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Article 12 (State Definition)

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Introduction

The Constitution of India is the sovereign law of the land. It promises justice, liberty and equality to the people of India. For this, the Constitution carries the basic notion of rule of law i.e. limited government, and provides the structure, procedures, powers, and duties of government institutions, and sets out fundamental rights, directive principles, and the duties of citizens. The whole constitutional scheme prohibits all of the three organs of State i.e. legislature, executive and judiciary, from acting against the spirit of the Constitution of India. The Constitution of India prohibits the State from interfering with the individuals‟ fundamental rights. The State cannot act arbitrarily, irrationally, and unfairly. The State cannot impose unreasonable restrictions on an individual's fundamental freedoms. In order to limit someone's right to life and personal liberty, the State has to adopt just, fair, and reasonable procedure.[2] The State is under obligation to act fairly without ill-will or malice in fact or in law.[3] However, all such constitutional remedies are available against the State's action only. In other words, the fundamental rights can be enforced against the State only. An individual cannot enforce his fundamental right against a private individual. Whereas, the present age is of an inevitable privatization and globalization, and has brought infinite private bodies or entities performing functions of public importance. The limited enforcement of fundamental rights involves serious implications, and asks what would happen if private entities or non-state actors violate individuals‟ fundamental rights. Furthermore, in order to understand the Indian Constitutional scheme of „State‟ under Article 12, the present paper also focuses on the situation of „state action in United States and „public authority‟ in the United Kingdom.

Meaning of 'State' under Article 12 of the Indian Constitution

Since India is a modern welfare state, its functions have been increased over the period of time. The Indian state has to draft and implement welfare policies and schemes. Furthermore, the government needs the assistance of different departments, agents, and private bodies or individuals, for performing essential public functions. However, the State cannot escape from their responsibility to protect individuals‟ fundamental rights. Currently, many private bodies and individuals engage in various commercial and non-commercial activities and perform numerous functions of public importance affecting individuals‟ fundamental rights. But due to lack of broadest meaning of „State‟, an individual could not enforce his or her fundamental rights against these private or non-state actors.

In the Indian Constitutional scheme almost all of the fundamental rights are available against the state. Article 12 of the Constitution defines state to include the Government and Parliament of India, the Government and the Legislature of each of the States, all local authorities, and other authorities within the territory of India or under the control of the Government of India.

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[2] Maneka Gandhi v Union of India AIR 1978 SC 597.

[3] Kalabharati Advertising v Hemant Vimalnath AIR 2010 SC 3745

The most problematic expression under Article 12 is "other authorities" as this expression is not defined in the Constitution. Thus, it is for the courts to interpret this term, and it is clear that the wider this term is interpreted, the wider the ambit of fundamental rights would be.

In *University of Madras v Shanta Bai,*[4] the Madras High Court evolved the principle of *"ejusdem generis"* which meant only authorities that perform governmental or sovereign functions can be included under Article 12. The court interpreted the definition of „State" in a very restricted sense. The court treated the definition as exhaustive one, and confined to the authorities or those which are of like nature.

The next stage was illustrative one. In *Rajasthan Electricity Board v Mohan Lal*,[5] the Supreme Court held that „other authorities" included those authorities which had been created by the Constitution or under any statute and, on whom powers had been conferred upon by law. And it is immaterial that some of the powers conferred on the authority may be for the purpose of carrying on commercial activities while deciding the status of the authority under Article 12 of the Constitution.

In *Sukdev Singh v Bhagat Ram*[6], the court discussed the status of statutory corporations like ONGC, IFC and LIC. The court held that all of these corporations were "the State" under Article 12 of the Constitution because these corporations were created by statutes, had the statutory power to make binding rules and regulations, and were subject to pervasive government control.

Mathew J in his concurring judgment went further. He said that a state acts through the instrumentality or agency of natural or juridical persons. It means that if an action has been done by a state's instrumentality or agency, then it would amount to State action. In order to find out whether an entity is a state's agency or instrumentality, he gave following determining factors:

- Whether the State has financial and administrative control over the management and policies of the agency.
- Whether the entity or instrumentality or agency is performing an essential public function.
- Whether the entity or agency is carrying out business for the benefit of public or not.

Justice Mathew"s concurring opinion became a guiding factor for the future judges to determine whether an entity is a state"s agency or instrumentality or not.

In the case of *R.D.Shetty v International Airport Authority*[7], the Court laid down five tests to be considered „other authority", which are as follows:

- Entire share capital is owned or managed by State.
- Enjoys monopoly status.
- Department of Government is transferred to Corporation.
- Functional character governmental in essence.

[4] AIR 1954 Mad. 67.
[5] AIR 1967 SC 185
[6] AIR 1975 SC 1331.
[7] 1979 SCR (3)1014.

- Deep and pervasive State control.
- Object of Authority.

In *Ajay Hasia v Khalid Mujib*,[8] a regional engineering college was under the government‟s financial and administrative control of the government. The court held that the college was an "authority" for the purposes of Article 12. The court laid down the following tests to determine whether a body is an instrumentality of the government or not:

- If the entire share capital of the corporation is held by the government
- Where the financial assistance of the state is so much as to meet almost entire expenditure of the corporation.
- Whether the corporation enjoys monopoly status, which is state conferred or state protected.
- Existence of deep and pervasive state control.
- If the functions of the corporation are of public importance.
- If a department of government is transferred to corporation.

However, these tests are not conclusive and exhaustive. These are inclusive in nature.

With regard to private entities, the Supreme Court widened the meaning of State action. In *M.C. Mehta v Sri Ram Fertilizers Ltd*.[9], the court stressed that the ambit of Article 12 should be enlarged in order to bring private companies under the strict scrutiny of fundamental rights.

Furthermore, in the case of *J.P. Unni Krishnan v State of A.P*[10]., the court held that private educational institutions cannot be allowed to violate Article 14 as they are performing a public function of imparting education. It is very important for the judiciary to enlarge the scope of Article 12 for essential public function like education.

In *Pradeep Kumar Biswas v Indian Institute of Chemical Biology & Ors*.[11], the Supreme Court said that the tests formulated in *Ajay Hasia* are not a rigid set of principles. The court held that cumulative effective of all the tests will be considered to find out whether the body is financially, functionally and administratively dominated by or under the control of the Government.

In *Zee Telefilms Ltd. v Union of India*[12], the court excluded Board of Control for Cricket in India (BCCI), from the purview of article 12. The court said that mere regulatory control, whether under statute or otherwise, did not make a body „state". The court found that the Board was not the creation of any statute. The government had no financial control over the Board. Moreover, the state confers no monopoly status over Board of cricket in the country. The court found that the government has only regulatory control over the Board and not administrative one. Therefore, the court held that the Board was not „state" under Article 12. However, the relief against BCCI is available in high courts under article 226.

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[8] AIR 1981 SC 487
[9] 1987 SCR 819.
[10] (1993) 1 SCC 645.
[11] (2002) 5 SCC 111.
[12] (2005) 4 SCC 649.

In *Lt. Governor of Delhi v V.K. Sodhi*,[13] the issue of whether State Council of Education, Research and Training (SCERT) is a State within the meaning of Article 12 of the Constitution of India or not, was raised. The Supreme Court found no governmental interference or control either financially, functionally or administratively, in the working of the Council.

A legislation of 1989 was enacted for promoting industries in the State of Assam including small scale industries. The 1989 Act constituted a Board for the purpose of monitoring supplies to various departments. The Managing Director of the Corporation was a member of the board in terms of the provisions of the 1989 Act. Analyzing the whole functioning of the corporation, the Supreme Court in *Assam Small Scale Ind. Dev. Corporation v J.D. Pharmaceuticals*[14] held that it was a statutory body and was a „State" within the meaning of Article 12 of the Constitution of India. The contract by and between the parties being a statutory one, the Corporation was required to act fairly and reasonably.[15]

However, the above said statutory bodies, corporations, government companies or public sector undertakings are not „State" within the meaning of Article 131.

The Constitution of India, 1949, Art. 131 It provides: Original jurisdiction of the Supreme Court Subject to the provisions of this Constitution, the Supreme Court shall, to the exclusion of any other court, have original jurisdiction in any dispute

(a) between the Government of India and one or more States; or

(b) between the Government of India and any State or States on one side and one or more other States on the other; or

(c) between two or more States, if and in so far as the dispute involves any question (whether of law or fact) on which the existence or extent of a legal right depends: Provided that the said jurisdiction shall not extend to a dispute arising out of any treaty, agreement, covenant, engagements, and or other similar instrument which, having been entered into or executed before the commencement of this Constitution, continues in operation after such commencement, or which provides that the said jurisdiction shall not extend to such a dispute.

It has been settled through various decisions that this Article will not be applicable where citizens or private bodies are parties either jointly or in the alternative with the State or the Government of India. In *Tashi Delek Gaming Solutions Ltd. and Anr. v State of Karnataka*[16] the Supreme Court held that the enlarged definition of „State" under Article 12 would not extend to Article 131 of the Constitution. The Court says that it is also not in dispute that even a statutory corporation is not a state within the meaning of the said provision.

The courts in India continuously says that „instrumentalities of State" are different from „State Government, " though both may answer the definition of „State" under Article 12 for the limited purpose of Part-III of the Constitution. The Supreme Court in *Srikant v*

[13] AIR 2007 SC 2885.
[14] AIR 2006 SC 131.
[15] ibid. 138.
[16] AIR 2006 SC 661.

Vasantrao,[17] said that the very inclusive definition of „State‟ under Article 12 by referring to Government of India, the Government of each of the States and the local and other authorities, made it clear that a „State Government‟ and a local or other authorities, are different and that they fall under a common definition only for the purpose of Part-III of the Constitution. The Court refused to apply the enlarged definition of „State‟ given in Part-III (and Part-IV) of the Constitution, for interpreting the words „State‟ or „State Government‟ occurring in other parts of the Constitution. The Court continued to say that while the term „State‟ may include a State Government as also statutory or other authorities for the purposes of part-III (or Part- IV) of the Constitution, the term „State Government‟ in its ordinary sense does not encompass in its fold either a local or statutory authority. Considering these findings, the court held that the corporation or other state‟s instrumentalities are not „State Government‟ for the purposes of section 9-A (read with section 7) of the Representation of the People Act, 1951.

Again, in *State of Assam v Barak Upatyaka D.U. Karmachari*,[18] the Supreme Court held that the fact that a corporate body or co-operative society answers the definition of „state‟ does not make it the „state government,‟ nor will the employees of such a body, become holders of civil posts or employees of the state government. Therefore the fact that a corporation may answer the definition of „state‟ does not mean that the state government is liable to bear and pay the salaries of its employees. However, recently the Supreme Court of India in *Indian Medical Association v Union of India,*[19] held that the rights of non-minority educational institutions to admit students of their choice, if exercised in full measure, that would be detrimental to the true nature of education as an occupation, damage the environment in which our students are taught the lessons of life, and imparted knowledge, and further also damage their ability to learn to deal with the diversity of India, and gain access to knowledge of its problems, so that they can appreciate how they can apply their formal knowledge in concrete social realities they will confront.

Since education is the most important function of public importance, every individual, body or entity performing such public function should be considered as state action within the meaning of Article 12 of the Indian Constitution. The liberal interpretation of „state action‟ is the only way to protect individuals‟ fundamental right to education in India.

The National Commission to Review The Working Of The Constitution 2002, had recommended that in article 12 of the Constitution, the following explanation should be added; „Explanation: – In this Article, the expression "other authorities" shall include any person in relation to such as it functions which are of a public nature.‟

Currently, traditional functions of a welfare state are being dealt and performed by the private entities and private individuals. Where these private entities violate individuals‟ fundamental rights, for instance if private employers terminate LGBTs‟ employment or discriminate on any other unconstitutional ground, the limited interpretation of „other authority‟ under Article 12 would be a wrong law. The individuals should be empowered to enforce their fundamental rights against private entities too.

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[17] AIR 2006 SC 918.
[18] AIR 2009 SC 2249.
[19] AIR 2011 SC 2365.

Freedom of Speech and Expression (Art. 19)

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Introduction:

The essence of free speech is the ability to think and speak freely and to obtain information from others through publications and public discourse without fear of retribution, restriction, or repression by the government. It is through free speech, people could come together to achieve political influence, to strengthen their morality, and to help others to become moral and enlightened citizens.

The freedom of speech is regarded as the first condition of liberty. It occupies a preferred and important position in the hierarchy of the liberty, it is truly said about the freedom of speech that it is the mother of all other liberties.

Freedom of Speech and expression means the right to express one's own convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode. In modern time it is widely accepted that the right to freedom of speech is the essence of free society and it must be safeguarded at all time. The first principle of a free society is an untrammelled flow of words in an open forum. Liberty to express opinions and ideas without hindrance, and especially without fear of punishment plays significant role in the development of that particular society and ultimately for that state. It is one of the most important fundamental liberties guaranteed against state suppression or regulation.

