

FUNDAMENTAL RIGHTS

Since India is a democratic state therefore Fundamental Rights (Articles - 12 to 35) are essential feature of the democratic polity. It is fundamental because paramount for the development of personality of citizens. It is right which means a claim by citizens and individual against the state. Rights are not gift of the state or government but it is **Gift of the Constitution** which is made by people of India. Fundamental Rights put the limitation over **Power of State** and **Government**. Fundamental Rights are supreme and cannot be violated by the state. Fundamental Rights envisages the primacy of citizens over the state. It guarantees constitutionalism and rule of law. Fundamental Rights are incorporated in Part - III of Indian constitution it is most debated part in the constituent assembly. **J. B. Kripalani committee** was constituted consideration over for Fundamental Rights in constituent assembly.

Meaning of State

Part - III of the constitution begins with Article - 12 which incorporates the definition of state.

Fundamental Rights are available against the state.

According to Article - 12 States includes-

- Government and parliament of India.
- Government and legislature of every state.
- All local and other authorities.
- Within the territory of India or under control of government of India.

Supreme Court interpreted the meaning of state in various cases. Delhi University, all India institute of Medical science are other agencies of state. Authorities funded by the state come within the domain of state. Nature of function also determined the definition of state thus board of Cricket control of India comes within the meaning of state. Policy of privatization

and liberalization is initiated in India since, 1991. Consequently the functions of state minimized. Private players entered in education, health, transportation, Banking Sectors. Fundamental Rights is not available against the private sectors. There is no provision of reservation in private companies. It means privatization is shrinking the scope of Fundamental Rights.

Special Protection of Fundamental Rights

Article - 13 provides the protection of Fundamental Rights it is only given for Part - III of constitution.

Article - 13 contains following varieties of law-

Pre-constitutional laws

The laws made and came into force before the commencement of this constitution. Simply it means the law existed before 26 January, 1950. In case of conflict between pre-constitutional laws and Fundamental Rights of Part - III, Fundamental Rights shall **eclipse** the pre-constitutional laws. It is also known as **doctrine of eclipse**. Therefore pre-constitutional laws shall be eclipsing likewise Clouds eclipse the sun. Pre-constitutional laws shall not become null and void but it will become **in operative**, says Article - 13(1) of the Part - III.

Priority of Fundamental Rights

State cannot make any law which take away or violates the Fundamental Rights included in Part - III. Laws enacted by state shall be declared null and void if it encroach the Fundamental Rights. There may be various segments of a law, and one part of law goes against the Fundamental Rights. Entire law shall not be declared ultra-virus but only that part becomes null and void which is inconsistent with Fundamental Rights. This is known as **Principle of Severability**. Supreme Court makes separation between legal and

illegal part of the law and only illegal part is declared null and void, (Article - 13 (2)).

Definition of Law

Article - 13(3) of the Fundamental Rights defines law. Law includes ordinance, bylaws, regulation, custom and notification. Administrative Office, are authorize to make supplementary law. It is known as delegated legislation. By laws is secondary legislation, made by the executive. Ordinance is a law made by president. By laws is a Supplementary Law. Regulation is a medium essential for implementation of law. Notification implies the publication of law in a government gazette. And customs is a form of law prevails in tribal society.

Difference between ordinary Law and Constitutional Law

Parliament can make a law over union list and state enacts a law over state list under Article- 246. Parliament need simple majority for making a law. But parliament can amend the constitution while exercising Constituent Power under Article - 368. Amendment of the constitution requires special majority. By applying its Constituent Power parliament can amend Fundamental Rights. Article - 13 (4) is added in 1971 by 24th Constitutional Amendment. It gives power to parliament for amendment of Fundamental Rights. Thus restriction of Article - 13 (2) is not applicable on Constitutional Amendment. Fundamental Rights are not beyond the amending power of parliament.

Types of Fundamental Rights

- Right to Equality (Article - 14 to 18)
- Right to Freedom (Article - 19 to 22)
- Right against Exploitation (Article - 23 to 24)
- Right to Freedom of Religion (Article - 25 to 28)
- Cultural and Educational Rights (Article - 29 to 30)
- Right to Constitutional Remedies (Article - 32)

1. Right to Equality (Article – 14 to 18)

- Fundamental Rights begins with right to equality. Article - 14 says that each and every one are equal before law and there shall be equal protection of law. Article - 14 contains **two variety of equality-**

- i. Equality before law.
- ii. Equal protection of law.

- i. **Equality before Law:** The notion of equality before law is taken from the British law. It is propounded by the British Scholar Dicey. This implies equal treatment for everyone. Same set of law is applicable over every one. This creates the rule of law or supremacy of law. Nobody is above the law. Individual office, status, property does not matter in the eyes of law. Similar punishment is prescribed for everyone. No discrimination is permitted between individuals while enforcing the law. Equal treatment for each and every one appears Negative Idea. Social condition is not identical for every individual. Thus same set of law cannot maintain equality but helping hand of state is required for the marginalized sections of society. Article - 14 includes the positive meaning of equality borrowed from the U. S. A. Constitution.

- ii. **Equal Protection of Law:** It means law will protect the under privileged sections of society. Different law is required for different people. For protection of Scheduled Caste and Scheduled Tribes Parliament enacted Separate Laws. **Women and Children** are also protected from the positive law. Same law should not be applicable for men and women because social conditions are adverse for women. Parliament can make discrimination but it should be **Rational and Logical**. The ground of discrimination is not mentioned in Article - 14. Supreme Court told the various grounds for discrimination in different cases.

