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## FUNDAMENTAL RIGHTS

### Introduction

In democracy, the governing power is derived from the people, either by direct referendum or by means of elected representatives. The success or failure of a democracy depends to a large extent to which the civil liberties are enjoyed by its people. A free society can ensure all round development of the individual's personality & life. This **all round development** helps the advancement of the human welfare. So, every democracy pays special attention to rights of its citizens and this is the reason the fundamental rights are incorporated in the constitution.

In the democratic set up, there are certain **primary or basic conditions which are necessary for the fullest development of its people and these primary or basic conditions are called Fundamental Rights**. They are protected, ensured and guaranteed by the constitution of the state.

### Fundamental Rights in British Constitution

- The uncodified nature of the British Constitution embodies **no** fundamental rights.
- Some British dominions such as **Canada and Australia** also **embody no** fundamental rights.
- The British constitutionalists are of the view that written rights are not of much practical value
- According to them the real guarantee of the liberty lives in an effective public opinion and existence of government that is amenable to such public opinion.

This seems to be a sound position, as in Great Britain there is possibly more individual freedom, but one can ask, how long did it take to reach the present position?

Further, Eric Barendt, a legal scholar of London argues that the uncodified nature of the United Kingdom constitution does not mean it should not be characterized as a "constitution", but also claims that the lack of an effective separation of powers, and the fact that parliamentary sovereignty allows Parliament to overrule fundamental rights, makes it to some extent a 'facade' constitution.

### Fundamental Rights in USA Constitution

The original constitution of the USA<sup>1</sup> had not included a Bill of Rights. However, within two years of inauguration, a series of amendments was enacted and out of the **27 amendments of US constitution** till now, **first ten amendments are known as the Bill of Rights**. The task of enforcing and protecting these rights was entrusted to the Judiciary, particularly US Supreme Court.

- ✍ Fundamental Rights in the Indian Constitution are inspired with the US Constitution.
- ✍ US Constitution was the **First Written Constitution** and it **provided** the "**Fundamental Rights**" embodied in the constitution as "Bill of Rights".

### Difference between the Legal Rights and Fundamental Rights

The legal rights are protected by an ordinary law, but they can be altered or taken away by the legislature by changing that law. Fundamental Rights are protected and Guaranteed by the Constitution and they cannot be taken away by an ordinary law enacted by the legislature. If a legal right of a person is violated, he can move

<sup>1</sup> adopted on September 17, 1787

to an ordinary court, but if a fundamental right is violated the Constitution provides that the affected person may move to High court or Supreme Court.

For example Rights to Property was a fundamental right before 1978. The Constitution (Forty-fourth Amendment) Act, 1978, taken away the Right to property (Article 31) as a Fundamental Right and was made a legal right under new Article 300 A.

### Demand for Fundamental Rights

The American bill of rights had a great impact on the thinking of Indian Leaders on the topic of Fundamental Rights. Demand for fundamental rights was first made in 1928 in the Nehru Committee Report. It was discarded by the Simon Commission. The Constitution assembly, when met for the first time on December 9, 1946, the idea of Chapter on Fundamental Rights was not opposed by any member. After adopting the 'Objectives Resolution', moved by Nehru, the Constituent Assembly appointed an advisory committee under Sardar Vallabhbhai Patel on January 24, 1947. The Patel committee dealt with the rights of citizens, minorities, tribal and excluded areas. Patel presented the committee's recommendations on political safeguards for minorities sans separate electorates on August 27. The recommendations were accepted in the Assembly the following day.

**Sardar Vallabhbhai Patel**, the chairman of the Special Advisory Committee played a decisive role in the Constituent Assembly and remained the moving spirit behind some of the landmark provisions of Indian principles such as Fundamental Rights, the position of the Prime Minister, the Election Procedure of the President and the Status of Kashmir.

### Documents that Influenced Incorporation of Fundamental Rights in our Constitution

#### Pre War Constitutions

##### US Constitution "Bill of Rights":

- First ten amendments to the United States Constitution are known as "Bill of Rights". They were introduced by **James Madison** to the First United States Congress in 1789 as a series of articles.
- They came into effect on December 15, 1791, after getting ratified by three-fourths of the States.

##### Declaration of the Rights of Man and Citizens, France

- The last article of the Declaration of the Rights of Man and of the Citizen (*Déclaration des droits de l'Homme et du Citoyen*) was adopted 26 or 27 August, 1789.
- It is the fundamental document of the French Revolution which defines the individual and collective rights of all the estates of the realm as universal.
- It is Influenced by the doctrine of natural rights, the rights of Man are universal: valid at all times and in every place, pertaining to human nature itself.
- It does not talk about rights of Women.

##### Irish Constitution:

- The Irish Constitution came into force on 29 December 1937 after having been passed by a national plebiscite on 1 July 1937.
- It has important features such as Equality before the law (Guaranteed by Article 40.1), Prohibition on titles of nobility, Personal rights, Prohibition of abortion, Habeas Corpus, Freedom of speech, Freedom of assembly, Private property, Religious indiscrimination etc.

-: About this document:-

**Post War Constitutions:**

- Constitution of Japan and Constitution of Burma of 1948 and Universal Declaration of human Rights of 1948 were the post war constitutions influencing the embodiment of Fundamental Rights in Indian Constitution.

**Universal Declaration of Human Rights:**

- Universal Declaration of human Rights was adopted by the United Nations General Assembly on 10 December 1948 at Paris and is today, the most widely translated document of the world. John Peters Humphrey was its principal drafter. Its preamble starts with:

*"Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,"*

and its Article 1 reads:

*"All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood."*

- It was on the final stage of its adoption at the United nations when our constitution was being drafted.

**Factors that Influenced incorporation of Fundamental Rights in Our Constitution**

The people of India suffered from the disabilities during the British rule, which denied them of any true fundamental rights. There was a strong institution of caste which included a big section of Indian society as "Untouchables". There were a large number of linguistic, religious and racial minorities in the country whose cultural rights were to be safeguarded.

**Overview of Part III of the Constitution**

Part III of the constitution is "Fundamental Rights". The articles in Part III are **Article 12 to Article 35**. The article in Part III are divided into 8 groups

- ⇒ General (Article 12 & 13)
- ⇒ Right to Equality (Article 14-18)
- ⇒ Right to Freedom (Article 19-22)
- ⇒ Right against Exploitation (Article 23 & 24)
- ⇒ Right to Freedom of Religion (Article 24-28)
- ⇒ Cultural and Educational Rights (Article 29-30)
- ⇒ Saving of Certain Laws (Article 31A-31C)
- ⇒ Right to Constitutional Remedies (Article 32- 35)

**Article 12**

Article 12 defines the "state". The state includes the **Government** and **Parliament** of India and the **Government** and the **Legislature** of each of the **States** and all **local** or other authorities within the territory of India or under the control of the Government of India.

**Article 13**

Article 13 makes all laws in force in the country immediately before the commencement of the constitution void so far they are inconsistent with the provisions of the part III. Article 13 also defines the law and law in force.

✍ Article 13 is inapplicable to any amendment of the constitution enacted under article 368. [Constitution (Twenty-fourth Amendment) Act, 1971]

**Article 14: Equality before law**

*“The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.”*

Equality before law as provided in the Article 14 of our constitution provides that no one is above the law of the land. **Rule of the Law is an inference derived from Article 14 of the constitution.** The article 14 aims to establish the “Equality of Status and Opportunity” as embodied in the Preamble of the Constitution.

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

- Article 15.1. The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.
- Article 15.2. No citizen shall, on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to-
  - a. access to shops, public restaurants, hotels and places of public entertainment; or
  - b. 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.
- Article 15.3. Nothing in this article shall prevent the State from making any special provision for women and children.
- Article 15.4. 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.
- Article 15.5. 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.

Explanation: 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 93<sup>rd</sup> 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.

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

Article 16 gives the guarantee of equality of opportunity in matters of public employment. Article 16(1) & 16(2) have laid down a general rule that **there shall be equal opportunity for all citizens and thus emphasizes on universality of Indian Citizenship.** However, further section of Article 16 provides the exceptions. Article 16(3) reads as follows:

Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office [under the Government of, or any local or other authority within, a State or Union territory, any requirement as to residence within that State or Union territory] prior to such employment or appointment.

As per this article residence qualifications may be made necessary in the case of appointments under the state for particular positions, thus **making the domicile provisions stronger**, however, **the power is not vested in the states but in Parliament to prescribe the requirement as to residence in the state**. This emphasizes on **making the qualifying test uniform throughout the country**.

### Indra Sawhney and Others vs. Union of India and Others (1992) case<sup>2</sup>

Article 16 (4) discusses **reservation in the posts** for the first time in the constitution. This article 16(4) empowers the state to make any provision for the reservation of appointments or posts in favor of the backward classes. The matter of determination of the community is left with the each state government by phrase " ...which in the opinion of the state, is not adequately represented in the services of the state."

Parliament by 77th Constitutional amendment inserted Art 16(4) (A) permitting **reservation in promotions** to the **Schedule Castes** and **Schedule Tribes**. Later it was further amended to include consequential seniority by 85th amendment.

The Article 16(4) came under the Supreme Court's interpretation in the Indra Sawhney and Others vs. Union of India and Others (1992) case. The members of the Scheduled Tribes and Scheduled castes of the country were enjoying the facility of reservation in appointments as well as promotions since 1950s. On 16 November 1992, Supreme Court in its judgment in the Indra Sawhney and Others vs. Union of India and Others (1992) case held that the Reservation of Appointments under article 16(4) of the constitution is **CONFINED** to initial appointments and **does not extend to the matter of Promotion**.

The government opined that this ruling of the Supreme Court will adversely affect the interests of the Scheduled castes and Scheduled Tribes Community of the Country. The government further opined that representation of the SCs and STs in the services in the state have not reached the required level.

So to continue the existing share of reservation in the promotions as well, Constitution (Eighty-sixth Amendment) Bill, 1995 was brought to the parliament, which after being enacted came into force as Constitution (Seventy-seventh Amendment) **Act, 1995**. This amendment of the constitution added article 16 (4 A) in the constitution. Article 16 (4A) read as follows after the **77th amendment Act 1995**.

Nothing in this article shall prevent the State from making any provision for reservation **in matters of promotion to any class** or classes of posts in the services under the State in favor of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State, are not adequately represented in the services under the State.

However, later the same article 16(4A) was once more amended. The words which I have highlighted were replaced by "**in matters of promotion, with consequential seniority, to any class**", to further clarify and strengthen the state's position by Constitution (**Eighty-fifth Amendment**) Act, 2001.

<sup>2</sup> Full judgment can be read here <http://www.indiankanoon.org/doc/1363234/>

**Article 16(4B) and Backlog Vacancies**

Article 16 (4B) was inserted in the constitution by Constitution **81st Amendment Act 2000**.

Prior to August, 29, 1997, the vacancies reserved for the SC & ST, which could not be filled up by direct recruitment on account of non-availability of the candidates belonging to the SC & ST were treated as "**Backlog Vacancies**". These vacancies were treated as a distinct group and were excluded from the ceiling of 50% reservation. The Supreme Court of India in its **judgment in the Indra Sawhney versus Union of India** held that the **number of vacancies to be filled up on the basis of reservations in a year including carried forward reservations should in no case exceed the limit of 50%**

As total reservations in a year for the Scheduled Castes, the Scheduled Tribes and the other Backward Classes combined together had already reached 49.5% and the total number of vacancies to be filled up in a year could not exceed 50%, it became difficult to fill the "Backlog Vacancies" and to hold Special Recruitment Drives.