Freedom of speech is guaranteed not only by the constitution or statutes of various states but also by various international conventions like U**niversal Declaration of Human Rights, European convention on Human Rights and fundamental freedoms, International Covenant on Civil and Political Rights** etc. These declarations expressly talk about protection of freedom of speech and expression.

Freedom of Speech and Expression- Meaning & Scope

Article 19(1)(a) of the Constitution of India guarantees to all its citizens the right to freedom of speech and expression. The law states that, "all citizens shall have the right to freedom of speech and expression". Under **Article 19(2)** "reasonable restrictions can be imposed on the exercise of this right for certain purposes. Any limitation on the exercise of the right under **Article 19(1)(a)** not falling within the four corners of **Article 19(2)** cannot be valid.

The freedom of speech under **Article 19(1)(a)** includes the right to express one's views and opinions at any issue through any medium, e.g. **by words of mouth, writing, printing, picture, film, movie etc.** It thus includes the freedom of communication and the right to propagate or publish opinion. But this right is subject to reasonable restrictions being

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imposed under **Article 19(2)**. Free expression cannot be equated or confused with a license to make unfounded and irresponsible allegations against the judiciary.

It is important to note that a restriction on the freedom of speech of any citizen may be placed as much by an action of the State as by its inaction. Thus, failure on the part of the State to guarantee to all its citizens irrespective of their circumstances and the class to which they belong, the fundamental right to freedom of speech and expression would constitute a violation of **Article 19(1)(a)**.

The fundamental right to freedom of speech and expression is regarded as **one of the most basic elements of a healthy democracy for it allows its citizens to participate fully and effectively in the social and political process of the country.** In fact, the freedom of speech and expression gives greater scope and meaning to the citizenship of a person extending the concept from the level of basic existence to giving the person a political and social life.

This right is available only to a citizen of India and not to foreign nationals. This right is, however, not absolute and it allows Government to frame laws to impose reasonable restrictions in the interest of sovereignty and integrity of India, security of the state, friendly relations with foreign states, public order, decency and morality and contempt of court, defamation and incitement to an offence.

In the Preamble to the Constitution of India, the people of India declared their solemn resolve to secure to all its citizen liberty of thought and expression. The Constitution affirms the right to freedom of expression, which includes the right to voice one's opinion, the right to seek information and ideas, the right to receive information and the right to impart information. The Indian State is under an obligation to create conditions in which all the citizens can effectively and efficiently enjoy the aforesaid rights.

In ***Romesh Thappar v State of Madras*** **(AIR 1950 SC 124),** the Supreme Court of India held that the freedom of speech and expression includes freedom to propagate ideas which is ensured by freedom of circulation of a publication, as publication is of little value without circulation. **Patanjali Sastri, J.,** rightly observed that-

'Freedom of Speech and of Press lat 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 Government, is possible' However, **Article 19(2)** of the Constitution provides that this right is not absolute and 'reasonable restrictions' may be imposed on the exercise of this right for certain purposes. The right to freedom of expression includes the right to express one's views and opinions on any issue and through any medium whether it be in writing or by word of mouth.

The phrase "speech and expression" used in **Article 19(1) (a)** has a broad connotation. **This right includes the right to communicate, print and advertise the information.** In India, **freedom of the press** is implied from the freedom of speech and expression guaranteed by **Article 19(1)(a)**. The freedom of the press is regarded as a "**species of which freedom of expression is a genus**". On the issue of whether 'advertising' would fall under the scope of the Article, the Supreme Court pointed out that the right of a citizen to exhibit films is a part of the fundamental right of speech and expression guaranteed by **Article 19(1)(a)** of the Constitution.

Indian law does not expressly refer to commercial and artistic speech. However, Indian Law is developing and the Supreme Court has ruled that 'commercial speech' cannot be denied the protection of **Article 19(1)(a**) of the Constitution. The Court has held that 'commercial speech' is a part of the 'right of freedom of speech and expression' as guaranteed by our Constitution.

The citizens of India have the right to receive 'commercial speech' and they also have the right to read and listen to the same. This protection is available to the speaker as well as the recipient.[iv] Freedom of Speech and Expression also includes artistic speech as it includes the right to paint, sign, dance, write poetry, literature and is covered by **Article 19(1)(a)** because the common basic characteristic of all these activities is freedom of speech and expression.[v]

Under the provisions of the Constitution of India, an individual as well as a corporation can invoke freedom of speech arguments and other fundamental rights against the State by way of a Writ Petition under **Articles 32** and **226** of the Constitution of India subject to the State imposing some permissible restrictions in the interests of social control.

Under the provisions of Indian law, the right to invoke the freedom of speech arguments is not limited to individuals alone. Corporations are also entitled to invoke such arguments. The cases of ***Bennet and Coleman & Co. v. Union of India*** (1973) 2 SCR 757 and I***ndian Express Newspapers (Bombay) P. Ltd v. Union of India*** ('86) A.SC. 515, are of great significance. In these cases, the corporations filed a writ petition challenging the constitutional validity of notifications issued by the Government. After much deliberation, the Courts held that the right to freedom of speech cannot be taken away with the object of placing restrictions on the business activities of citizens. However, the limitation on the exercise of the right under **Article 19(1)(a)** not falling within the four corners of **19(2)** is not valid.

<u>Importance of Freedom of Speech</u>

Freedom of Speech is the bulwark of democratic government. This freedom is essential for the proper functioning of the democratic process. Freedom of speech and liberty is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy liberties giving succour and protection to all other liberties. It is the mother of all liberties.

In a democracy, freedom of speech & expression opens up channels of free discussion of issues. Freedom of speech plays a crucial role in the formation of public opinion on social, economic & political matters. It embraces within its scope the freedom of propagation and interchange of ideas, dissemination of information which would help the formation of one's opinion & viewpoint & debates on matters of public concern. So long as the expression is confined to nationalism, patriotism & love for the motherland, the use of National flag by the way of expression of those sentiments would be a Fundamental Right.

In ***Maneka Gandhi v. Union of India,*** **BHAGWATI J.,** has emphasized on the significance of the freedom of speech & expression in these words:

"Democracy is based essentially on free debate and open discussion, for that is the only corrective of government action in a democratic set up. If democracy means government of the people by the people, it is obvious that every citizen must be entitled to participate in the

democratic process and in order to enable him to intelligently exercise his rights of making a choice, free & general discussion of public matters is absolutely essential."

This aspect of the right to freedom of speech and expression extending the concept of citizenship to include socio-political participation of a person is critical in the process of determining the scope of right to life of a citizen under **Article 21** of the **Constitution**. **It is important to note that the scope of the "freedom of speech and expression" in Article 19(1)(a) of the Constitution has been expanded to include the right to receive and disseminate information. It includes the right to communicate and circulate information through any medium including print media, audio, television broadcast or electronic media.**

The judiciary has time and again opined that the right to receive information is another facet of the right to freedom of speech and expression and the right to communicate and receive information without interference is a crucial aspect of this right. This is because, a person cannot form an informed opinion or make an informed choice and effectively participate socially, politically or culturally without receipt of adequate information. The Supreme Court in State of Uttar Pradesh v. Raj Narain31 has held that **Article 19(1)(a)** of the Constitution guarantees the freedom of speech and expression to all citizens in addition to protecting the rights of the citizens to know the right to receive information regarding matters of public concern.

This position was reiterated by the Court in Secretary, Ministry of Information and Broadcasting, ***Govt. of India v. Cricket Association of Bengal***32 wherein it was held that **Article 19(1)(a)** includes the right to acquire and disseminate information. The Supreme Court, while opining on the right to freedom of information, further noted in Dinesh Trivedi, ***M.P. and Ors v. Union of India***33 that "in modern constitutional democracies, it is axiomatic that citizens have a right to know about the affairs of the government which, having been elected by them, seek to formulate sound policies of governance aimed at their welfare."

The print medium is a powerful tool for dissemination and receipt of information for any citizen. Thus, access to printed material is crucial for satisfaction of a person's right to freedom of speech and expression guaranteed to him under the Constitution. Persons with print impairment have no access to printed material in their normal format. Failure on part of the State to make legislative provision for enabling access to persons with print impairment of material in alternative accessible formats would constitute a deprivation of their right to freedom of speech and expression and such inaction on the part of the State falls foul of the Constitution. In view of the same, it is an obligation on part of the State to ensure that adequate provisions are made in the law enabling persons with print impairment to access printed material in accessible formats.

Under the Freedom of Speech and Expression, there is no separate guarantee of freedom of the press and the same is included in the freedom of expression, which is conferred on all citizens **(*Virender Vs. State of Punjab*, A. 1958, SC. 986 and *Sakal Papers Vs. Union of India* A.1962 S.C. 305).** It has also been by this judgment that freedom of the press under the Indian Constitution is not higher than the freedom of an ordinary citizen.

Need to Protect Freedom of Speech and Expression

Freedom of speech offers human being to express his feelings to other, but this is not the only reason; purpose to protect the freedom of speech. There could be more reasons to protect these essential liberties. There are four important justifications for freedom of speech –

- For the discovery of truth by open discussion – According to it, if restrictions on speech are tolerated, society prevents the ascertainment and publication of accurate facts and valuable opinion. That is to say, it assists in the discovery of truth.
- Free speech as an aspect of self- fulfilment and development – freedom of speech is an integral aspect of each individual's right to self-development and self-fulfilment. Restriction on what we are allowed to say and write or to hear and read will hamper our personality and its growth. It helps an individual to attain self-fulfilment.
- For expressing belief and political attitudes – freedom of speech provides opportunity to express one's belief and show political attitudes. It ultimately results in the welfare of the society and state. Thus, freedom of speech provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.
- For active participation in democracy – democracy is most important feature of today's world. Freedom of speech is there to protect the right of all citizens to understand political issues so that they can participate in smooth working of democracy. That is to say, freedom of speech strengthens the capacity of an individual in participating in decision-making.

Thus, we find that protection of freedom of speech is very much essential. Protection of freedom of speech is important for the discovery of truth by open discussion, for self-fulfillment and development, for expressing belief and political attitudes, and for active participation in democracy.

Indian Perspective

In India under **Article 19(1)(a)** of the **Constitution** of India, "all citizens shall have the right to freedom of speech and expression". In the Preamble to the Constitution of India the people of India declared their solemn resolve to secure to all its citizens liberty of thought and expression. The Supreme Court of India held that the freedom of speech and expression includes freedom to propagate ideas which is ensured by freedom of circulation of a publication, as publication is of little value without circulation.

Article 19(2) of the **Constitution** of India provides that this right is not absolute and 'reasonable restrictions' may be imposed on the exercise of this right for certain purposes. The right to freedom of speech would include both artistic and commercial speech which is required to be protected. Freedom of speech and expression would include artistic speech as it includes the right to paint, sign, dance, write poetry, literature and is covered by **Article 19(1)(a)** of the **Constitution** because the common basic characteristic of all these activities is freedom of speech and expression.

Under the Constitution of India an individual as well as corporation can invoke freedom of speech and their fundamental rights. Freedom of Speech is not only protected from unwarranted governmental interference but also when a private party calls upon a Court to enforce rules of law whose effect would be to restrict or penalize expression. Much would

depend on the issue as to whether the reference to the trademark involved has been used in the trademark sense, for example, as envisaged in **Section 2(2) (a), (b)** and **(c)** of the **Trade Marks Act, 1999**. There is dearth of case law of how free speech interests are involved in trademark litigation. In a given case a party could challenge an act or omission on the part of the Registrar of Trade Marks on the ground that it infringes the fundamental right of a citizen.

For example: Freedom of speech and expression; or Registrar has acted in a manner which is against all norms of natural justice. A party could also in a given case challenge the vires of a provision in the **Trade Marks Act, 1999** or the Rules framed thereunder – if it would violate the right to freedom of speech and expression.

Under the Trade Marks Act, 1999 there is no specific reference in crystal clear terms to criticism of another's mark. However, reference is invited to **Section 29 (8)** & **(9)** of the **Trade Marks Act, 1999** as follows: –

"Section 29(8) A registered trade mark is infringed by any advertising of that trade mark if such advertising

- *takes unfair advantage of and is contrary to honest practices in industrial or commercial matters; or*
- *is detrimental to its distinctive character; or*
- *is against the reputation of the trade mark."*

Infringement by oral use is provided for in subsection 9 of **Section 29**:

"(9) Where the distinctive elements of a registered trade mark consist of or include words, the trade mark may be infringed by the spoken use of those words as well as by their visual representation and reference in this section to the use of a mark shall be construed accordingly."

The position of law is that a tradesman is entitled to declare that his goods are the best in the world even if the statement is untrue, but he may not in any circumstances say that his competitor's goods are bad or criticize his competitors' goods. If he makes such a statement, it would amount to slander.