S. No.	Equality before law	Equal protection of law
1.	Equal treatment	Differential treatment
2.	Negative	Positive
3.	Derived	Taken from U.S.A. constitution.
4.	Same law for everyone	Protective law for deprived section

The Base of Discrimination

Any law made by the parliament or state legislature becomes null and void if the law violates Article - 14. Supreme Court said that **following grounds may be reasonable-**

- Geographical Ground may be a fit case for discrimination, for example same set of law cannot be applied over the resident of Delhi and North-East.
- Profession may be a logical base for discrimination likewise the armed personal received Alcohol on duty but it is not available for doctors.
- Social Educational Background came be considered as a base of differentiation. Reservation is allowed for the marginalized sections of society. It is not available for rich persons. Above mention base of discrimination is not absolute and Supreme Court can propound any other bases from time to time. This proves that **Supreme Court** protect the Fundamental Rights.

i. No Discrimination by State

State shall not discriminate with citizens **only** on the ground of **religion, race, caste, sex** or **place** of birth. Only indicates that discrimination is possible on the other grounds like physical fitness or educational qualifications. Citizen means this right is not applicable for aliens or foreigners. Equality does not mean absence of all discrimination but elimination of irrational discrimination according to Article - 15 (1).

ii. Equality in Public Places

No **citizen** shall be subject to any **disability, liability, restriction on ground only** of **religion, race, caste, sex, place of birth** or any of them. **With regard to-**

- Access to shops, public restaurant, hotels and places of public entertainment or,
- The use of wells, tanks, bathing Ghats, roads and place of public resort,
- Maintained wholly or partly out of state fund or,
- Dedicated to the use of general public, describes in Article - 15 (2).

Each and every word connotes the **wider meaning**, like shop includes Barber shop and clinic of doctor too. Use of general public and state fund is significant which means this is not available in private domain. Nobody can demand equality in **private swimming pool**. **British government** reserved some hotel restaurant for Britishers only. It was not open for Indians. The Fundamental Right forbids the state to carry out any discrimination in **public places**. Even no citizen is entitled to practice discrimination in public domain. **Race** is determination on the bases of physical character of any citizen like hair or the shape of nose. India is a home of all races of the world like Nordic and Mongoloid.

Balance Between Rights and Justice

Fundamental Rights are **not absolute** but it is kept under various **limitations**. Article - 15 (3) is an exception of right to equality and provides to special protection for **women and Children**. Stateshall make some special provision for the empowerment of women and children. It is similar to the notion of social justice. Special provision includes better education facility, reservation and other welfare policies.

i. Special Provision for Socially and Educationally Backward Classes

Under Article - 15 (4) says that state will provide special provision **for the advancement of-**

- Socially and educationally backward classes of citizens.
- Scheduled caste and scheduled tribes.

Article - 15 (4) was inserted in the constitution by the first constitutional amendment in 1951 due to ruling of Supreme Court in **Champkam Dorai Rajan** case. Supreme Court declared null and void the reservation given by Madras government in **Medical College**. Constitution does not explain the meaning of socially and educationally backward classes of citizens. According to **Article - 340** President shall appoint a backward class's commission. In **1953 Kaka Kalelkar Commission** was appointed. **Bindeshwari Prasad Mandal commission** was appointed in 1979 by Janta Party government. Mandal Commission said that the socially and educationally backward class means the **backward caste**. Therefore caste and class are interrelated in India. Class denotes the economic and modern stratification of society. However caste is a traditional parameter to stratify the society. Technically caste and class are different, but practically it is similar in India. Term scheduled caste and scheduled tribes are included first time in the government of India act 1935.

ii. Reservation in Educational Institutions

Then human Resource Minister Arjun Singh announced for reservation in educational institutions in year, 2006. Consequently 93rd Constitutional Amendment put forth in the constitution and Article - 15 (5) is inserted in Part - III. According to Article - 15 (5) reservation for socially and educationally backward classes of citizens and **scheduled caste and scheduled tribes is-**

- Central educational institutions.
- Private educational institutions, aided or non-aided.

- Reservation is not applicable in minority educational institutions.

Central educational institutions included IIT, IIM and central universities. Private Educational Institutions including Amity University, whether they are receiving fund from the government or not funded by the government. **Minority educational** institutions mean institution which is set up by the minority community under Article - 30.

iii. Economically Backward Class (EWS)

Economic backwardness is introduced by **103rd Constitutional Amendment** in 2019, which allow the state to make-

- Any special provision for the advancement of any economically weaker section of citizens. Reservation is given to economically weaker section of society.
- Special provision includes admission in education institutions.
- Admission in private education institutions, funded by government or not receiving fund from the government.
- Special provision is not applicable for the minority educational institutions.
- Reservation in educational institution should not be exceeded to 10 Percent.

Constitution does not define economic backwardness. Government is eligible to determine economic backwardness, under Article - 15(6).

Equality in Public Employment and Appointments

Equality of opportunity is available for all citizens relating to employment or appointment to any office under the state. **Employment** deals with the terms and condition of the job. **Appointment** means entry in the job. The promotion is related to employment. Office

under state tells that equality of opportunity is not applicable in **private jobs**. There is difference between equality and **equality of opportunity**. Equality reflects equal treatment but equality of opportunity provides equal opportunity to become unequal. Every citizen is given the equal opportunity to appear in civil services exams. The result of exam cannot be same for every candidate. This right is available only for citizens not for aliens. (Article – 16 (1)).

i. No Discrimination

Employment or appointment under state shall not be discriminated only on the grounds of **religion, race, caste, sex, descent, Place of Birth, residence or any of them**. Article - 16 incorporates two new grounds, **descent and residence** which are not mentioned in Article - 15. **Descent** means origin or background of the person in terms of family or nationality. Residence refers to home or house of a person. Term **only** prescribe that discrimination is possible on the other grounds like **marks in examination or physical fitness**.

ii. Discrimination on the Bases of Residence

Residence may be criteria for employment and appointment under state, Union territory or under local authority. Regarding the appointment on the basis of residence, **parliamentary law** is needed. **State legislature** is not empowered to make of law. Appointment on the ground of residence can be made for any classes of employment. It is determined by the parliamentary law. Article - 16 (3) this article is base of the regionalism in India which is known as **sons of soil** movement too. Regional disparity exist in India therefore residence as a ground can protect the interest of backward states.

