valid under article 14, there must be a relation between the classification and the object sought to be achieved. Any one scheme of admission rules should be devised so as to select the best available talent for admission to medical college in the state. in reality discriminatory as a high qualified candidate from one district may be rejected while a less qualified candidate from another district may be admitted.

In ***D.S Nakara v. Union of India***, in this case supreme court said that Rule 34 of the central services(pension) rules, 1972 as unconstitutional on the ground that the classification made by it between pensioners retiring before a certain date and retiring after that date was not depend upon the any rational principal it was arbitrary and the infringement of article of article 14 of Indian constitution law.

Article 361 of Indian Constitution Law

The President, or the governor or rajpramukh of a state, shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him In the exercise and performance of those power and duties. Provided that the conduct of the president may be brought under review

361. Protection of President and Governors and Rajpramukhs.

1) The President, or the Governor or Rajpramukh of a State, shall not be answerable to any court for the exercise and performance of the powers and duties of his office or for any act done or purporting to be done by him in the exercise and performance of those powers and duties:

Provided that the conduct of the President may be brought under review by any court, tribunal or body appointed or designated by either House of Parliament for the investigation of a charge under article 61: Provided further that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Government of India or the Government of a State.

2) No criminal proceedings whatsoever shall be instituted or continued against the President, or the Governor of a State, in any court during his term of office.

3) No process for the arrest or imprisonment of the President, or the Governor of a State, shall issue from any court during his term of office.

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

In ***Srinivas Theatre v. state of T.N., Reddy, J.***, has noted that equality before law is a dynamic concept having many facets. one of them there is that there shall be no privileged person of class and name shall be above state law. A fact there of is the obligation upon the state to bring about, through the machinery of law, a more equal society envisaged by the preamble and part IVth (directive principles of state policy) of the Indian constitution.

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PROCEDURE ESTABLISHED BY LAW VS DUE PROCESS OF LAW

Two important terms often cited in Supreme Court Judgments - Procedure Established by Law and Due Process of Law - their meanings and significance. The former is Indian constitutional doctrine and the latter is American, but now the boundaries are very narrow. Article 21 in The Constitution Of India

21. **Protection of life and personal liberty :** No person shall be deprived of his life or personal liberty except according to procedure established by law.

Procedure Established by Law vs Due Process of Law

As we have seen, the term "procedure established by law" is used directly in the Indian constitution. Due Process of Law has much wider significance, but it is not explicitly mentioned in Indian Constitution. The due process doctrine is followed in United States of America, and Indian constitutional framers purposefully left that out. But in most of the recent judgments of the supreme court, the due process aspect is coming into picture again.

Case 1 : Procedure Established by Law

It means that a law that is duly enacted by legislature or the concerned body is valid if it has followed the correct procedure. Following this doctrine means that, a person can be deprived of his life or personal liberty according to the procedure established by law. So, if Parliament pass a law, then the life or personal liberty of a person can be taken off according to the provisions and procedures of the that law. This doctrine has a major flaw. What is it? It does not seek whether the laws made by Parliament is fair, just and not arbitrary. "Procedure established by law" means a law duly enacted is valid even if it's contrary to principles of justice and equity. Strictly following procedure established by law may raise the risk of compromise to life and personal liberty of individuals due to unjust laws made by the law making authorities. It is to avoid this situation, SC stressed the importance of due process of law.

Case 2 : Due Process of Law

Due process of law doctrine not only checks if there is a law to deprive the life and personal liberty of a person, but also see if the law made is fair, just and not arbitrary. If SC finds that any law as not fair, it will declare it as null and void. This doctrine provides for more fair treatment of individual rights.

Under due process, it is the legal requirement that the state must respect all of the legal rights that are owed to a person and laws that states enact must confirm to the laws of the land like - fairness, fundamental rights, liberty etc. It also gives the judiciary to access the fundamental fairness, justice, and liberty of any legislation.

The difference in layman's terms is as below: Due Process of Law = Procedure Established by Law + The procedure should be fair and just and not arbitrary.

History of Due Process of Law

Due process developed from clause 39 of the Magna Carta in England. When English and American law gradually diverged, due process was not upheld in England, but did become incorporated in the Constitution of the United States.

Change of situation in India : *Maneka Gandhi vs Union of India* case (1978)

In India a liberal interpretation is made by judiciary after 1978 and it has tried to make the term 'Procedure established by law' as synonymous with 'Due process' when it comes to protect individual rights. In Maneka Gandhi vs Union of India case (1978) SC held that - 'Procedure established by law' within the meaning of article 21 must be 'right and just and fair' and 'not arbitrary, fanciful or oppressive' otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied. Thus, the 'procedure established by law' has acquired the same significance in India as the 'due process of law' clause in America.

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EX POST FACTO LAWS AND INDIAN LEGAL SCENARIO

Protection against Ex Post Facto Laws and Indian Legal Scenario

In this creation of god, who knows what is going to happen the next day? It is settled principle that for the action one is going to get the reaction but nowhere in any document or any scriptures is the action defined. Certain actions of man in one era are considered good and in another bad. Certain actions are considered to be legal at one time and illegal at another. It is this inconsistency in man to decide what is good and bad that has become the reason to have immunity from ex post facto laws. An act that was thought innocent at one time is no longer innocent today but is illegal. These changing circumstances have lead to wrongful punishment of many innocent individuals. For what reason and how the ex post facto laws are justified and if not then what is the remedy for protection against such ex post facto laws. How the Supreme Court the final pedestrian of the justice has played its role in providing the protection against ex post facto laws?

Is Ex post Facto Laws are Laws ?

An ex post facto law (from the Latin for "from something done afterward") or retroactive law is a law that retroactively changes the legal consequences of acts committed or the legal status of facts and relationships that existed prior to the enactment of the law. Ex post facto laws are laws that, retrospectively increase punishments for existing offences, Laws that do not directly punish persons but which create new liabilities for past conduct as judicially determined, Laws that retrospectively remove defenses or exceptions to civil or criminal liability. Generally speaking, ex post facto laws are seen as a violation of the rule of law as it applies in a free and democratic society. At this point of time question comes in the mind that is ex post facto law is law? If it's not a law then what is the mechanism for protection against such laws.

Moral objections against ex post facto laws ?

Suppose a person does an act in 1990 which is not then unlawful. A law is passed in 1992 making that act a criminal offence and seeking to punish that person for what he did in 1990. Or suppose, punishment prescribed is increased in 1992 to imprisonment for a year, and is made applicable to the offences committed before 1992. These both are the examples of the ex- post facto laws. Such laws are regarded as inequitable and abhorrent to the notions of justice.

Safeguards against the ex post facto laws :

The moral objection to ex post facto law is not founded on constitutional pragmatics but on the most fundamental demand of the rule of law that a person is subject only to established and known law. Accordingly, Art 15(1) of the United Nations Covenant on Civil and Political Rights (ICCPR) condemns laws that hold a person 'guilty of any criminal offence on account of any act or omission, which did not constitute a criminal offence, at the time when it was committed or impose a heavier penalty than the one that was applicable at the time when the criminal offence was committed'.

Indian Constitution and ex post facto laws :

Article 20(1) of the Indian constitution provides necessary protection against ex post facto law. Art. 20(1) has two parts. Under the first part, no person is to be convicted of an offence except for violating 'a law in force' at the time of the commission of the of the act charged as an offence. A person is to be convicted for violating a law in force when the act charged is committed. A law enacted later, making an act done earlier (not an offence when done) as an offence, will not make the person liable for being convicted under it. [***Kanaiyalal v. Indumati***, AIR 1958 SC 444: 1958 SCR 1394.] The second part of Art. 20(1) immunizes a person from a penalty greater than what he might have incurred at the time of his committing the offence. Thus, a person cannot be made to suffer more by an ex-post-facto law than what he would be subjected to at the time he committed the offence. [***Wealth Tax Commr. Amritsar v. Suresh Seth***, AIR 1981SC 1106] What is prohibited under Art. 20(1) is only conviction or sentence, but not trial, under an ex-post-facto law. The objection does not apply to a change of procedure or of court. A trial under a procedure different from what obtained at the time of the commission of the offence or by a court different from that which had competence ate then time cannot ipso facto be held unconstitutional. A person being accused of having committed an offence has no fundamental right of being tried by a particular court or procedure, except in so far as any constitutional objection by way of discrimination or violation of any other fundamental right may be involved.

Verdicts of Supreme Court and Ex Post Facto Laws :

Supreme Court of India has played an important role in exploring as well in interpreting the doctrine of ex-post-facto law. Apart from above mentioned cases there are several cased in which apex court has dealt with the

questions regarding operation of such laws. In ***R. S. Joshi v. Ajit Mills Ltd.*** [AIR 1977 SC 2279] Supreme Court said that Art.20 relates to the constitutional protection given to persons who are charged with a crime before a criminal court. The word 'penalty' in Art. 20(1) is used in the narrow sense as meaning a payment "which has to be made or a deprivation of liberty which has to be suffered as a consequence of finding that the person accused of a crime is guilty of the charge".

The immunity extends only against punishment by courts of a criminal offence under as ex-post-facto law, and cannot be claimed against preventive detention, or demanding a security from a press under a press law, for acts done before the relevant law is passed. Similarly, a tax can be imposed retrospectively. [***Sunderaramier & Co. v. State of Andhra Pradesh***, AIR 1958 SC 468.] Imposing retrospectively special rates for unauthorized use of canal water is not hit by Art. 20(1). [***Jawala Ram v. Pepsu***, AIR 1962 SC 1246.]

Art. 20(1) does not make a right to any course of procedure a vested right. Thus, a law which retrospectively changes the venue of trial of an offence from a criminal court to an administrative tribunal is not hit by Art. 20(1). [***Union of India v. Sukumar***, AIR 1966 SC 1206.] A change in court entitled to try an offence is not hit by Art. 20(1). [***Shiv Bahadur v. Vindhya Pradesh***, AIR 1953 SC 394.] Similarly, a rule of evidence can be made applicable to the trial of an offence committed earlier.

In order to punish corrupt government officers, parliament has enacted the preventive of corruption Act which creates the offence of criminal misconduct. S. 5(3) crates a presumption to the effect that if the government servant for corruption has in his possession property or assets which were wholly disproportionate to his known sources of income and if he cannot explain the same satisfactorily, then he is guilty of criminal misconduct. S. 5(3) was challenged before Supreme Court in ***Sujjan Singh v. State of Punjab*** [AIR 1964 SC 464] vis-à-vis Art. 20(1). It was argued that when S.5(3) speaks of the accused being in possession of pecuniary resources, or property disproportionate to his known sources of income, only the pecuniary resources or property acquired after the date of the act is meant. To think otherwise would be to give the Act retrospective operation and for this there is no justification. The Supreme Court rejected the contention that to take into consideration the pecuniary resources or property in the possession of the accused, or any other person on his behalf, which are acquired before the date of the Act is in any way giving the Act a retrospective operation. The court explained the position as follows : "the statute cannot be said to be retrospective because a part of the requisites for its actions is drawn from a time antecedent to its passing". The court also rejected the contention that S. 5(3) crates a new offence in the discharge of official duty. According to the court S. 5(3) does not create a new offence. The court stated further : "it merely prescribes a rule of evidence for the purpose of proving the offence of criminal misconduct as defined in S. 5(1) for which an accused person is already under trial…when there is such a trial which necessarily must be in respect of acts committed after the prevention of corruption Act came into force, S.5 (3) places in the hands of the prosecution a news mode of proving an offence with which an accused has already been charged".

A person can be convicted and punished under a 'law in force' which means a law 'factually' in existence at the time the offence was committed. A law not factually in existence at the time, enacted subsequently, but by a legislative declaration 'deemed' to have become operative from an earlier date (by a fiction of law), cannot be considered to be a law 'factually' in force earlier than the date of its enactment and the infirmity applying to an ex-post-facto law applies to it, the reason is that if such a fiction were accepted, and a law passed later were to be treated as a law in existence earlier, then the whole purpose of the protection against an ex-post-facto law would be frustrated, for a legislature could then give a retrospective operation to any law.

A slightly different situation is presented by the following fact-situation. A law was made in 1923, and certain rules were made there under. The Act of 1923 was replaced in 1952 by another Act, but the old rules were deemed to be the rules under the new Act as well. As these rules had been operative all along and did not constitute retrospective legislation, an offence committed in 1955 could be punishable under them as these were factually in existence at the date of the commission of the offence. [***Chief Inspector of Mines v. Karam Chand Thapra***, AIR 1961 SC 838.]