There is no 'fair use' clause or an 'open end' clause in Indian Trade Mark law. In India, there is dearth of cases on trademark infringement where the defendant has invoked freedom of speech as a defense. Joke articles in India are treated like any other and the author has not entitled to any additional immunity for the reason that the article is a humorous one.

Freedom of speech enjoys special position as far India is concerned. The importance of freedom of expression and speech can be easily understood by the fact that preamble of constitution itself ensures to all citizens inter alia, liberty of thought, expression, belief, faith and worship. The constitutional significance of the freedom of speech consists in the Preamble of Constitution and is transformed as fundamental and human right in **Article 19(1)(a)** as "freedom of speech and expression".

Explaining the scope of freedom of speech and expression Supreme Court has said that the words "freedom of speech and expression" must be broadly constructed to include the freedom to circulate one's views by words of mouth or in writing or through audiovisual

instrumentalities. Freedom of Speech and expression means the right to express one's own convictions and opinions freely by words of mouth, writing, printing, pictures or any other mode. It thus includes the expression of one's idea through any communicable medium or visible representation.

Moreover, it is important to note that liberty of one must not offend the liberty of others. Patanjali Shastri, J. in **A.K. Gopalan** case, observed, *"man as a rational being desires to do many things, but in a civil society his desires will have to be controlled with the exercise of similar desires by other individuals"*.

It therefore includes the right to propagate one's views through the print media or through any other communication channel e.g. the radio and the television. Every citizen of this country therefore has the right to air his or their views through the printing and or the electronic media subject of course to permissible restrictions imposed under Article 19(2) of the Constitution. In sum, the fundamental principle involved here is the people's right to know. Freedom of speech and expression should, therefore, receive generous support from all those who believe in the participation of people in the administration.

We can see the guarantee of freedom of speech under the following heads:

Freedom of Press

Although **Article 19** does not express provision for freedom of press but the fundamental right of the freedom of press implicit in the right the freedom of speech and expression. In the famous case ***Express Newspapers (Bombay) (P) Ltd. v. Union of India*** court observed the importance of press very aptly. Court held in this case that "In today's free world freedom of press is the heart of social and political intercourse. The press has now assumed the role of the public educator making formal and non-formal education possible in a large scale particularly in the developing world, where television and other kinds of modern communication are not still available for all sections of society. The purpose of the press is to advance the public interest by publishing facts and opinions without which a democratic electorate [Government] cannot make responsible judgments. Newspapers being purveyors of news and views having a bearing on public administration very often carry material which would not be palatable to Governments and other authorities."

The above statement of the Supreme Court illustrates that the freedom of the press is essential for the proper functioning of the democratic process. Democracy means Government of the people, by the people and for the people; it is obvious that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussion of public matters is absolutely essential. This explains the constitutional viewpoint of the freedom of press in India.

Obscenity

Freedom of speech, though guaranteed, is not absolute in India. Unlike the U.S. Constitution, the text of India's Constitution clearly sets out restrictions on free speech. The freedom of speech guaranteed under **Article 19(1)(a)** can be subject to reasonable state restriction in the interest of decency or morality. Obscenity in India is defined as "offensive to modesty or decency; lewd, filthy and repulsive." It stated that the test of obscenity is

whether the publication, read as a whole, has a tendency to deprave and corrupt those whose minds are open to such immoral influences, and therefore each work must be examined by itself .

With respect to art and obscenity, the Court held that "the art must be so preponderating as to throw obscenity into a shadow or the obscenity so trivial and insignificant that it can have no effect and may be overlooked." The Court concluded that the test to adopt in India, emphasizing community mores, is that obscenity without a preponderating social purpose or profit cannot have the constitutional protection of free speech.

Right to Information

Right to know, to information is other facet of freedom of speech. The right to know, to receive and to impart information has been recognized within the right to freedom of speech and expression. A citizen has a fundamental right to use the best means of imparting and receiving information and as such to have an access to telecasting for the purpose. The right to know has, however, not yet extended to the extent of invalidating **Section 5** of the **Official Secrets Act**, 1923 which prohibits disclosure of certain official documents. Even, **Right to Information Act** 2005, which specially talks about peoples' right to ask information from Government official, prohibits discloser of certain documents under u/s 8 of the Act. These exceptions are generally the grounds of reasonable restrictions over freedom of speech and expression under **Article 19(1)** of **Constitution** of India. One can conclude that 'right to information is nothing but one small limb of right of speech and expression.

Voters Have Right to Know About their Candidates

In a landmark judgment in ***Union of India v. Association for Democratic Reforms***4, a three-judge bench held that the amended Electoral Reforms Law passed by Parliament is unconstitutional as being volatile of citizen's right to know under **Art. 19(1)(g)**.

The' Freedom of Speech and Expression' Is Indeed A Very High One

In recent judgment of the Supreme Court in ***Khushboo v. Kannaiammal***6 upholds the right to freedom of speech and expression. Khushboo's right to freedom of speech was violated by the institution of multiple criminal cases against her in various courts across the country and consequent harassment that she suffered.

Grounds of Restrictions

It is necessary to maintain and preserve freedom of speech and expression in a democracy, so also it is necessary to place some restrictions on this freedom for the maintenance of social order because no freedom can be absolute or completely unrestricted. Accordingly, under **Article 19(2)** of the Constitution of India, the State may make a law imposing "reasonable restrictions" on the exercise of the right to freedom of speech and expression "in the interest of" the public on the following grounds: Clause (2) of **Article 19** of the Indian constitution contains the grounds on which restrictions on the freedom of speech and expression can be imposed:-

1) Security of State: Security of state is of vital importance and a government must have the power to impose a restriction on the activity affecting it. Under Article 19(2) reasonable restrictions can be imposed on freedom of speech and expression in the interest of the security of State. However, the term "security" is a very crucial one. The term "security of the state" refers only to serious and aggravated forms of public order e.g. rebellion, waging war against the State, insurrection and not ordinary breaches of public order and public safety, e.g. unlawful assembly, riot, affray. Thus speeches or expression on the part of an individual, which incite to or encourage the commission of violent crimes, such as, murder are matters, which would undermine the security of State.

2) Friendly relations with foreign states: In the present global world, a country has to maintain a good and friendly relationship with other countries. Something which has the potential to affect such relationship should be checked by the government. Keeping this thing in mind, this ground was added by the constitution (First Amendment) Act, 1951. The object behind the provision is to prohibit unrestrained malicious propaganda against a foreign friendly state, which may jeopardize the maintenance of good relations between India and that state.

3) No similar provision is present in any other Constitution of the world: In India, the Foreign Relations Act, (XII of 1932) provides punishment for libel by Indian citizens against foreign dignitaries. Interest of friendly relations with foreign States, would not justify the suppression of fair criticism of foreign policy of the Government. However, it is interesting to note that member of the commonwealth including Pakistan is not a "foreign state" for the purposes of this Constitution. The result is that freedom of speech and expression cannot be restricted on the ground that the matter is adverse to Pakistan.

4) Public Order: Next restriction prescribed by constitution is to maintain public order: This ground was added by the Constitution (First Amendment) Act. 'Public order' is an expression of wide connotation and signifies "that state of tranquility which prevails among the members of political society as a result of internal regulations enforced by the Government which they have established."

Here it is pertinent to look into meaning of the word "Public order. Public order is something more than ordinary maintenance of law and order. 'Public order' is synonymous with public peace, safety and tranquility. Anything that disturbs public tranquility or public peace disturbs public order. Thus communal disturbances and strikes promoted with the sole object of accusing unrest among workmen are offences against public order. Public order thus implies absence of violence and an orderly state of affairs in which citizens can peacefully pursue their normal avocation of life. Public order also includes public safety. Thus creating internal disorder or rebellion would affect public order and public safety. But mere criticism of government does not necessarily disturb public order.

The words 'in the interest of public order' includes not only such utterances as are directly intended to lead to disorder but also those that have the tendency to lead to disorder. Thus a law punishing utterances made with the deliberate intention to hurt the religious feelings of any class of persons is valid because it imposes a restriction on the right of free speech in the interest of public order since such speech or writing has the tendency to create public disorder even if in some case those activities may not actually lead to a breach of peace. But there

must be reasonable and proper nexus or relationship between the restrictions and the achievements of public order.

5) Decency or morality: The way to express something or to say something should be a decent one. It should not affect the morality of society adversely. Our constitution has taken care of this view and inserted decency and morality as a ground. The words 'morality or decency' are words of wide meaning. **Sections 292** to **294** of the **Indian Penal Code** provide instances of restrictions on the freedom of speech and expression in the interest of decency or morality. These sections prohibit the sale or distribution or exhibition of obscene words, etc. in public places. No fix standard is laid down till now as to what is moral and indecent. The standard of morality varies from time to time and from place to place.

6) Contempt of Court: In a democratic country Judiciary plays a very important role. In such situation, it becomes essential to respect such an institution and its order. Thus, restriction on the freedom of speech and expression can be imposed if it exceeds the reasonable and fair limit and amounts to contempt of court. According to **Section 2** 'Contempt of court' may be either 'civil contempt' or 'criminal contempt.' But now, Indian contempt law was amended in 2006 to make "truth" a defense.

However, even after such amendment, a person can be punished for the statement unless they were made in public interest. Again in Indirect Tax Practitioners Assn. vs R.K.Jain, it was held by court that, "Truth based on the facts should be allowed as a valid defense if courts are asked to decide contempt proceedings relating to contempt proceeding relating to a speech or an editorial or article". The qualification is that such defense should not cover-up to escape from the consequences of a deliberate effort to scandalize the court.

7) Defamation: Ones' freedom, be it of any type, must not affect the reputation or status of another person. A person is known by his reputation more than his wealth or anything else. Constitution considers it as ground to put restriction on freedom of speech. Basically, a statement, which injures a man's reputation, amounts to defamation. Defamation consists in exposing a man to hatred, ridicule, or contempt. The civil law relating to defamation is still uncodified in India and subject to certain exceptions.

8) Incitement to an offense: This ground was also added by the **Constitution (First Amendment) Act,** 1951. Obviously, freedom of speech and expression cannot confer a right to incite people to commit offense. The word 'offense' is defined as any act or omission made punishable by law for the time being in force.

9) Sovereignty and integrity of India: To maintain the sovereignty and integrity of a state is the prime duty of government. Taking into it into account, freedom of speech and expression can be restricted so as not to permit anyone to challenge sovereignty or to permit anyone to preach something which will result in threat to integrity of the country.

From above analysis, it is evident that Grounds contained in **Article 19(2)** show that they are all concerned with the national interest or in the interest of the society. The first set of grounds i.e. the sovereignty and integrity of India, the security of the State, friendly relations with foreign States and public order are all grounds referable to national interest, whereas, the second set of grounds i.e. decency, morality, contempt of court, defamation and incitement to an offence are all concerned with the interest of the society.

Conclusion

Expression through speech is one of the basic guarantees provided by civil society. However in modern world Right to freedom of speech and expression is not limited to express ones' view through words but it also includes circulating one's views in writing or through audiovisual instrumentalities, through advertisements and through any other communication channel. It also comprises of right to information, freedom of press etc. It is a right to express and self-realization.

Two big democracies of world i.e. America and India have remarkably protected this right. As far as India is concerned, this important right is mentioned in **Article 19(1) (a)**, which falls in fundamental right category. Indian courts have always placed a broad interpretation on the value and content of **Article 19(1) (a)**, making it subjective only to the restrictions permissible under **Article 19(2).**

The words 'in the interest of public order', as used in the **Article 19** include not only utterances as are directly intended to lead to disorder but also those that have the tendency to lead to disorder. There should be reasonable and proper nexus or relationship between the restriction and achievement of public order.

Freedom of speech and expression is the bulwark of democratic government. This freedom is essential for the proper functioning of democratic process and is regarded as the first condition of liberty. It occupies a preferred position in the hierarchy of liberties giving protection to all other liberties. It has been truly said that it is the mother of all other liberties. That liberty includes the right to acquire information and disseminate the same. It includes the right to communicate it through available media without interference to as large a population of the country, as well as abroad, as is possible to reach. Right to know is the basis right of the citizens of a free country and **Art. 19(1)(a)** protects that right. Right to receive information springs from **Art 19(1)(a).**

Right to Privacy (Art. 21)

*Mahendra Kumar Baishya[21]

INTRODUCTION:

The constitution of India encompasses Right to Privacy under Article 21, which is a requisite of right to life and personal liberty. Stressing on the term 'privacy' it is a dynamic concept which was needed to be elucidated. The scope of Article 21 is multi-dimensional under the Indian constitution. Law of torts, Criminal Laws, as well as Property Laws also recognize right to privacy. Privacy is something that deals with individual privacy and also which was needed to be protected earlier before the passing of landmark case *K.S. Puttaswamy v. Union of India* in 2017 as it was, previously, not considered a fundamental right under the Indian Constitution. However, our Indian judiciary has at present carved out a distinctive precinct regarding privacy and an upshot of that is Right to Privacy, it is now recognized as a fundamental right, which is intrinsic under Article 21

"Privacy" is a notoriously difficult concept to define and cannot be understood as a static and one-dimensional concept. It can only be construed as a group of rights. For understanding the concept of privacy invasion and impact of technology on privacy it is important to know what does "Right to Privacy" means. According to **Black's Law Dictionary** 'Right to Privacy' means "the condition or state of being free from public attention to intrusion into or interference with one's acts or decisions[22]" which concludes to the right to be let alone; the right of a person to be free from any unwarranted publicity; the right to live Without any unwarranted interference by the public in matters with which the public is not necessarily concerned. The right to privacy is derived from an English Common Law maxim which asserts that "Every man's house is his castle". The existence of a "private" element in an individual's life has also been recognized by Jeremy Bentham.