iii. Reservation in Appointment

The state can provide reservation of appointment or post in favour of any **backward class** of citizen. Reservation is allowed when state feels that the backward class of citizens does not have **Adequate Representation** in services of state. Article - 16 (4) provides reservation which is very much debatable in public domain. Reservation in appointment began in year, **1955** in form of reservation for scheduled caste and scheduled tribes. They got 22 percent reservation in the appointment under the state. Further **V. P. Singh** government introduces 27 percent reservation for other backward classes in year, 1990 for central and all India services. Therefore the quantum of reservation has gone up to 49.5 percent. By **103rd Constitutional Amendment** 10 percent reservation is provided for economically weaker section. Percentage of reservation is now reached up to 59.5 percent. Ratio of reservation in terms of percentage under state differs from state to state. However the ceiling of reservation is 69 percent in Tamil Nadu and the reservation in Maharashtra has gone upto 78 percent. Thus debate is bound to emerge. And various issues regarding **reservation can describe as follows-**

• Meaning of Backwardness

Bindeshwari Prasad Mandal commission (1979) applied three criteria for Identification of backwardness-

- i. **Social.**
- ii. **Economic.**
- iii. **Educational.**

Mandal commission said that **backward** caste is **backward class**. Supreme Court said that backwardness means social and educational backwardness in **Indra Sawhney case** which is popularly known as **Mandal case**. Scheduled Caste is also backward. Therefore backward class is consider other backward classes, other means other than

scheduled caste and scheduled tribes. Supreme Court said that **backward class** is not homogenous category and introduce the notion of **creamy layer** in **Indra Sawhney case** in 1992. Creamy layer is only applicable for OBCs not for reservation of SC and ST's, People belonging to creamy layer are not eligible for reservation. The notion of economic backwardness is also included in the constitution by 103rd Constitutional Amendment.

• Upper Limit of Reservation

Supreme Court in Mandal case said that ceiling of reservation should not be exceeded to 50 percent. Court said that more than 50 percent reservation will hamper the concept of **equality of opportunity**. It is also again the idea of efficiency in services. **Article - 335 of Constitution** says that while providing reservation for scheduled caste and scheduled tribes, Efficiency of services should not be compromised. According to 103rd Constitutional Amendment Article - 16 (6) is inserted in the constitution. It gives 10 percent reservation for economically weaker section, thus decision of Mandal case automatically overruled by the parliament. Ceiling of reservation is gone up to 59.5 percent in central services and all India services; although 103rd Constitutional Amendment is challenged by youth for equality in Supreme Court. Decision of Supreme Court is awaited till today.

• Reservation in Promotion

The candidates belonging to scheduled caste and scheduled tribes are enjoying the reservation in promotion too. Supreme Court in **Mandal case** said that reservation is applicable for the initial appointment. Reservation in promotion is **ultra-vires** said by Supreme Court in **Mandal Case**. It is against the **efficiency and equality of opportunity**. However

government brought about 77th constitutional amendment act in year 1995. It inserted Article - 16 (4A) which provides benefits of reservation to scheduled caste and scheduled tribes in jobs. They will get benefit of **Consequential Seniority**. Supreme Court again blocked the reservation in promotion in **Nagrajan case in year, 2006**. Supreme Court said that reservation in promotion can be allowed, **if it fulfill the following criteria-**

- The members of scheduled caste and scheduled tribes are still backward.
- Their representation is still inadequate in services under state.
- The efficiency of services shall not be compromised.

Therefore Supreme Court said that reservation in promotion is allowed with certain conditions. But debate is going on over the issue till today. Demand of application of creamy layer for reservation of SC/STs is growing, because the benefit of reservation is appropriated by the well of section in SC/STs.

• Reservation for Backlog Vacancies

Supreme Court said that **carry forward rule** is constitutional. Court allowed the government to carry forward unfulfilled vacancies of reserve category. Unfulfilled vacancies are known as backlog vacancies, which will be added in vacancies of next year. But court also said in **Mandal case** that ceiling of reservation should not be exceeded to 50 percent. It means 50 percent limitation is applicable for backlog vacancies too. Eventually it was eating benefit of reservation thus backlog seats should be reserved 100 percent for reserve category. Therefore 81st amendment in year, 2000, inserted Article - 16 (4B) in the constitution which stipulates 100 percent reservation for backlog vacancies. Ceiling of 50 percent is not applicable for the backlog seats.

Equality in Religious Institutions

Article - 16 (5) authorized any religious are denominational institution can appoint in their office, a person belonging to a particular religion on denomination. Management of a temple shall employ, person, belonging to their own religious faith.

i. Abolition of Untouchability

Positive meaning of equality denotes equality of opportunity. Equality also refers the absence of **irrational discrimination**. Untouchability is the worst kind discrimination which believes that human beings are impure, or polluted. Article - 17 said that untouchability is **abolished**. Its practice in any form is forbidden. Untouchability is a **punishable offence**, according to law. Generally fundamental rights are available against the state. But Article - 17 is applicable against individual too. Untouchability is not defined in the constitution. Generally Fundamental Rights in Indian constitution are **not absolute**. Rights are subject to various limitations but Article - 17 is absolute right. Therefore untouchability is not allowed in any condition or any ground. It is available against state as well as against individuals too. Fundamental Rights can be classified on the **following grounds too-**

- **Self-operative** Fundamental Rights which means parliamentary law is not needed for enforcing the Fundamental Rights. Article - 14, 15 are self-operated Fundamental Rights.
- Article - 17 requires parliamentary act for enforcement of right against untouchability. Because Article - 17 envisages that it is punishable offence. Parliament made **untouchability prohibition act, 1955** for enforcement of Article - 17. It is not self-operative right.
- Parliamentary act of 1955 is changed in to **civil rights protection act, 1976**. Act does not define the meaning of untouchability but it includes **various examples such as-**
- Nobody can be denied in the entry of temple of public character.