When a late statute again describes an offence describes an offence created by a statute enacted earlier, and the later statute imposes a different punishment, the earlier statute is repealed by implication. But that is subject to Art. 20(1) against ex-post-facto law providing for a greater punishment. The later Act will have no application if the offence described therein is not her same as in the earlier Act, i.e., if the essential ingredients of the two offences are different. If the later Act creates new offences, or enhances punishment for the same offence, no person can be convicted under such an ex-post-facto law nor can the enhanced punishment prescribed in the later Act apply to a person who had committed the offence before the enactment of the later

law. [***T. Barai v. Henry Ah Hoe***, AIR 1983 SC 150.]

Further, what Art. 20(1) prohibits is conviction and sentence under as ex-post-facto law for acts done prior thereto, but not the enactment or validity of such a law. There is, thus, a difference between the Indian and the American positions on this point, whereas in America, an ex-post-facto law is in itself invalid, it is not so in India. The courts may also interpret a law in such a manner that any objection against it of retrospective operation may be removed. [***Sardar Gyan Singh v. State of Bihar***, AIR 1975 Pat.69] In ***Lily Thomas v. Union of India*** [AIR 1995 Sc 1531] it was argued that the law declared by the Supreme Court in Sarla Mudgal could not be given retrospective effect because of Art. 20(1); it ought to be given only prospective operation so that the ruling could not be applied to a person who had already solemnised the second marriage prior to the date of the Sarla Mudgal judgment [AIR 2000 Sc 1650]. However, Supreme Court rejected the contention arguing that it had not laid down any new law in Sarla Mudgal. What the court did in that case was only the law which had always been existence. It is the settled principle that the interpretation of a provision of law relates back to the date of the law itself and cannot be prospective from the date of the judgment because the Court does not legislate but only interprets existing laws.

Conclusion :

Indians are blessed against the application of ex post facto law as Indian judiciary has provide protection and a strong safeguard against ex post facto laws and Indian Constitution is itself a law against such laws. I am of the opinion that in those countries where such protective clause has not been incorporated in its constitutions they have problems provided their judiciary is not taking the same in to consideration. I personally believe that Indian Judiciary has completely justified the application of Art. 20 (1) of the Constitution of India which also reflects in the pronouncement of the Supreme Court verdicts. At the same time Supreme Court has also use some of them to provide justice to the victims also. So it can be concluded that in India every action if legally and justifiably defined and so what today morally wrong in Indian will be morally wrong forever provided it is according the principle of natural justice.

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JUDICIAL ACTIVISM

Origins :

Its emergence can be traced back to 1893, when Justice Mahmood of Allahabad High Court delivered a dissenting judgement.

It was a case of an under trial who could not afford to engage a lawyer, So the question was whether the court could decide his case by merely looking his papers, Justice Mahmood held that the pre-condition of the case being "heard" would be fulfilled only when somebody speaks.

Meaning :

The judicial activism is use of judicial power to articulate and enforce what is beneficial for the society in general and people at large. Supreme Court despite its constitutional limitation has come up with flying colors as a champion of justice in the true sense of the word. JUSTICE… this seven letter word is one of the most debated ones in the entire English dictionary. With the entire world population being linked to it, there is no doubt about the fact that with changing tongues the definition does change. The judicial activism has touched almost every aspect of life in India to do positive justice and in the process has gone beyond, what is prescribed by law or written in black and white. Only thing the judiciary must keep in mind is that while going overboard to do justice to common man must not overstep the limitations prescribed by sacrosanct i.e. The Constitution. Judicial activism describes judicial rulings suspected of being based on personal or political considerations rather than on existing law.

Black's Law Dictionary defines judicial activism as a "philosophy of judicial decision-making whereby judges allow their personal views about public policy, among other factors, to guide their decisions". Judicial activism means active role played by the judiciary in promoting justice. Judicial Activism to define broadly, is the assumption of an active role on the part of the judiciary.

As to its meaning, Judicial Activism is not a distinctly separate concept from usual judicial activities. The word 'activism' means "being active", 'doing things with decision' and activist is the 'one' who favours intensified activities. Justice Krishna Iyer observed 'every judge is an activist either on the forward gear or on the reverse'.

Judicial policy making can be either an activity in support of legislative and executive policy choices or in opposition to them. But the latter one is usually referred to as judicial activism. The essence of true judicial activism is the rendering of decision which is in tune with the temper and tempo of the times.

Activism in judicial policy making furthers the cause of social change or articulates concepts such as liberty, equality or justice. It has to be an arm of the social revolution. An activist judge activates the legal mechanism and makes it play a vital role in socio-economic process.

Judicial activism is the view that the Supreme Court and other judges can and should creatively (re) interpret the texts of the Constitution and the laws in order to serve the judges' own visions regarding the needs of contemporary society.

Judicial activism believes that judges assume a role as independent policy makers or independent "trustees" on behalf of society that goes beyond their traditional role as interpreters of the Constitution and laws. The concept of judicial activism is the polar opposite of judicial restraint. Failure on part of the legislative and executive wings of the Government to provide 'good governance' makes judicial activism an imperative. Delivering justice to a population of over a billion does not sound like and never will bean easy task. It however becomes increasingly difficult in a country like India. The Executive, the Legislature and the Judiciary are the three wings of the Indian democracy.

Course of Judicial Activism :

In the first decade of independence, activism on part of the judiciary was almost nil with political stalwarts running the executive and the parliament functioning with great enthusiasm, judiciary went along with the executive. In the 50s through half of the 70s, the apex court wholly held a judicial and structural view of the constitution.

Bhopal gas tragedy and the Jessica Lal Murder case are among the top two. The latter was an open and shut case for all. Money and muscle power tried to win over the good. But lately, it was with the help of judicial activism that the case came to at least one decision. The two most prominent figures in the Bar Council of India whose names are the most inter related with judicial activism are Justice Prafulla Chandra Natwarlal Bhagwati and Justice Vaidyanathapura Rama Krishna Iyer.

The Golak Nath case is an example of judicial activism. The Supreme Court by a majority of six against five laid down that the fundamental rights as enshrined in Part-III of the Constitution are immutable and beyond the reach of the amendatory process. The power of parliament to amend any provision in Part-III of the Constitution was taken away.

In Kesavananda Bharati AIR 1973 SC 1461 AIR 1973 SC 1461 case by a majority of seven against six, the Supreme Court held that by Article368 of the Constitution, Parliament has amending powers. But the amendatory power does not extend to alter the basic structure or framework of the Constitution. The basic features of the Constitution being : (i)Supremacy of the Constitution; (ii) Republican and Democratic form of government; (iii) Secularism; (iv) Separation of powers between the legislature, the executive and the judiciary; and (v) Federal character of the Constitution. Supremacy and permanency of the Constitution have thus been ensured by the pronouncement of the summit court of the country with the result that the basic features of the Consti- tution are now beyond the reach of Parliament. After making these observations certain reasons can be gener- alized which lead to judicial activism. The following are some of the well accepted reasons which compel a court or a judge to be active while discharging the judicial functions assigned to then either by a constitution or any other organic law,

i) Near Collapse of responsible government. ii) Pressure on judiciary to step in aid. iii) Judicial enthusiasm to participate in social reform and change. iv) Legislative vacuum left open. v) The constitutional scheme. vi) Authority to make final declaration as to validity of a law.vii) Role of Judiciary as guardian of fundamental rights. viii) Public confidence in the judiciary etc.

In ***VC Shukla v Delhi Admin*** [1980 AIR 1382; 1980 SCR (3) 500](1980), the court while dealing with the legislative competence of the state to pass a law establishing special courts for dealing with offences committed by persons holding high public office, held such courts to be valid. It also held that the court could strike down an administrative act if bias or mala fides was proved. The court in this case clarified that the theory of "basic structure" would apply only to constitutional amendments and not to an ordinary law passed by the Parliament or the state legislature.

In the Bhagalpur Blinding case (***Khatri (II) v State of Bihar***[1981 SCR (2) 408, 1981 SCC (1) 627], it was held that Article 21 included the right to free legal aid to the poor and the indigent and the right to be represented by a lawyer. It was also held that the right to be produced before a magistrate within 24 hours of arrest must be scrupulously followed.

In ***Fertilizer Corporation Kamgar Union v Union of India*** [1981 AIR 344, 1981 SCR (2) 52.], the petitioners of a public enterprise challenged the sale of the plant and machinery of the undertaking, as it resulted in their retrenchment. The Supreme Court held that sale resulting in retrenchment had not violated their rights under Article 19(1)(g) of the constitution, and likened it to termination of employment due to abolition of posts. The court ruled that the petitioner did not have the locus standi to petition under Article 32. While reiterating that the jurisdiction of the Supreme Court under Article 32 was part of the "basic structure" of the constitution, the court violated, a petition under Article 32 was not maintainable even though one under Article 226 may be permissible.

In ***T. V. Vaitheeswaran v State of Tamilnadu*** [1983 AIR 361, 1983 SCR (2) 348], the Supreme Court held that a delay in the execution of the death sentence for two years would entitle the prisoner to commutation of the death sentence to one of life imprisonment. However, in ***Sher Singh v State of Punjab*** [1983 AIR 465, 1983 SCR (2) 582] this view was overruled. In the latter case, the delay was due to the conduct of the convict.

In the Asian Games case (People's Union for ***Democratic Rights v Union of India*** [1982 AIR 1473, 1983 SCR (1) 456], 1982), the court held that workers temporarily employed by contractors for construction work were entitled to the benefit of the relevant labour and industrial laws and to seek for their implementation under Article 32 of the constitution. The court directed the government and the concerned authorities to ensure compliance with the laws in respect of workers connected with the construction work of the ensuing Asian Games in Delhi. In ***A R Antulay v R S Nayak*** [1984 AIR 684, 1984 SCR (2) 495] , the court, while dealing with the question of prior sanction for prosecution of a public servant, held that an MLA was not a 'public servant' within the meaning of the relevant clauses as he was not remunerated by the fees paid by the executive in the form of the State Government.

In ***Bandhua Mukti Morcha v Union of India*** [AIR 1982 SC 1473], the Supreme Court's attention was drawn to the widespread incidence of the age-old practice of bonded labour which persists despite the constitutional prohibition. Among other interventions, one can refer to the Shriram Food & Fertilizer case [(1986) 2

SCC 176] where the Court issued directions to employers to check the production of hazardous chemicals and gases that endangered the life and health of workmen. It is also through the vehicle of PIL, that the Indian Courts have come to adopt the strategy of awarding monetary compensation for constitutional wrongs such as unlawful detention, custodial torture and extra judicial killings by state agencies. [***Bhim Singh v. State of Jammu and Kashmir***, (1985) 4 SCC 677].

Taking cognisance of custody deaths Supreme Court ordered the police not to handcuff a man arrested purely on suspicion, not to take a woman to the police station after dusk. High Court judges visited the prisons to check the living conditions of prisoners, in the year 1993, in just a month the apex court proclaimed judgment protecting the rights of innocents held in Hazaratbal mosque in Srinagar, defining the constitutional powers of the Chief Election Commissioner, threatening multi-crore rupees industries with closure if they continued to pollute the Ganga and Taj Mahal and brought all government and semi government bodies under the purview of the Consumer Protection Act.

The controversial 27% reservation of jobs in Central Government and public sector undertakings was referred to the Supreme Court by the Rao Government. The court decision favoured 49% of jobs for backward castes and class but the 'creamy layers'; were exempted from this reservation. Simi-larly the court put a curb on the operation of capitation fee in colleges in Karnataka.

The Supreme Court giving directions to the CBI and summoning the head of the CBI to report on the hawala case reveals the breakdown of other machineries of the government. The court interfer-ence with the CBI working became inevitable in the wake of the tactics of delay and technical evasion that was undertaken by the investigative agencies.

Ban on smoking in public places- In **Murli S. Deora v. Union of India, AIR 2002 SC 40,**

In this case the Supreme Court directed all States and Union Territories to immediately issue orders banning smoking in public places and public transports, including railways.

CONCLUSION

A former Solicitor General of India, Mr Dipankar P Gupta, wrote (Hindustan Times, June 15, 2007): "There is a real danger that the activism of the courts may aggravate the activism of the authorities. Today, inconvenient decisions are left by the executive for the courts to take.