Privacy has also been considered a "type of social isolation; "right against unwarranted intrusion by the state"; a "right against the intrusion on an individual's personal life or affairs" but presently right to privacy has become a burning issue regarding to concerns raised against government's initiatives to collect personal data from citizens. Though privacy is not a fundamental right specifically mentioned in the Constitution of India

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[22] Black's Law Dictionary, Eighth Edition, South Asian Edition, Pg1233.

but it is now seen as an ingredient of personal liberty. Various issues are now being raised for the government's initiatives such as Unique Identification Authority of India (UIDAI), Digital Locker, and other digital services through Digital India Scheme. The right to privacy has been developed by the Supreme Court over a period of time. With the expansive interpretation of the phrase "personal liberty" this right has been read into Article 21 of the Indian Constitution. The expression "personal liberty" includes the right of privacy also. However, it cannot be treated as an absolute right, as some limitations on this right have been imposed.

INTERNATIONAL INSTRUMENTS ON RIGHT TO PRIVACY

The constitutional right privacy has been recognized by almost all the democratic states in the world. It is expressed in a variety of the legislative provisions such as the Privacy Act (1974) in the USA, the proposed Open Democracy Act in South Africa (1996) and the Data Protection Act in England. The other statues which have a universal status also contains provisions recognizing the right to privacy.

- **Universal Declaration of Human Rights** states that "No one shall be subjected to arbitrary interference with his privacy, family, home or correspondence nor to attack upon his honour and reputation. Everyone has the right to protection of the law against such interference or attacks.[23]"
- **International Covenant on Civil and Political Rights** (to which India is a party) states "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home and correspondence, nor to unlawful attacks on his honour and reputation."[24]
- **European Convention on Human Rights** states "Everyone has the right to respect for his private and family life, his home and his correspondence; there shall be no interference by a public authority except such as is in accordance with law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the protection of health or morals or for the protection of the rights and freedoms of others."[25]

RIGHT TO PRIVACY: INDIAN STATUS QUO

"Privacy makes possible individuality, and thus, freedom." The right to privacy is considered as the most comprehensive and one of the most valued right by a civilized man. Privacy is defined as 'the state of being free from intrusion or disturbance in one's private life or affairs" Privacy as a universal concept and a legal right are two different issues which must be dealt separately. Though everyone has their own definition of privacy, but the fundamental idea on which the concept of privacy drives has existed from centuries but the courts are still developing the concept of legal right of privacy through the judicial pronouncements.

BEFORE 1975: RIGHT TO PRIVACY NOT EXPRESSELY RECOGNISED

Right to privacy has not been defined as a Fundamental Right under Constitution of India. In 1954, the Supreme Court in *M. P. Sharma v. Satish Chandra*[26], rejected the

[23] Article 12 of UDHR,1948.
[24] Article 17 of ICCPR,1976.
[25] Article 8 of ECHR,1953.
[26] AIR 1954 AIR 300

contention that there exists a right to privacy under Article 20(3), due to the absence of any provision analogous to the Fourth Amendment of the US Constitution.

The scope of this right first evolved in *Kharak Singh v. The State of Uttar Pradesh & others*[27], which was concerned with the validity of certain regulations that permitted surveillance of suspects. This right of privacy is considered as the right to be let alone. In the context of surveillance, it has been held that surveillance, if intrusive and seriously encroaches on the privacy of citizen, can infringe the freedom of movement, guaranteed by Articles 19(1)(d) and Article 21 of Indian Constitution. Although, the Supreme Court began to accept certain points of the minority view, the right to privacy was still waiting for its place in Indian constitutional jurisprudence.

DURING 1975-2000: RIGHT TO PRIVACY IMPLICIT IN ARTICLE 21 OF INDIAN CONSTITUTION

In *Govind v. State of Madhya Pradesh*[28], Justice Mathew accepted that, the right to privacy as an emanation from Art. 19(1)(a), (d) and 21, but right to privacy is not absolute right. "The fundamental rights clearly guaranteed to a citizen have penumbral regions and that the right to privacy is itself a fundamental right, the fundamental right must be question to restriction on the very root of compelling public interest". Surveillance by which the domiciliary visits are not always be an unreasoning invasion in privacy of a person owing to the character and antecedents of the person subjected to surveillance as also the objects and limitation in which the surveillance is setup. The privacy right deals only with 'persons not places. In this decision, Justice Mathew taking the US jurisprudence into consideration, observed that the right to privacy exists within the penumbral zones of the Fundamental rights explicitly guaranteed under Part III of the Constitution.

In another case *Smt. Maneka Gandhi v. Union of India & Anr*[29], the Supreme Court held that 'personal liberty' under article 21 shelters a variety of rights and some have status of fundamental rights and given additional protection under Article19 of the Indian Constitution. The Triple Test for any law intrusive with personal liberty:

(1) It must prescribe a procedure; (2) the procedure must endure the test of one or more of the fundamental rights conferred under Article 19 of Indian Constitution which may be applicable in a given situation and (3) It must withstand test of Article 14.

The law and procedure authorizing interference with personal liberty and right of privacy must also be right just and fair and not arbitrary, fanciful or oppressive.

In *P.U.C.L. v. Union of India*[30], the Supreme Court of India, while laying down the standards for telephone wire tapping had observed that the right to privacy is an integral part of the fundamental right to life enshrined under Article 21 of the Constitution and this right shall be available only against the state. Prior Justice P.N Bhagawati had also observed that the right to life and personal liberty also includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as proper nutrition, clothing

[27] AIR 1963 SC 1295.
[28] 1975 AIR 1378, 1975 SCR (3) 946.
[29] 1978 AIR 597, 1978 SCR (2) 621.
[30] (1997)1 SCC 30.

and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing with fellow human beings. The actions which may damage individual's dignity will constitute the violation of his right to live and it would have to be in accordance with reasonable, fair and just procedure recognized by the law which stands the test of other fundamental rights." Hence, one could observe from the above cases that the Supreme Court had acknowledged that the human dignity implies expressing oneself in diverse forms and acknowledges the worth of all individuals in the society.

2000 TO PRESENT: RECGONITION AND SAFEGUARDSALONG WITH REASONABLE RESTRICTIONS TO THE RIGHT TO PRIVACY

In *Mr X v. Hospital Z*[31], the apex court held that, right to privacy in doctor patient relationship is not absolute. Right to healthy life would justify breach of confidentiality or right to privacy of another person.

In another case *Directorate of Revenue v. Mohd Nisar Holla*[32], the court held that an individual who does not break any law would be entitled to enjoy his life and liberty which include the right not to be disturbed. A right to be let alone is recognized to be a right under article 21.

In the most recent judgement of the case *K.S. Puttaswamy (Retd.)and Ors. v. Union of India*[33] *(UOI)* and Ors, the apex court of India held that, if the observations made in *M.P. Sharma*[34] *and Ors. v. Satish Chandra and* Ors.and *Kharak Singh v. State of U.P. and Ors*[35]. are read literally and putative as law, the fundamental rights guaranteed under the Constitution of India and more particularly right to liberty under Article 21 of the Indian Constitution would be denuded of vigor and vitality. Institutional integrity and judicial discipline require that assertion made by superior benches of this Court cannot be overlooked by the smaller benches without appropriately clearing up the reasons for not following the decrees pronounced by the larger benches. It is better that the ratio decidendi in the two cases is scrutinized and the jurisprudential correctness of the subsequent decisions of this Court where the privacy right which is asserted or referred be examined and authoritatively decided by a bench of appropriate strength.

Lord Denning contended for the acknowledgement of right to privacy that, "English law should recognize a right to privacy. Any infringement of it must give a cause of action for damages or an injunction as the case may require. It should also recognize a right of confidence for all correspondence and communications which expressly or impliedly are given in confidence. None of these rights is absolute. Each is subject to exceptions. These exceptions are to be allowed whenever the public interest in openness outweighs the public

[31] (1998)8 SCC 296.
[32] (2008) 2 SCC 370.
[33] 2015 (8) SCALE 747.
[34] 1954 AIR 300.
[35] AIR 1963 SC 129.

interest in privacy or confidentiality. In every instance it is a balancing exercise for the Courts. As each case is decided, it will form a precedent for others. So, a body of case law will be established."

The Apex Court has admitted that personal liberty is taken as a compendious term to embrace the varieties of rights which maintain the 'personal liberties' of an individual other than those dealt with in Article 19(1). The court held that, while Article 19(1) deals with particular types or parts of freedom, "personal liberty" in Article 21 takes in and encompasses the residue.' However, the right to privacy may not be absolute and in exceptional circumstances surveillance as per statutory provisions may not violate such a right.[36]

CONCLUSION:

The term "privacy" has been defined as the right of the individual to limit the extent to which he desires to share of himself with others. In many States, the right to privacy has not been given expressly to their citizens, rather discovered from judicial interpretations. The constitutional makers might not have envisioned the said right in the Constitution, but the technology we are experiencing presently is far unlike and advanced from of the lives of generations who drafted the constitution. So, there is a need for modification in the method of resolution for the newly emerging problems and solutions must undergo a procedure of reengineering.

It can thus be concluded that the use of technology in the processing of information, poses important questions with regard to a person's right to privacy. So, practical guidelines in the handling of these problems must be formulated according to the norms of freedom, truth and human rights.

[36] Ramlila Maidan Incident, Re, (2012) 5 SCC 1.

"ARTICLE 32: SCOPE AND APPLICABILITY"

***Mahendra kumar Baishya**[37]

This article describes the last of the Fundamental Rights, it is remedial and not substantive in nature. But it is in no way less important than the other rights. In the words of Dr. Ambedkar "Just as the remedy of habeas corpus is called the bulwark of liberties in England, this Article has been called the heart and soul of the Constitution". Gajendragadkar, J.,"The Fundamental Right to move this Court can therefore be appropriately described as the cornerstone of the democratic edifice raised by the Constitution." That is why it is natural that this Court should, regard itself "as the protector and guarantor of Fundamental Rights" and should declare that "it cannot, consistently with the responsibility laid upon it, refuse to entertain applications seeking protection against infringements of such rights".

Remedies for enforcement of rights conferred by this Article are –

1) The right to approach the Apex Court, by appropriate proceedings for the purpose of enforcement of the rights is guaranteed under this Article.

2) The SC have power to issue directions, orders or writs, including in the nature of- habeas corpus, , prohibition, quo warranto, mandamus and certiorari, appropriate for the enforcement of rights conferred .

3) 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 its jurisdiction or any of the powers used by the Supreme Court under clause (2).

4) The right guaranteed by article 32 shall not be suspended except as otherwise given for by this Constitution.

Article 32 (1):

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The right to move the Supreme Court guaranteed under clause (1) is subject to the condition of 'appropriate proceedings'. 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." There is no freedom to move the Supreme Court by all sorts of proceedings but only by 'appropriate proceedings'. Only those proceedings are appropriate which invoke, by original petition, the jurisdiction of the Supreme Court to issue, according to the nature of the case, writs or orders or directions of the types described in clause (2).

In Daryao v. State of U.P.[38], the Supreme Court has said; "The expression 'appropriate proceedings' has reference to proceedings which may be appropriate having regard to the nature of order, direction or writ which the petitioner seeks to obtain from this Court. The appropriateness of the proceedings would depend upon the particular writ or order which he claims and it is in that sense that the right has been conferred on the citizen to move this Court by 'appropriate proceedings'".

The Court has further clarified that "there is no limitation in regard to the kind of proceedings envisaged in clause (1) of Article 32 except that the proceedings must be 'appropriate' and this requirement of appropriateness must be judged in the light of the purpose for which the proceedings is to be taken, namely, enforcement of a Fundamental Right".[39]

The word "appropriate" does not refer to any form but to the purpose of the proceeding and therefore so long as the purpose of the proceeding is enforcement of a Fundamental Right, it is appropriate and when it relates to the enforcement of the Fundamental Rights of poor, disabled or ignorant by a public spirited person "even a letter addressed by him to the Court can legitimately be regarded as an 'appropriate proceeding'.[40]

Article 32 of the Constitution gives the Supreme Court very wide discretion in the matter of framing writs to suit the exigencies of particular cases and the application of the petitioner cannot be thrown out simply on the ground that the proper writ or direction has not been prayed for.[41]

Article 32 (2)

Clause (2) empowers the Supreme Court to issue directions or orders or writs, including the 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 Part III of the Constitution. The five writs specifically mentioned in clause (2) are known as the prerogative writs in the English law.