To implement the judgment of the Supreme Court, an Official Memorandum dated August 29, 1997 was issued to provide that the **50% limit shall apply to current as well as "Backlog Vacancies"** and for discontinuation of the Special Recruitment Drive.

This Official memorandum was protested by various organizations and politicians including the Members of the Parliament. Later, Government brought Constitution (Ninetieth Amendment) Bill, 2000 which was enacted as **The Constitution (Eighty-first Amendment) Act, 2000**. This amendment inserted Article 16 (4B) in the constitution. Article 16 (4B) reads as follows:

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

The **impact of this amendment** was that the **unfilled vacancies of a year**, which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) of article 16 of the Constitution, were now **to be considered as a separate class of vacancies to be filled up in any succeeding year or years** and such class of vacancies **shall not be considered together** with the **vacancies** of the year in which they are being filled up for determining the ceiling of fifty percent. Reservation on total number of vacancies of that year.

**Article 16 (5)**

Nothing in this article shall affect the operation of any law which provides that the incumbent of an office in connection with the affairs of any religious or denominational institution or any member of the governing body thereof shall be a person professing a particular religion or belonging to a particular denomination.

Article 16(5) merely reiterates the religious indoctrinations by the state.

### Article 17: Abolition of Untouchability

Article 17 abolishes the untouchability and its practice in any form is made punishable under the law. This was the article which was adopted with the cries of "Mahatma Gandhi ki Jai". Though, this article does not create a right, yet it is a lease of rescue to the 1/6th of Indian population from perpetual subjugation, humiliation & disgrace of centuries. To incorporate the article in the constitution as one of the most unambiguous articles of the constitution was the best way to eradicate this evil.

To, **further strengthen the constitutional provision** in Article 15 and Article 17, the parliament of India enacted the **Untouchability (offences) Act in 1955<sup>3</sup>**. This act was further amended and **renamed in 1976** as **Protection of Civil Rights Act, 1955**.

This act lays down that whatever is open to general public (or Hindus) should be open to the members of the scheduled castes. No shopkeeper can refuse to sell them, no person may refuse to render any service to any person on the ground of untouchability. The act made provision for imprisonment and fine.

### Article 18: Abolition of titles

- **Article 18(1):** No title, not being a military or academic distinction, shall be conferred by the State.
- **Article 18 (2):** No citizen of India shall accept any title from any foreign State.
- **Article 18(3):** No person who is not a citizen of India shall, while he holds any office of profit or trust under the State, accept without the consent of the President any title from any foreign State.
- **Article 18(4):** No person holding any office of profit or trust under the State shall, without the consent of the President, accept any present, emolument, or office of any kind from or under any foreign State.

Article 18 prevents the state from confirming any title **except military** and **academic** distinction. Article 18 prohibits the Indian citizens from receiving titles from any foreign state. The foreign nationals holding the office of profit under the state may accept titles from the foreign government with the consent of President. In a true democracy, there is no space for artificial distinctions among the same society. Titles such as *Rai Bahadur, Sawai, Rai Sahab, Zamindar, taluqdar* etc were prevalent in medieval and British India. All these titles were abolished by article 18 of the constitution.

### Article 19-22: Right to Freedom

Article 19, 20, 21 & 22 deal with the different aspects of Personal Liberty, the basic right of a citizen in a democracy. These articles are as follows:

- ✓ Article 19: Protection of certain rights regarding freedom of speech, etc.
- ✓ Article 20: Protection in respect of conviction for offences.
- ✓ Article 21: Protection of life and personal liberty.
- ✓ Article 22: Protection against arrest and detention in certain cases.

<sup>3</sup> came into force 1st June, 1955



**Article 19: Protection of certain rights regarding freedom of speech, etc**

Article 19 is the most important and key article which embodies the “basic freedoms”. Article 19(1) provides that all citizens shall have the right- (originally 7, now 6)

- (a) to freedom of speech and expression;
- (b) to assemble peaceably and without arms;
- (c) to form associations or unions;
- (d) to move freely throughout the territory of India;
- (e) to reside and settle in any part of the territory of India;
- (f) **omitted by 44<sup>th</sup> amendment act. (it was right to acquire, hold and dispose of property)**
- (g) to practice any profession, or to carry on any occupation, trade or business.

However, Freedom of speech and expression is not absolute. As of now, there are 8 restrictions on the freedom of speech and expression. These are in respect of the sovereignty and integrity of the country.

These 8 **restrictions** were:

1. Security of the state
2. Friendly relations with foreign states
3. Public Order
4. Decency or morality
5. Contempt of Court
6. Defamation
7. Incitement to offence
8. Sovereignty and integrity of India.

These 8 **restrictions were embodied in their current form in the constitution First Amendment Bill 1951**, this was necessitated by *Romesh Thapar v. State of Madras* (1950). In this case the entry and circulation of the English journal “Cross Road”, printed and published in Bombay, was banned by the Government of Madras. The Supreme court held in this case that, unless a law restricting the freedom of speech and expression were directed solely against the undermining of the security of the state or its overthrow, the law could not be held a reasonable restriction though it sought to impose a restraint for the maintenance of public order.

✍ Please note that When a proclamation of emergency is made under article 352, article 19 itself remains suspended.

**Freedom of Speech and Expression**

Article 19 of the constitution provides freedom of speech which is the right to express one’s opinion freely without any fear through oral / written / electronic/ broadcasting / press.

The Constitution **does not make any special / specific reference to the Freedom of Press**. The protagonists of the “free Press” called it a serious lapse of the Drafting committee. However, the freedom of expression includes freedom of press. Dr. Ambedkar in this context had said on speaking behalf of the Drafting Committee that the press had no special rights which are not to be given to an individual or a citizen. Dr.

Ambedkar further said that the “editors or managers of press are all citizens of the country and when they chose to write in newspapers they are merely expressing their right of expression”.

#### Some landmark Supreme Court Judgments regarding the Freedom of Expression

**Romesh Thapar v. State of Madras, (1950):** Freedom of speech and of the press laid at the foundation of all democratic organizations, for without free political discussion no public education, so essential for the proper functioning of the process of popular government, is possible.”

**Maneka Gandhi v. Union of India, (1978):** Freedom of speech and expression has no geographical limitation and it carries with it the right of a citizen to gather information and to exchange thought with others not only in India but abroad also.

**Prabha Dutt v. Union of India ((1982) :** Supreme Court directed the Superintendent of Tihar Jail to allow representatives of a few newspapers to interview Ranga and Billa, the death sentence convicts, as they wanted to be interviewed.

**Indian Express v. Union of India (1985):** Press plays a very significant role in the democratic machinery. The courts have duty to uphold the freedom of press and invalidate all laws and administrative actions that abridge that freedom.

**Secretary, Ministry of Information and Broadcasting v. Cricket Association of Bengal (“Cricket Association”) (1995):** Every citizen has a fundamental right to impart as well as receive information through the electronic media. It ruled that frequencies or airwaves are public property, and that the government enjoys no monopoly over broadcasting. Court ordered the government to take immediate steps to set up an independent and autonomous public authority to regulate frequencies. Freedom of speech and expression (Article 19.1 & 19.2) played an important role in this decision.

So, the word expression covers the Press. In modern times it covers the blogs and websites too.

#### Freedom of Assembly

The constitution guarantees right to hold meetings and take out processions. The processions and meetings should be unarmed and peaceful. This right may be restricted in the interest of the public order or sovereignty and integrity of the country.

This article has also been reviewed and interpreted by the Supreme Court many times. It's worth note that section 144 of the Sub-section (6), of the Code of Criminal Procedure can be imposed by the government in certain areas which makes the assembly of 5 or more people an unlawful assembly. This section was challenged in the supreme court via Kamla Kant Mishra And ors. vs State Of Bihar And ors. Case (1962), on the basis that it violates article 19(1) of the constitution and thus is invalid. The Supreme Court in its judgment held that power conferred upon the State Government under Section 144, Sub-section (6), of the Code of Criminal Procedure, is constitutionally valid.

Section 129 of the Code of Criminal Procedure authorizes the police to disperse any unlawful assembly which may cause disturbance to public peace.

#### Freedom of Association

The constitution declares that all citizens will have the right to form associations and unions.

#### Freedom of Movement

The freedom of movement is guaranteed by the constitution and citizens can move from one state to another and anywhere within a state. A person free to move from any point to any point within the country's territories. There are certain exceptions such as Scheduled Tribes areas and army areas.

#### Freedom of Residence:

An Indian Citizen is free to reside in any state except Jammu & Kashmir. Again this is subject to certain restrictions.

### Freedom of Trade & occupation:

The constitution of India guarantees each of its citizen to do trade , occupation or business anywhere in the country.

### Article 20: Protection in respect of conviction for offences

⇒ Article 20(1): No person shall be convicted of any offence except for violation of a law in force at the time of the commission of the Act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.

⇒ Article 20(2): No person shall be prosecuted and punished for the same offence more than once.

⇒ Article 20(3) No person accused of any offence shall be compelled to be a witness against himself.

This article embodies the fundamental principles of natural justice and provides protection against arbitrary and excessive punishment to any person who commits an offense.

### Article 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.**

This article in the original drafted constitution used the words "no person is to be deprived of his *life or liberty without due process of law*".

The drafting committee changed it to "No person shall be deprived of his life or **personal liberty** except according to **procedure established by law**" giving the reason that liberty should be qualified by the word personal, so that unnecessary interpretation may be avoided.

The expression "Procedure established by law" is more definite phrase and this phrase finds the place in the Japanese Constitution of 1946. It implies that life and personal liberty of a person cannot be encroached upon arbitrarily **without the proper sanction and provision of law.**

### Article 21-A : Right to Education

The first question is that - If **Right to Education has been added as 11<sup>th</sup> Fundamental duty in the constitution.** then how come it is a Fundamental Right? We frame a multiple choice question as follows:

Right to Education is a \_\_\_\_\_?

- A. Fundamental Right Only
- B. Fundamental Duty Only
- C. Both Fundamental Right and Fundamental Duty
- D. Neither a Fundamental Right nor a Fundamental Duty. (obviously not a correct option)

We should remember that there are 3 articles in the constitution of India which have Children as their special focus. These articles are Article 24, 39 & 45. Article 24 reads as follows:


**Article 24:** No child below the age of 14 years shall be employed to work in any factory or mine or engaged in hazardous employment.

**Article 39<sup>4</sup> (f)**

The State shall, in particular, direct its policy towards securing—

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

**Article 45 :** The State shall endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

The **86<sup>th</sup> Amendment Act** which was introduced in the parliament as **93<sup>rd</sup> Amendment Bill** brings the following effects: 

1. **A new article 21A was inserted below the Article 21** which made Right to Education a Fundamental Right for children in the range of 6-14 years. This article reads:

**“The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine”**

2. Article 45 which originally stated :

The State shall endeavor to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

Was substituted as

**The State shall endeavor to provide early childhood care and education for all children until they complete the age of six years<sup>5</sup>.**

3. Article 51A was also amended and after clause (J), the clause (k) was added which says:

**“who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.”.**

We can conclude the 86th Amendment Act made the **following changes:**

- ✍ It made Right to Education a Fundamental Right for Children from Age 6-14.
- ✍ It made education for all children below 6 years a Directive Principle for State Policy (DPSP).
- ✍ It made the opportunities for education to child a **Fundamental duty of the parents** of the children.