Extensive use of judicial powers in the administrative filed may well, in the long-run, blunt the judicial powers themselves. This is not a healthy situation. "What then is the solution? The task of the court should be to compel the authorities to act and to pass appropriate executive orders rather than substitute judicial orders for administrative ones. They must be told how their duties are to be properly discharged and then commanded to do so. For this, they must be held accountable to the court." The Supreme Court recently noted in Indian Drugs & Pharmaceuticals Ltd v Workmen [(2007) 1 SCC 408] that : "the Supreme Court cannot arrogate to itself the powers of the executive or legislature… There is a broad separation of powers under the Constitution of India, and the judiciary, too, must know its limits".

Judicial Activism is not a result of general development of judicial procedure. It is an essential aspect of the dynamics, derivatives and independent findings of the courts. It is a specific judicial interest about the issues. Judicial Activism does not mean governance by the judiciary. Judicial Activism must also function within the limits of judicial process. Within those limits it performs the function of stigmatizing, as well as legitimizing, the actions of the other bodies of the Government-more often legitimizing. The judiciary is having certain limitation according to statutes which are framed by the legislature. It becomes strong only when people repose faith in it. Such faith constitutes the legitimacy of the Court and of judicial activism. Courts do not have to bow to public pressure, but rather they should stand firm against public pressure. Such inarticulate and diffused consensus about the impartiality and integrity of the Judiciary is the source of the Court's legitimacy. It is an essential aspect of the dynamics of a constitutional court. I have a hope that, in modern India, the judicial activism may develop through many aspects and it will play an important role to future challenges of the democratic India.

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PREVENTIVE DETENTION

The Article 22 of the constitution of India is also a very important Article which has given rise to so many controversial legislations. The issue related to this Article is 'issue of preventive detention'. Our purpose is to get the basic idea of the 'preventive detention' and related contemporary issues.

Article 22 of the constitution of India provides that :

A person cannot be arrested and detained without being informed about the grounds of such arrest.

This means that before a person is arrested, he/ she must be informed that he is being arrested and reason why he / she is being arrested.

A person who is arrested cannot be denied to be defended by a legal practitioner of his choice.

This means that the arrested person has right to hire a legal practitioner to defend himself/ herself.

Every person who has been arrested would be produced before the nearest magistrate within 24 hours.

The custody of the detained person cannot be beyond the said period by the authority of magistrate.

The Article 22(1) and 22(2) make the above provisions. However, Article 22(3) says that the above safeguards are not available to the following:

If the person is at the time being an enemy alien.

If the person is arrested under certain law made for the purpose of "Preventive Detention"

The first condition above is justified, because when India is in war, the citizen of the enemy country may be arrested.

But the second clause was not easy to justify by the constituent assembly. This was one of the few provisions which resulted in stormy and acrimonious discussions.

Amendments to Article 22

The Constitution divides the legislative power with regard to preventive detention between the Parliament and the state legislatures.

The Parliament has exclusive authority to make a law of preventive detention for reasons connected with defense, foreign affairs and security of India.

Both Parliament as well as the state legislature can concurrently make a law of preventive detention for reasons connected with the security of a state, the maintenance of public order and the maintenance of supplies and services essential to community.

It is unfortunate to know that no democratic country in the world has made preventive detention as an integral part of the Constitution as has been done in India. It is unknown in USA. It was resorted to in Britain only during first and second world war time. In India, preventive detention existed even during the British rule.

After independence, the Preventive Detention Act, 1950 was the first enactment on preventive detention. The Act was purely a temporary measure, originally passed for one year only. Several times, since 1950, the term of the Act was extended until it expired at the end of 1969. Later, the Preventive Defence Law was revived in the form of 'Maintenance of Internal Security Act, 1971 (MISA).

In 1974, Parliament passed the 'Conservation of Foreign Exchange and Prevention of Smuggling Activities Act', 1974. (COFEPOSA).

In 1976, Parliament passed the 'Smugglers and Foreign Exchange Manipulators (Forfeiture of Property) Act', 1976. [SAEM(FOP)A]. Both these acts were upheld by the Court.

The MISA continued to be in operation until the year 1977. The number of detenus, during the Emergency of 1975-76 had soared up to 1,75,000 under MISA.

In April 1978, MISA was repealed but SAFEM(FOP)A & COFEPOSA still remain. In 1980 two Acts were enacted for this purpose of Prevention of Black marketing and Maintenance of Suppliers of Essential Commodities Act, 1980 and National Security Act, 1980.

NSA amended in 1984 and 'Terrorist and Disruptive Activities (Prevention) Act', 1985. (TADA).

In 1988, the Preventive of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988 (PITNDPS)Act which continues even today.

TADA repealed in 1995 and "Prevention of Terrorist Act, 2002 (POTA) was enacted on March 28, 2002. But too was repealed on October 23, 2004.

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RIGHT AGAINST EXPLOITATION IN INDIAN CONSTITUTION

The Rights against Exploitation is provided under Articles 23 and 24 of the Constitution of India. Right to personal liberty is never real if some people are exposed to exploitation by others. Arts. 23 and 24 of the constitution are designed to prevent exploitation of men by men. Thus rights ensured by these two articles may be considered as complimentary to the individual rights secured by Arts. 19 and 21 of the constitution.

Article 23 of the Indian Constitution reads as follows :

i. "Traffic in human beings and beggar and similar other forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law."

ii. "Nothing in this article shall prevent the state from imposing compulsory service for public purposes and in imposing such service the state shall not make any discrimination on grounds only of religion, race, caste of class or any of them."

Ever since the dawn of civilization in every society, the stronger exploited the weak. Slavery was the most prevalent and perhaps the cruelest form of human exploitation. Our constitution does not explicitly forbid slavery. The scope of Article 23 is far wide. Any form of exploitation is forbidden. Thus forcing the landless labour to render free service by the land-owner is unconstitutional. Equally, forcing helpless women into prostitution is a crime. The intention of the constitution is that whatever a person does must be voluntary. There must not be any element of coercion involved behind a man's action.

The state however may call upon citizens to render national service in defence of the country. Thus conscription is not unconstitutional. But in compelling people to render national service, the state must not discriminate on grounds of race, sex, caste or religion.

Art. 24 forbid employment of child-labour in factories or in hazardous works. The art. reads "No child below the age of fourteen years, shall be employed to work in any factory or mine or, engaged in any other hazardous employment."

In an environment of all pervading poverty, children are often forced to seek employment to earn a living. Employers often find it less costly to engage child labour at a cheap price. But children so employed do not get opportunities for development. Thus, employment of child labor is a form of traffic in human beings. Hence it is justifiably and forbidden. But employment of child labor cannot be effectively checked unless there is overall improvement of economic conditions of the poorer sections of the society. This provision of the constitution remains a pious wish even today.

PROVISIONS RELATING TO EXPLOITATION OF HUMAN BEINGS AND FORCED LABOUR UNDER THE INDIAN CONSTITUTION 1.

Right against Exploitation S 23 : Prohibition of traffic in human beings and forced labour :—

1) Traffic in human beings and begar and other similar forms of force labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law.

2) Nothing in this article shall prevent the state from imposing compulsory service for public purpose. And in imposing such service the state shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

Introductory overview :

This article embodies two declarations. First, that traffic in human beings, beggar and other similar forms of forced labour are prohibited, and second, that any contravention of the prohibition shall be an offence punishable in accordance with law.1 Under Article 35 of the constitution laws punishing acts prohibited by this article shall only be made by parliament, are saved.

Traffic in human beings means to deal in men and women like goods, such as to sell or let or otherwise dispose of them. It would include traffic in women and children for immoral or other purposes. The suppression of Immoral Traffic in Women and Girls Act, 1956 is a law made by the parliament under Article 35 of the constitution for the purpose of punishing acts which result in traffic in human beings. Slavery is not expressly mentioned but there is no doubt that expression "traffic in human beings" would cover it. Under the existing law whoever imports, exports, removes, buys, sells or disposes of any person as a slave or accepts, receives or detains against his will any person as a slave shall be punished with imprisonment. Bonded labour has also been made illegal by law.

Other form of forced labour- interpretation :— According to Art. 23 (1), traffic in human beings, begar, and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law. The Calcutta High Court in Dulal Samanta Dist. Magistrate AIR 1958 Cal 365, interpreting the expression "other similar forms of forced labour? as appearing in Art. 23(1) held that the expression is to be interpreted ejusdem generis and it has to be something in the nature of either traffic in human beings or begar, conscription for police service or military service cannot come under either of them. Article 23(1) does not prohibit compulsory service for public purposes and in imposition of such services the state shall not make any discrimination on the ground of religion, race, caste or any of them. However, the discrimination on the ground of se is not forbidden by art. 23(2) and the state may exempt women from compulsory service.

Background :

At the time of the adoption of the Constitution there was hardly anything like slavery or the widespread practice of forced labour in any part of India. The National Freedom movement, since the twenties of this century, had been a rallying force against such practices.

However, there were many areas of the country where the "untouchables" were being exploited in several ways by the higher castes and richer classes.1 For example, in parts of Rajasthan in Western India, which was in pre-Independence days a cluster of Princely States, there existed a practice under which labourers who worked for a particular landlord could not leave him to seek employment elsewhere without his permission.

Very often this restriction was so severe and the labourer's dependence on the "master" was so absolute that he was just a slave in reality. The local laws had supported such practices.

Evils like the Devadasi system under which women were dedicated in the name of religion, to Hindu deities, idols, objects of worship, temples and other religious institutions, and under which, instead of living a life of dedication, self-renunciation and piety, they were the life-long victims of lust and immorality, had been prevalent in certain parts of southern and western India.

Vestiges of such evil customs and practices were still there in many parts of the country. The Constitution makers were eager to proclaim a war against them through the Constitution as these practices would have no place in the new political and social concept that was emerging with the advent of independence.

Articles 23 and 24, through Fundamental Rights, lay dormant for almost thirty two years after the Constitution came into force and there was hardly any significant judicial pronouncement concerning these constitutional provisions.

Since 1982, however, these articles have assumed great significance and have become potent instruments in the hands of the courts to ameliorate the pitiable condition of the poor in the country.

According to article 23(1), traffic in human beings, begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law. Article 23(1) proscribes three unsocial practices, viz.,

(a) Begar ; (b) Traffic in human beings ; and (c) Forced labour.

A significant feature of Article 23 is that it protects the individual not only against the State but also against private citizens.

Meaning and Concept :

1) **Begar :** The term begar is of Indian origin. It means involuntary work without payment. Begar constitutes of 2 elements-

(a) It is to compel a person to work against his will, and

(b) He is not paid any remuneration for that work.

Begar thus means "labour or service exacted by Government or a person in power without giving remuneration for it".

The practice was widely prevalent in the erstwhile princely States in India before the advent of the Constitution. It was a great evil and has therefore been abolished through Article 23(1).

In ***Kahason Thangkhul v. Simirei Shailei AIR*** 1961 Manipur, a custom though immemorial according to which the Headman if the village, for being the headman and the first settlement in the village, was entitled to one day?s free labour of one person from each household every month, was struck down as amounting to begar, prohibited by Article 23(1).

In ***Chandra v. State of Rajasthan AIR*** 1959 Cal 496, the Sarpanch of the village ordered every household to send one man, along with a spade and an iron pan, to render free service for the embankment of the village tank. The Rajasthan High Court held the order of the Sarpanch clearly against Article 23(1) which forbade begar.

In ***Dubar Goala v. Union Of India AIR*** 1952 cal 496, the petitioners, who were licensed porters at Howrah Railway station, voluntarily entered into an agreement to do two hours extra work for the Railway administra- tion for which they were to be paid some remuneration. The Calcutta High Court held the agreement not violated of Article 23(1).

A law punishing a person for refusing to render personal services solely on the ground of caste or class is not hit by Article 23(1).

2) **Traffic in human beings :** The expression "traffic in human beings"? commonly known as slavery, implies the buying and selling of human beings as if they are chattels, and such a practice is constitutionally abolished.

Traffic in women for immoral purposes is also covered by this expression :

3) **Forced Labour :** The words "other similar forms of forced labour"? in Article 23(1) are to be interpreted ejusdem generis. The kind of "Forced Labour"? contemplated by the Article has to be something in the nature of either traffic in human beings or begar.

The prohibition against forced labour is made subject to one exception. Under Article 23(2) the State can impose compulsory service for public purposes.

Similar forms of Forced Labour :

Every other similar form of forced labour is prohibited by Article 23(1)

Bonded Labour is an instance of forced labour. The State is to warrant necessary compliance from the private individuals and to ensure that Fundamental Rights are not violated and strictly observed by the private individuals when the persons complain of such violation belongs to the weaker section of humanity and are unable to wage a legal battle against a strong and powerful opponent who is exploiting him.