The language of clause (2) is wide and does not confine the power of the Court to issuing of prerogative writs only, nor does it compel the Court to observe all procedural technicalities which had gathered round the prerogative writs in English law. It extends to

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[38] AIR 1961 SC 1457, 1461
[39] Bandhua Mukti Morcha v. Union of India, (1984) 3 SCC 161 : AIR 1984 SC 802, 813-14.
[40] M.C. Mehta v. Union of India (1987)1 SCC 395
[41] Chiranjit Lal Chowdhury v. Union of India AIR 1951 SC 41

issuing of any directions or orders that may appropriate for the enforcement of any of the Fundamental Rights. The powers of the Court are not only injunctive in scope i.e. preventing the violation of a fundamental rights but also remedial in scope and provides remedy against the breach of a Fundamental Rights already provided.

In respect of award of compensation, the Court has clarified that Article 32 is a public law remedy and the limitation of sovereign immunity in Article 300 in respect of private law remedies, is inapplicable to it. Such Compensation may, however, be awarded only to the victim of violation of the Fundamental Rights.[42]

Again, Clause (2) does not lay down the procedure which the Court has to follow in the enforcement of Fundamental Rights and granting the appropriate relief. It does not mean that the Court can ignore all canons of judicial procedure and propriety, but certainly it can devise appropriate procedures within the broad judicial parameters to suit the enforcement of a Fundamental Right.

Further, the Court has held that its power under Article 32 is plenary power which it can use even for correcting its own mistakes. The power can also be used for entrusting functions on other bodies such as National Human Rights Commission.[43]

Territorial Jurisdiction – The powers of the Court under Article 32 are not circumscribed by any territorial limitation. It extends not merely over every authority within the territory of India but also those functioning outside, provided such authorities are under the control of the Government of India. But the power under Article 32 must be read in conjunction with Article 142 of the Constitution.

Article 32(3)

The Parliament is authorized under clause (3) to empower by law any other Court to exercise, within the local limits of its jurisdiction, any of the powers exercisable by the Supreme Court under Clause (2). It will be noted that the Constitution itself empowers every High Court throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority within those territories, directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition quo warranto, certiorari, or any of them for the enforcement of any of the rights conferred by Part III. The power conferred on the High Courts and to be conferred on any other Court under this clause is not in derogation of the power conferred on the Supreme Court by clause (2) of Article 32.

Article 32 (4)

It is enacted in clause (4) that the right to move the Supreme Court for the enforcement of the Fundamental Rights shall not be suspended except as otherwise provided in the Constitution. It is only under Article 359 that the Constitution empowers the President to suspend the enforcement of the Fundamental Rights, when a proclamation of emergency under Article 352 is in operation.

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[42] Nilbati Behra v. State of Orissa, (1993) 2 SCC 746; Consumer Education & Research Centre v. Union of India, (1995) 3 SCC 42.

[43] Common Cause, A Registered Society v. Union of India, (1999) 6 SCC 667 : AIR 1999 SC 2979.

RELATIONSHIP BETWEEN ARTICLES 32 AND 226

Art. 32 differs from Art. 226 in that whereas Art. 32 can be evoked only for the enforcement of Fundamental Rights, Art. 226 an be evoked not only for the enforcement of Fundamental Rights but for "any other purpose" as well. This means that the Supreme Court's power under Art.32 is restricted as compared with the power of a High Court under Art.226. The words "for any other purpose" mentioned in Art. (Not in Art.32), enable a High Court to take consideration of any matter even if no Fundamental Right is involved.

However, there are some exceptional cases where the Supreme Court has entertained writ petitions under Art. 32 and question of Fundamental Right was not involved.

These matters are –

(i) Misuse of ordinance – making power by the State of Bihar.[44]
(ii) Appointment of the judges of High Courts and the Supreme Court.[45]
(iii) Issues related with the procedure to remove a Supreme Court Judge.[46]

In ***Romesh Thappar v. State of Madras***,[47] the Supreme Court ruled that such a petitioner can come straight to the Supreme Court without going to the High Court first. The Court stated that unlike Art. 226, Art. 32 confers a Fundamental Right on the individual and imposes an obligation on the Supreme Court which it must discharge when a person complains of infringement of a Fundamental Right.Art.32 provides a guaranteed remedy for the enforcement of the Fundamental Rights and constitutes the Supreme Court as the "guarantor and the protector of Fundamental Rights." This proposition has been reiterated by the Supreme Court in a number of cases.[48]

In ***P.N. Kumar v. Municipal Corporation of Delhi***.[49] SC held that the citizens should not come to the court directly for the enforcement of their Fundamental Rights, but they should first seek remedy in the High Courts and then if the parties are dissatisfied with the judgment of the High Court, they can approach the Supreme Court by way of appeal. Disposing the petition, the judges laid down following guidelines for the exercise of the right under Article 32.

However, the directions of the Supreme Court in this case are contrary to the spirit of Art. 32, which guarantees to every citizen of India-the right to move the highest Court of the nation for the enforcement of his Fundamental Rights. The argument that since a large number of cases are pending in the Court therefore the citizens should not come directly to the court is not justified.

Since, it is the view expressed by a two Judge-Bench, it cannot be regarded as an authoritative pronouncement on an important constitutional issue, viz. inter relationship

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[44] D.C. Wadhwa V. State of Bihar AIR 1987 SC 597
[45] Supreme Court Advocates on Record Ass. V. Union of India
[46] Sarojini Ramaswamy V. Union of India AIR 1992 SC 2219
[47] Romesh Thappar v. State of Madras AIR 1950 SC 12
[48] State of Madras v. V.G. Row, AIR 1952 SC, 196; K.K. Koachunni v. State of Madras, AIR 1959 SC 725; Kharak Singh v. State of Uttar Pradesh AIR 1963 SC 1295.
[49] (1987) 4 SCC 609

between Arts. 32 and 226. Such a vital pronouncement could be made only by the constitution Bench consisting at least of five judges, especially, when the long-established position is sought to be overturned.

RESTRICTIONS UNDER ARTICLE 32

1. **Article 32 and Res-judicata:** The Supreme Court has imposed a significant restriction on the invocation of its jurisdiction under Article 32 by applying the doctrine of res judicata, based on considerations of public policy. It is in the larger interest of the society that finality should attach to binding decisions of courts of competent jurisdiction and that individuals should not be made to face the same kind of litigation twice. Accordingly, a person cannot move successive petitions under Art 32 for the same cause of action. But res-judicata would not apply if orders sought to be challenged through successive writ petitions as for example, when a petition challenging the validity of the tax assessment for one year is dismissed by the Supreme Court, a similar order passed for the subsequent year can be challenged through a new writ petition on some grounds not raised earlier in the first writ petition.[50] The Supreme Court has ruled in ***Lallubhai v. Union of India***[51] that the doctrine of constructive res judicata is applied only to civil actions and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of habeas corpus under Art. 32 on fresh grounds not taken in the earlier petition for the same relief. When a writ petition under Art. 226 has been dismissed by the High Court, another writ petition under Art, 32 cannot be moved in the Supreme Court, to seek redress in the same matter. The principle of res judicata envisages that if a judgement has been pronounced by a court of competent jurisdiction, it is binding between the parties unless it is reversed or modified in appeal, revision or other procedure prescribed by law.The principle of res judicata has also been applied when a person first goes to the Supreme Court under Art 32, and on his application having been rejected there, comes to the High Court under Art, 226.[52]

2. Doctrine of Laches: Laches or inordinate delay on the part of the petitioner may disentitle him to move a writ petition Art, 32 to enforce his Fundamental Right. The Court refuses relief to the petitioner on the ground of laches unless there is reasonable explanation for the delay. The aggrieved party should therefore, file the petition at the earliest possible time. In ***Rabindra Nath v. Union of India***,[53] the Court rejected a writ petition filed to challenge the seniority rule made fifteen years earlier under Arts. 14 and 16.

3. Existence of Alternative Relief: The existence of an alternative relief is no bar, to the grant of remedy under Art. 32. In cases involving the breach of fundamental rights, even under Art 226, the existence of an alternate remedy is no ground for refusal of proper relief. The Supreme Court ordinarily insists that the alternative remedy should be availed of unless

[50] Amalgameted Coalfields V Janapada Sabha, Chinolvara Air 1961 SC 964.
[51] Air 1981 SC 728
[52] Metal Corp. of India v. Union of India, AIR 1970 Cal 15
[53] AIR 1970 SC 470 : (1970) 1 SCC 84.

the alternative remedy is useless to the petitioner. In ***Kharak Singh v. State of U.P***.[54] and also in ***K.K. Kochuni v. State of Madras***,[55] it was held that in cases involving the breach of fundamental rights, even under Article 226, the existence of an alternative remedy is no ground for the refusal of proper relief. The existence of an alternative relief is no bar to the grant of remedy u/a 32.

4. No Direct Place u/a 32: In the case of ***Bhisham Das v. State of Punjab***[56] it was held that writ petition as regards regularization of service would require detailed investigation into the facts. The court directed petitioner to approach the State Govt. with a claim of regularization first. In the case of ***Virender Singh Negi v. State of UP***[57] it was held that as the writ petition was filed for protection in hilly areas in Dehradun, the Court directed to file case before Allahabad High Court. SC directed the cases for violation of human rights to be filed before National Human Rights Commission – ***Upendra Baxi v. State of U.P.***[58]

AGAINST WHOM A WRIT CAN BE ISSUED

The rights which are given to the citizens by way of Fundamental Rights as included in Part III of the Constitution are a guarantee against State action as distinguished from violation of such rights from private parties. Private action is sufficiently protected by the ordinary law of land.

In ***P.D. Shamdasani v. Central Bank of India***,[59] the petitioner, in an application under Article 32 of the Constitution, sought the protection of the Court on the ground that his property right under Articles 19 (1) (f) and 31 were infringed by the action of another private person – the Central Bank of India. The Supreme Court dismissed the petition.

Fundamental Rights are enforceable against the State. The term 'state' has been defined in Art. 12. The actions of any of the bodies comprised within the term 'State' as defined in Art.12 can be challenged before the courts under Art. 13(2) on the ground of violating Fundamental Rights.

The most significant expression used in Art. 12 is "other authorities." This expression is not defined in the Constitution. The Supreme Court has expanded, the term "other authorities" in Art. 12 and has made the coverage of the Fundamental Rights wider i.e. more and more bodies are brought within the scope of the Fundamental Rights. For this purpose, the Supreme Court has developed the concept of an "instrumentality" of the state under Art. 12.

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[54] AIR 1963 SC 1295
[55] AIR 1960 SC 1080
[56] AIR 1961 SC 1570
[57] AIR 1954 SC 447
[58] AIR 1987 SC 191
[59] AIR 1952 SC 59

In ***Rajasthan State Electricity Board v. Mohanlal***,[60] the Supreme Court ruled that a State electricity board, set up by a statute, having some commercial functions to discharge, would be an 'authority' under Art. 12. The Court emphasized that it is not material that some of the powers conferred on the concerned authority are of commercial nature. This is because under Art. 298, the government is empowered to carry on any trade or commerce.

The question was considered more thoroughly in ***Ramanna D. Shetty v. International Airport Authority***,[61] The International Airport Authority, a statutory body, was held to be an 'authority'.

The Supreme Court also developed the general proposition that an 'instrumentality' or 'agency' of the government would be regarded as an 'authority' or 'state' within Art.12 and laid down some tests to determine whether a body could be regarded as an instrumentality or not.

In ***A.R. Antulay v. R.S. Nayak***,[62] held that the Court cannot pass an order or issue a direction which would be violative of Fundamental Rights of citizens, it can be said that the expression "State" as defined in Article 12 of the Constitution includes judiciary also.

There are a few Fundamental Rights, such as, under Arts 17, 21, 23 or 24 which are also available against private persons. In case of violation of any such right, the court can be make appropriate orders against violation of such rights by private persons.

Who can apply for a writ:

Art. 32 does not prescribe the persons or classes of persons who can invoke the Supreme Court's jurisdiction for the redressal of their grievances? The matter of 'standing' thus lies within the realm of the Supreme Court.

The general principle is that a person whose Fundamental Right has been infringed has locus standi to move the Supreme Court under Art. 32 for the enforcement of his right except the petition for a writ of habeas corpus.The rule of standing is also relaxed in case of a petition for quo warranto.