**So, we can say that Right to Education is a “Fundamental Right” as well as “ Fundamental Duty”. However, for state, it is a DPSP BUT that too only for 0-6 years of children.**

The day this 86<sup>th</sup> Amendment Act was passed, a huge crowd of 70,000 people gathered at the capital and demanding that education be made a fundamental right also for children up to six years of age. This amendment became an act but it is more or less a regressive act.

**Why a Regressive Act?**

<sup>4</sup> Article 39 (f) was inserted by 42<sup>nd</sup> amendment act 1976.

<sup>5</sup> However this substitution has not been notified yet.

We go back to 1993 to understand this. In 1993, in *J.P. Unnikrishnan vs the State of Andhra Pradesh*, a five-member Bench of the Supreme Court had laid down that the right to education was a fundamental right that flowed from the Right to Life (Article 21). The judgment quoted:

"The passage of 44 years - more than four times the period stipulated in article 45 has converted the obligation created by the article into an enforceable right. At least now the state must honor the command of Article 45 and make it a right"

Further the Supreme Court stated:

"Right to Education is implicit and flows from right to life guaranteed under Article 21 and "Every Child of this country has a right to free education until the age of 14, there after his rights are circumscribed by the economic capacity and development of the state"

**We can conclude that:**

1. This bill has kept the zero to six age group **out of the scope of "fundamental rights,"** and by doing this our government has actually **diluted the long-term objective of Universalisation of Elementary Education (UEE).**
2. This bill virtually relieves the state of its duty to guarantee education to children by placing the onus on parents, who will have to ensure that their children are provided "opportunities for education"
3. This bill relieves the state of its duty to guarantee free and compulsory education for children up to the age of six.
4. This bill by mentioning "such manner as the State may, by law, determine" again virtually makes it a loose act.
5. The Eighty-sixth Constitutional Amendment Act has **split the age group 0-14 years into two clear categories and these separate ages cover their interests under separate Articles in the Constitution.** Article 21A as a fundamental right for age group 6-14 years and Article 45 a Directive Principle of State Policy for age of 0-6 years.

### **Right to Education: Background Events**

1. The 1986 National Policy of Education **DID NOT** make the education compulsory.
2. The first official document on the education right of children was **Ramamurti Committee Report** in 1990 which reviewed the National Education Policy 1986. This committee mentioned that not paying attention to the right to education was the most fundamental problem of our education system. Ramamurti Committee also noted that "the time has come to recognize "Right to Education" as a fundamental right of the Indian Citizens.
3. In 1991, a book by **Myron Wiener** titled " The Child and State in India: Child labour & Education in comparative perspective" noted states failure to eradicate child labour and enforce compulsory education.
4. In 1992, **India became signatory to the UN Convention on Rights of the Child.** Article 28 of this Convention "asks the states to recognize right of education for every child and make primary education compulsory". At that time, it was not in line with the constitution's provision in article 51(c) which says: State shall endeavor to foster respect for international law and treaty obligations. (DPSP)

5. In 1993, Supreme Court Gave its landmark judgment in the Unnikrishnan JP vs State of Andhra Pradesh & Others. In this case, SC held that Education is a Fundamental right flowing from Article 21.
6. In 1994, The United Front Government set up **Saikia Committee** to examine the proposal of making right to free and compulsory education.
7. In 1997, the **Saikia Committee** Reported that Constitution of India should be amended to **make the right to free education up to 14** years of age a **compulsory right**. It also recommended making an explicit fundamental duty of every parent to provide opportunities for elementary education.
8. In 1997, the United Front Government introduced 83rd Amendment Bill, 1997 which encompassed insertion of article 21A & omitting article 45 of the Constitution. This amendment bill had an additional financial memorandum that outlined the costs that would go into making education for children in the six to 14 age groups a fundamental right for a 10-year period.
9. **Tapas Majumdar Committee** was set up by the NDA Government in 1999 to look into the financial implications of operationalising the 83rd Amendment Bill introduced by the United Front government in 1997, seeking to make the right to free and compulsory education up to the age of 14 a fundamental right. The 83rd Amendment Bill was renamed the 93rd Amendment Bill and significant changes were incorporated in it. The tapas majumadar committee recommended that even children belonging to the **poorest sections of society must receive education that was comparable in quality with the best**. It did not advocate low-cost alternatives.
10. The 93rd Amendment Bill was discussed and passed By Lok Sabha on 27 November 2001 and Rajya Sabha on 14th May 2002. The date of the bill was to amended from 2001 to 2002 so it again went to Lok Sabha.
11. **After ratification by the President, it became Constitution 86th Amendment Act.**  
In pursuance with article 21A, which says that “The State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine” and **Constitution 86th amendment act**, it was now up to the state (means central government) to determine how and in which manner the Free & compulsory education is to be provided.
12. **The 86th amendment provided for a follow-up legislation**, which culminated in Right to Education Bill 2005, Right to Education Bill 2008 and finally **Right to Education Act 2009**.

### **Right to Education Act: Main Features**

#### **Education as Fundamental Right:**

- ✍ Every Child of the age group of 6-14 years shall have right to free and compulsory Education.
- ✍ No child is liable to pay any kind of fee/ capitation fee/ charges. A collection of capitation fee invites a fine up to 10 times the amount collected.

#### **Children from Disadvantaged Group:**

- ✍ This right provides that “ child belonging to **disadvantage group**” means a child who

1. Belongs to SC & ST
2. Socially backward class.
3. Geographical, Linguistic, Gender or such other matters.

✍ The Right to Education Act 2009 does not talk about “Physically disabled” people.

An amendment to Right to Education is making news now a days. Which among the following is the aim of this amendment?

- A. Banning the screening tests
- B. Provide reservation to SC/ ST children
- C. Include Differentially abled children under the ambit of the act
- D. Make primary education compulsory

The answer of the above question is C. Include Differentially abled children under the ambit of the act .

The Right of Children to Free & Compulsory Education (Amendment) Bill 2010 was introduced in the Rajya Sabha on April 16, 2010. This bill was later referred to a standing committee on Human Resource Development. As of now this bill has not become an act.

This The Right of Children to Free & Compulsory Education (Amendment) Bill 2010 aims to amend the Right of Children to Free & Compulsory Education Act 2009 by expanding the definition of “Child belonging to disadvantaged group”. Now this group shall also include the children with disability. Disability means blind, leprosy cured, hearing impaired, locomotor disabled and mentally ill. It also includes autism, cerebral palsy, mental retardation & multiple disabilities. These children have the same right as of other children.

#### Teachers:

This act provides that the states will ensure that no non-teaching work is given to the teachers. The act recommends quality teachers and mandates that untrained teachers will have to upgrade themselves in 5 years.

#### Schools:

The act has listed minimum infrastructure requirements as a part of the schools and mandates the states to ensure that schools have these requirements. The schools which don't conform to the quality standards as mentioned in the act, will upgrade themselves in 3 years or face derecognition.

#### Reservation:

The act mandates 25% reservation for disadvantage sections of the society as defined by the act.

#### Management Committees:

The act mandates that parents are to constitute the 75% members in the management committees. The School management committees are to have 50% women members.

#### Screening:

This act makes the screening of students / parents unlawful. It invites fine up to ` 25000 in the first instance and double in every successive violations.

#### Examinations:

No child can be put through any exam, not even class V & Class VIII board examinations.

#### Number of Teachers:

The act mandates number of teachers as follows: (please note that in newspapers, different news have written different ratios. The following list is reproduced from the official document<sup>6</sup>)

<sup>6</sup> <http://www.education.nic.in/Elementary/free%20and%20compulsory.pdf>

**Class I to Class V**

- ✓ Up to 60 children : 2 teachers (Pupil Teacher Ratio: 30:1)
- ✓ 61 to 90 children : 3 teachers (Pupil Teacher Ratio: 30:1)
- ✓ 90 to 120 : 4 teachers (Pupil Teacher Ratio: 30:1)
- ✓ 121-200 : 5 teachers (minimum Pupil Teacher Ratio: 40:1)

**Class VI to Class VIII**

- ✓ One teacher per class each for 1. Science and math 2. Social Studies 3. Languages.
- ✓ One teacher for 35 children
- ✓ If there are more than 100 children then 1. A full time teacher 2. Part time instructors for Art, Health and Physical Education, Work Education.

**Corporal punishment:**

The Right to Education Act 2009 makes corporal punishment unlawful.

**Private Teaching / Tuitions:**

Clause 28, Chapter 28 of the act mandates that no teacher shall engage himself / herself in private teaching.

**Monitoring:**

The act states that National & State Commissions for protection of Child rights would monitor the effective implementation of measures in this act and inquire into complaints.

**National Advisory Council:**

The act provides that the central Government shall constitute a National Advisory Council of maximum 15 members which shall advise the central government on implementation of the various provisions of the act.

**Right to Education Act: Some Issues**

**From where the Money will come?**

The implementation cost for right to education is more than ` 2 Lakh crores in next five years. The HRD Ministry admitted that there is a shortfall of ` 60000 Crore over the said period. The ministry also said the allocation would be made.

In this context, on August 8, 2010, Pranab Mukherjee made this statement:

*“The Human Resource Development Minister has said that ₹ 2,31,000 crore will be required for implementing RTE in the next three years for setting up schools, appointment of teachers and building of infrastructure. I said that the money will be provided,”*

**Centre State participation: Implementation Issues:**

Sarva Shiksha Abhiyan has been advertised as the main vehicle for implementing RTE. In the Sarva Shiksha Abhiyan the assistance pattern was to be as 85:15 sharing arrangement during the IX Plan, 75:25 sharing arrangement during the X Plan, and 50:50 sharing thereafter between the Central government and State governments.

**What are the Current Sharing of Funds among the center and States in 2010-11?**

- A. 60:40
- B. 65:35
- C. 55:45
- D. 50:50



However, this funding pattern was changed on 25 September 2007).<sup>7</sup>

**Following is the Funding Pattern for SSA at present**

**For States/Union Territories other than NE States:**

“The funding pattern between the Central Government and States/UTs shall be in the ratio of

- ✓ 2007-08 : 65:35
- ✓ 2008-09 : 65:35
- ✓ 2009-10 : 60:40
- ✓ 2010-11: 55:45 (Answer of above question)
- ✓ 2011-12 : 50:50

**For 8 North Eastern States.**

For the 8 North-Eastern States, the fund sharing pattern between Centre and States shall be 90:10 under the programme with the Centre’s share resourced from the 10% earmarked funds for the NE Region in the SSA’s Central Budget”.

So, at present the sharing ratio is 55:45 and it will be 50:50 by the 12th Plan.