- Any restriction in the entry of public places like shops and restaurant.
- Forbidding entry in hospitals.
- Discrimination over the use of pond, road or drinking water supply.
- Justifying untouchability on philosophical ground.
- Disrespecting any one on the basis of caste amounts to untouchability.

ii. SC/STs (Prevention of Atrocities) Act, 1989

Act is made by parliament for protecting the cause of SC/STs. Act came in limelight due to decision of Supreme Court in **Subhas Kashinath Mahajan vs State of Maharashtra**. Primarily court said that act is misused but later Supreme Court change her own decision and admitted that the people belonging to Scheduled caste and Scheduled tribes need special protection.

iii. Separate Legal Procedure

Criminal law is based on presumption of innocence. Court presumes that a person, against whom charge sheet is filed by the police, is innocent. It is the responsibility of police to prove that person is guilty. Under **SC/ST Prevention of atrocities act**, judiciary does not follow the principle of Presumption of innocence. **No anticipatory bail** is permitted under act. Person is arrested at once after the FIR. **Preliminary inquiry** is **not** required. However in other cases preliminary inquiry is needed before the arrest.

iv. Abolition of Titles

Titles are privilege practiced in undemocratic societies. British government awarded titles for making **hierarchy** in society. Title gives privilege or nobility. Titles are antithetical to the notion of equality. Constituent assembly decided for abolition the title. **J.**

B. Kriplani said that titles are against the **Socialist Society**. **Article - 18** seeks for abolition of title. British government maintained an aristocratic class by providing titles like Rai Bahadur, Rai Saheb, and Taluqdar. It incorporates **the following issues-**

- **Restriction over State**

According to Article - 18 (1) No title shall be conferred by the state. But military and educational titles shall be conferred. By the Military titles like **Param Vishist Sewa Medal**, educational title like Doctor is permitted. Government of India introduces awards like **Bharat Ratna, Padma Vibhushan, Padma Bhushan and Padma Shree in 1954**. Supreme Court said that these are **awards not titles**. Therefore government can give awards said by court in **1996 Balaji Raghavan case**. Court observed that equality does not mean equal treatment. **Equality and Efficiency** are not against to each other. Supreme Court also instructed that the award like **Bharat Ratna** should not be used as a prefix or suffix in the name of person. Although no law exists, which prevent the person to use awards before or after his/her name?

- **Restriction over Foreign Title**

Citizen of India shall not accept any title from **foreign state**. The awards received by artist is not prohibited says Article - 18(2).

- **Consent of President**

Article - 18 (3) allowed that any person is not **citizen of India**, While holding any **office of profit or trust under** the state. Person shall not receive any titles from foreign state without consent of the president.

- **Restriction of accepting present, emolument or office**

A **person** holding office of profit or trust under state, Person shall not accept any **present, emolument or office** from **foreign state** without consent of president.

2. Freedom of Speech and Expression (Article - 19 to 22)

Article - 19 protects various rights regarding freedom of speech and expression. It is available only for citizens. Article - 19 covers **the following rights-**

- To freedom of speech and expression.
- To assemble peaceably and without arms.
- To form associations or unions by **97th constitutional amendment** co-operative societies also included.
- To move freely throughout the territory of India.
- To reside and settle in any part of territory of India.
- To acquire and dispose property. It is deleted from Part - III by 44th constitutional amendment, 1978. It no longer exists.
- To practice any **profession**, or to carry on any **occupation, trade, or business**.

Issues Related to Freedom of Speech and Expression

- **Freedom of press**

Freedom of press is **inherent** in freedom of speech and expression. It is **not explicitly** written in the constitution. Freedom of press included **print media** and **electronic media** both. Unique feature of democratic government is debate, dialogue, disagreement and dissent. Without freedom of press debate is incomplete. Press reflects the opinion of the people. Press play role of **opposition** and give voice to

opposition. Therefore press is considered **fourth pillar of democracy**. Press maintains check and balance over the activities of the government. Freedom of speech and expression is not absolute in India. Freedom is subject to **sovereignty and integrity of India, security of the state, Friendly relation with foreign state, public order, decency, morality, contempt, defamation or incitement to an offence**. These restrictions are mentioned in Article - 19 (2). Therefore freedom of **press** is not unlimited. Now a day's press is run by corporate houses. And they want to fulfill their own business interest. Media trial is a new tendency developing in India, Media pronounces a person guilty before the decision of court of law. Need of hour is to make balance between freedom of press and unity and integrity of the nation.

- **Freedom to make movies**

Speech simply means speaking but medium of expression are multiple. Press movies, writing books, Social media are the various dimensions of expression. Impact of every medium is different. Films are screened in a dark closed theatre, thus the impact of films over the people is more-deep. Visuals always create more influence than any books. The freedom to make a movie is not an absolute right. Limitations inserted under Article - 19 (2) are applicable over films too. Parliament is already setup the central board of film certification which is responsible for scrutinize the film before its release. Now a day's people are opposing the screening of movie because they don't like it. They are blocking the movie on the name of **moral policing**. Films can't be banned because majority is disagreed with movie. Democracy should not be allowed to become **mobocracy**.

i. Sedition and Freedom of Speech

Fundamental Rights in Indian constitution are **not absolute**. **Article - 19 (2) puts limitation**

over freedom and speech and expression. More over Indian penal code (IPC) also restrict the scope of freedom of speech and expression. Section - 124 (A) of IPC says that whoever attempt to spread hatred, contempt towards the state, Showing **disloyalty and feeling of enmity** towards state amount to sedition. Government often misuses the provision of sedition. It becomes tool in hand of government to suppress the **opponents**. **Criticizing government** becomes the basis of sedition. It discourages the freedom of speech and expressions. It does not allow the **disagreement**. Raising the Slogans, not singing the national song is considered as sedition. **Unity and integrity** of the nation is paramount. But freedom is equally important in **democracy**. Destruction of nation is different from the criticism of the government. Human rights activist and the leaders of opposition are framed in charge of sedition, law enacted in 1860. It is already abolish in democratic nations like **England, New Zealand, USA and Australia**. **IPC** also incorporates the provision of waging war against India, which is sufficient for protecting unity and integrity. Therefore law regarding sedition is not required.