The principle applicable to civil suits that all parties interested in the subject-matter of the suit should be made parties, is not applicable to the petitions under Art. 32. If a petitioner has a right to maintain the petition, his petition would not be thrown out and relief refused to him merely because he has not made another person, having equal right with him to maintain the petition, a party thereto. Over a period of time, the Supreme Court has been taking a liberal view of locus standi through the concept of PIL. It is not necessary that the victim of the violation of the Fundamental Rights should personally approach the Court for redress as the Court can itself take cognizance of the matter and proceed Suo motu, or on a petition filed by any public-spirited individual.

RELIEF UNDER ARTICLE 32:

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[60] AIR 1967 SC 1857: (1967) 3 SCR 377.
[61] AIR 1979 SC 1628 : (1979) 3 SCC 489
[62] AIR 1988 SC 1531

The phraseology of Art. 32(2) is very broad. Thereunder the Supreme Court is authorized to issue orders, directions, or writs, "including" writs, "in the nature of"- mandamus, certiorari, prohibition, quo warranto and habeas corpus. Under Art. 32, the Supreme Court may issue not only the specified writs but also make any order, or give any directions as it may consider appropriate in the circumstance of the case, to give proper relief to the petitioner. The Court can grant declaration or injunction as well if that be the proper relief. The Court can mold relief to meet the exigencies of the specific circumstances.[63]

In **M.C. Mehta v. Union of India**, SC held, the petition cannot be thrown out merely because he has not prayed for a proper writ or direction. While issuing writs, the Court is not bound to follow all the technicalities which surround these writs in Britain.[64]

DAMAGES/COMPENSATION

In course of time, the Supreme Court has given a new dimension to Art. 32 by awarding damages/compensation for violation of fundamental rights and where no other suitable remedy is available to give relief and redress in the specific situation for the injury caused to the petitioner. This, indeed, is a major contribution made by the Supreme Court towards the protection of Fundamental Rights against undue interference by administrative authorities.

In ***Rudul Sah v. State of Bihar***,[65] in a writ petition for habeas corpus, the Court awarded damages to the petitioner against the State for breach of his right of personal liberty guaranteed by Art. 21, as he was kept in jail for 14 years even after his acquittal by a criminal court. The Court has granted damages in the cases of- personal injuries at the hands of government servants by their tortuous acts; police atrocities; custodial deaths; medical negligence; environmental pollution. etc. In cases of environmental pollution, the Supreme Court has advocated the principle of polluter pays.

GENERAL DIRECTIONS

The Court has used Art. 32 for a much wider purpose i.e. to lay down general guidelines having the effect of law to fill the vaccum till the making of necessary law. The Court derives such a power by reading Art. 32 with Art. 142 and Art. 141. Art. 144 mandates all authorities to act in aid of the Court orders.

The Court has stated in the case of ***Visakha***,[66] that it is the duty of the executive to fill the vaccum by executive orders because its field is coterminous with that of the legislature. And where even the executive does not act, the judiciary must step in, in exercise of its constitutional obligations.

THE WRITS

1. Habeas Corpus

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[63] Golaknath v. State of Punjab, AIR 1967 SC 1643
[64] AIR 1987 SC 1086, 1091.
[65] AIR 1983 SC 1086
[66] AIR 1997 SC 3011

The writ of habeas corpus is used to secure release of a person who has been detained unlawfully or without legal justification or against due procedure subject to the provisions of Art.22. The greater value of the writ is that it enables an immediate determination of a person's right to freedom. The power of detention vested in an authority, if exceeded, abused or exercised mala fide makes the detention unlawful.[67]

The Supreme Court has pointed out in ***Icchu Devi v. Union of India***,[68] that in case of an application for a writ of habeas corpus, the court does not, as a matter of practice, follow strict rules of pleading. Even a postcard by a detenu from jail is sufficient to activate, the court into examining the legality of detention. Also, because of Art. 21, the court places the burden of showing that detention is in accordance with the procedure established by law on the detaining authority. The court may grant an interim bail while dealing with a habeas corpus petition. Habeas corpus may also be issued when a person complains of illegal custody or detention by a private person. When conflicting claims are made for the custody of an infant, the court can enquire into these claims and award the custody to the proper person.

2. Quo Warranto

The writ lies only in respect of a public office of a substantive character. The writ calls upon the holder of a public office to show to the court under what authority he is holding that office. The court may oust a person from an office to which is not entitled. It is issued against the usurper of an office and the appointing authority is not a party. The court can thus control election or appointment to an office against law, and protect a citizen from being deprived of a public office to which he may be entitled.[69]

To file a petition for quo warranto, it is not necessary that the petitioner should have suffered a personal injury himself, or should seek to redress a personal grievance.

3. Mandamus

Mandamus is a command issued by a Court commanding a public authority to perform a public duty belonging to its office. For example, when a tribunal omits to decide a matter which it is bound to decide, it can be commanded to determine the questions which it has left undecided. Mandamus can be granted only when a legal duty is imposed on the authority in question and the petitioner has a legal right to compel the performance of this duty. The existence of a legal right in the petitioner and corresponding legal duty on the respondent are conditions precedent for issuing a writ of mandamus. The performance of the duty should be imperative and not discretionary.

According to the Supreme Court, mandamus is issued "to compel performance of public duties which may be administrative, ministerial or statutory in nature". Mandamus writ cannot be issued to the State Government directing it to appoint a commission to inquire into changes in climatic cycle, floods in the State etc. because the Government's power to appoint

[67] Ram Manohar Lohia v. State of Bihar, AIR 1966 SC 740.
[68] AIR 1980 SC 1984
[69] Univ. of Mysore v. Govinda Rao, AIR 1965 SC 491

a commission is discretionary and optional. Mandamus can be issued when the government denies to itself a jurisdiction which it undoubtedly has under the law.[70]

4. Certiorari and Prohibition

The writs of Certiorari and Prohibition are issued practically on similar grounds. The only difference between the two is that certiorari is issued to quash a decision after the decision is taken by a lower tribunal while prohibition is issuable before the proceedings are completed. The object of prohibition is prevention rather than cure. The jurisdiction to issue certiorari is a supervisory jurisdiction and the High Court exercising it is not entitled to act as an appellate Court.

The Supreme Court has emphasized that a writ in the nature of certiorari is a wholly inappropriate relief to ask for when the constitutional validity of a legislative measure is being challenged. In such a case, the proper relief to ask for would be a declaration that a particular law is unconstitutional and void. If a consequential relief is thought necessary, then a writ of mandamus may be issued restraining the state from enforcing or giving effect to the provisions of the law in question.[71]

The grounds for the issue of certiorari have been succinctly stated by the Supreme Court is ***Syed Yakoob v. K.S. Radhakrishanan***[72]. The writ of certiorari or prohibition is issued on the following grounds :

(1) when the body concerned proceeds to act without, or in excess of, or

(2) fails to exercise its jurisdiction; or

(3) there is an error of law apparent on the face of the record in the impugned decision of the body; or

(4) the findings of fact reached by the inferior tribunal are based on no evidence; or

(5) it proceeds to act in violation of the principles of natural justice; or

(6) it proceeds to act under a law which is itself invalid, ultra vires or unconstitutional, or

(7) it proceeds to act in contravention of the Fundamental Rights.

Effect of Declaration of Emergency on Article 32

Emergency has a debilitating effect on the rights of the people in a democratic country. In India, a proclamation of emergency under Art 352 affects the Fundamental Rights of the people very drastically.

The ***ADM Jabalpur v. S. Shukla***[73] ruling was startling and struck at the very foundations of Rule of Law and the Administrative Law of India. It has been laid down

[70] E.A. Coop. Society v. State of Maharashtra, AIR 1966 SC 1149
[71] Prabodh Verma v. Uttar Pradesh AIR 1985 SC 167
[72] AIR 1964 SC 47
[73] AIR 1976 SC 1207

judiciary that the executive must keep the law, even during an emergency, in relation to Art 358.As a result of the Shukla case ruling, the emergency provisions in the Indian Constitution came to be re-casted through the 44th Amendment of the Constitution, enacted in 1978.The 44thConstitutional Amendment restricted the scope of Art 358 in several ways.Art. 19 is not suspended in case of the proclamation of emergency issued on the ground of armed rebellion. Under Art, 358 (1), there is an automatic suspension of Art. 19 as emergency is proclaimed on the ground of war or external aggression, and Art 19 ceases to restrain the legislature or the executive power of the state or the Centre. If the legislature makes a law. or the executive commits acts, which are inconsistent with the rights guaranteed by Art 19, their validity is not open to challenge either during the continuance of the emergency or even thereafter.

Art 358 (1) does not apply to:

i) Any law which does not contain a recital that such law is in relation to the proclamation of emergency in operation when it is made; or
ii) Any executive action taken otherwise then under a law containing such a recital.

Art. 358 (2) confirms that only a law enacted in regard to the emergency, but no other law, would be immune from being challenged under Art 358 during an emergency. In (ii) above "action under a law" suggests that any action which is ultra-vires the law is not protected.

According to a proviso to Art 358 (1), makes it possible to extend any law or executive action taken in the part in which emergency prevails to any others part of the country if activities there in threaten the security of India or any post thereof.

Art 359 refers to the suspension of the operation of all fundamental rights other than Art 19 during an emergency. Under Art. 359, Fundamental Rights as such are not suspended, but only their enforcement. But to curtail the vast power vested in the executive, the 44th Amendment restricts the scope of Art. 359 somewhat. Art 359 has been amended so as to provide that the presidential power to suspend the right to move the Court for the enforcement of a Fundamental Right can't be exercised in respect of the Fundamental Rights guaranteed by Arts 20 and 21. Thus it is not possible to suspend the right to life and personal liberty guaranteed by Art 21 and the right to protection in respect of conviction for offences guaranteed by Art 20.

Under Art 359 (1), when a proclamation of emergency is in operation the President may by Order, declare that the right to move any court for the enforcement of such of the Fundamental Rights as may be mentioned in the order (except Art 20 and 21), and all proceedings pending in any Court for the enforcement of the rights so mentioned, shall remain suspended for the period during which the proclamation is in force, or for such shorter period as may be specified in the Order.

CONCLUSION:

Fundamental Rights in order to be meaningful must be enforceable. The Constitution not only guarantees certain Fundamental Rights but under article 32 it also guarantees the right to move the highest Court in the land directly by appropriate proceedings for the enforcement of

the Fundamental Rights. The Supreme Court may issue writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari. Parliament may empower any other courts also to exercise these powers. The right guaranteed by article 32 cannot be suspended except as provided by the Constitution. For example, during a proclamation of Emergency (a) the right to move Court for enforcement of any of the Fundamental Rights except articles 20 and 21 can be suspended under article 359 and (b) executive and legislative power of the State shall not stand restricted under article 358 by the rights to freedom enshrined in article 19. Where the suspension of Fundamental Right is protected by the Constitution, article 32 will not apply. It has been held by the Supreme Court that this right cannot be taken away even by amending the Constitution as it is a basic feature of the Constitution. Even at the time of framing the Constitution, Dr. Ambedkar had described this provision as the very soul and heart of the Constitution. Only the Fundamental Rights guaranteed by the Constitution can be enforced under article 32. Article 32 is not exactly concerned with an erroneous order or even with the unconstitutionality of a legislation unless it directly affects or invades any of the Fundamental Rights. Since right to constitutional remedy under article 32 is itself a Fundamental Right, the Supreme Court may not refuse relief for violation of a substantive Fundamental Right. Article 226 grants powers to the High Courts also to issue various writs. In case of violation of Fundamental Rights, the Supreme Court and the High Courts both have concurrent jurisdiction and an affected person can approach either. However, the Supreme Court has since held that where relief through High Court under article 226 is available, the High Court should be approached first. Under the new concept of public interest litigation propounded by the Supreme Court in the Transfer of Judges case, it is no more necessary to be the affected party to approach the Court for violation of Fundamental Rights. Any member of the public can do so even through a letter on behalf of a person or group of persons who for any reason may not be in a position to approach the Court.

Writs of Indian Constitution (Art. 32 & 226)

***Mahendra Kumar Baishya**[74]*

A person whose right is infringed by an arbitrary administrative action may approach the Court for appropriate remedy. The Constitution of India, under Article 32 and 226 confers writ jurisdiction on Supreme court and High Court, respectively for enforcement /protection of fundamental rights of an Individual. Writ is an instrument or order of the Court by which the Court (SC and HC) directs an Individual of official or an authority to do an act or abstain from doing an act.

Article 32(2) of the Constitution of India provides: "The Supreme Court shall have power to issue directions or order or writs, including writs in 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 is a fundamental right under Part -III of the Constitution. Under this Article, the Supreme Court is empowered to relax the traditional rule of Locus Standi and allow the public interest litigation (PIL) at the instance of public-spirited citizens. The Supreme Court can provide relief to various types of litigants such as bonded labour, undertrial prisoners, victims of police torture etc. The Supreme Court may also award exemplary damages by exercising its power under Article 32 as it has imposed in ***Bhim Singh's*** and ***Rudul Shah's*** cases.