**States Concerns about Right to Education**

The states have raised their concerns for implementation of Right to Education. In later half of 2009 the states started bargaining on the issue. Orissa CM Naveen Patnaik had demanded a 75:25 funding pattern for RTE between Centre and states. The Madhya Pradesh chief minister Shivraj Singh Chauhan wrote to PM Manmohan Singh demanding that the funding pattern for RTE should be 90:10 between Centre and states. He also circulated the letter to other CMs as well. Bihar government said that it cannot bear the extra burden since it is already shelling out 25% of its annual budget on education.

Initially, the HRD ministry officials made some statements that it is looking for change in the funding pattern. However, the bill became a law and nothing substantially on this matter could be worked out.

Uttar Pradesh Chief minister Mayawati became the first politician to make a statement that her states has No money to implement this act. Chief Minister Mayawati said that state does not have Rs 8,000 crore for the education of children.

Further, the government said that Uttar Pradesh will need new 4,596 new primary and 2,349 upper primary schools and with this 3.25 lakh teachers would be required in primary schools to implement this act. It would create over 3 lakh new jobs. But the government said “It has No Money”

**Private Schools Concerns about Right to Education**

This act defines the schools<sup>8</sup> as recognized schools-

- ✓ that are aided by the government and local authorities.
- ✓ that are not aided by the government and school authorities.

This means that private schools have not be ruled out by the act. This mandate is for all schools without exception. The private schools are for making profits. Those who are anti this act can say there this affects

<sup>7</sup> [http://ssa.nic.in/ssa-framework/Letter\\_All\\_20SPD.pdf](http://ssa.nic.in/ssa-framework/Letter_All_20SPD.pdf)

<sup>8</sup> Section 2 (n) RTE Act 2009.

their business and their fundamental right provided by article 19 (1g) (to practice any profession, or to carry on any occupation, trade or business).

When we analyze this issue we can easily figure out that the above clause (g) to practice any profession or business is virtually controlled by article 19 (6)<sup>9</sup> which says that nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public, reasonable restrictions on the exercise of the right conferred.

Article 19.6 restricts the right to conduct business and this is the article which prevents anybody to conduct such trades like nuclear energy, narcotic plants, satellites etc. which require government's due approval and a conforming to existing laws.

### Admission Issues

The Model Rules don't provide many details on the implementation of 25 per cent reservation in private schools. It does not specify the definition and verification of the weaker and disadvantaged sections. How to select the children and in which class they shall be admitted. How they will gap the admission demand and seats available? What can be the vigilance mechanism? How the schools (private) would be reimbursed? etc. There is no clear instruction for private schools for formation of the school management committee.

### Free Education

This is the most basic issue, which caused lot of confusion. It was earlier stated by Kapil Sibal that " It could mean free books, free uniform or anything as defined by the states". This confusion prevails.

### Madarsa Issue

The act does not rule out any schools whether private or *sarkari*. So what about *Madarsas*?

Madarsas in India are governed by Article 30 which says

Article 30: (1) All minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

On July 26, 2010, Government had clarified Madarsas have been clearly kept out of the purview of the Right of Children to Free and Compulsory Education Act 2009 (RTE). But the Clerics in the country don't believe this assurance. They want that RTE act 2009 should be amended and it should clearly mention that Madarsas are out of the purview of the act.

### Article 22

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 :

1. 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.
2. A person who is arrested cannot be denied to be defended by a legal practitioner of his choice.

<sup>9</sup> This paragraph is inspired from Supreme Court decision on T M A Pai Foundation Vs State of Maharashtra

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

3. Every person who has been arrested would be produced before the nearest magistrate within 24 hours.
4. 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:**

1. If the person is at the time being an enemy alien.
2. 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.

### **What is Preventive Detention?**

A person can be put in jail / custody for two reasons. One is that he/ she has done a crime. Another is that he /she may do a crime in future. The later reason is preventive detention and in this, a person is deemed likely to commit a crime.

Preventive detention in peacetime is **unlawful in most countries**, and India is one among a few countries where Preventive Detention has been duly made lawful by the constitution.

This means that Preventive Detention is done before the crime has been committed.

The definition of Preventive detention itself is so confusing. For example:

1. How one can say that a person will do a crime in future?
2. What are the implications of arresting a person without having committed a crime?
3. Why Preventive Detention in peacetime. Isn't it against the safeguards of our own citizens as provided by Article 22?

Of the provisions of the “Preventive Detention” are unlawful in most countries like USA & UK, then why we have such thing?

The answer of above question is that the **“circumstances at the time , when our constitution came in force demanded such provisions”**.

This is evident from following statement of Dr. Bhimrao Ambedkar:

“....in the present circumstances of the country, it may be necessary for the executive to detain a person who is tempering either with the public order or with the defense services of the country. In such case, I don't think that the exigency of the liberty of an individual shall be above the interests of the state” Dr. B R Ambedkar.

However, the provisions of the constitution seem to be ambiguous and this ambiguity has been tried to do away with some provisions. These provisions are mentioned in Article 22 (1), 22(5), 22 (6).

The following points summarize these provisions:

1. **Every case of preventive detention must be authorized by law and not at the will of the executive.**

2. The Preventive detention cannot extend beyond a period of 3 months<sup>10</sup>.
3. Every case of preventive detention must be placed before an Advisory Board composed of Judges of the High Court (or persons qualified for Judges of the High Court)
4. The case must be presented before the Advisory Board within 3 months.
5. A continued detention after 3 months must be having a "favors of the Advisory Board".
6. The person will be given opportunity to afford earliest opportunity to make a representation against the preventive detention.
7. No person can be detained indefinitely.

However, Article 22 (7) provides exception to the above provisions. This Article mandates that:

1. When parliament prescribes by law the circumstances under which a person may be kept in detention may be kept in detention beyond 3 months without the opinion of the advisory board.
2. Parliament by law can also describe under the same law, the maximum period of detention.

### Preventive Detention and Contemporary Issues

India has a long history of "Preventive Detention". Ours is one of the few countries in the world whose Constitution allows for preventive detention during peacetime. The antagonists to this law say that these provisions are without any safeguards that elsewhere are understood to be basic requirements for protecting fundamental human rights.

For example, the European Court of Human Rights has long held that preventive detention is unlawful under the European Convention on Human Rights regardless of the safeguards embodied in the law.

South Asia Human Rights Documentation Centre (SAHRDC), recommended in its submission to the National Commission to Review the Working of the Constitution (NCRWC) in August 2000, to remove the provisions of the Constitution of India that explicitly permit preventive detention.

The following are some historical landmarks related to Preventive Detention in India.

1. In India the history of preventive detention dates back to the early days of the British rule when under the Bengal Regulation— III of 1818 (the Bengal State Prisoners Regulation) the government was empowered to detain anybody on mere suspicion.
2. Rule 26 of the Rules framed under the Defense of India Act 1939 allowed the detention of a person if it was "satisfied with respect to that particular person that such detention was necessary to prevent him from acting in any manner prejudicial" to the defense and safety of the country<sup>11</sup>.
3. Post Independence, The first Preventive Detention Act was passed in 1950. The validity of this act was challenged in the Supreme Court in the Gopalan v/s State of Madras Court. The supreme Court held this act constitutionally valid except some provisions. This act expired in 1969, and before it expired, it was amended for 7 times, each expansion was to make it valid for 3 more years and this it was extended till 31 December 1969.

<sup>10</sup> A period of 2 months as constitution 44<sup>th</sup> amendment act, but it has not come in force as of now.

<sup>11</sup> Emp. vs. Sibnath A. 1945 P.C.156

1. In 1971, the Maintenance of Internal Security Act (MISA) was passed. MISA was basically a modified version of the PDA Act. It was abolished in 1978.
2. Another law, Conservation of Foreign exchange and Prevention of Smuggling Activities (COFEPOSA) was enacted in 1974 and it continued.
3. In the heat of the terrorism in Punjab the Terrorist & Disruptive Activities (Prevention) Act or infamous TADA was enacted in 1985. It was renewed in 1989, 1991 and 1993 and lapsed in 1995 due to increasing unpopularity due to widespread allegations of abuse. The main abuse was that a confession before a police officer, even though being given under torture, was admissible as evidence in court.
4. Another similar act Prevention of Terrorism Ordinance (POTO) of 2001 came into force.
5. Both the TADA & POTO were later succeeded by another controversial Prevention of Terrorist Activities Act (POTA) during 2002-04. This act was supported by the NDA Government but later was scrapped by the UPA government.
6. After the Bombay attacks of November 26, 2008 parliament enacted another anti terror law known as Unlawful Activities (Prevention) Act.

#### Preventive Detention as "Evil" of Article 22: View

1. Constitution of India has several flaws and Article 22 is the worst flaw in that.
2. Under Article 22, preventive detention may be implemented any time and the constitution expressly allows an individual to be detained -- without charge or trial so it is a devastating blow to personal liberties of the citizens of the country.
3. It obviates the Article 4 of the International Covenant on Civil and Political Rights (ICCPR) which permits that rights can only be limited "in time of public emergency which threatens the life of the nation" because it allows detention in peacetime as well.
4. It does not provide any procedural protections such as to reduce detainees' vulnerability to torture and discriminatory treatment; and to prevent officials' misusing preventive detention for subversive activities.
5. The long period of detaining (3 months) poses a threat of torture.
6. Constitution of India allows the government to pass preventive detention laws against its own citizens in the name of national security and "maintenance of public order" as per Entry 9 of List I and Entry 3 of List III of the Constitution, this is quite unbelievable.
7. In the absence of proper safeguards, preventive detention has been misused, particularly against the Dalits and the minorities.
8. The Power of states to form similar legislations has been misused.
9. Before a preventive detention case is brought before the High Court, a three member Advisory Board headed by a sitting High Court Judge is constituted by the government to examine whether the detention is justified or not. But, the proceedings of the Board are confidential except for that part of the report which expresses the opinion of the Board.

### Preventive Detention as "Evil" of Article 22: Counterview

1. The constitutional philosophy of personal liberty is an idealistic view, the curtailment of liberty for reasons of State's security; public order, disruption of national economic discipline, etc. are envisaged as a necessary evil to be administered under strict constitutional restrictions.
2. India is a large country and many separatist tendencies against the national security and integrity existed and existing and a strict law is required to counter the subversive activities.
3. The number of persons detained in these acts is not a very large and due attention is made before preventive detention.
4. Having such kind of acts has a restraining influence on the anti-social and subversive elements.
5. The state should have very effective powers to deal with the acts in which the citizens involve in hostile activities, espionage, coercion, terrorism, etc.
6. The citizens of India have enjoyed the personal liberty for a long period since independence except two years of emergency.
7. Such acts are required to deal with the antisocial elements such as terrorist attacks on innocent people which target lot of lives.

#### Conclusion:

The PDA is a "necessary evil". In a country like India where a lot of subversive activities are being carried out by our own citizens, the philosophy of the Article 22 remains valid even today akin to the conditions prevalent in the country at the time of independence.

### Right against Exploitation

#### Article 23 & 24

Article 23 & 24 of Indian Constitution deal with the Right against Exploitation. Article 23 prohibits the traffic in human beings and forced labor such as *begar*.

*Begar* was a system in which government (yes, the British Government officers) and *Zamindars* used to compel the persons to carry their goods when they moved from one place to other place and this was a forced labor in which no remuneration was paid.

The Human Trafficking is the illegal trade in human beings for the purposes of commercial sexual exploitation, prostitution or forced labor. It is the modern form of slavery.