ii. Defamation and Freedom

Liberty is also curtailed on the ground of sedition. Section - 499 of IPC tells that defamation is punishable offence. In addition to that monetary compensation can be demanded due to defamation. Defamation is both **civil as well as criminal offence**. **Journalist** opposes the defamation laws, which goes against freedom and speech and expression. Several countries like **England, Sri Lanka, USA**, have decriminalized defamation made it a civil wrong. Journalist said that anyone is free to harass them on the basis of defamation. Most of the report of journalist is based on the presumption. Supreme Court said that defamation

is violation of right to life under Article - 21 which includes right to **reputation**. Defaming anyone is more dangerous than **physical assault**. Now a day any person can be defamed in an age of social media. Reputation is acquired by the hard work and in a longer time but it can be ruined in overnight. Freedom of speech **promotes toleration**. It gives a right of **disagreement**. It doesn't allow anyone to attack over reputation of others, In case when it becomes a Civil Offence. Its means any rich person is free to attack over others reputation, because the person is capable to **pay Monetary Compensation**. It is important to be noted that **fraternity** is equally important apart from **liberty**.

iii. Other Component of Freedom

- **To Assemble Peaceably without Arms:** This is most important right in a democratic country like India. Citizens are entitled to organized and assembly for any common purpose. They have right to organized **protest** against the government. Supreme Court said that there is no Fundamental Rights to go on strike. Assembly with arms is not permitted. **Calling Bandh** is not a Fundamental Rights. Bandh means total closer of shops, transport, schools and movement. It hampers the right of others to move freely. Protest should not hamper the movement of others. Place of protest should be designated.
- **Form Union are Association:** Every citizen is empowered to make union or association. Various unions like Student union, labour union, peasant union exist in India. Political parties can also be formed for contesting elections. In absence of union and association democracy cannot flourish. This is not absolute right by 16th constitutional amendment, 1963 it is restricted on the ground of **sovereignty** and **integrity** of India.
- **To Move Freely:** Every citizen is allowed to travel across India. Freedom of movement means

internal movement within the territory of India. External movement is also a part of freedom of movement. Therefore citizens are free to go **abroad too**. It is under limitation of **sovereignty** and **integrity** of India, public order or **morality**. For example during communal violence freedom of movement can be hold up.

- **Freedom of Residence and Settlement:** Residence denotes staying for short term. **Settlement** implies that citizen is choosing the **permanent residence**. It can be curtailed in the interest of general public for the protection of the interest of any Scheduled tribes. Nobody can be allowed to settle in scheduled areas.
- **Freedom of Profession, Occupation, Trade and Business:** Every citizen is allows choosing his profession. Profession is work which indicates the expertise of a person. Occupation is associated with **livelihood**. Business is oriented for appropriating profit. Trade is the name of **exchange of goods**. Various limitations like professional or technical qualification are essential for profession and occupation. Government can own any **trade**, business industry or services. It can be excluded partially and completely for citizens.
- **Reasonable Restrictions:** The various freedom mentioned in Article - 19 (1) (a) (g) is not absolute. Limitations are imposed under Article - 19 (2) (6). Ground of restriction is written in the constitution. Government can enact laws for restricting the Fundamental Rights. However Supreme Court examine the **reasonableness** of the restriction, **which means-**
 - i. It is not objective, it depends upon the medium of expression and time and space of restriction. For example reasonableness for film is different from book. Because impact of film is more over the people than impact of book. What was an unreasonable in 1960 may be reasonable today.

Now Censor over movies is more liberal in comparison to the past.

- ii. Procedure of restriction should be fair. Nobody can disallow the realisation of movie without screening the movie. Nobody can be forbidden without being heard.
- iii. The purpose of restriction is to prevent the misuse of freedom. Thus quantum of restrictions should not be more. Freedom of speech and expression cannot be suppressed because of dislike of others.
- iv. Approach of Supreme Court is more liberal in terms of restrictions on the basis of decency, morality. Therefore films cannot be challenged on these grounds like decency and morality. However court adopted strict view over the issues of harming of unity and integrity and sovereignty of the nation.
- v. Therefore each and every law and policy can be challenged before Supreme Court. And court examines reasonableness in every new circumstance afresh.

January, 2019 cannot be enforced from January, 2018.

- ii. Double Jeopardy Law: It is taken in Indian constitution from the United States. No person can be prosecuted and punished twice for same offence in criminal law. Person committed multiple crime can be prosecuted multiple times. But same person for same offence cannot be prosecuted and punished twice. The administrative punishment is not counted in double jeopardy. It is applicable only for criminal offence in court of law. Administrative officer suspended from the department and later punished by court of law is not protected under double jeopardy.
- iii. Freedom from Being Witness against Himself: Nobody shall be compelled to be witness against himself. It is responsibility of police to show the evidence of crime. Nobody can be forced to admit his guilt. Blood sample, figure print or the voice sample is not considered as compelled to be witness against himself. Therefore Fundamental Rights is available in court of law and after punishment too.

Protection against Conviction of Offences

Article - 20 protects the people from any **criminal act** which provides the **procedure** and amount of punishment. It says that nobody can be punished without violation of law. **It also forbids-**

- i. Ex-Post Facto Law: It is a Latin term which prevents the application of any criminal law from back date, No criminal law cannot be applied retrospectively. Civil law can be enforced retrospectively. It means a criminal law made on

Protection of Life and Personal Liberty

Article - 21 guarantee right to life and personal liberty. Although it is not absolute right which can be violated through **procedure established by law** Right to life and personal liberty has always been the subject of debates begins from 1950 till today. Interpretation of right to life is **dynamic** therefore it is changing from time to time. First landmark case regarding right to life and personal liberty was delivered in 1950.