In ***Peoples Union for Democratic Rights v Union of India*** AIR 1982 SC 1473, the Supreme Court held that Article 23(1) would strike at forced labour in whatever form it might manifest itself. It thus prohibited not only begar but also prohibited compelling all unwilling labour, whether paid or not. Any amount of remuneration paid to a person will be immaterial if labour is forced upon him.

In ***Bandhua Mukti Morcha v. Union of India*** AIR 1998 SC 3164, the Supreme Court observed that the failure of the State to identify the bonded labourers, to release them from their bondage and to rehabilitate them as envisaged by the Bonded Labour System(Abolition) Act, 1976, violated Articles 21 and 23.the Court held that "bonded labour? a crude form of forced labour was prohibited by Article 23.

In ***Neeraja Choudhary v. State of M.P*** AIR 1984 SC 1099, the Supreme Court directed the State to identify and rehabilitate the bonded labourers as the court apprehended that if they are not rehabilitated then they would soon relapse into the state of bondage.

The imposition of forced labour on a prisoner will get protection from the ban under Article 23 of the Constitution, only if it can be justified as a necessity to achieve some public purpose. It is said that hard labour imposed on proved offenders would have a deterrent effect against others from committing crimes and thus, the society would, to that extent, be protected from perpetration of criminal offence by others.

Object and scope :

Article 23 of the Constitution prohibits forced labour and mandates that any contravention of such prohibition shall be an offence punishable in accordance with law. While ban against traffic in human beings is absolute, the prohibition against forced labour is made subject to one objection i.e. the State is permitted to impose compulsory service if such service is necessary for public purpose.

During the making of the Constitution some exception was thought of in the original draft and after a full debate the Constituent Assembly headed by Dr. B. R. Ambedkar adopted sub clause (2) regarding "pubic purposes?.

Compulsory Service for Public Purposes [Article 23(2)]

Clause (2) of Article 23, an exception to clause (1), enables the State to impose compulsory service for public

purpose. However, while imposing such compulsory service, the State is prohibited from making any discrimination on the ground only of religion, race, caste, class or any of them.

The expression "public purpose"? includes any object or aim in which the general interest of the community as opposed to the particular interest of individuals is directly and essentially concerned. It would include the social or economic objectives enshrined in part IV of the Constitution relating to Directive Principles of State Policy.

In ***Devendra Nath Gupta v. State of M.P.*** AIR 1983 MP 172, the Madhya Pradesh High Court held that the service required to be rendered by the teachers towards educational survey, family planning, preparation of voters? list, general elections, etc. were for "public purpose? and therefore even if no compensation was paid, that did not contravene Article 23.

In ***State of H.P. v. Jarawar*** AIR 1955 HP 18, it was held that conscription for the defence of the country or for the social services, are held in the nature of compulsory service, which can be imposed by the State, for public purposes, under clause (2) of Article 23.

The state is obligated to pay for the compulsory services imposed. It was said in justification of this provision in the Constituent Assembly that whenever compulsory services is needed, it shall be demanded from all and if the State demands service from all and does not pay anyone than, than the State is not committing any great inequity.

When a convict is sentenced to rigorous imprisonment and forced to work in execution of his sentence, the forced labour extracted from the prisoners should be suitably compensated by amount of reasonable wages for the work taken by them.

It was held in Prison Reforms Case 5 that the prisoners are entitled to the payment of reasonable wages for the amount of labour extracted from them while serving the sentence in the prison. The right not to be exploited in contravention of Article 23 is a right guaranteed to a citizen and there is no reason why a prisoner should lose his right to receive wages for his labour extracted from him by the State.

Reformation and rehabilitation of prisoners are of great public purpose and the reformative approach is now very much intertwined with rehabilitative aspect to a convicted prisoner.

The court in ***Gurudev Singh v. State of H.P*** AIR 1991 HP 76, disapproved the argument advanced that giving of better facilities and payment of wages to them would mean creating an expression that committing of crime and going to the prison is a better mode of living and earning wages.

Forced labour - prohibited in private contract- In Asiad Workers Case 1982 SC 88, the Supreme Court gave liberal interpretation to the expression forced labour and held that when wages less than the minimum wages are paid to the labour engaged by the private contractor it would be regarded as forced labour. The court reasoned that even if a person has contracted with another person to perform service, and there is consideration, for such service, he cannot be forced, by the compulsion of law or otherwise, to continue to perform such service, as that would be a forced labour.

The Calcutta High Court in ***Dulai Shamanta v. District Magistrate, Howrah*** AIR 1958 Cal 365, held that the state is not prevented from imposing compulsory service for public purpose such as conscription for police or military services as this services is neither begar nor trafficking human beings and not hit by Article 23 of the constitution

Similarly, in ***Durbar Goala v. Union of India*** AIR 1952 Cal 496, it was held that if a person voluntarily agrees to do a work or to do additional work for remuneration of a certain benefits for return there is no forced labour or begar.

In ***Raj Bahadur Case*** AIR 1953 Cal 496, it was held that Article 23 specifically prohibits traffic in human beings or women for immoral purpose.

Employment of Children [Article 24]

Article 24 provides : "No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment".

This provision read with the Directive Principles of State Policy contained in Articles 39(e) and 39(f), provides for the protection of the health and strength of children below the age of fourteen years.

The Supreme Court in ***Peoples Union for Democratic Rights v. Union of India*** (AIR 1982 SC 1473), held that building construction work was such hazardous employment where children below the age of fourteen years should not be employed, and the prohibition contained in Article 24 could be plainly and indubitably

enforced against everyone, whether State or private individual.

India is a federal form of government, and child labour is a matter on which both the central government and state governments can legislate. The major national legislative developments include the following :

The Factories Act of 1948 : The Act prohibits the employment of children below the age of 14 years in any factory. The law also placed rules on who, when and how long can pre-adults aged 15-18 years be employed in any factory.

The Mines Act of 1952 : The Act prohibits the employment of children below 18 years of age in a mine.

The Child Labour (Prohibition and Regulation) Act of 1986 : The Act prohibits the employment of children below the age of 14 years in hazardous occupations identified in a list by the law. The list was expanded in 2006, and again in 2008.

The Juvenile Justice (Care and Protection) of Children Act of 2000 : This law made it a crime, punishable with a prison term, for anyone to procure or employ a child in any hazardous employment or in bondage.

The Right of Children to Free and Compulsory Education Act of 2009 : The law mandates free and compulsory education to all children aged 6 to 14 years1 . This legislation also mandated that 25 percent of seats in every private school must be allocated for children from disadvantaged groups and physically challenged children.

CONCLUSION :

Most of the Fundamental Rights operate as limitations on the power of the State and impose negative obligations on the State not to encroach on individual liberty and the rights are only enforceable against the State. But there are certain Fundamental Rights which are enforceable against the whole world egs. Articles 17, 23 and 24. Article 23 is not limited in its application against the State but strikes as such practices wherever they are found and thus, the sweep of Article 23 is wide and unlimited.

Although Articles 23 and 24 lay down definite provisions against trafficking and child labour, the weaker sections of the society are still faced by such grave problems. Punishable by law, these acts are now legitimately bound by legal actions of the Parliament in the form of Bonded Labour Abolition Act of 1976 and the Child Labour Act of 1986, along with the ground rules and provisions stated in the Right against Exploitation act.

Awareness must be spread that child labour is not acceptable and this awareness shouldn?t be restricted to just advertisements in newspapers. It should spread to villages. Women?s groups should be formed to take care of underprivileged women and girls. I think, we, the youth, can bring about a major change if we choose to. Only then can India become a nation where all its citizens live a life of equality, without fear of exploitation.

In my opinion, the principle of equality before law, equal protection of laws, and any other fundamental right for that matter, would have no meaning if ones life is under subjugation, and at the mercy of another man. Even though this fundamental right does assure citizens protection of the government, India still has a long way to go on the path of achieving zero exploitation.

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RIGHT TO FREEDOM OF RELIGION

THE CONCEPT

Identity crisis is amongst the major concern for men, since its existence. For the same, we came up with an idea of associating us with someone OR something greater than us. Namely, GOD, something superior, sacred, divine and not human. The people with the same idea of GOD came together, gave themselves an identity, shared common views on their culture and gave birth to RELIGION. Well, this is just my idea of Religion, whereas many scholars have given considerably acceptable definitions to religion. While religion is difficult to define, one standard model of religion, used in religious courses, was proposed by Clifford Gretz, who simply called it a "Cultural System" (Clifford Geertz, Religion as a Cultural System, 1973). A critique of Geertz's model by Talal Asad categorized religion as "an anthropological category". (Talal Asad : The Construction of Religion as an Anthropological Category, 1982.). Impliedly, such a faith becomes the root to human society and the values following from it become a major concern for its subjects. But, what law has to do with it? Again, law shares the same problem as religion; problem of an exact definition. Law can be considered as a set of rules which controls the human conduct in the society. Today, law is entering into every reach of human life.

Law and Religion : Both conduct the human behavior, making them inseparable and they intersect in today's world. Law is sanctioned by the State, whereas religion is supposed to be sanctioned by GOD. State plays a vital role in enforcing and encouraging human values in the society and also guarantees a protection to the same. Now, in the era of democratic States, the religious freedom is granted in the form of legal rights. In present time of globalization and unprecedented international migration flow, have established the spheres of cultural identity. Therefore, various political, legislative and judicial treatment of the issue has given different interpretation of freedom of religion.

In India, Article 25-28 of the Constitution of India deals with the right to religious freedom. The religious freedom guaranteed by Arts. 25 and 26 is intended to be a guide to a community of life to allow every religion to act according to its culture .India in its 42nd amendment in the Constitution, introduced the concept of Secularism. A concept of controversy. Unlike western nations, India interprets the ideology of secularism by treating every religion equally. This concept doesn't evades the essence of secularism i.e. separation of the state from religion and its affairs, rather it takes it to a new level by harmonizing the acts of the state. It allows the state to not to encourage a particular religion, and at the same time treat every religion equally too. But this is not the case with USA; by the first amendment of 1791 of the Constitution of USA, it makes itself a "neutral" state. The first amendment can be divided into 2 parts, one is the "Establishment clause" (commonly known as Anti-establishment clause) and the other is "Free exercise clause". The scope of the 1st amendment was first considered in ***Devis v. Beason***, wherein it was held that congress shall make no law respecting the establishment of a religion or forbidding the free exercise of the same. The two clauses have independent significance, the Establishment Clause enjoins the State to observe "neutrality" as between religions and it would be contra- vened if the state adopts an official religion or religious activity, even though if no individual is coerced to follow the same. Whereas, the Free Exercise Clause, cannot come into action till the aggrieved individual can show that the state has been coercive in practice of religion, though the state may not have been indulged in any religious activity or shown any preferences to any religion.

Now, if we try to understand and learn about a European nation, France would be a strong example of protecting freedom of religion. In France, these rights are guaranteed by the constitutional rights set forth in the 1789? Declaration of the Rights of Man and of the Citizen. Since 1905, French government has followed the principle of "laicite".

i.e. French secularity; the absence of religious involvement in government affairs as well as absence of government involvement in religious affairs. The relationship between the state and religious organization is endorsed in 1905, "Law concerning the separation of the churches and the state" ("Loi concernant la séparation des Églises et de l'Etat"). Still, the governments all around the globe do not carry the same ideas of non-interference or equality in context of religions. The 1972 Constitution of Bangladesh carries the same concept of Right to freedom of religion as embedded in the Indian constitution, but military President Ziaur Rahman amended it in 1977 by (a) dropping the word secularism, (b) inserting the words, "the principles of absolute trust and faith in the almighty Allah" and (c) encouraging the state to preserve relations with Islamic states based on Islamic solidarity. By the sight and virtue of these provisions, Bangladesh has become an Islamic republic and the freedom of religion is subsidiary.

Right to Freedom of Religion (Article 25 to Article 28)

One of the rights guaranteed by the Indian Constitution is the right to Freedom of Religion. As a secular nation, every citizen of India has the right to freedom of religion i.e. right to follow any religion. As one can find so many religions being practiced in India, the constitution guarantees to every citizen the liberty to follow the religion of their choice. According to this fundamental right, every citizen has the opportunity to practice and spread their religion peacefully. And if any incidence of religious intolerance occurs in India, it is the duty of the Indian government to curb these incidences and take strict actions against it. Right to freedom of religion is well described in the Articles 25, 26, 27 and 28 of Indian constitution.