As per the provisions enshrined the constitution the government passed "The Immoral Traffic (Prevention) Act 1956 and "The Bonded Labour System (Abolition) Act 1976.

#### What is Bonded Labor?

Bonded Labour or Forced Labour is forbidden. The Forced Labour means not only the physical and legal force *but also arising out of the compulsion of the economic circumstances*.

In this context, the Supreme Court of India in *People's Union for Democratic Rights and others Vs. Union of India and others* [1982] also known as "**Asiad Workers Case**" gave the following explanation:

"We are, therefore, of the view that when a person provides labour of service to another for remuneration which is **less than the minimum wage**, the labour or service provided by him clearly falls within the scope and ambit of the words "forced labour" under Article 23 (of the Constitution of India)."

**Forced Labour Some Implications**

1. Even when the state takes up relief works such as famine or flood relief, it cannot pay less than minimum wages.
2. When the prisoners are sent for the **rigorous imprisonment**, they must **be paid reasonable wages**. Please note that as per Supreme Court if a **prisoner is not paid wages**, it is **NOT** a violation of article 23. But if the **under trials**, persons sentenced to **simple imprisonments** and those who have been detained under **preventive detention** can NOT be asked to do manual work. They can do work if they wish to do out of their choice and it would require equitable wages.

**Article 24: Prevention of Child Labour**

Article 24 mandates that No child below age of 14 years shall be employed to work in any **factory or mine** or engaged in any other **hazardous** employment.

Similarly Article 39(f) lays down certain directive principles of policy to be followed by the State:

Article 39 The State shall, in particular, direct its policy towards securing:

(f) that children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.

**Child Labour: Some Implications:**

1. It's worth note that **The Employment of Children Act 1938** was among the first acts to prevent child labour.
2. The provisions of this act did not include the construction work on projects because the construction industry was not a process specified in the Schedule to the Act. **But construction work & projects were held equal to hazardous occupation by the Supreme Court** in the People's Union for Democratic Rights v. Union of India (1982) case.
3. Similarly in the *M.C.Mehta v. State of Tamil Nadu (1991)* case, Supreme Court directed that children should not be employed in hazardous jobs in factories for manufacture of match boxes and fireworks.
4. In *Gaurav Jain v Union of India: [1997]* case, the Supreme Court held that the children of the prostitutes have the right to equality of opportunity, dignity, care, protection and rehabilitation so as to be part of the mainstream of social life without any pre-stigma attached on them.

**Article 25-28: Right to Freedom of Religion**

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

Article 26. Freedom to manage religious affairs.

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

Article 28. Freedom as to attendance at religious instruction or religious worship in certain education institutions.

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

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 42<sup>nd</sup> 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 patronizes any religion.
- ✘ The Constitution 42<sup>nd</sup> amendment Act made the above thought “explicit” in the constitution.

### Is being a Hindu means No secular?

In Our country, Hindus are in majority. However, secularism means that in India, state shall observe neutrality & impartiality to all religions. Here, all religions are respected and all beliefs & methods of worship are accepted. All minority religions enjoy full freedom and in certain cases protected. This is opposite in some neighbouring countries such as Pakistan and Bangladesh which were part of India but later became Islamic countries. Secularism does not mean that state is hostile to a particular religion. If a person is a Hindu, he / she do not cease to be a secular. The Supreme Court in *Pannalal Pitti v/s State of Andhra Pradesh* mandated that while Article 25 and 26 grants religious freedom to minority religions such as Islam and Christianity, yet they do NOT intend to DENY the same guarantee to Hindus.

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.

### What is the meaning of subject to public order, morality and health?

This means that **Article 25 & 26 are not absolute**. No person can do such religious things which affect the public order, morality and health. For example no one has right to conduct human sacrifice. No one can perform worship on busy highway or other public places which disturb the community.

### Is right to performing rituals protected?

Yes, it is protected. But the **state by law may regulate the economic, financial, political, or other activity** which may not be a direct part of religion. For example **management of Temples** can be controlled by the state.

### Does Constitution allow use of loudspeakers in temples / mosques etc.?

Using the loudspeakers for making noise is **not guaranteed** by the Constitution. The protagonists of this thought took shelter of Article 19(1) freedom of speech and right to expression. However, nobody can claim a fundamental right to create noise by amplifying the sound of his speech with the help of loudspeakers.

In this context, cracking of fireworks on Diwali & using loudspeakers for *Ajan* in the morning had also come under Supreme Court’s scrutiny. The Court restricted the time of bursting the firecrackers, and it does not in any way violate the religious rights of any person as enshrined under Article 25 of the Constitution.

The festival of Diwali is mainly associated with Pooja performed on the auspicious day and not with firecrackers. In no religious textbook it is written that Diwali has to be celebrated by bursting crackers.

Diwali is considered as a festival of lights not of noises.



In this context, the Government of India framed and published **Noise Pollution Control and Regulation Rules, 1999**. This legislation was amended in 2002 and empowered the State Governments to permit use of loudspeaker or public address system during night hours (between 10 pm and 12 pm mid-night) on or during the cultural or religious occasions for a limited period not exceeding 15 days.

The Supreme Court in *Church of God in India v. K.K.R. Majestic Colony Welfare Assn., (2000)* held that the Court may issue directions in respect of controlling noise pollution even if such noise was a direct result of and was connected with religious activities. The mandate included the following lines:

"Undisputedly, no religion prescribes that prayers should be performed by disturbing the peace of others nor does it preach that they should be through voice amplifiers or beating of drums. In our view, in a civilized society in the name of religion, activities which disturb old or infirm persons, students or children having their sleep in the early hours or during daytime or other persons carrying on other activities cannot be permitted".

Article 26: gives every religious group a right to establish and maintain institutions for religious and charitable purposes, manage its affairs, properties as per the law. **This guarantee is available to only Citizens of India and not to aliens.**

Article 27: This Article mandates that no citizen would be compelled by the state to pay any taxes for promotion or maintenance of particular religion or religious institutions.

Article 28: This Article mandates that No religious instruction would be imparted in the state funded educational institutions.

### Freedom of Religion and Issue of Conversion

In India, religious conversion is a thousand year old phenomenon. The forced conversion started with the invasion of Islamic adventurers, when Hindus were forcibly converted to Muslims. The Qaimkhani Muslims are such clan which was Hindu Rajputs 600 years ago.

The first progenitor of Qaimkhanis was Karamchand, who was born in the family of Moterao of Chauhan clan, of Churu, Rajasthan, who was converted by Firuz Shah Tughluq and was named Qaimkhan.

During the British Era, the forced conversion into the Christian belief started and was somewhat protected by the governance. Before India's independence, Udaipur State Conversion Act of 1946 along with Raigarh State Conversion Act of 1936 were some acts by the princely states which tried to make the forced conversion unlawful.

In this context, In 1954 Congress government in Madhya Pradesh set up **Niyogi Committee**. This committee was chaired by Justice Bhawani Shankar Niyogi, a retired Chief Justice of the Nagpur High Court. This committee submitted its report in 1956. The Committee was set up in response to the Bharatiya Jana Sangh's protest movement, "**The Anti-Foreign Missionary Week**".

This committee found that <sup>12</sup> "schools and hospitals were being used as means of securing converts." Reference was also made to the practice of the Roman Catholic priests or preachers visiting newborn babies to give 'ashish' (blessings) in the name of Jesus, taking sides in litigation or domestic

<sup>12</sup> Vindicated by Time: The Niyogi Committee Report (edited by Sita Ram Goel, 1998)

quarrels, kidnapping of minor children and abduction of women and recruitment of labour for plantations in Assam or Andaman as a means of propagating the Christian faith among the ignorant and illiterate people"

The Congress government of Madhya Pradesh as well as *Sangh Parivar* alleged that Christian missionaries were creating 'a state within a state' and observed that the 'philanthropic activities of Christian missionaries are a mask for conversions.

Consequently, in 1968, the Madhya Pradesh Government passed "The Madhya Pradesh Freedom of Religion Act of 1968".

*This act required an affidavit from the convert that he was not under pressure, force or allurements.*

In the same year, the Orissa state government passed "The Orissa Freedom of Religions Act of 1968" This act mandates that

"No person shall convert or attempt to convert either directly or otherwise any person from one religious faith to another by the use of force or by inducement or by any fraudulent means nor shall any person abet any such conversion"

Both the above acts penalized the forced conversion. The move was later followed by Arunachal Pradesh, Tamil Nadu, Gujarat and lately Rajasthan. The Government of Rajasthan has its own act which was passed in 2008.

✂ Seven of 28 states in India have passed anti-conversion laws viz. Gujarat, Orissa, Madhya Pradesh, Chhattisgarh and Himachal Pradesh, Arunachal Pradesh & Rajasthan.

**Issue of Conversion in Supreme Court:**

The act passed by the Madhya Pradesh Government was challenged in the Supreme Court. The landmark case was *Stanislaus versus the State of Madhya Pradesh*. It was pleaded before the Supreme Court that the right to propagate includes the right to convert. However, it was rejected by the Supreme Court and honorable apex court mandated that forced conversions enjoy no protection under the provisions of Article 25. Similar pleas were admitted to Supreme Court in case of Arunachal Pradesh and Gujarat and subsequently the pleas were rejected.

**Implications of Article 25 & 26 not being absolute**

1. Use of loudspeakers is not an integral part of the religions so the government can restrict on the use of loudspeakers for *Ajan* and *Bhajan Kirtans*.
2. Followers of no religions have right to stop the processions of other religions on the ground that it is a nuisance.
3. State may abolish "Cow Slaughter" as sacrifice of Cow on *Bakrid* is not an essential part of the religion.
4. Possessing a **Kirpan** is an essential part of professing Sikkism and it is **protected right of Sikhs**. (Article 25 Explanation I)
5. **The Aligarh Muslim University was established under an act of parliament so Muslims can NOT claim to run this university as per provisions of Article 26 & Article 29.**
6. None of the rights guarantee that a *Brahmin* only can perform rituals of Hinduism.

## Cultural & Educational Rights

Article 29. Protection of interests of minorities.  
 Article 30. Right of minorities to establish and administer educational institutions.  
 Article 31. [Repealed.]

Both Article 29 and Articles 30 guarantee certain right to the minorities. Article 29 protects the interests of the minorities by making a provision that any citizen / section of citizens having a distinct language, script or culture have the right to conserve the same. Article 29 mandates that no discrimination would be done on the ground of religion, race, caste, language or any of them.

Article 30 mandates that all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice.

✎ Article 30 is called a Charter of Education Rights.

✎ Madarsas are administrated by the Article 30.

Article 30 provides an absolute right to the minorities that they can establish their own linguistic and religious institutions and at the same time can also claim for grant-in-aid without any discrimination.

### Issues Related to Minority Institutions

#### Can a Madarsa<sup>13</sup> Can be acquired by the Government?

Yes, The article 30(1A) was inserted by the 44<sup>th</sup> Amendment Act 1978. This article provides that if while making any law which provides for the compulsory acquisition of any property of any educational institution established and administered by a minority, the State shall ensure that the amount fixed by or determined under such law for the acquisition of such property is such as would not restrict or abrogate the right guaranteed under that clause. This clause makes it clear that such acquisition requires conformable compensation.