S. No.	Procedure established by law	Due process of law
1.	Term mentioned in Article - 21 of the Fundamental Rights.	Evolved by judiciary not written in constitution.
2.	Procedure written in law should be followed, while encroaching the right to life and personal liberty under Article-21.	Procedure should be just, fair and reasonable it should not be arbitrary.
3.	Power of parliament is more important.	Power of Judiciary becomes vital.
4.	Procedure is enacted by parliament; Judiciary cannot raise the question over wisdom of parliament.	Procedure should fulfill the norms of natural justice. Thus judiciary can raise the question over reason of parliament.

i. Gopalan Case, (1950)

A. K. Gopalan was leader of Communist party was arrested and detained under preventive detention act. And it was challenged in Supreme Court. **Therefore Article - 21 was explained by Supreme Court-**

- **Right to Life and Personal Liberty:** Supreme Court said that right to life and personal liberty means protecting the **organs** and **limbs** of individual. It protects the individual from **arbitrary arrest**. Right to life and personal liberty under **Article - 21** and various freedoms in **Article - 19** is **separate** with each other. It was **narrower interpretation** of right to life and personal liberty.
- **Procedure Establish by Law:** Court said that right to life and personal liberty is available against the **executive or police**. It is not available against the law made by parliament. Parliament makes law which incorporates procedure too. Gopalan was arrested by the parliamentary act and **procedure** was followed too. Therefore he was put behind the bar legally. Court said that it can protect the right of individual when, procedure prescribe in **law is violated**. Police cannot arrest anyone without the violation of any **law or procedure in law**.
- **ADM Jabalpur vs Shivkant Shukla Case (1976):** It is popularly known as **habeas corpus case**. During **emergency** to 1976 Fundamental Rights were suspended. It was **suspended by law** and prescribes procedure too. Supreme Court

strictly followed the principle of procedure establish by law and refuse to protect the Fundamental Rights. It was criticize as a **black day** for Supreme Court.

ii. Maneka Gandhi Case (1978)

- **Liberal Interpretation of Right to Life:** Supreme Court expended the meaning of right to life. Court said that right to life is not merely and **animal existence**. Right to life means right to life and personal liberty with **dignity**. Maneka Gandhi was denied to overseas visit and governments snatch her passport. Government followed the **procedure of passport act, 1967**. Supreme Court overruled her decision of A. K. Gopalan case (1950). Court said that right to life and personal liberty should be combined with the right of Article - 19. **Article - 19 and Article - 21** are complimentary and like two organs of body. Therefore right to life include right to travel outside of India. **7 Judges Bench** delivered a historical verdict because Supreme Court said that various rights are inherent in right to life and personal liberty. Court said that Spirit of the constitution should be kept in the mind while interpreting the letter or words of the constitution.
- **Due Process of Law: Maneka Gandhi case** is a historical Supreme Court said that Parliament is powerful enough to enact law and decided procedure established by law. But procedure must be **reasonable, fair and just**. Procedure should

not be arbitrary and unreasonable. This also known as **due process** of law; it is the feature of **American constitution**. Court said that procedure of passport act 1967 is unreasonable. Therefore declared it null and void. Supreme Court applied the principle of reasonableness in **Article -21** too. It became reality because court said that **Article - 19** and **Article - 21** or complimentary. The term reasonable restriction is mention in **Article - 19**. Reading out **Article - 19** and **Article - 21** together means the principle of reasonableness is applicable for **Article - 21** too.

- Choice of sexual relation.
- Marriage.
- Dressing.
- Right to privacy also available in public domain.
- Nobody can be frisked publically or openly.
- Court also said that right to privacy is **not absolute** right.
- Right to privacy can be curtailed on the ground of social justice and security of the country.

Extended Meaning of Right to Life

Since Maneka Gandhi case onwards Supreme Court said that constitution is **not static** document. It is **living document**. Therefore the interpretation of the constitution shall change according to changing of circumstances. Expansion of right to life should be visualizes in light of **public interest litigation (PIL)**. And Supreme Court propounded the notion of PIL in 1980s. The broader meaning of **right to life includes-**

- Right to livelihood.
- Right to education.
- Right against sexual harassment.
- Pollution free environment.
- Right against arbitrary arrest and detention.
- Right against solitary confinement.
- Right to privacy.
- Right of reputation.
- Right of speedy trial.

i. Triumph of Fundamental Rights

Fundamental Rights are the sign of vibrant democracy. Supreme Court propounded a landmark judgment in **K. S. Puttaswamy case, (2018)**, and said that right to privacy is an integral part of right to life and personal liberty. Court gave its decision while hearing the issue of compulsory use of Aadhar. Judiciary did not define meaning of privacy **but said that privacy includes-**

In the current age of social media the right to privacy becomes cardinal right. **Nine judges of Puttaswamy** case were unanimous over the issue of privacy. Any law and policy can be challenge on the base of encroachment of privacy Supreme Court also directed the government to make sure protection of data. Right to privacy requires a private zone of individual life where nobody is allowed to interfere.

ii. Right to Life is not absolute

Right to life is not an absolute right. Therefore nobody is allowed to end his/her life. Nobody can waive fundamental rights it is known as **principle of waiver**. Supreme Court said in **Gain kaur case (1996)** that individual can kill himself under right to life and personal liberty in Article - 21. Now Supreme Court overruled its earlier decision and said that right to life does not mean **right to die**. In **2018** Supreme Court pronounced landmark judgment in **Aruna Ramchandra Shanbaug** case. It said that **passive euthanasia** is permitted which is popularly known as **mercy killing**. Now a person under medical treatment can decided for give up life support. Court said that a person must be given right to die with dignity. Passive euthanasia implies that withdrawal of medical treatment from ill patient. Right to life is also subject to the procedure established by law. Therefore parliament can penalize any person procedure established by law.