Right to Freedom of Religion : Article 25 to 28 of the constitution of India guarantees the right of Freedom of religion.

25. Freedom of conscience and free profession, practice and propagation of religion :—

1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;

b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Explanation I - The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion.

Explanation II - In sub-clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jaina or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

According to this right, every person is equally permitted to enjoy the freedom of conscience and the right to acknowledge, practice and spread religion. However, this right is subject to certain restrictions to maintain public law and order, morality and peace in the country. This article will not hinder the operation of any existing law or prevent the State from making any law. It will also not restrict the working of any financial, economic, political or secular activity which may be related to the religious practice. However, an institution run by the State is not allowed to impart education that is pro-religion. And also the right to propagate a particular religion does not mean the right to convert another individual as this will violate other individual's right to freedom of conscience.

This right guarantees to every person the freedom of conscience and right to profess, practice and propagate religion. This right is however, subjected to public order, morality and health and to the other provisions of Part III of constitution. Right to propagate does not include right to convert. This means no one has the right to convert another person to his own religion by force, fraud or by offering incentives.

The wearing and carrying of kirpans shall be deemed to be included in the profession of the Sikh religion. In sub clause (b) of clause (2), the reference to Hindus shall be construed as including a reference to persons professing the Sikh, Jain or Buddhist religion, and the reference to Hindu religious institutions shall be construed accordingly.

Though the Right to freedom of speech and expression (Article 19) envisages the philosophy of freedom of religion in India because despite of the creation of Pakistan, a lot of Muslims were scattered all over India, part from Sikhs, Parsees, Christians and others. Yet the constituent assembly made it explicit by incorporating a separate group of Articles as per a agreement with / recommendation of Advisory Committee on Fundamental Rights, Minorities, Tribal and Excluded Areas (Chairman: Vallabhbhai Patel) and Minorities Sub-Committee (Chairman: H.C. Mookherjee).

Before the Constitution 42nd amendment Bill added the word "secular" in the constitution of India, the word "secular" appeared only in "Article 25".

India is a secular country and there is no state religion. India also does not patronize any religion. The Constitution 42nd amendment Act made the above thought "explicit" in the constitution. Article 25 mandates that subject to public order, morality and health, all persons enjoy the freedom of conscience and have the right to

entertain any religious belief and propagate it.

Restrictions that can be imposed on the right of freedom of religion.

Freedom of religion does not mean that every person can do what he feels under the veil of the religion. It does not mean that the religion is uncontrollable, unrestrictible, unfettered. The framers of the Constitution provided some restrictions on the freedom of religion, so that the valuable right of freedom of religion may not be misappropriated.

Public order, morality and health.

By Article 25(1) the Constitution itself makes freedom of religion subject to — **(a)** public order; **(b)** morality; (c) health and **(d)** other provisions of this Part.

Nothing can be done in the name of religion which will adversely affect public order. If a thing disturbs the current of the life of the community and does not merely affect an individual, it would amount to of the public order. The expression 'public order' occurs elsewhere in the Constitution - e.g. Article 19(2) and should bear the same meaning here also. Public order is virtually synonymous with public peace, safety and tranquility. All and every breach of tranquility in a sense would involve breach of public order. Right to propagate of religion which conferred in Article 25 do not mean that a person can use force to convert another from his religion. Forcible conversion from one religion to another religion comes under public order.

In ***Shyamal Ranjan Mukherjee v. Nirmal Ranjan Mukherjee***, [AIR 2008 (NOC) 568 (All.)], it has been held that where temples and other religious institutions of Hindus are affected by frequent communal violence the State is duty bound to maintain public order.

Nothing can be done in the name of religion which will adversely affect public order, morality and health. In ***Ghulam Abbas v. State of U.P.*** [AIR 1981 SC 2198], Supreme Court has held that shifting of a property (grave) connected with religion to avoid clashes between two religious communities is valid and does not affect religious rights being in the interest of public in general.

Regulation or restriction of any economic, financial, political or other secular activity which may be associated with religious practice [Art. 25(2)(a)];

2) Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

(a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice ;

The freedom to practice extends only to those activities which are the essence of religion. It would not cover secular activities which do not form the essence of religion. It is not always easy to say which activities fall under religious practice or which are of secular, commercial or political nature associated with religion practice. Each case must be judge by its own facts and circumstances.

In ***Mohd. Hanif Quareshi v. State of Bihar*** [AIR 1958 SC 731], it was held that slaughter of a cow on the day of Bakreed, was not an essential element of Muslim religion and hence could be prohibited by law.

In ***M. P. Gopalakrishnan Nair v. State of Kerala*** [2005 AIR SCW 2292], it has been observed that the State cannot interfere with the freedom of person to process, practice and propagate his religion but the secular activities connected therewith may be controlled by the State. The management of temple is a secular act and hence it can be controlled by the State.

Social Welfare and Social Reforms - Clause (2) (b) —

(b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

Under this clause the State empowered to make laws for social welfare and social reform. Thus under this clause the State can eradicate social practices and dogmas which stand in the path of the country's onward progress. Such laws do not affect the essence of any religion. This declares that where there is conflict between the need of social welfare and reform and religious practice must yield. Prohibition of evil practices such as Sati or system of Devadasi has been held to be justified under this clause.

The right protected under this clause is a right to enter into a temple for the purpose of worship. But it does not follow from this that, that right is, absolute and unlimited in character.

In ***Venkataramana Devaru v. State of Mysore*** [AIR 1958 SC 255], it has been observed that no one can

claim that a temple must be kept open for worship at all hours of the day and night or that he should be permitted to perform services personally which the Acharya alone could perform.

In ***Vaguapurushadji v. Maldas*** [AIR 1966 SC 1119], it has been observed that the State cannot regulate the manner in which the worship of the deity is performed by the authorized pujaris of the temple or the hours and days on which the temple is to be kept open for Darshan or Puja for devotees.

The right of Sikhs to wear and carry Kripan is recognised as a religious practice in Explanation 1 of Article 25. It does not mean that he can keep any number of Kripans. He cannot possess more than one Kripan without licence.

Secularism :

- In the West, the state has nothing to do with religion.
- In India, the state will remain neutral in the matters of religion.
- This means, if a state seeks to promote religion, it has to promote all religions equally.
- Secularism is seen as a means to promote communal harmony.

Constitutionally, India is a secular country and has no State religion. However, it has developed over the years its own unique concept of secularism that is fundamentally different from the parallel American concept of secularism requiring complete separation of church and state, as also from the French ideal oflacite - described as 'an essential compromise whereby religion is relegated entirely to the private sphere and has no place in public life whatsoever'.Despite the clear incorporation of all the basic principles of secularism into various provisions of the Constitution when originally enacted, its preamble did not then include the word 'secular' in the short description of the country which it called a 'Sovereign Democratic Republic'. This was not an inadvertent omission but a well-calculated decision meant to avoid any misgiving that India was to adopt any of the western notions of a secular state. Twenty-five years later - by which time India's own concept of secularism had been fully established through judicial decisions and state practice - the preamble to the Constitution was amended by the Constitution (Forty-second Amendment) Act 1976 to include the word 'secular' along with 'socialist', to declare India to be a 'Sovereign Socialist Secular Democratic Republic'.

As will be seen below, there is a blend of secular and religious elements within the text of the Constitution and it is this admixture that defines and determines the contours of secularism to be acted upon by the State and the religious freedom to be exercised by individuals and communities in modern India. We are a secular nation, but neither in law nor in practice there exists in this country any 'wall of separation' between religion and the State - the two can, and often do, interact and intervene in each other's affairs within the legally prescribed and judicially settled parameters. Indian secularism does not require a total banishment of religion from the societal or even State affairs. The only demand of secularism, as mandated by the Indian Constitution, is that the State must treat nil religious creeds and their respective adherents absolutely equallyand without any discrimination in all matters under its direct or indirect control.In an early case after the commencement of the Constitution a court had examined the US principle of the 'wall of separation' between religion and State and Concluded that there are provisions in the Indian Constitution which are 'inconsistent with the theory that there should be a wall of separation between Church and State' - ***Narayanan Namboodripad v State of Madras***.

In the leading case of SR Bommai v Union of India (1994) 3 SCC 1 various judges of the Supreme Court of India individually explained the significance and place of secularism under the Constitution in very meaningful words sampled below:

i. The Constitution has chosen secularism as its vehicle to establish an egalitarian social order. Secularism is part of the fundamental law and basic structure of the Indian political system.

ii. Notwithstanding the fact that the words 'Socialist' and 'Secular' were added in the Preamble of the Constitution, the concept of secularism was very much embedded in our constitutional philosophy from the very beginning. By this amendment what was implicit was made explicit.

iii. Constitutional provisions prohibit the establishment of a theocratic State and prevent the State from identifying itself with or otherwise favouring any particular religion

iv. Secularism is more than a passive attitude of religious tolerance. It is a positive concept of equal treatment of all religions.

v. When the State allows citizens to practice and profess their religion, it does not either explicitly or implicitly allow them to introduce religion into non-religious and secular activities of the State. The freedom and

tolerance of religion is only to the extent of permitting pursuit of spiritual life which is different from the secular life. The latter falls in the exclusive domain of the affairs of the State.

National Flag, Anthem & Emblem

The National Flag of India with its saffron, green and white colours and the Buddhist wheel of dhamma (faith) is seen by many Indians as religious symbolism, though legal texts do not specify this implication. India's National Anthem is more conspicuously religious. Drawn from a Bengali-language song, it invokes the Supreme God.

The National Emblem of India is an adaptation from Ashoka's pillar at Sarnath superscribed with the Vedic expression Satyameva jayate (truth alone triumphs) in Devnagari script. The emblem is used on all official stationery and seals of the government of India. It also appears on government publications, coins and currency notes.

Proposed Amendments

On two different occasions attempts were made to amend the Constitution with a view to further strengthening and clarifying its provisions on secularism, but the Bills moved for this purpose could not be enacted for technical reasons. Among these Bills were:Constitution (Forty-fifth) Amendment Bill 1978 proposing to define the expression 'Secular Republic' as 'a Republic in which there is equal respect for all religions'.

a. Constitution (Eightieth Amendment) Bill 1993 seeking to empower Parliament to ban parties and associations if they promote religious disharmony and disqualify members who indulge in such misconduct.

b. Constitution (Eightieth Amendment) Bill 1993 seeking to empower Parliament to ban parties and associations if they promote religious disharmony and disqualify members who indulge in such misconduct.

Why aren't we able to achieve a secular society?

- Considering Hindu-Muslim communalism, the wounds of partition have not healed so far.
- Imbalances in development in the Hindu and Muslim community.
- These imbalances were brought out by Sachar Committee Report (2006).
- Majority of communities have not been magnanimous enough to accommodate the diversity of this country.
- Absence of Uniform Civil code.
- There is no effective framework, legal or institutional, to check communalism and promote National Unity.

Article 26 : Freedom to run religious affairs.

26. Freedom to manage religious affairs.-Subject to public order, morality and health, every religious denomination or any section thereof shall have the right-

(a) to establish and maintain institutions for religious and charitable purposes;

(b) to manage its own affairs in matters of religion;

(c) to own and acquire movable and immovable property; and

(d) to administer such property in accordance with law.

While Article 25 confers right of religion on all persons, Article 26 is confined to the rights of every religious denominations or section thereof, however, the rights so guaranteed are subject to public order morality and health as in Article 25.

According to the Constitution of India, freedom to run religious affairs include the freedom to establish and maintain charitable institutions either to manage its own affairs in the matters of religion or to acquire and own movable and immovable property and to take care of such property, without infringing the law. However, only structured bodies such as religious denominations have the liberty to enjoy this right and the secular activity of such associations can be administered by the government. This right does not apply to individuals. Religious organizations can set up and control educational and other charitable institutions without any intervention of the state, except in case of any threat to public law and order.

In M.P. Gopaladrishnan Nair and another v. State of Kerala and others, [AIR 2005 SC 3035], it has been held that Article 26 does not create any new rights and it protects such of those practices well established already prior to 1950.

a) Right to establish and maintain institutions for religious and charitable purposes.

The words 'establish and maintain' should be read conjunctively and consequently, the right to maintain the institution can be claimed only by the religious demonization which has established the institution. Right to maintain the institution includes the right to administer it.