#### Can a Madarsa teach Computers?

In context with the Kerala Education Bill 1957, The supreme court of India said that:

Article 30 does not say that minorities based on religion should establish the educational institutions for teaching their language / religion only. The minorities would desire that their children be eligible for higher university education, the education institutions of minorities would also include the general secular education.

#### Are Madarsas come under the purview of Right to Education Act?

No, they don't come. Right to Education Act applies to all recognized (whether funded by the government or not funded) schools and educational institutions. The Madarsas come under article 30 so they don't need to conform to the Right to Education Act<sup>14</sup>.

### Article 31: Repealed

Article 19(1)(f) Right to acquire, hold and dispose of property and Article 31 were repealed by the Constitution 44<sup>th</sup> Amendment Act 1978. A new part was inserted in Part XII of the Constitution and right to

<sup>13</sup> Or any other minority institution

<sup>14</sup> Kindly refer our module on Article 21 (a) & RTE.

property has been transferred as Article 300 A. This will be detailed when we study part XII. The main points are:

- ✍ Right to Property is not a fundamental right but a legal right
- ✍ One can not approach supreme court for remedy under article 32 on violation of his / her right to property because it is not a fundamental right.

### Article 32: Right to Constitutional Remedies

32. Remedies for enforcement of rights conferred by this Part.

32A. [Repealed.]

33. Power of Parliament to modify the rights conferred by this Part in their application to Forces, etc.

34. Restriction on rights conferred by this Part while martial law is in force in any area.

35. Legislation to give effect to the provisions of this Part.

✍ **Article 32 was called “the very soul of the constitution and the very heart of it” by Dr. B R Ambedkar.**

### What is Constitutional Remedy?

Mere declaration of the fundamental right is meaningless until and unless there is an effective machinery for enforcement of the fundamental rights. So, a right without a remedy is a worthless declaration. The framers of our constitution adopted the special provisions in the article 32 which provide remedies to the violated fundamental rights of a citizen.

Article 32 (1) says:

The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

Article 32 (2) says:

The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of **habeas corpus, mandamus, prohibition, quo warranto and certiorari**, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

Article 32(3) Says:

Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), **Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).**

And Article 32 (4) Says:

The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

All the 4 sections of article 32 are very important. Please note the following points:

1. Article 32(1): Guarantee to remedy
2. Article 32(2) : Power of supreme court (and high courts) to issue writs
3. Article 32(3) : Power of parliament to confer the power to issue writs to other courts (so far this power is not exercised.
4. Article 32(4) : Suspension of Fundamental Rights.

Consider the following statements:

1. Both Supreme Court & High Courts have power to issue writs
2. Parliament can confer power to other courts to issue writs.

Which among the above statements is / are correct?

In the above question both statements are correct . Second statement comes from Article 32(3).

**Role of Supreme Court:**

Supreme Court which is guardian of the fundamental rights in India has three kinds of jurisdiction viz. **original, appellate & advisory.**

**Article 32 uses the power of original jurisdiction** of the Supreme Court by which any person who has a complaint that his / her fundamental right has been violated within the territory of India may move directly to the Supreme Court. He / She may move to the High Court does not imply that he/ she cannot move directly to the Supreme Court.


**What is Original Jurisdiction?**

Original jurisdiction of the Supreme Court extends to any **dispute between**

1. Government of India and one or more States
2. between the Government of India and any State or States on one side and one or more States on the other or between two or more States, if insofar as the dispute involves any question (whether of law or of fact) on which the existence or extent of a legal right depends.

In addition, **Article 32 of** the Constitution gives an extensive original jurisdiction to the Supreme Court in regard to enforcement of Fundamental Rights. It is empowered to issue directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari to enforce them.

**What is a Writ?**

A writ means an order. A warrant is also a type of writ. Anything that is issued under an authority is a writ. In this sense, using the power conferred by Article 32, the Supreme Court issues directions, orders or writs. As we know that Article 32(3) confers the power to parliament to make law empowering any court to issue these writs. But this power has not been used and only **Supreme Court by Article 32 (2) and High Courts (Article 226) can issue writs.** 

**Meaning of habeas corpus, mandamus, prohibition, quo warranto and certiorari**

**Habeas corpus, mandamus quo warranto and certiorari** are Latin words. They have different meaning and different implications. Let's understand one by one:

**Habeas corpus**

Habeas corpus literally means "that you have the body".

**Whose body?**

Habeas corpus means the body of the person who is under detention.

**What is the implication of Habeas corpus writ?**

By Habeas corpus writ the Supreme Court or High Court can cause any person who has been detained or imprisoned (this means violation of his fundamental right to liberty) to be **physically brought** before the

court. The court then examines the reason of his detention and if there is no legal justification of his detention, he can be set free.

**Is body (physical presence) compulsory?**

Ordinarily yes, but in *Kanu Sanyal v/s District Magistrate* (AIR) (1974) case the Supreme Court laid down that the physical presence is NOT a part of the writ.

**When this writ of Habeas corpus is issued?**

1. When the person is detained and not produced before the magistrate within 24 hours
2. When the person is arrested without any violation of a law.
3. When a person is arrested under a law which is unconstitutional
4. When detention is done to harm the person or *is malafide*.

**Who can file the petition?**

A general rule of filing the petition is that a person whose right has been infringed must file a petition. But Habeas corpus is an exception to that. This is because, a person detained or imprisoned may be severely handicapped. So anybody on behalf of the detainee can file a petition.

**Is it applicable to Preventive Detention?**

Yes, it is applicable.

**What is the core philosophy of Habeas corpus ?**

To set at liberty a person who is confined without legal justification.

**Can Habeas corpus issued against state and individuals?**

Yes, the writ can be issued against authorities of states or individuals or organizations.

**Mandamus**

Mandamus means “we order”.

**Who orders?**

The Supreme Court or High Court orders to a person, corporation, lower court, public authority or state authority.

**What order?**

The order to do something. It’s a command or directive to perform something or some act.

**What kind of act?**

Performance of the ministerial acts or public duty. The Mandamus is also called a wakening call. It awakes the sleeping authority to perform their duty. **It demands an activity and sets the authority in action.**

**Who can file a writ petition?**

A person can file a writ petition **against anybody who** seeks a legal duty from that person.

**What is legal duty?**

Legal duty means some duty which is by a law viz. constitution, act, subordinate, legislation etc.

**But did the person move to the authority?**

Yes, the petition requires that the person moved to the authority and the authority refused to do this duty.

This is **demand and refusal.**

**What is the core philosophy of Mandamus?**

The core philosophy is that a person or authority despite of fulfillment of such conditions which demand an action refuses to act then, the Supreme Court or High Court can ask the person or authority to perform that duty.

**Any example?**

For example, if a person fulfills all the preconditions & formalities to be issued a license but still the authority refuses to issue a license even after that person approaches to that particular authority, the person may seek writ petition.

**What are essential conditions to file to request the court issue Mandamus writ?**

1. The person must have a real or special interest in the subject matter.
2. The person must have specific legal right
3. No other equally effective remedy is there.

The third condition can be understood by the example:

A person fulfills all the conditions of an appointment and the authority has completed the selection procedure then he must be issued an appointment letter. But when the authority refuses to do this duty, the person is eligible to file a writ petition under Mandamus.

**Prohibition**

**Whose Prohibition?**

The writ of prohibition means that the **supreme court and High Courts may prohibit the lower courts** such as special tribunals, magistrates, commissions, and other judiciary officers who are doing something which **exceeds to their jurisdiction** or **acting contrary to the rule of natural justice**.



This implies that if a judicial officer has personal interest in a case, it may hamper the decision and the course of natural justice. Writ of Prohibition means to be issued in this case.

**Certiorari**

**Certiorari means a writ that orders to move a suit from a inferior court to superior court.**

**Quo Warranto**

Quo warranto means “by what warrant”?

This means that Supreme Court and High Court may issue the writ which **restrains the person or authority to act in an office which he / she is not entitled to**. This writ is applicable to the **public offices only**.

**Power of parliament and Suspension of Fundamental Rights**

Article 33 & 34 maintain that parliament has the power to modify the application of the fundamental rights to the members of armed forces and Police forces. This is required to make the proper discharge of their duty.

This article means that in cases of a disaster or other situations such as Martial law, Curfew etc. the parliament by law may indemnify the persons of these forces for their acts.

Article 35 provides that **the freedoms guaranteed under the article 19 automatically get suspended on the proclamation of National Emergency**. For this **Article 359 empowers the president to suspend the**

fundamental rights given by other articles also. However, Article 20 (protection in respect of conviction for offences) and Article 21 (Protection of life and personal liberty) cannot be suspended by any order under article 359.

### Explanation of Article 33

33. [Parliament may, by law, determine to what extent any of the rights conferred by this Part shall, in their application to,—

(a) the members of the Armed Forces; or

(b) the members of the Forces charged with the maintenance of public order; or

(c) persons employed in any bureau or other organisation established by the State for purposes of intelligence or counter intelligence; or

(d) person employed in, or in connection with, the telecommunication systems set up for the purposes of any Force, bureau or organisation

referred to in clauses (a) to (c), be restricted or abrogated so as to ensure the proper discharge of their duties and the maintenance of discipline among them.]

**Explanation:** Here we note that the article 33 empowers the Parliament to restrict or abrogate the application of the fundamental rights in relation to the armed forces, paramilitary forces, police etc. But it does not mean that the article itself would abrogate any rights. The operation of this article depends upon the parliamentary legislation, though these legislations don't need to refer this article. Such legislation by parliament of India may restrict the operation of any fundamental rights such as Equality, Freedom of Expression, Freedom of association, Personal Liberty etc. One such article is Police Forces (Restriction of Rights) Act, 1966. This act was even challenged in Supreme Court but was held valid. Some acts such as Army Act 1950, Navy Act 1950, Air Forces Act 1950 were the major acts enacted by parliament of India as per this article 33 of constitution of India.

Now, the question is that **why there is limitation of fundamental rights to these people** who serve the nation?

The answer itself is in the question-**because they are serving the nation**. We can imagine that if the members of armed forces are given right to demonstrations, strike, form association, form unions, what would have happened. Even, the barbers, musicians, carpenters, mechanics etc. who are employees of the armed forces **also don't have all the fundamental rights** which are available to the citizens.

Parliament is empowered to make a law determining "to what extent any of the right shall, in their application to (a) the members of the Armed forces or (b) the members of the armed forces charged with the maintenance of public order", be restricted or abrogated so as to ensure the proper discharge of their duties. They need to maintain discipline and that is what this article demands.

Now, here is an important question, which needs our attention. Article 32 gives right to constitutional remedies by means of writ petitions. Article 33 blocks some of the fundamental rights. Then **are the members of armed forces allowed to file a writ petition in Supreme Court or High court?**



**The answer is Yes.** Here, we have to note that Article 136(2) and 227 (4) exclude the appellate jurisdiction of the Supreme Court and the supervisory jurisdiction of the High Court in case of Court Martial. But at the same time, they also don't exclude the operation of article 32 and 226 (powers of SC and HC to issue writs). This means that the honorable Supreme Court as well as the High Court CAN intervene in the Court martial cases too, provided that there is a substantive fundamental right is excluded by law made under article 33. The Supreme Court CAN intervene if the sentence provided under court martial is disproportionate to the crime.