iii. Protection against arrest and detention

- **Right Against Arbitrary Detention:** Article - 22 (1) said that no person shall **arrested** and detained in **custody** without been **informed**. The **ground of arrest** must be told to the person. Person can be arrested on the ground of violation of law. But **arbitrary detention** means arresting a person without information, And without any valid reason. Arbitrary detention deprives individual right to life and personal liberty.
- **Consultation with Legal Practitioner:** Everyone is allowed to consult a legal practitioner of his **own choice**. And person shall be defended by legal practitioner (advocate). It means constitution prescribe for **fair trails** because **police** can frame charge against any innocent person too. And person is entitle defend himself in court of law with help of lawyer, written in Article - 22(2).
- **Permission of Magistrate:** Any person who is arrested and detain shall be produce before the **nearest magistrate** within **24 hours**. It means police cannot detain any one beyond 24 hours without permission of magistrate. 24 hours does not include the **time of journey** from **place of arrest** to the court of magistrate. It guarantees rule of law and prohibits the possibility of police state, according to Article - 22 (2).

iv. Preventive Detention

Article - 22 (3) allow preventive detention. Preventive detention means detaining any person without committing crime. It prevents the person against committing the crime in future. Therefore it maintains an exception of arbitrary detention. **Enemy alien** is also deprived from the right against arbitrary detention. Alien means person who is not citizen of India, although the term **enemy alien** is not defined in the Constitution. Parliament enacted enemy property

act, 1968. Act defines enemy is a country which committed an act of aggression against India and its citizens. This automatically means **China and Pakistan** can be categories as an enemy state.

S.No.	Preventive Detention	Punitive Detention
1.	Detaining anybody before the breach of law.	Detaining anybody after violation of law.
2.	Detained by police.	Detained by the order of court of law.
3.	Detained merely on the basis of suspicion.	Detained after committing crime.
4.	It promotes police state.	It is according to rule of law.
5.	Police can detain beyond 24 hours, without permission of Magistrate.	Police cannot detain after 24 hours, without permission of magistrate.

- Rights for Detenu:** Article - 22 (4) (7) provides the right of person under preventive detention. And no person can be detaining for longer period than **three months** without a decision of **advisory board**. Advisory board is comprised of persons who are judge of High Court, or a person qualified to appoint as judge of High Court. Normally person cannot be detains for more than three months in absence of sufficient cause.
- Representation against Detention:** Authority shall communicate the ground of detention to that person. Detenu shall be given an earliest opportunity of making representation against the order. In **public interest** the ground of detention may not be disclosed.
- Detention for More than Three Months:** Article - 22 prescribe **three types of detention**-
 - Less than three month.
 - More than three month, which requires the permission of advisory board?
 - Parliament by law shall determine period of detention for more than **three months**.

iv. Ground of Preventive Detention Law

Entry number -3 in **concurrent** list mention about preventive detention in **seventh schedule**. Reasons behind preventive detention may be connected to security of state. Maintenance of public order or the maintenance of supply and services to the community is the base of preventive detention law. **Union government** and **state government** both are entitled to make a law related to preventive detention/origin of preventive detention law is dated back to Bengal act, 1818. British government enacted Defence of India Act, 1939.

v. Preventive Detention Law in Independent India

The first preventive detention act was enacted by parliament on 26 February, 1950. A. K. Gopalan, famous communist leader was detained by the same act.

vi. Maintenance of Internal Security Act, 1971 (MISA)

Parliament enacted Maintenance of Internal Security Act (MISA) in 1971 during the premiership of Indira Gandhi. It was heavily misused by Indira Gandhi government during **Emergency** period between 1975-1977. Leaders of opposition were put behind the bars. On the name of national security **opposition** was suppressed. There after it was repealed in 1978 by **Janta party government**. It was the first non-congress government in union after Independence.

Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974 (COFEPOSA)

It is aimed for prevention of money laundering. It is also against the smuggling of various articles. It is still applicable at present time in India.

i. National Security Act, 1980 (NSA)

Indira Gandhi government enacted NSA. NSA was new addition of MISA. NSA was revival of MISA. NSA is applied India till today.

ii. Terrorist and Disruptive Activities (Prevention) Act, 1985 (TADA)

The famous actor Sanjay Dutt was detained in act. **Rajiv Gandhi** Government brought about TADA for regulating militancy in **Punjab**. It became the first act which defines **terrorism** in India. National human right commission criticized TADA which detained person **up to one year**. Commission said that it was draconian law, there after it was repealed in year, 1995.

iii. Prevention of Terrorism Act, 2002 (POTA)

Parliament was under attack in December, 2001. Subsequently national democratic alliance (NDA) Government enacted POTA in 2002. United progressive alliance (UPA) government came into power in 2004. Same government repealed act in 2004.

iv. Unlawful Activities (Prevention) Act, 2008 (UAPA)

India is facing the threat of cross border terrorism. Thus strict law is essential for prevention of terrorism. UAPA is enacted way back in 1967. Later various Amendments were incorporated in the act. Recent amendment is brought **about in 2019**. First time government can designate person as terrorist. Any person is associated with the terrorist activities, can be designated as a terrorist. Designation of **organization** is not sufficient because they often change the name of organization. It also strengthen national investigation **agency (NIA)**. Which is allowed to seize the property of designated person?

v. Drawback of Preventive Detention Act

Critics said that preventive detention act destroy the **liberty** of Article - 19 and right to life of Article - 21. It is against the **democracy** because liberty and right are fundamental elements of democracy. It negates the concept of rule of law and promotes police state in India. It is a kind of permanent emergency which suspend the Fundamental Rights. It is true that preventive detention is an evil. But in absence of unity and integrity nobody can enjoy the liberty. India is victim of cross border terrorism. Now crime is becoming organized. Therefore it is necessary because it secure the unity and integrity of country. Evil means it is harmful for liberty.

3. Right against Exploitation (Article - 23 to 24)

Right to life means right to life with dignity. An exploitation means the potential and strength of a person should be utilize for the wellbeing of others. Article - 23 recognize **following forms of exploitation-**

- Traffic in human being.
- Beggar.
- Similar forms of forced labour.

Traffic in human being is not permitted. It means Prostitution is prohibited and trade of human organs is not allowed. Illegal trafficking of child is a part of traffic of human being. Article - 23 says that the violation of these provisions is punishable offence. But parliament did not enact the law for prohibiting the prostitution till today.