In Azeez Basha v. Union of India, [AIR 1968 SC 662}, the Aligarh University was established under the statute passed by Parliament and hence, the Supreme Court held that Muslim minority could not claim the right to maintain it as it was not established by the Muslim minority community.

b) Right to manage its own affairs in matters of religion;

Under Article 26(b) every religious denomination or any section thereof has the right to manage its own affairs in matters of religion only and the State cannot interfere in the affairs, unless it is against public order, morality or health. When the Temples, Mosque, Gurudwaras are used for political purposes, the State is not expected to remain a mere passive spectator. When the freedom of religion is being used against the interest of society and the Nation as a whole the State has a positive duty to control them.

In Sri Adi Visheshwara of Kashi Vishwanath Temple v. State of U.P., [(1997) 4 SCC 606], it has been held that right to manage a temple is not an integral part of religion and it can be regulated by the State.

In Durga Committee v. Hussain Ali, [AIR 1961 SC 1402], the Supreme Court has observed that if the right of a denominational or a section of denomination has been totally taken away and vested in other authorities by enacting a statute, the relevant portion of such statute must be struck down as a whole or in its entirety.

c) Right to own and acquire movable and immovable property;

Article 26(c) provides the right to own and acquire property by religious denomination or a section thereof subject to public order, morality and health. The right to own property is not an absolute right. It is subject to reasonable regulation by the State, the important condition being that such regulation should not affect the survival of the religious institution itself.

The property of the religious denomination may be acquired by authority of law. In ***Suryapalsingh v. State of U.P.***, [(1952) SCR 1056], it has been held that acquisition of property by religious denomination (under the authority of law) is valid subject to the condition of public order, morality and health.

d) Right to administer such property in accordance with law.

The right to administer its property by religious denomination cannot be destroyed or taken away completely. It can only be regulated by law with a view to improve the administration of property for the better utilization of the endowment property. The law must leave the right of administration of property to the religious denomination itself subject to such restrictions and regulations as it might choose to impose.

In ***Rati Lal Gandhi v. State of Bombay*** [AIR 1954 SC 388], it has been held that a law which took away the right of administration altogether from religious denomination and vested it in other secular authority is viola- tive of the right guaranteed by Art. 26(d) of the Constitution.

Article 27 : No person shall be compelled to pay any tax for the promotion or maintenance of any religion.

27. Freedom as to payment of taxes for promotion of any particular religion.-No person shall be compelled to pay any taxes, the proceeds of which are specifically appropriated in payment of expenses for the promotion or maintenance of any particular religion or religious denomination.

According to this article of Indian constitution, no person shall be forced to pay any taxes, the proceeds of which are particularly appropriated in payment of expenses for the spread or protection of any particular religion or religious denomination. A 'tax' is a compulsory exaction of money for public purpose. If the State exacts money through a tax whose proceeds are assigned for the benefit of a particular religion, obviously the State favours, patronises and supports that particular religion. Hence the prohibition is made against such taxes.

In ***K. Raghunath v. State of Kerala*** [AIR 1974 Ker. 48], it has been observed that if places of worship are destroyed due to communal riot and the State grants money so as to restore these places to the pre-riot condition, it cannot be said that the State is making payment for the promotion of a particular religion or religious denomination and consequently such grant by the State will not be violative of Art. 27 of the Constitution.

In ***B. K. Deb v. State of Orissa*** [AIR 1975 Orissa 8], it has been observed that where State granted money for renovation of water tank belonging to Lord Jaganath but used by the general public for bathing and drinking purposes, it is not violative of Art. 27 because in such circumstances the State could not be taken to have promoted or maintained the Hindu religion as the tank is used for general public, and its renovation is necessary to maintain the hygienic condition.

In ***Basir Ahmed v. State of West Bengal*** [AIR 1976 Cal. 142], it has been observed that contribution to education fund for the Mohammedan children under Sec. 27 of the Bengal Wakf Act, 1934 as provided by the Amendment Act of 1973 by the Muslim Wakfs towards the promotion of education of the Muslim students does not amount to maintain or supporting that religion.

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

28. Freedom as to attendance at religious instruction or religious worship in certain educational institutions—

1) No religious instruction shall be provided in any educational institution wholly maintained out of State funds.
2) Nothing in clause (1) shall apply to an educational institution which is administered by the State but has been established under any endowment or trust which requires that religious instruction shall be imparted in such institution.
3) No person attending any educational institution recognised by the State or receiving aid out of State funds shall be required to take part in any religious instruction that may be imparted in such institution or to attend any religious worship that may be conducted in such institution or in any premises attached thereto unless such person or, if such person is a minor, his guardian has given his consent thereto.

According to this fundamental right, no religious instruction shall be offered in any educational institution wholly maintained out of State funds. No person attending any educational institution acknowledged by the State or receiving aid out of State funds shall be obliged to take part in any religious instruction that may be instructed or taught in such institution or to attend any religious worship that may be performed in such institution or in any premises. In case of a minor, his guardian has to give the consent for the same. Thus, article 28 forbids religious instruction in a wholly State-funded educational institution and educational institutions receiving aid from the State.

In ***Aruna Roy v. Union of India*** [AIR 2002 SC 3176], it has been observed that the National Curriculum Frame-Work for School Education pertaining to education for value development is neither violative of Art.28 not it brings secularism to peril.

No country in this world has such a diverse religious background as India. Thus, the Right to Freedom of religion forms a very important Fundamental right of our country and aims at maintaining the principle of secularism in India. Indian constitution firmly states that all religions are equal before the law and no religion shall be favored over the other.

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SECULARISM

Secularism, also called Secularity or (adjectives: Secular or non religious) is the idea of something being not religious or not connected to a church. An example of this is the government, which is independent of any religion in many states. In some countries, such as Pakistan, Iran or Saudi Arabia, there is a state religion. In that case, the government follows the state religion. Another example is that of the United States: There, founding fathers such as Thomas Jefferson made a law that religion and government should stay separate. This means that anyone can choose to practice or not practice any religion they want, and the government cannot make them be a part of a religion if they do not want to.

Secularism is the principle of the separation of government institutions and persons mandated to represent the state from religious institutions and religious dignitaries. One manifestation of secularism is asserting the right to be free from religious rule and teachings, or, in a state declared to be neutral on matters of belief, from the imposition by government of religion or religious practices upon its people. Another manifestation of secularism is the view that public activities and decisions, especially political ones, should be uninfluenced by religious beliefs and/or practices.

The purposes and arguments in support of secularism vary widely. In European laicism, it has been argued that secularism is a movement toward modernization, and away from traditional religious values (also known as secularization). This type of secularism, on a social or philosophical level, has often occurred while maintaining an official state church or other state support of religion. In the United States, some argue that state secularism has served to a greater extent to protect religion and the religious from governmental interference, while secu- larism on a social level is less prevalent.[2][3] Within countries as well, differing political movements support secularism for varying reasons.

Secularism in India means equal treatment of all religions by the state. Unlike the Western concept of secular- ism which envisions a separation of religion and state, the concept of secularism in India envisions acceptance of religious laws as binding on the state, and equal participation of state in different religions.

With the 42nd Amendment of the Constitution of India enacted in 1976, the Preamble to the Constitution asserted that India is a secular nation. However, neither India's constitution nor its laws define the relationship between religion and state. The laws implicitly require the state and its institutions to recognize and accept all religions, enforce religious laws instead of parliamentary laws, and respect pluralism. India does not have an official state religion. The people of India have freedom of religion, and the state treats all individuals as equal citizens regardless of their religion. In matters of law in modern India, however, the applicable code of law is unequal, and India's personal laws - on matters such as marriage, divorce, inheritance, alimony - varies with an individual's religion. Muslim Indians have Sharia-based Muslim Personal Law, while Hindus, Christians, Sikhs and other non-Muslim Indians live under common law. The attempt to respect unequal, religious law has created a number of issues in India such as acceptability of child marriage, polygamy, unequal inheritance rights, extrajudicial unilateral divorce rights favorable to some males, and conflicting interpretations of religious books.

Secularism as practiced in India, with its marked differences with Western practice of secularism, is a controver- sial topic in India. Supporters of the Indian concept of secularism claim it respects Muslim men's religious rights and recognizes that they are culturally different from Indians of other religions. Supporters of this form of secularism claim that any attempt to introduce a uniform civil code, that is equal laws for every citizen irrespective of his or her religion, would impose majoritarian Hindu sensibilities and ideals, something that is unacceptable to Muslim Indians. Opponents argue that India's acceptance of Sharia and religious laws violates the principle of equal human rights, discriminates against Muslim women, allows unelected religious personali- ties to interpret religious laws, and creates plurality of unequal citizenship; they suggest India should move towards separating religion and state.

The 7th schedule of Indian constitution places religious institutions, charities and trusts into so-called Concur- rent List, which means that both the central government of India, and various state governments in India can make their own laws about religious institutions, charities and trusts. If there is a conflict between central government enacted law and state government law, then the central government law prevails. This principle of overlap, rather than separation of religion and state in India was further recognized in a series of constitutional amendments starting with Article 290 in 1956, to the addition of word 'secular' to the Preamble of Indian Constitution in 1975]

The overlap of religion and state, through Concurrent List structure, has given various religions in India, state support to religious schools and personal laws. This state intervention while resonant with the dictates of each religion, are unequal and conflicting. For example, a 1951 Religious and Charitable Endowment Indian law

allows state governments to forcibly take over, own and operate Hindu temples, and collect revenue from offerings and redistribute that revenue to any non-temple purposes including maintenance of religious institutions opposed to the temple;] Indian law also allows Islamic religious schools to receive partial financial support from state and central government of India, to offer religious indoctrination, if the school agrees that the student has an option to opt out from religious indoctrination if he or she so asks, and that the school will not discriminate any student based on religion, race or other grounds. Educational institutions wholly owned and operated by government may not impart religious indoctrination, but religious sects and endowments may open their own school, impart religious indoctrination and have a right to partial state financial assistance.

In matters of personal law, such as acceptable age of marriage for girls, female circumcision, polygamy, divorce and inheritance, Indian law permits each religious group to implement their religious law if the religion so dictates, otherwise the state laws apply. In terms of religions of India with significant populations, only Islam has religious laws in form of sharia which India allows as Muslim Personal Law.

Secularism in India, thus, does not mean separation of religion from state. Instead, secularism in India means a state that is neutral to all religious groups. Religious laws in personal domain, particularly for Muslim Indians, supersede parliamentary laws in India; and currently, in some situations such as religious indoctrination schools the state partially finances certain religious schools. These differences have led a number of scholars to declare that India is not a secular state, as the word secularism is widely understood in the West and elsewhere; rather it is a strategy for political goals in a nation with a complex history, and one that achieves the opposite of its stated intentions.

Indian concept of secularism, where religious laws supersede state laws and the state is expected to even-handedly involve itself in religion, is a controversial subject. Any attempts and demand by Indian Hindus to a uniform civil code is considered a threat to their right to religious personal laws by Indian Muslims.

Accordingly Article 25 (2) provides broad sweeping power of interference to the state in religious matters. This Article imposes drastic limitations on the rights guaranteed under Article 25(1) and reflects the peculiar needs of Indian society. It is important to mention here that law providing for the very extensive supervision by the state about temple administration has been enacted by virtue of this provision. Hindu personal law (marriage, divorce, adoption, succession etc.) has been effected by legislation based on the provision permitting measures of social welfare and social reform. There is an interesting case on the validity of the Bombay Prevention of Hindu Bigamous Marriages Act of 1946, where the validity was upheld by the Bombay High Court.

The same constitutional provision permits legislation opening Hindu religious institutions of a public character to all classes and sections of India. Harijan temple entry laws have been enacted by many of the state legislatures. The Central Untouchability (Offences) Act of 1955 provides that any attempt to prevent Harijans from exercising their right to enter the temple is punishable with imprisonment or fine or with both. Therefore it must be clear that a secular civil law is equally applicable to all Indian citizens.

The right under Article 26(a) is a group right and is available to every religious denomination. Clause (b) of Article 26 guarantees to every religious denomination the right to manage its own affairs in matters of religion. The expression 'matters of religion' includes 'religious practices, rites and ceremonies essential for the practicing of religion.' An important case that involved the right of a religious denomination to manage its own affairs in matters of religion was Venkataramana Devaru Vs. Stae of Mysore . In this matter, Venkatramana temple was belonging to the Gowda Saraswath Brahman Community. The Madras Temple Entry Authorization Act, supported by Article 25(2)(b) of the Constitution, threw open all Hindu public temples in the state to Harijans. The trustees of this denominational temple refused admission to Harijans on the ground that the caste of the prospective worshipper was a relevant matter of religion according to scriptural authority, and that under Article 26(b) of the Constitution they had the right to manage their own affairs in matters of religion. The Supreme Court admitted that this was a matter of religion, but when it faces conflict with Article 25(2) (b), it approved a compromise arrangement heavily weighted in favour of rights of Harijans and a token concession to the right of a religious denomination to exercise internal autonomy.