### Explanation of Article 34

*[Notwithstanding anything in the foregoing provisions of this Part, Parliament may by law indemnify any person in the service of the Union or of a State or any other person in respect of any act done by him in connection with the maintenance or restoration of order in any area within the territory of India where martial law was in force or validate any sentence passed, punishment inflicted, forfeiture ordered or other act done under martial law in such area.]*

**Explanation:** Article 34 pertains to the restrictions on the fundamental rights conferred by this part while martial law is in force in any area. The article gives indemnity by law in respect to acts done during operations of martial law. Here we have to note that the Constitution does not have a provision of authorizing the proclamation of martial law. The article simply means that if there is a Government servant on duty, then he/ she is indemnified for the acts done by him or her in connection with maintenance of law and order in the area where martial law is in force. This act of indemnity CAN NOT be challenged in any court on the ground of contravention with any of the fundamental rights.

**The question is what is martial law?** As states above, Constitution does not define it. It has been borrowed from English common law and simply refers to military rule. So, any administration which is carried out by armed forces is martial law. Martial law CAN be declared in any area under the territories of India. It is generally imposed under situations like insurgency, war, invasion, rebellion, riots or any other violent activities.

### Part IV and IVA of Constitution of India

- ✓ Part IV Directive Principles Of State Policy Article ( 36-51 )
- ✓ Part IVA Fundamental Duties Article ( 51A )
- ✓ The original constitution had no fundamental duties.
- ✓ The fundamental duties as Constitution Part IV A were added in the Constitution by 42<sup>nd</sup> Amendment Act 1976 which came into effect from 3.1.1977.

### Basics of Directive Principles of State Policy

#### What are Directive Principles?

The directive principles, as the name suggests, are some principles which give a direction in making certain decisions. These are the guidelines by the Constitution of India to the state. **State is defined by Article 12.** State includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the

Government of India. The basic idea is that the "state" should keep these principles while framing laws, policies, ordinances etc.

**From where the idea of DPSP came?** 

The Framers of the constitution were influenced by the Irish Constitution of 1937 to add a chapter on DPSP.

### The Sources of DPSP

- ✍ The **Constitution of Ireland** which is called *Bunreacht na hÉireann* in Irish came into force in 1937 and it replaced the Free State Constitution of 1922.
- ✍ Article 45 of the Constitution of Ireland details the "Directive Principles of State Policy".
- ✍ However, DPSP were not original idea of the framers of the Irish Constitution even. They borrowed it from the **Spanish Constitution**.
- ✍ The **Instruments of Instructions** under the **Government of India Act 1935** was also an immediate source of the Directive Principles of State Policy. However **the basic difference was that the Instruments of Instructions directs the executive while the DPSP direct to the "State" as defined in Article 12 of the Constitution of India.**

### Article 36

Article 36 says that "State" means as defined in Part III. We know that State is defined by Constitution Part III article 12.

### Article 37

Article 37 says that the Directive principles **are not enforceable by any court**. However, article 37 mandates that it shall be the duty of the **state to apply these principles in the governance**.

- ✓ This is because the implementation of these principles would require resources which the state may not have.

### Article 38

Article 38(1) and Article 38(2) say that the state has to **secure a social order** with economic, political and social justice for the promotion and welfare of the people. The state shall strive to **minimize the inequalities of income, status, facilities, opportunities etc.**


### Article 39

Article 39 lays down the fundamentals for policy making by the state. This article asks the state to secure:

- a) That all citizens (men & women) have equal right to means of livelihood.
- b) That the ownership and control of the material resources are so distributed that they are best to sub serve the common good.
- c) That the operations of the economic system don't result in the concentration of wealth for some.
- d) There is equal pay for equal work for men and women.
- e) The health and strength of the **workers** (men & women) and **children** are not abused.
- f) Children are given opportunities to develop in healthy manner and they are protected against the exploitation.

### Article 39A


The title of the Article 39A is **Equal justice and free legal aid**.

- ✍ Equal Justice and Free legal aid (Article 39A) was inserted by Constitution 42nd amendment act 1976 (w.e.f. 3.1.1977). 

-: About this document:-

This article says that State shall secure that the operation of the legal system promotes justice, on a basis of equal opportunity, and shall, in particular, provide free legal aid, by suitable legislation or schemes or in any other way, to ensure that opportunities for securing justice are not denied to any citizen by reason of economic or other disabilities.

#### Article 40

Article 40 says that the state shall take steps to **organize Panchayats and endow them with such powers and authority as may be necessary to enable them to function as units of self government** 

#### Article 41

Article 41 says that state shall (within its limits of economic capacity & development) will make effective provisions for **securing right to work, education etc. and to Public Assistance in case of unemployment, old age, sickness, disablement or any other case of undeserved want.**

👉 **Article 41** inspires the government of India to launch **National Social Assistance programme** and State Governments to launch their various **old age pension plans** & schemes for the sick and disabled persons.


#### Article 42

Article 42 says that state shall make provisions for **securing just and humane conditions for work** and for **maternity relief.**

#### Article 43

Article 43 says that the state will Endeavour to secure by suitable legislations or economic organizations or in other way to all workers, agricultural, industrial or otherwise, work, a living wage, conditions of work ensuring a **decent standard of life** and **full enjoyment of leisure & social cultural opportunities** and in particular **promote cottage industries** on an individual or cooperative basis in rural areas.

#### Article 43A

Article 43 A was inserted by 42<sup>nd</sup> amendment act 1976. This article says that the State shall take steps, by suitable legislation or in any other way, **to secure the participation of workers in the management of undertakings, establishments** or other organizations engaged in any industry. 

Article 43A inspired the government of India to launch **various schemes on Workers participation in PSU** management. Such programmes were launched for the first time in 1975. The participation of workers in Management Bill, 1990 was inspired by article 43A.

#### Article 44

Article 44 says that the State shall endeavor to secure for the citizens a **uniform civil code** throughout the territory of India.


#### Article 45

Article 45 says that State shall Endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

This article remains substituted by the 86<sup>th</sup> amendment act 2002 and it says:

*Provision for early childhood care and education to children below the age of six years.—The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.*

#### Article 46

Article 46 says The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation. 

#### Article 47


This article says that the State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties and, in particular, the State shall endeavour to bring about prohibition of the consumption except for medicinal purposes of intoxicating drinks and of drugs which are injurious to health.

Most of the social development programmes such as NRHM, Mid Day Meal scheme, ICDS etc. which target the women, children, weaker sections of the society are inspired by Article 47.

#### Article 48

Article 48 says that the State shall endeavor to organize agriculture and animal husbandry on modern and scientific lines and shall, in particular, take steps for preserving and improving the breeds, and prohibiting the slaughter, of cows and calves and other milch and draught cattle.


#### Article 48 A

Article 48A was added in the constitution by 42<sup>nd</sup> amendment act 1976. The State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country. 

#### Article 49

Article 49 says that - It shall be the obligation of the State to protect every monument or place or object of artistic or historic interest, declared by or under law made by Parliament to be of national importance, from spoliation, disfigurement, destruction, removal, disposal or export, as the case may be.

#### Article 50

Article 50 says that State shall take steps to separate the judiciary from the executive in the public services of the State. 

#### Article 51

Article 51 says that The State shall endeavour to promote international peace and security, maintain just and honorable relations between nations, foster respect for international law and treaty obligations in the dealings of organized peoples with one another; and encourage settlement of international disputes by arbitration.



**Key Focus of Each Article**

We see that Directive principles contain some principles which are either social, economic or inspired by Gandhian Philosophy. The important thrust of each article is summarized in the following table:

Article	Key Emphasis
Article 36	Defines state as per article 12 of part III
Article 37	<b>Non Justifiable nature of the DPSP</b>
Article 38(1)	Social, Economic and Political Justice
Article 38(2)	Elimination of Inequalities
Article 39	Adequate means of livelihood, equal pay for equal work, resource distribution, safety of citizens and healthy development of Children
Article 39A	<b>Equal Justice and free legal aid</b>
Article 40	<b>Organization of Village Panchayats</b>
Article 41	<b>Public Assistance Programmes, old age, unemployment programmes etc.</b>
Article 42	Just & humane conditions of work
Article 43	Living wages and conditions to work
Article 43 A	Participation of workers in management of industries
Article 44	<b>Uniform Civil Code</b>
Article 45	<b>Provision for Free and Compulsory education for Children</b>
Article 46	Promotion of education and economic interests in SCs and STs
Article 47	Nutrition and standard of Living
Article 48	Prevention of cow slaughter, organization of agriculture and animal husbandry
Article 48A	Protection of environment
Article 49	Protection of Monuments, places and objects of national importance
Article 50	<b>Separation of Judiciary from the executive</b>
Article 51	<b>Promotion of international peace and security.</b>

**Significance of DPSP**

The directive principles place an ideal before the legislator of India which shows that light while they frame the policies & laws. They are basically a **code of conduct for the legislature and administrators** of the country. They show the path to the leaders of the country which takes the country to achieve the ideal of the constitution embodied in the Preamble "Justice, Social, Economic, Political; liberty, equality and fraternity".

**Fundamental Duties**

The 42<sup>nd</sup> amendment Act 1976 added a new part in the constitution part IVA. It incorporated the fundamental duties by inserting a new article 51A below article 51.

The **objective** of incorporating the fundamental duties is to place before the country **a code of conduct**, which the **citizens are expected to follow**. The Fundamental duties are as follows:

- (a) to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem;
- (b) to cherish and follow the noble ideals which inspired our national struggle for freedom;
- (c) to uphold and protect the sovereignty, unity and integrity of India;
- (d) to defend the country and render national service when called upon to do so;

- (e) to promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities; to renounce practices derogatory to the dignity of women;
- (f) to value and preserve the rich heritage of our composite culture;
- (g) to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures;
- (h) to develop the scientific temper, humanism and the spirit of inquiry and reform;
- (i) to safeguard public property and to abjure violence;
- (j) to strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement;
- (k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

### The Distinction between Fundamental Rights and Directive Principles

1. The basic objective of the fundamental rights is to protect an individual from encroachment of his basic rights. The basic objective of the directive principles is to create a "welfare" state.
2. The fundamental rights limit the state action towards an individual while the directive principles are positive instruction to the state to establish a just socioeconomic and political order.
3. The Fundamental rights are justifiable i.e. a person can approach the court on their infringement, the directive principles are non-justifiable and one cannot approach to the court if they are not enforced by the state.
4. The Fundamental rights are directly guaranteed by the Constitution, but the directive principles are only some guidelines and they require a legislation for their implementation. For example Panchayati Rat Act was passed to implement the directive of article 40.

### Implementation of Directive Principles of State Policy

The Government of India and Various state governments have done many efforts to implement the Directive Principles of State policy and create a welfare state. It may be stated that the state has not been able to make the country a 'welfare state' in the last 6 decades yet, the pace of the development, when we compare it with the pace of development in the British Era, is satisfactory. Following are some of the programmes & legislations which have inspired the state to achieve the objective enshrined in the DPSP:

1. The efforts of translating the directive principles into reality are first of all evident in the five year plans. The first five year plan was initiated soon after commencement of the constitution and the basic objective of the public policy has been promotion of rapid & balanced economic development.
2. The objective of universalization of the elementary education was in the development programmes. And after the 86th amendment act which inserted Article 21A in the constitution, the state seeks to provide free and compulsory education to all children between 6-14 years.