Article 226(1) of the Constitution of India, on the other hand says," Notwithstanding anything in Article 32, every High Court shall have powers, throughout the territories in relation to which it exercise jurisdiction, to issue to any

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person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibitions, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose." As is clear from the bare language, this Article guarantees an individual to move the High Court for enforcement of the fundamental rights as well as for any other purpose also i.e. for enforcement of any other legal right. Article 226 confers wide powers on the High Courts. It serves as a big reservoir of judicial power to control administration. Its power under Article 226 cannot be curtailed by legislation. Thus, powers of High Courts conferred under Article 226 are wider as compared to powers conferred on the Supreme Court under Article 32 of the Constitution of India.

Both the Articles 32 and 226 provide five types of writs namely writ of habeas corpus, mandamus, prohibition, certiorari and quo-warranto. These are known as prerogative writs in English Law because they had originated in the King's prerogative power of superintendence over the due observance of law by his officers and tribunals. The prerogative writs are extra-ordinary remedies intended to be applied in exceptional cases in which ordinary legal remedies are not adequate.[75]

Dr Ambedkar stated that: "If I was asked to name any particular article in this Constitution as the most important- an article without which this Constitution would be a nullity, I could not refer to any other article except this one. It is the very soul of the Constitution and the very heart of it and I am glad that the House has realized its importance."

Types of Writs

There are five types of Writs as provided under Article 32 of the Constitution:

1. Habeas Corpus

- Meaning

It is one of the important writs for personal liberty which says "You have the Body". The main purpose of this writ is to seek relief from the unlawful detention of an individual. It is for the protection of the individual from being harmed by the administrative system and it is for safeguarding the freedom of the individual against arbitrary state action which violates fundamental rights under articles 19, 21 & 22 of the Constitution. This writ provides immediate relief in case of unlawful detention.

- **When Issued?**

[75] Dr. J.N. Pandey, Constitutional law of India, Central law Agency, Allahabad (20190

Writ of Habeas Corpus is issued if an individual is kept in jail or under a private care without any authority of law. A criminal who is convicted has the right to seek the assistance of the court by filing an application for "writ of Habeas Corpus" if he believes that he has been wrongfully imprisoned and the conditions in which he has been held falls below minimum legal standards for human treatment. The court issues an order against prison warden who is holding an individual in custody in order to deliver that prisoner to the court so that a judge can decide whether or not the prisoner is lawfully imprisoned and if not then whether he should be released from custody.

- **Important judgments on Habeas Corpus**

The first Habeas Corpus case of India was that in Kerala where it was filed by the victims' father as the victim P. Rajan who was a college student was arrested by the Kerala police and being unable to bear the torture he died in police custody. So, his father Mr T.V. Eachara Warrier filed a writ of Habeas Corpus and it was proved that he died in police custody.

Then, in the case of ***ADM Jabalpur v. Shivakant Shukla***,[76] which is also known as the Habeas Corpus case, it was held that the writ of Habeas Corpus cannot be suspended even during the emergency (Article 359).

While deciding whether Habeas Corpus writs are civil or criminal in nature, it was held in ***Narayan v. Ishwarlal*** , that the court would rely on the way of the procedures in which the locale has been executed.

This writ has been extended to non-state authorities as well which is evident from two cases. One from the ***Queen Bench's case of 1898 of Ex Parte Daisy Hopkins*** in which the proctor of Cambridge University detained and arrested Hopkins without his jurisdiction and Hopkins was released. And in the case of ***Somerset v. Stewart*** wherein an African Slave whose master had moved to London was freed by the action of the Writ.

2. Quo Warranto

- What does the writ of Quo Warranto mean?

Writ of Quo Warranto implies thereby "By what means". This writ is invoked in cases of public offices and it is issued to restrain persons from acting in public office to which he is not entitled to. Although the term 'office' here is different from 'seat' in legislature but still a writ of Quo Warranto can lie with respect to the post of Chief Minister holding a office whereas a writ of quo warranto cannot be issued against a Chief Minister, if the petitioner fails to show that the minister is not properly

[76] AIR 1976 SC 1207

appointed or that he is not qualified by law to hold the office. It cannot be issued against an Administrator who is appointed by the government to manage Municipal Corporation, after its dissolution. Appointment to public office can be challenged by any person irrespective of the fact whether his fundamental or any legal right has been infringed or not.

- The court issues the Writ of Quo Warranto in the following cases:

1. When the public office is in question and it is of a substantive nature. A petition against a private corporation cannot be filed.
2. The office is created by the State or the Constitution.
3. The claim should be asserted on the office by the public servant i.e. respondent.

- Important Case Laws

In the case of ***Ashok Pandey v. Mayawati*** , the writ of Quo Warranto was refused against Ms Mayawati (CM) and other ministers of her cabinet even though they were Rajya Sabha members.

Then in the case of ***G.D. Karkare v. T.L. Shevde*** , the High Court of Nagpur observed that "In proceedings for a writ of quo warranto, the applicant does not seek to enforce any right of his as such nor does he complain of any non-performance of duty towards him. What is in question is the right of the non-applicant to hold the office and an order that is passed is an order ousting him from that office."

The Writ of quo warranto was denied by the court in the case of ***Jamalpur Arya Samaj v. Dr D. Ram***. The writ was denied on the ground that writ of quo warranto cannot lie against an office of a private nature. And also it is necessary that office must be of substantive character. Whereas in the case of ***R.V. Speyer***, the word 'substantive' was interpreted to mean an 'office independent to the title'. Also, in ***H.S. Verma v. T.N. Singh*** , the writ was refused as the appointment of a non-member of the state legislature as C.M. was found valid in view of Article 164(4) which allows such appointment for six months.

3. Mandamus

- **Writ of Mandamus**

Writ of Mandamus means "We Command" in Latin. This writ is issued for the correct performance of mandatory and purely ministerial duties and is issued by a superior court to a lower court or government officer. However, this writ cannot be issued against the President and the Governor. Its main purpose is to ensure that the powers or duties are not misused by the administration or the executive and are fulfilled duly. Also, it safeguards the public from the misuse of authority by the

administrative bodies. The *mandamus* is "neither a writ of course nor a writ of right but that it will be granted if the duty is in nature of public duty and it especially affects the right of an individual, provided there is no more appropriate remedy". The person applying for mandamus must be sure that he has the legal right to compel the opponent to do or refrain from doing something.

- Conditions for issue of Mandamus

1. There must rest a legal right of the applicant for the performance of the legal duty.
2. The nature of the duty must be public.
3. On the date of the petition, the right which is sought to be enforced must be subsisting.
4. The writ of Mandamus is not issued for anticipatory injury.

- **Limitations**

The courts are unwilling to issue writ of mandamus against high dignitaries like the President and the Governors. In the case of ***S.P. Gupta v. Union of India***, judges were of the view that writ cannot be issued against the President of India for fixing the number of judges in High Courts and filling vacancies. But in ***Advocates on Records Association v. Gujarat***, the Supreme Court ruled that the judges' issue is a justiciable issue and appropriate measures can be taken for that purpose including the issuance of mandamus. But in ***C.G. Govindan v. State of Gujarat***, it was refused by the court to issue the writ of mandamus against the governor to approve the fixation of salaries of the court staff by the Chief Justice of High Court under Article 229. Hence, it is submitted that the Governor or the President means the state or the Union and therefore issuance of mandamus cannot take place.

- **Important Judgements**

In ***Rashid Ahmad v. Municipal Board***, it was held that in relation to Fundamental Rights the availability of alternative remedy cannot be an absolute bar for the issue of writ though the fact may be taken into consideration.

Then, in the case of ***Manjula Manjori v. Director of Public Instruction***, the publisher of a book had applied for the writ of mandamus against the Director of Public Instruction for the inclusion of his book in the list of books which were approved as text-books in schools. But the writ was not allowed as the matter was completely within the discretion of D.I.P and he was not bound to approve the book.

4. Certiorari

- What does Writ of Certiorari mean?

Writ of Certiorari means to be certified. It is issued when there is a wrongful exercise of the jurisdiction and the decision of the case is based on it. The writ can be moved to higher courts like the High Court or the Supreme Court by the affected parties.

There are several grounds for the issue of Writ of Certiorari. Certiorari is not issued against purely administrative or ministerial orders and that it can only be issued against judicial or quasi-judicial orders.

- When is a writ of Certiorari issued?

It is issued to quasi-judicial or subordinate courts if they act in the following ways:

1. Either without any jurisdiction or in excess.
2. In violation of the principles of Natural Justice.
3. In opposition to the procedure established by law.
4. If there is an error in judgement on the face of it.

Writ of certiorari is issued after the passing of the order.

- Important Judgements on writ of Certiorari

In ***Surya Dev Rai v. Ram Chander Rai & Ors.***, the Supreme Court has explained the meaning, ambit and scope of the writ of Certiorari. Also, in this it was explained that Certiorari is always available against inferior courts and not against equal or higher court, i.e., it cannot be issued by a High Court against any High Court or benches much less to the Supreme Court and any of its benches. Then in the case of ***T.C. Basappa v. T. Nagappa & Anr.***, it was held by the constitution bench that certiorari maybe and is generally granted when a court has acted (i) without jurisdiction or (ii) in excess of its jurisdiction. In ***Hari Bishnu Kamath v. Ahmad Ishaque*** , the Supreme Court said that "the court issuing certiorari to quash, however, could not substitute its own decision on the merits or give directions to be complied with by the court or tribunal. Its work was destructive, it simply wiped out the order passed without jurisdiction, and left the matter there." In ***Naresh S. Mirajkar v. State of Maharashtra*** , it was said that High Court's judicial orders are open to being corrected by certiorari and that writ is not available against the High Court.

5. **Prohibition**

- What does Writ of Prohibition mean?

It is a writ directing a lower court to stop doing something which the law prohibits it from doing. Its main purpose is to prevent an inferior court from exceeding its jurisdiction or from acting contrary to the rules of Natural Justice.

- When is the writ of Prohibition issued?

It is issued to a lower or a subordinate court by the superior courts in order to refrain it from doing something which it is not supposed to do as per law. It is usually issued when the lower courts act in excess of their jurisdiction. Also, it can be issued if the court acts outside its jurisdiction. And after the writ is issued, the lower court is bound to stop its proceedings and should be issued before the lower court passes an order. Prohibition is a writ of preventive nature. The principle of this is 'Prevention is better than cure'.

- Important Case Laws

In case of ***East India Commercial Co. Ltd v. Collector of Customs***, a writ of prohibition was passed directing an inferior Tribunal prohibiting it from continuing with the proceeding on the ground that the proceeding is without or in excess of jurisdiction or in contradiction with the laws of the land, statutes or otherwise. Then in the case of ***Bengal Immunity Co. Ltd***, the Supreme Court pointed out that where an inferior tribunal is shown to have seized jurisdiction which does not belong to it than that consideration is irrelevant and the writ of Prohibition has to be issued as a right.

RESTRICTIONS UNDER ARTICLE 32

1. **Article 32 and Res-judicata:** The Supreme Court has imposed a significant restriction on the invocation of its jurisdiction under Article 32 by applying the doctrine of res judicata, based on considerations of public policy. It is in the larger interest of the society that finality should attach to binding decisions of courts of competent jurisdiction and that individuals should not be made to face the same kind of litigation twice. Accordingly, a person cannot move successive petitions under Art 32 for the same cause of action. But res-judicata would not apply if orders sought to be challenged through successive writ petitions as for example, when a petition challenging the validity of the tax assessment for one year is dismissed by the Supreme Court, a similar order passed for the subsequent year can be challenged through a new writ petition on some grounds not raised earlier in the first writ petition.[77] The Supreme Court has ruled in ***Lallubhai v. Union of India***[78] that the doctrine of constructive res judicata is applied only to civil actions and civil proceedings. This principle of public policy is entirely inapplicable to illegal detention and does not bar a subsequent petition for a writ of habeas corpus under Art. 32 on fresh grounds not taken in the earlier petition for the same relief. When a writ petition under Art. 226 has been dismissed by the High Court, another writ petition under Art, 32 cannot be moved in the Supreme Court, to seek redress in the same matter. The

[77] Amalgameted Coalfields V Janapada Sabha, Chinolvara Air 1961 SC 964.
[78] Air 1981 SC 728

principle of res judicata envisages that if a judgement has been pronounced by a court of competent jurisdiction, it is binding between the parties unless it is reversed or modified in appeal, revision or other procedure prescribed by law.The principle of res judicata has also been applied when a person first goes to the Supreme Court under Art 32, and on his application having been rejected there, comes to the High Court under Art, 226.[79]

2. Doctrine of Laches: Laches or inordinate delay on the part of the petitioner may disentitle him to move a writ petition Art, 32 to enforce his Fundamental Right. The Court refuses relief to the petitioner on the ground of laches unless there is reasonable explanation for the delay. The aggrieved party should therefore, file the petition at the earliest possible time. In ***Rabindra Nath v. Union of India***,[80] the Court rejected a writ petition filed to challenge the seniority rule made fifteen years earlier under Arts. 14 and 16.