Further Article 26(c) and (d) recognize the right of a religious denomination to own, acquire and administer movable and immovable property in accordance with law. However it was held in Surya Pal Singh Vs. State of U.P. that this guarantee did not imply that such property was not liable to compulsory acquisition under the U.P. Abolition of Zamindari Act. Similarly in Orissa, land reforms resulted in the expropriation of a village and surrounding agricultural land dedicated to the maintenance of a Hindu deity. Since compensation was paid, the High Court held that there was only a change in the form of the property.

Article 30 deals with another aspect of collective freedom of religion :

1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

2) The state shall not, in granting aid to educational institutions, discriminate against any educational institution on the ground that it is under the management of a minority, whether based on religion or language.

The object behind Article 29 & 30 is the recognition and preservation of the different types of people, with diverse languages and different beliefs, which constitute the essence of secularism in India.

Shah Bano case :

Mohd. Ahmed Khan v. Shah Bano Begum

In 1978, the Shah Bano case brought the secularism debate along with a demand for uniform civil code in India to the forefront.

Shah Bano was a 62-year-old Muslim Indian who was divorced by her husband of 44 years in 1978. Indian Muslim Personal Law required her husband to pay no alimony. Shah Bano sued for regular maintenance payments under Section 125 of the Criminal Procedure Code, 1978. Shah Bano won her case, as well appeals to the highest court. Along with alimony, the Chief Justice of the Supreme Court of India wrote in his opinion just how unfairly Islamic personal laws treated women and thus how necessary it was for the nation to adopt a Uniform Civil Code. The Chief Justice further ruled that no authoritative text of Islam forbade the payment of regular maintenance to ex-wives.

The Shah Bano ruling immediately triggered a controversy and mass demonstrations by Muslim men. The Islamic Clergy and the Muslim Personal Law Board of India, argued against the ruling. Shortly after the Supreme Court's ruling, the Indian government with Rajiv Gandhi as Prime Minister, enacted a new law which deprived all Muslim women, and only Muslim women, of the right of maintenance guaranteed to women of Hindu, Christian, Parsees, Jews and other religions. Indian Muslims consider the new 1986 law, which selectively exempts them from maintenance payment to ex-wife because of their religion, as secular because it respects Muslim men's religious rights and recognizes that they are culturally different from Indian men and women of other religions. Muslim opponents argue that any attempt to introduce Uniform Civil Code, that is equal laws for every human being independent of his or her religion, would reflect majoritarian Hindu sensibilities and ideals.

Islamic feminists

The controversy is not limited to Hindu versus Muslim populations in India. Islamic feminists movement in India, for example claim, that the issue with Muslim Personal Law in India is a historic and on going misinterpretation of Quran. The feminists claim Quran grants Muslim women rights that in practice are routinely denied to them by male Muslim ulema in India. The 'patriarchal' interpretations of the Quran on the illiterate Muslim Indian masses is abusive, and they demand that they have a right to read the Quran for themselves and interpret it in a woman-friendly way. India has no legal mechanism to accept or enforce the demands of these Islamic feminists over religious law.

Women's rights

Some religious rights granted by Indian concept of secularism, which are claimed as abusive against Indian women, include child marriage, polygamy, unequal inheritance rights of women and men, extrajudicial unilat- eral divorce rights of Muslim man that are not allowed to a Muslim woman, and subjective nature of shariat courts, "jamaats", "dar-ul quzat" and religious qazis who preside over Islamic family law matters.

GOA

Goa is the only state in India which has Uniform Civil Code. The Goa Civil Code, also called the Goa Family Law, is the set of civil laws that governs the residents of the Indian state of Goa. In India, as a whole, there are religion-specific civil codes that separately govern adherents of different religions. Goa is an exception to that rule, in that a single secular code/law governs all Goans, irrespective of religion, ethnicity or linguistic affiliation.

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SEPARATION OF POWERS

ORIGIN

The concept of separation of powers grew out of centuries of political and philosophical development. Its origins can be traced to 4th century B.C., when Aristotle, in his treatise entitled Politics, described the three agencies of the government viz. the General Assembly, the Public Officials, and the Judiciary.268In republican Rome, there was a somewhat similar system consisting of public assemblies, the senate and the public officials, all operating on the principle of checks and balances. 269 Following the fall of the Roman Empire, Europe became fragmented into nation states, and from the end of the middle ages until the 18th century, the dominant governmental structure consisted of a concentrated power residing in the 268 Aristotle also described three elements in every constitution as the deliberative element, the element of magistracies, and the judicial element.

The three organs of the government which we know as the executive, the judiciary and legislature represent the people and their will in our country and are responsible for the smooth running of a democratic government in our society. The legislature is the law-making body, the executive is responsible for the enforcement of all such laws and the judiciary deals with the cases that arise from a breach of law. Thus they are all interlinked organs of the government and their roles and functions tend to overlap with each other, as it isn't possible to separate the three from each other completely. This has been the cause for not only serious political debate in our country but has raised many philosophic and jurisprudential debates among legal scholars and the law frater- nity. Whether there should be a complete separation of powers or a well co-ordinate system of distribution of powers thus becomes the focal point of contemplation.

To analyse the separation of powers doctrine, the theory aspect will be dealt with, and a comprehensive understanding of the doctrine as used in our country under our parliamentary system of governance will be made. Landmark cases will also be discussed to understand the progression of this debate, and the basic structure doctrine will be used to emphasize this point.

MEANING

Understanding that a government's role is to protect individual rights, but acknowledging that governments have historically been the major violators of these rights, a number of measures have been devised to reduce this likelihood. The concept of Separation of Powers is one such measure. The premise behind the Separation of Powers is that when a single person or group has a large amount of power, they can become dangerous to citizens. The Separation of Power is a method of removing the amount of power in any group's hands, making it more difficult to abuse. It is generally accepted that there are three main categories of governmental functions - (i) the legislative, (ii) the Executive, and (iii) the Judicial. At the same time, there are three main organs of the Government in State i.e. legislature, executive and judiciary. According to the theory of separation of powers, these three powers and functions of the Government must, in a free democracy, always be kept separate and exercised by separate organs of the Government. Thus, the legislature cannot exercise executive or judicial power; the executive cannot exercise legislative or judicial power of the Government.

THEORY

The French scholar Montesquieu pointed out as early as in the sixteenth century that placing power in the hands of only one organ or group in a government entails tyranny. Thus to check this problem he felt that the solution would be to vest power in three distinct organs of the government, namely, the legislature, the executive and the judiciary. This would allow each organ to be independent of the other such that no encroachment or overlapping of powers may exist and a harmony may be reached which would aid the smooth running of the government.

These words state the Doctrine of Separation of Powers as given by Montesquieu, "There would be an end of everything, were the same man or same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing laws, that of executing public resolutions, and of trying the causes of individuals".

This doctrine stands testimony to Montesquieus belief that powers of the executive and the legislature if vested in the same hands would result in a situation of arbitrariness and despotism, for the executive will be enabled with the power of having any laws it wishes, to be passed, alternatively if the judiciary and legislature or executive were not separated then the common man would have no defence against the state. These Montesquieu saw as a serious threat to the liberty of the people and in order to preserve them extolled the theory of separation of powers.

The American politician James Madison, better known as the 'Father of the American Constitution' also believed the same and articulated the following, "The accumulation of all powers, legislative, executive and

judicial, in the same hands whether of one, a few, or many and whether hereditary, self-appointed or elective, may justly be pronounced the very definition of tyranny".

Therefore, the separation of powers doctrine, in theory, aims at separating power and disseminating it such that tyranny by the government may be prevented entirely as equal power vests in three separate organs which act as a check and balance for each other. Thus assigning a different function to each organ and creating exclusive functions for them counters the concentration of powers and makes this doctrine a success. In fact this doctrine has been adopted around the world in many constitutions and in ours to an extent as well. It is a remarkable way of protecting human liberty and creating a system of governance which is responsible and fair.

U.S.A.

The doctrine of separation finds its home in U.S. It forms the basis of the American constitutional structure. Art. I vests the legislative power in the Congress; Art. II vests executive power in the President and Art. III vests judicial power in the Supreme Court. The framers of the American constitution believed that the principle of separation of powers would help to prevent the rise of tyrannical government by making it impossible for a single group of persons to exercise too much power. Accordingly they intended that the balance of power should be attained by checks and balances between separate organs of the government. This alternative system existing with the separation doctrine prevents any organ to become supreme.

U.K.

Before we go to India, it's important to know the constitutional setup of the country to which India was a colony and ultimately owes the existence of the form of government it has. U.K. follows a parliamentary form of government where the Crown is the nominal head and the real legislative functions are performed by the Parliament. The existence of a cabinet system refutes the doctrine of separation of powers completely. It is the Cabinet which is the real head of the executive, instead of the Crown. It initiates legislations, controls the legislature, it even holds the power to dissolve the assembly. The resting of two powers in a single body, therefore denies the fact that there is any kind of separation of powers in England.

CONCEPT IN INDIA

It is often understood that in our country the debate about the separation of powers dates as long back as the Constitution itself. It was extensively debated in the Constituent Assembly. It was not given constitutional status in our Constitution finally but it does clearly seem that the constitution of India has been made keeping the separation of powers doctrine in mind, but nowhere is this explicitly stated or embraced by the constitution itself. Since ours is a parliamentary system of governance, though an effort has been made by the framers of the constitution to keep the organs of the government separated from each other, but a lot of overlapping and combination of powers has been given to each organ.

The legislative and executive wings are closely connected with each other due to this; the executive is responsible to the legislature for its actions and derives its powers from the legislature. The head of the executive is the president, but a closer look shows that he is only a nominal head and the real power rests with the Prime Minister and his Cabinet of ministers as in Article 74(1). In certain situations the President has the capacity to exercise judicial and legislative functions. For example, while issuing ordinances Art? The judiciary too performs administrative and legislative functions. The parliament too may perform judicial functions, for example if a president is to be impeached both houses of Parliament are to take an active participatory role. Thus all three organs act as a check and balance to each other and work in coordination and cooperation to make our parliamentary system of governance work. India being an extremely large and diverse country needs a system like this where all organs are responsible to each other as well as coordinated to each other; otherwise making governance possible becomes a very rigid and difficult task.

It is important to note that the separation of powers is still an important guiding principle of the constitution. Most noteworthy is our judicial system which is completely independent from the executive and the legislature. According to Article 226 and 32, the High Courts and Supreme Courts respectively have the power of judicial review which empowers them to declare any law passed by the parliament unconstitutional if it so decides. As in regard to the judges, they are extremely well protected by the Constitution, their conduct is not open to discussion in the Parliament and their appointment can only be made by the President in consultation with the Chief Justice of India and the judges of the Supreme Court.

It can be understood thus that there is a difference when there are 'essential' powers of one of the organs of the government and the 'incidental' powers of the organs. Hence, though one organ cannot usurp the 'essential' powers of an organ, it can exercise its powers on the 'incidental' powers for smooth cooperative running of the nation. This distinction clearly demarcates the amount of power one organ can wield over the activities of another. For example, though the judiciary has the right to judicial activism to check legislatures which maybe unconstitutional, it cannot usurp powers such as making laws themselves.

But it is clear that the Separation of Powers doctrine has not been implemented in its strictest format in our country nor been given Constitutional status but a diluted and modern approach is followed to aid and guide our parliamentary system of governance.

CASES

The debate continued through many landmark judgements which were made by the Supreme Court, especially about the 'basic structure' doctrine which takes up an important place in the history of this debate in our country.

The Kesavananda Bharati case is most important in this context. The main question was whether the parliament had unrestricted amending powers due to article 368 over the constitution and how much could actually be amended. To this the judgement given by the supreme court held that the amending power of the parliament was subject to the basic structure of the Constitution, and any amendments which tampered with the basic structure would be unconstitutional. In this judgement, the separation of powers doctrine was included in the basic structure of the constitution and thus any amendments which gave control of one organ over another would be unconstitutional, leaving the Executive, the Legislature and the Judiciary completely independent. It must be kept in mind though that in India the separation of powers doctrine is not followed extremely rigidly.