3. A lot of land reform programmes have been launched to lift the social and economic status of the poor and landless farmers of the country. The Panchayats have been established in the remotest areas of the country and there is a separate ministry of Panchayati Raj which seeks to bring back the lost glory of the Panchayats.
4. The state owned factories, industries and corporations are expanding and more and more people have been given employment. Various legislations such as The Employees State Insurance Act, Workmen Compensation Act, The Minimum Wages Act etc. some of the efforts which try to establish a just order taking guidelines from the DPSP. Government enacted Equal Remuneration Act in 1976 which provides equal pay for equal work for both men and women<sup>15</sup>.
5. The government has launched National Social Assistance Programme for the poor and old age people, which involves Indira Gandhi Old Age Pension Scheme, Indira Gandhi National Widow Pension Scheme (IGNWPS), Indira Gandhi National Disability Pension Scheme (IGNDPS), National Family Benefit Scheme (NFBS) and Annapurna.
6. The Mahatma Gandhi National Rural Employment Guarantee (MGNREGA) was introduced in 2005 as NREGA to enforce the directive principle embodied in the article 39, 41.
7. To enhance the nutritional level of the children and adolescent girls a lot of programmes have been launched such as Mid-day meal scheme, ICDS, SABLA etc.

### Amendment of the Directive Principles of State Policy

The Directive Principles of State Policy are subject to amendments and this amendment is a constitutional amendment. Constitutional amendment requires to be passed by special majority of both the houses of the parliament. The amendment requires approval of the 2/3 members present and voting. (But in this case, the number of members voting should not be less than simple majority; it will be discussed in detail under article 368).

### Conflict with the Fundamental Rights

The important question is where there is a conflict between the fundamental rights and directive principles, which should prevail?

#### Why a conflict?

The Fundamental Rights are the rights of the individual citizens guaranteed by the Constitution. The directive principles lay down various tenets of a welfare state. The conflict arises when the State needs to implement a directive principle and it infringes/ abridges the fundamental rights of the citizens.

#### What was the status in the original Constitution?

The chapters on the fundamental rights & DPSP were added in order of part III and part IV of the constitution. The Fundamental rights are justifiable and guaranteed by the constitution. The Directive principles were directives to the state and government machinery. But they are not enforceable, by the law.

#### Any early examples of Conflict?

<sup>15</sup> Please note that Article 16(2) also forbids any discrimination in the employment on the basis of sex, caste etc. So, if a question asks you -- Equal Remuneration is as per the provisions of the \_\_\_\_\_? Then the answer would be article 39 (DPSP) and Article 16(2) means Both DPSP and Fundamental Rights.

This issue came to the Supreme Court for the first time in *Champakam Dorairajan Case* (1952). Smt Champakam Dorairajan was a woman from the State of Madras. In 1951, she was not admitted to a medical college because of a Communal G.O. (Government Order) which had provided caste based reservation in government jobs and college seats. This GO was passed in 1927 in the Madras Presidency.

- ✘ *Champakam Dorairajan Case* was a first major verdict of the Supreme Court on the issue of Reservation.
- ✘ *Champakam Dorairajan Case* led to the First amendment of Indian Constitution.
- ✘ This was the case, which when was in Supreme Court, the Lok Sabha was not formed. Lok Sabha was formed in 1952.

The conflict was between article 16(2) from the chapter of Fundamental Rights and Article 46 of the Constitution. Article 16(2) says that :

No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.

And article 46 says:

The State shall promote with special care the educational and economic interests of the weaker sections of the people, and, in particular, of the Scheduled Castes and the Scheduled Tribes, and shall protect them from social injustice and all forms of exploitation.

The Supreme Court held that Article 37 expressly says that the directive principles are not enforceable by court. Supreme Court mandated that the chapter on **Fundamental rights in the constitution is sacrosanct and the directive principles have to conform to and run subsidiary to the chapter on Fundamental Rights.**

This means that Fundamental Rights were given superiority over the Directive principles. This continued for a decade and half and some other cases such as *Qureshi v/s State of Bihar*, *Sajjan Singh V/s State of Rajasthan* cases court confirmed this stand.

### What was Golak Nath Case and how it was a Landmark Case?

In 1967 came a very important case. This was *Golak Nath vs. The State of Punjab* (1967). In this case, for the first time a bench of 11 judges of the Supreme Court was formed. The court in this case laid down that Fundamental Rights cannot be abridged/ diluted to implement the directive principles. This decision forced the government to amend the constitution. By the 24th Amendment Act 1971, the Parliament amended Art. 13 and 368. This amendment made it clear that Parliament has the power to amend any part of the

The 25<sup>th</sup> amendment act of 1971 added Article 31 C and it upgraded the DPSP. **The idea is that if the laws are made to give effect to the directive principles over the fundamental rights, they shall not be invalid on the ground that they take away the fundamental rights.** This amendment reversed the situation and now, **DPSP were superior to Fundamental Rights.**

Constitution including Fundamental Rights and the word 'law' as used in Article 13 does not include a Constitutional Amendment Act.

### What was Kesavanand Bharti Case<sup>16</sup>?

<sup>16</sup> The Constitution Modules will be finished in around 30-35<sup>th</sup> week of our programme and these important cases are to be studied in detail.



In the Kesavananda Bharti Case the Supreme Court ruled that Parliament could amend any and every part of the Constitution including Fundamental Rights but it could not destroy the basic structure of the Constitution.

To nullify the Kesavanand Bharti Case, the 42<sup>nd</sup> Amendment further amended article 31 (C) and now it said that “No law giving effect to the policy on the ground” that is inconsistent with or takes away or abridges any of the rights conferred by article 14, 19 or 31.

### What was Minerva Mills Case?

The parliament by 42<sup>nd</sup> amendment further widened the scope of the Fundamental Rights. However in the *Minerva Mills v/s Union of India* (1980) case, the Supreme Court struck down these provisions. On the ground that it changed the basic structure of the Constitution. The Supreme Court held that the Constitution exists on the balance of part III and Part IV. Giving absolute primacy to one over other will disturb the harmony of the Constitution. This took the Article 31(C) to its prior condition that “ a law would be protected by article 31C only if it has been made to implement the directive in article 39(b) and (c) and not any of the articles included in Part IV.

### Is there really any conflict?

**Yes, but NO.** To understand this we go back to the Constituent assembly. A member in the constituent assembly moved an amendment which sought to make the directive principles justifiable. However, this move was turned down on the fact that, there was no use in being carried out away by the sentiments. A court cannot enforce the directive principles and it is the strength of the public opinion which makes these provisions enforceable, because there are elections every five year and the public, if the DPSPs are not implemented can show the door to the government.

It was a view of Jawahar Lal Nehru that where there was a conflict between the Fundamental Rights and Directive Principles the DPSP should prevail. However, where we look into the Judicial ‘nature’ of the above two, we see that Supreme Court should upheld the Fundamental Rights because they are guaranteed by the Constitution and justifiable. But the solution provided by the Supreme Court may be “Judicial” but not “practical” in all cases. It is the parliament which can reach beyond the “Judicial” solution.

When a social conflict arises out of the conflicts of the Fundamental Rights and DPSP, the state should emerge as a “Torch bearer” because ultimately it is the superiority of the “Social Interest” over the “individual interest’. However, it is the duty of the Court to resolve a conflict with an eye on the constitution and another on the social harmony.

After the Minerva Mills Case, The supreme court to the view that there is no conflict between the Fundamental Rights and the DPSP and they were complimentary of each other. There was no need to sacrifice one for the sake of the other. If there is a conflict it should be avoided as far as possible.

### What is the Current Position of Article 31C?

#### 31C

The Article 31C is being reproduced in the text box provided below.

1. Article 31C was first inserted by 25th Amendment Act 1971.

2. The words that are in **Pink** were inserted by 42<sup>nd</sup> Amendment Act 1976 substituting “principles specified in clause (b) or clause (c) of article 39” However in the Minerva Mills case the above provision was held invalid.
3. The clause article 14 or article 19 was actually “**article 14, article 19 or article 31**” but **article 31** was removed by Constitution 44<sup>th</sup> Amendment act.
4. The lines which are in *light blue color and italics* were held invalid by the Supreme Court in the Kesavanand Bharti Case.

Notwithstanding anything contained in article 13, no law giving effect to the policy of the State towards securing [all or any of the principles laid down in Part IV] shall be deemed to be void on the ground that it is inconsistent with, or takes away or abridges any of the rights conferred by [article 14 or article 19]; and *no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy:*

**Provided that where such law is made by the Legislature of a State, the provisions of this article shall not apply thereto unless such law, having been reserved for the consideration of the President, has received his assent**

### What is the Current Position of the Precedence?

- ✎ Please note Only Article 39(a) and 39(b) can be given precedence over articling 14 & 19 and not all the directive principles.

### Other Issues and Important Points

#### Amendments in the DPSPs Article 45

##### Article 45 originally said:

The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years.

However, by the 86<sup>th</sup> amendment Act 2002, it has been amended as :

The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

Thus the amended article makes early child hood education a Directive Principle of state policy.

- ✎ Please note that Right to Education is now a fundamental right as per article 21A, but the DPSP under article 45 is for 0-6 years of children and here stands a distinction.

#### Fundamental Duties v/s Directive Principles

The fundamental duties were included in the constitution by the 42<sup>nd</sup> amendment act 1976. They are inspired by the “Constitution of Japan”. As the directive principles are addressed to the state, the fundamental duties are addressed to the Citizens. The citizens enjoying the fundamental rights must respect the ideals of the constitution, to promote harmony and spirit of the brotherhood.

#### Swaran Singh Committee

Sardar Swaran Singh committee was constituted by Indira Gandhi soon after emergency was imposed in the country. The objective of this committee was to study the question of amending the constitution in the light

of past experiences and recommend the amendments. The 42nd amendment act which is also called "Mini Constitution" which amended many articles and even the Preamble was a result of the recommendations of Sardar Swaran Singh committee.

✍ The 10 fundamental duties were also added as per the recommendations of Sardar Swaran Singh committee.

### Memorable Points

1. Article 36 to 51 deal with Directive Principles of State Policy. Article 51A deals with fundamental duties which was inserted by 42nd amendment act 1976 (w.e.f 3.1.1977)
2. The Fundamental Rights are justifiable and DPSP are Non Justifiable. This is the main difference between the two.
3. Dr. BR Ambedkar quoted about the DPSP that they aim at the establishment of economic democracy.
4. The main aim of the DPSP is to make the constitution an instrument of social justice and change.
5. The idea of DPSP was borrowed from Ireland which itself borrowed it from Spain. The idea of Fundamental Duties came from Constitution of Japan mainly.
6. Article 51 seeks to promote the international peace and security and the government of India when signs an international treaty implements article 51.
7. KT Shah quoted the DPSP as like a cheque on a bank payable at the convenience of the bank.
8. USA constitution has no DPSP. Burma Constitution has DPSP.
9. The enforcement of the DPSP ultimately lies with the resources available with the Government.
10. Article 40, 47 and 48 are based upon Gandhian Principles.