3. Existence of Alternative Relief: The existence of an alternative relief is no bar, to the grant of remedy under Art. 32. In cases involving the breach of fundamental rights, even under Art 226, the existence of an alternate remedy is no ground for refusal of proper relief. The Supreme Court ordinarily insists that the alternative remedy should be availed of unless the alternative remedy is useless to the petitioner. In ***Kharak Singh v. State of U.P***.[81] and also in ***K.K. Kochuni v. State of Madras***,[82] it was held that in cases involving the breach of fundamental rights, even under Article 226, the existence of an alternative remedy is no ground for the refusal of proper relief. The existence of an alternative relief is no bar to the grant of remedy u/a 32.

4. No Direct Place u/a 32: In the case of ***Bhisham Das v. State of Punjab***[83] it was held that writ petition as regards regularization of service would require detailed investigation into the facts. The court directed petitioner to approach the State Govt. with a claim of regularization first. In the case of ***Virender Singh Negi v. State of UP***[84] it was held that as the writ petition was filed for protection in hilly areas in Dehradun, the Court directed to file case before Allahabad High Court. SC directed the cases for violation of human rights to be filed before National Human Rights Commission – ***Upendra Baxi v. State of U.P.***[85]

Amendments to Article 32

'Anti-freedom' clauses were included in Article 32 by the 42nd Amendment. Such an amendment was made during the time of emergency when it was passed to reduce 'both directly and indirectly' the jurisdiction of the Supreme Court and the

[79] Metal Corp. of India v. Union of India, AIR 1970 Cal 15
[80] AIR 1970 SC 470 : (1970) 1 SCC 84.
[81] AIR 1963 SC 1295
[82] AIR 1960 SC 1080
[83] AIR 1961 SC 1570
[84] AIR 1954 SC 447
[85] AIR 1987 SC 191

High Courts to review the application of fundamental rights. Then 43rd amendment of the Indian Constitution was passed which repealed Article 32A immediately after the emergency was revoked. Following the amendment, the Supreme Court again gained the power to quash the state laws. Also, the High Court's got the power to question the constitutional validity of central laws.

Limitations to Article 32

There are certain circumstances during which the citizens do not get the privileges which they ought to under Article 32. Therefore, the situations when the fundamental rights may be denied to the citizens but the constitutional remedies will not be available i.e. Article 32 will not be applicable are:

- Under Article 33, the Parliament is empowered to make changes in the application of Fundamental Rights to armed forces and the police are empowered with the duty to ensure proper discharge of their duties.
- During the operation of Martial law in any area, any person may be indemnified by the Parliament, if such person is in service of the state or central government for the acts of maintenance or restoration of law and order under Article 34.
- Under Article 352 of the Constitution when an emergency is proclaimed, the guaranteed Fundamental Rights of the citizens remains suspended. Also, Fundamental Rights guaranteed under Article 19 is restricted by the Parliament under Article 358 during the pendency of an emergency.
- Article 359 confers the power to the President to suspend Article 32 of the Constitution. The order is to be submitted to the Parliament and the Parliament may disapprove President's order.

Conclusion

The constitutional remedies provided to the citizens are the powerful orders with immediate effect. And the writs are mostly invoked against the state and are issued when PILs are filed. The Writ Jurisdictions which are conferred by the Constitution though have prerogative powers and are discretionary in nature and yet they are unbounded in its limits. The discretion, however, is exercised on legal principles. Therefore, the first essential on which the constitutional system is based in the absence of arbitrary power. Hence, the decision must be taken on the basis of sound principles and rules and should not be based on whims, fancies or humour. And if a decision is not backed by any principles or rules, then such a decision is considered arbitrary and is taken not in accordance with the rule of law.

Relationship between FR & DPSP

**Mahendra Kumar Baishya*[86]

Introduction

The constitution of India is considered as the longest written constitution of any sovereign nation in the world. At its birth, it had 395 articles in 22 parts and 8 Schedules and it currently has a Preamble, 25 Parts with 12 schedules, 5 appendices, 101 amendment and 448 articles. January 26 is celebrated as the Republic Day every year. The importance of the Constitution was given effect after 70 years and later on, it was amended 101 times also.

To implement the ideals and to achieve the goals enshrined in the preamble and to establish welfare state, fundamental rights and the directive principles of state policy have been provided for in the constitution. Part III, which contains Articles 12 to 35, deals with fundamental rights, while part-IV, which contains Articles 36 to 51, deals with directive principles of state policy.

Fundamental Rights and Directive Principles of State Policy as enshrined in the Constitution of India together comprise the human rights of an individual. The idea of constitutionally embodied fundamental rights emerged in India in 1928 itself. The Motilal Committee Report of 1928 clearly envisaged inalienable rights derived from the Bill of Rights enshrined in the American Constitution to be accorded to the individual. These undeniable rights were preserved in Part III of the Indian Constitution.

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The concept of Directive Principles embedded in the Constitution was inspired by and based on Article 45 of the Irish Constitution. The Directive Principles imposed a duty upon the state to not only acknowledge the Fundamental Rights of an individual but also to achieve certain socio-economic goals. Directive Principles were enumerated in Part IV of the Constitution. Parts III and IV of the Indian Constitution were once described by **CJ. Chandrachud** to be the conscience of the Constitution.

However, there has perennially been a controversy surrounding the constitutional relationship between Fundamental Rights and Directive Principles, as there would be a conflict between the interest of an individual at the micro level and the community's benefit at a macro level.

FUNDAMENTAL RIGHTS VIS-À-VIS DIRECTIVE PRINCIPLES

The question of relationship between the Directive Principles and the Fundamental rights has caused some difficulty, and the judicial attitude has undergone transformation on this question over time. What if a law enacted to enforce a directive principle infringes a fundamental right? On this question, the judicial view has veered round from irreconcilability to integration between the Fundamental rights and Directive Principles and in some of the more recent cases, to giving primacy to the Directive Principles.

Initially, the courts adopted a strict and literal legal position in this respect. The Supreme Court adopting the literal interpretative approach to Art. 37 ruled that a Directive Principle could not override a Fundamental right, and that in case of conflict between the two, the Fundamental right would prevail over the Directive Principle.

This point was settled by the Supreme Court in ***State of Madras v. Champakam Dorairajan,***[87] where governments order in conflict with Art. 29 (2), a fundamental right, was declared invalid, although the government did argue that it was made in pursuance of Art 46, a Directive Principle. The court ruled that while the Fundamental rights were enforceable, the Directive Principles were not, and so the laws made to implement Directive Principles could not take away Fundamental rights. The Directive Principles should conform, and run as subsidiary, to the Fundamental rights. The Fundamental rights would be reduced to 'a mere rope of sand' if they were to be override by the directive principles. The court observed in this regard.

"The Directive Principles of the state policy, which by Art. 37 are expressly made unenforceable by a court cannot override the provisions found in part III

[87] AIR 1951 SC 226

(fundamental rights) which, notwithstanding other provisions, are expressly made enforceable by appropriate writs, orders or directions under article 32. The chapter on fundamental rights is sacrosanct and not liable to be abridged by any legislative or executive act or order, except to the extent provided in the appropriate article in part III. The Directive Principles of state policy have to conform to and run as subsidiary to the chapter on Fundamental rights."

This view of the apex court was reaffirmed in subsequent landmark decisions such as ***Mohd. Hanif Quareshi v State of Bihar***[88] and ***In re Kerala Education Bill***,[89] 1957. These decisions of the apex court were subject to much criticism due to the excess importance endorsed to Fundamental Rights resulting in the complete neglect of principles that promoted socio-economic change and development. The legislature was disappointed with the judiciary's interpretation and believed that it was contradictory to what the framers of the Constitution believed. Pandit Nehru in his speeches in relation to the 1st and 4th Constitutional Amendments expressly stated his disappointment. He stated, "There is difficulty when the Courts of the Land have to consider these matters and lay more stress on the Fundamental Rights than on the Directive Principles. The result is that the whole purpose behind the Constitution which was meant to be a dynamic Constitution leading to a certain goal step by step, is somewhat hampered and hindered by the static element being emphasized a little more than the dynamic element."

It is therefore evident that the legislature believed that Fundamental Rights were to assist the Directive Principles and not vice-versa.

This subsequently led to a transformation in the interpretation of the relationship between Fundamental Rights and Directive Principles to be more inclusiv e and harmonious. In ***Chandra Bhawan Boarding and Lodging Bangalore v State of Mysore***[90], the Minimum Wages Act, 1948 was challenged for conferring unrestricted, unfettered and arbitrary power on the state in determining the minimum wages. The state argued that it was obligated to provide for minimum wages in accordance with the Directive Principles. The court held that the provisions of the Constitution were created to facilitate progress, as intended by the Preamble and it would be fallacious to assume that the Constitution provided only for rights and no duties.

Furthermore, it was stated that although Part III encompasses Fundamental Rights, Part IV was essential in the governance of the country and were therefore supplementary to each other.

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[88] AIR 1958 SC 731
[89] [1959] SCR 995
[90] [1969] 3 SCC 84

This view was reaffirmed in ***Kesavanda Bharati v State of Kerala***[91] where it was held that the directive principles were in harmony with the country's aims and objectives and the fundamental rights could be amended to meet the needs of the hour implying that Parts III and IV needed to be harmoniously construed. Although these judgments were more dynamic in comparison to the previous approach that the apex court had extended, it still did not satisfy the ideals of the legislature. It could easily be speculated that the 42nd Amendment in 1976 was to accord primacy to the Directive Principles over the Fundamental Rights. The purpose of the amendment was to make the Directive Principles comprehensive and accord them precedence over the fundamental rights "which have been allowed to be relied upon to frustrate socio-economic reforms for the implementing of Directive Principles".

This resulted in the resurgence of the debate on the relationship between Fundamental Rights and Directive Principles. In ***Minerva Mills Ltd. v Union of India***[92], the court believed that the harmonious relation between Fundamental Rights and Directive Principles was a basic feature of the Constitution. It was stated that Part III and Part IV together comprised of the core of the constitution and any legislation or amendment that destroyed the balance between the two would be in contravention to the basic structure of the Constitution. Chandrachud CJ. reasserted that Parts III and IV are complementary to each other and together they constitute the human rights of an individual. Reading these provisions independently would be impossible, as that would render them incomplete and thereby inaccessible. However, this was not settled as law yet and there was another hiccup in the subsequent judgments. In ***Sanjeev Coke Mfg. Co. v M/s Bharat Coking Coal Ltd***.[93], the Supreme Court held that the part of the Minerva Mills judgment that dealt with Article 31 C of the Constitution was merely *obiter dictum* and therefore not binding. The court thus upheld the Coking Coal Mines (Nationalization) Act, 1972 by granting greater importance to Directive Principles than Fundamental Rights in accordance with Article 31C that provided for the same.

The Sanjeev Coke judgment resulted in a divergence of opinion, which was ultimately settled in ***State of Tamil Nadu v L. Abu Kavier Bai***[94]. The court referred to the decision of Constituent Assembly to create two parts for these core constitutional concepts. It was stated that the purpose of the two distinct chapters was to grant the Government enough latitude and flexibility to implement the principles depending on the time and circumstances. The court therefore considered the Minerva Mills case precedent and recommended a harmonious construction of the two parts in public interest and to promote social welfare. This view has been consistently adopted ever

[91] [1973] 4 SCC225
[92] [1980] 2 SCC 591
[93] *AIR 1983 SC 239*
[94] AIR 1984 SC 725

since and has been endorsed in ***Mohini Jain v State of Karnataka***[95] and ***Unni Krishnan v State of Andhra Pradesh***.[96] It can therefore be construed to be well settled that a harmonious interpretation of Fundamental Rights and Directive Principles is quintessential in ensuring social welfare and the apex court is promoting the same view after much deliberation.

In ***Ashok Kumar Thakur Vs. Union of India, 2008,***[97] the Supreme Court said that no difference can be made between the 2 sets of rights. Fundamental rights deal with Civil and political rights whereas DPSP deals with social and economic rights. DPSP are not enforceable in a court of law doesn't mean it is subordinate.

Conclusion

It can be concluded by saying that the basic feature of the constitution is to maintain harmony between fundamental rights and DPSP. They are complementary and supplementary to each other. The theme of fundamental rights must be made in light to DPSP

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[96] *U*nni Krishnan v State of Andhra Pradesh1993 AIR 2178

[97] (2008) 6 SCC 1, at page 515: (2008) 5 JT 1.