In Indira Gandhi Nehru v. Raj Narain, the Supreme Court asserted the Kesavananda ruling and upheld the basic structure as well as the separation of powers doctrine; making it a landmark cases our country. The dispute in this case was regarding the Prime Minister elections, where the constituent body had declared that the elections weren't void, thus acting in a judicial capacity. This made the actions of the constituent body ultravires. It was thus held that a parliament cannot under any constitutional amending power or the like take on the role of the judiciary. Thus the position of separation of powers was upheld and asserted in this case.

A recent case, Delhi Development Authority v M/s UEE Electricals Engg. Pvt. Ltd where the Supreme Court ruling has sought to clarify the meaning and objective of judicial review as a protection and not an instrument for undue interference in executive functions. The Supreme Court made the observation that, "One can conve- niently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground is "illegality", the second "irrationality" and the third "procedural impropriety".

Therefore we see that the organs of the state remain separated and this position of separation of powers doctrine has been upheld by the rulings made by the courts. No organs can encroach upon the others ambit of powers, and incase an attempt is made even by was of an amendment it has been struck down to uphold the basic structure doctrine.

CONCLUSION

In the modern world, the Separation of Powers has come to not only mean organs such as the Executive, the legislature and the judiciary but also institutions such as the press and academic institutions. The organs of an open society which hold power have thus increased with the media playing a huge role. Thus, in a modern society, implementation of Separation of Powers doctrine in its strictest sense, the way Montesquieu envisaged it to be in his book The Spirit of laws is an extremely difficult task. Even civil institutions wield a lot of power in all spheres of governance.

In India, the separation of powers theory has been used as a guiding philosophy to separate powers as much as possible but not completely, so that the organs of government are alienated from each other. In our parliamentary form of governance a lot of cooperation is required and thus each organ must correspond to the other on some level so as to function smoothly. Since vesting any one organ with too much power maybe very dangerous, a system of checks and balances has been developed over the years, which has even been consistent with many rulings of the Supreme Court as has been discussed previously. Hence though the doctrine of separation of powers is a theoretical concept and may be very difficult to follow completely a compromised version of it is used in our country. For example the judicial review and activism functions of the judiciary is an important element of our system of justice to keep a check on the legislature who are the law makers of the land, so that they do not exceed their powers and work within the allowances that the constitution has made for them. the separation of the judiciary from the other organs though is taken very seriously so that the common man's liberty can in no circumstances be compromised and a fair remedy be available to any individual citizen of the state.

Thus the Indian Constitution, which is an extremely carefully planned document designed to uphold the integrity and liberty of every citizen, has not in its entirety embraced the doctrine of separation of powers but has indeed drawn a lot from the concept and kept it as a guiding principle. But the doctrine of Separation of Powers has been included in our basic structure doctrine as has been ruled and upheld by the Supreme Court in a number of cases. Thus it holds a position of utmost importance, albeit has been modified to suit the needs of a modern all pervasive state.

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UNIFORM CIVIL CODE OF INDIA

Uniform civil code in India is the proposal to replace the personal laws based on the scriptures and customs of each major religious community in the country with a common set governing every citizen. These laws are distinguished from public law and cover marriage, divorce, inheritance, adoption and maintenance. Article 44 of the Directive Principles in India sets its implementation as duty of the State. Apart from being an important issue regarding secularism in India, it became one of the most controversial topics in contemporary politics during the Shah Bano case in 1985. The debate then focused on the Muslim Personal Law, which is partially based on the Sharia law and remains unreformed since 1937, permitting unilateral divorce and polygamy in the country.

Personal laws were first framed during the British Raj, mainly for Hindu and Muslim citizens. The British feared opposition from community leaders and refrained from further interfering within this domestic sphere. The demand for a uniform civil code was first put forward by women activists in the beginning of the twentieth century, with the objective of women's rights, equality and secularism. Till Independence in 1947, a few law reforms were passed to improve the condition of women, especially Hindu widows. In 1956, the Indian Parliament passed Hindu Code Bill amidst significant opposition. Though a demand for a uniform civil code was made by Prime Minister Jawaharlal Nehru, his supporters and women activists, they had to finally accept the compromise of it being added to the Directive Principles because of heavy opposition.

The debate for a uniform civil code dates back to the colonial period in India. The Lex Loci Report of October 1840 emphasised the importance and necessity of uniformity in codification of Indian law, relating to crimes, evidences and contract but it recommended that personal laws of Hindus and Muslims should be kept outside such codification.

Throughout the country, there was a variation in preference for scriptural or customary laws because in many Hindu and Muslim communities, these were sometimes at conflict;. The difficulty in investigating each specific practice of any community, case-by-case, made customary laws harder to implement. Towards the end of the nineteenth century, favouring local opinion, the recognition of individual customs and traditions increased.

The Muslim Personal law or Sharia law, was not strictly enforced as compared to the Hindu law. It had no uniformity in its application at lower courts and was severely restricted because of bureaucratic procedures. This led to the customary law, which was often more discriminatory against women, to be applied over it. Women, mainly in northern and western India, often were restrained from property inheritance and dowry settlements, both of which the Sharia provides. Due to pressure from the Muslim elite, the Shariat law of 1937 was passed which stipulated that all Indian Muslims would be governed by Islamic laws on marriage, divorce, maintenance, adoption, succession and inheritance.

LEGISLATIVE REFORMS

The Hindu law discriminated against women by depriving them of inheritance, remarriage and divorce. Their condition, especially that of Hindu widows and daughters, was poor due to this and other prevalent customs. The British and social reformers like Ishwar Chandra Vidyasagar were instrumental in outlawing such customs by getting reforms passed through legislative processes. Since the British feared opposition from orthodox community leaders, only the Indian Succession Act 1865, which was also one of the first laws to ensure women's economic security, attempted to shift the personal laws to the realm of civil. The Indian Marriage Act 1864 had procedures and reforms solely for Christian marriages. There were law reforms passed which were beneficial to women like the Hindu Widow Remarriage Act of 1856, Married Women's Property Act of 1923 and the Hindu Inheritance (Removal of Disabilities) Act, 1928, which in a significant move, permitted a Hindu woman's right to property.

The passing of the Hindu Women's right to Property Act of 1937, also known as the Deshmukh bill, led to the formation of the B. N. Rau committee, which was set up to determine the necessity of common Hindu laws. The committee concluded that it was time of a uniform civil code, which would give equal rights to women keeping with the modern trends of society but their focus was primarily on reforming the Hindu law in accordance with the scriptures. The committee reviewed the 1937 Act and recommended a civil code of marriage and succession; it was set up again in 1944 and send its report to the Indian Parliament in 1947.

The Special Marriage Act, which gave the Indian citizens an option of a civil marriage, was enacted first in 1872. It had a limited application because it required those involved to renounce their religion and was applicable only to Hindus. The later Special Marriage (Amendment) Act, 1923 permitted Hindus, Buddhists, Sikhs

and Jains to marry either under their personal law or under the act without renouncing their religion as well as retaining their succession rights.

The Indian Parliament discussed the report of the Hindu law committee during the 1948-1951 and 1951-1954 sessions. Thus, a lesser version of this bill was passed by the parliament in 1956, in the form of four separate acts, the Hindu Marriage Act, Succession Act, Minority and Guardianship Act and Adoptions and Maintenance Act. It was decided to add the implementation of a uniform civil code in Article 44 of the Directive principles of the Constitution specifying, "The State shall endeavour to secure for citizens a uniform civil code throughout the territory of India".

Later years and Special Marriage Act

The Hindu code bill failed to control the prevalent gender discrimination. The laws on divorce were framed giving both partners equal voice but majority of its implementation involved those initiated by men. Since the Act applied only to Hindus, women from the other communities remained subordinated. Thus, family law uniformity was not applied and was added to the Directive principles of the Constitution.

The Special Marriage Act, 1954, provides a form of civil marriage to any citizen irrespective of religion, thus permitting any Indian to have their marriage outside the realm of any specific religious personal law. The law applied to all of India, except Jammu and Kashmir. In many respects, the act was almost identical to the Hindu Marriage Act of 1955, which gives some idea as to how secularised the law regarding Hindus had become. The Special Marriage Act allowed Muslims to marry under it and thereby retain the protections, generally beneficial to Muslim women, that could not be found in the personal law. Under this act polygamy was illegal, and inheritance and succession would be governed by the Indian Succession Act, rather than the respective Muslim Personal Law. Divorce also would be governed by the secular law, and maintenance of a divorced wife would be along the lines set down in the civil law.

Shah Bano case (1985) [***Mohammad Ahmed Khan v. Shah Bano Begum*** AIR 1985 SC 945]

After the passing of the Hindu Code bill, the personal laws in India had two major areas of application : the common Indian citizens and the Muslim community, whose laws were kept away from any reforms. The frequent conflict between secular and religious authorities over the issue of uniform civil code eventually decreased, until the 1985 Shah Bano case. Bano was a 73-year-old woman who sought maintenance from her husband, Muhammad Ahmad Khan. He had divorced her after 40 years of marriage by triple Talaaq (saying "I divorce thee" three times) and denied her regular maintenance; this sort of unilateral divorce was permitted under the Muslim Personal Law. She was initially granted maintenance by the verdict of a local court in 1980. Khan, a lawyer himself, challenged this decision, taking it to the Supreme court, saying that he had fulfilled all his obligations under Islamic law. The Supreme court ruled in her favor in 1985 under the "maintenance of wives, children and parents" provision (Section 125) of the All India Criminal Code, which applied to all citizens irrespective of religion. It further recommended that a uniform civil code be set up. Besides her case, two other Muslim women had previously received maintenance under the Criminal code in 1979 and 1980.

The Shah Bano case soon became nationwide political issue and a widely-debated controversy. After this decision, nationwide discussions, meetings, and agitation were held. The then Rajiv Gandhi led Government overturned the Shah Bano case decision by way of Muslim Women (Right to Protection on Divorce) Act, 1986 which curtailed the right of a Muslim woman for maintenance under Section 125 of the Code of Criminal Procedure. The explanation given for implementing this Act was that the Supreme Court had merely made an observation for enacting the Uniform Civil Code, not binding on the government or the Parliament and that there should be no interference with the personal laws unless the demand comes from within.

The second instance in which the Supreme Court again directed the government of Article 44 was in the case of ***Sarla Mudgal v. Union of India*** AIR 1995 SC 1531. In this case, the question was whether a Hindu husband, married under the Hindu law, by embracing Islam, can solemnise second marriage The Court held that a Hindu marriage solemnised under the Hindu law can only be dissolved on any of the grounds specified under the Hindu Marriage Act, 1955. Conversion to Islam and Marrying again would not, by itself, dissolve the Hindu marriage under the Act. And, thus, a second marriage solemnised after converting to Islam would be an offence under Section 494 of the Indian Penal Code. "Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine". Justice Kuldip Singh also opined that Article 44 has to be retrieved from the cold storage where it is lying since 1949.

The Supreme Court's latest reminder to the government of its Constitutional obligations to enact a Uniform Civil Code came in July 2003 [***John Vallamattom v. Union of India*** AIR 2003 SC 2902] when a Christian priest knocked the doors of the Court challenging the Constitutional validity of Section 118 of the Indian Succession Act. The priest from Kerala, John Vallamatton filed a writ petition in the year 1997 stating that Section 118 of the said Act was discriminatory against the Christians as it impose unreasonable restrictions on their donation of property for religious or charitable purpose by will. The bench comprising of Chief Justice of India V. N. Khare, Justice S.B. Sinha and Justice A.R. Lakshamanan struck down the Section declaring it to be unconstitutional. Chief Justice Khare stated that,

"We would like to State that Article 44 provides that the State shall endeavour to secure for all citizens a uniform civil code throughout the territory of India It is a matter of great regrets that Article 44 of the Constitution has not been given effect to. Parliament is still to step in for framing a common civil code in the country. A common civil code will help the cause of national integration by removing the contradictions based on ideologies."

Goa is the only state in India which has a uniform civil code. The Goa Family Law, is the set of civil laws, originally the Portuguese Civil Code, continued to be implemented after its annexation in 1961.

In September 2003, in an interactive session in PGI Chandigarh, then President Dr. A. P. J. Abdul Kalam supported the need of Uniform Civil Code, keeping in view the population of the country.

Sikhs and Buddhists objected to the wording of Article 25 which terms them as Hindus with personal laws being applied to them. However, the same article also guarantees the right of members of the Sikh faith to bear a Kirpan.

In October 2015, Supreme Court of India asserted the need of a Uniform Civil Code and said that, "This cannot be accepted, otherwise every religion will say it has a right to decide various issues as a matter of its personal law. We don't agree with this at all. It has to be done through a decree of a court".

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