Broader Meaning of Exploitation

Supreme Court said in the case of People's Union for Democratic Rights (PUDR) 1981 that paying less wages to workers amount to exploitation.

i. Sexual Harassment

Supreme Court expanded the meaning of exploitation in famous **Vishaka case is 1997**. Courtsaid that sexual harassment is more dangerous than physical assault. Sexual harassment is violation of right to life with dignity. Court also gave guidelines for prevention of **sexual harassment at workplace**.

ii. Compulsory Service

State can impose compulsory service for **public purposes**. It is not consider as a **forced labour**. While imposing compulsory service state shall not make any discrimination on ground only of **religion, race, caste or class** or any of them, **under Article - 23 (2)**.

Right of Child against Exploitation

Article - 24 prohibits of employment of children-

- Factories,
- Mines,
- Hazardous Employment.

Article - 23 and 24 are not self-operated but parliamentary act is needed for enforcing the right.

Parliament enacted various acts for prevention of child labour. Parliament enacted a law in **1986** which was further amended in year, 2016. Act addresses the drawback of **Article - 24**, which prescribe that children shall not employed in factories, mines, and hazardous industries. It means children can be employed in other occupations. New act has completely banned employment of children below age of 14 years. Act permits only one exception because children below age of 14 can be employed in enterprise run by his own family. But education of children should not hamper.

Article - 24 prohibits the employment of children below age of 14, which implies that the children between Ages of 14 to 18 can be employed in any occupation. This **lacuna** is removed in new act. New act define a new category of persons known as

adolescent. Children between Ages of 14 to 18 defined as adolescent. And they are prohibited in any hazardous employment, although the number of **hazardous occupation** is reduced to 3 from 83.

Relation between Article - 24 and Article - 21 (A)

Article - 24 prohibits the employment of children below the age of 14 therefore it is negative in character. Article - 21 (A) is inserted in the constitution by 86th amendment in 2002. According to Article - 21 (A) state shall provide free and compulsory education to all children of age of 6 to 14 years. State shall enact law for free and compulsory education. Therefore right to education act is made by parliament in year, 2009.

4. Right to Freedom of Religion (Article - 25 to 28)

It was a debatable subject in constituent assembly. One of the prominent members of constituent assembly, **Rajkumari Amrit Kaur** raised objection over inclusion of religious right as a Fundamental Right. Kaur said that religious right will prove an obstacle in the path of **social reform**. But religious rights were incorporated in Part - III which proves that Indian state is **secular**. Although majority of the population is Hindu. Religious right is written from Article - 25 to Article - 28.

Freedom of Conscience: Clause - 1 of Article - 25 states that all persons are equally entitled to freedom of conscience and **right freely to-**

- Profess.
- Practice.
- Propagate religion.

Profess is associated with **religious belief**. Every person is free to choose his belief because it is **conscience** of person. Practice is related to **wearing** and **carrying Kripans**. **Propagate**

refers to educating others about religious teachings. Freedom of religion insures the division between state and religion. Because state shall not determine profess and practice of religion.

Restrictions over Religious Right

- **Public Order, Morality and Health:** Religious rights are not absolute. Article - 25 (1) says that freedom of conscience is limited from **public order, morality and health**. State is allowed to interfere in religious right on the ground of public order; which is basic **responsibility of state**. Nobody is allowed to **practice of obscenity** on the name of religious right.
- **Secular Activity:** Article - 25 (2) puts additional limitation over religious right. State is allowed to make a law for regulating any economic, financial, political or other **secular activity**. It can be associated with religious practice. Therefore State is allowed to **intervene** in religious matters but religious priest or institution is not permitted to interfere in **secular activity**, run by state.
- **Social Reform:** State is empowered to make a law for social welfare. It cannot be challenged in court of law on the ground of religious right. State can make a law for reforming the society. Therefore child marriage act is prohibited and **instant triple divorce** is declared as unconstitutional. State shall insure entry of all classes and sections of Hindus. But Hindu religious institution should be of **public character**.

i. Religious Conversation

Constitution neither mentions about religious conversation nor it prohibits religious conversation. Due to mass religious conversation **Odisha** became first state to enact law to curb religious conversation in 1967. Madhya Pradesh also made law for preventing religious conversation in 1968. Arunachal Pradesh

enacted law in 1978, Chhattisgarh (2000), Thereafter Gujarat (2003), Himachal Pradesh (2007), Jharkhand (2017), Uttarakhand (2018), Also enacted the same law. It is important to be noted that Tamil Nadu enacted a law in 2002 but it was repealed in year, 2004.

ii. Essential Features of Religious

Supreme Court said that slaughtering animals is not essential feature of religion. Use of **loud speaker** is unessential feature of religion. Banning entry of **women** in temple is not essential feature too. Bursting fire crackers may not be integral feature of religion. None essential feature can be regulated by the state.

Right to Life and Personal Liberty and Religious Freedom

Some Fundamental Rights are more fundamental than others. Right to life and personal liberty which is associated with various freedoms too, is core and epicenter of Fundamental Rights. Therefore **right to life** is more important than religious right. The followers of Jainism practice **Santhara**. Santhara is a renunciation of life willingly. Critics say that Santhara is a form of suicide. Nevertheless Jainism believes that Santhara is spiritual experience. The supporter of religious rights said that they have right to use fire crackers on festivals. However right to life involves pollution free environment. In case of clash between right to life and religious freedom, right to life should be given more importance.

i. Freedom to Manage Religious Affairs

Religious right is available not only for individuals but for **religious institutions** too. **Article - 26** incorporates religious freedom for religious institution. Fundamental Rights of religious institution are **mentioned below-**

- Establish and maintain institutions for religious and charitable purposes.

- To manage its own affairs in matters of religion.
- To own and acquire movable and immovable property.
- To administer such property in according to law.

This right is also subject to restriction of **public order, morality and health**. Thus it is **not absolute** right. It is interesting to be noted that right to property as a Fundamental Rights, no longer exist for citizens. Because by 44th amendment (1978) Fundamental Rights to property is deleted from Part - III. **Article - 26** still provides right to property as Fundamental Rights for religious institutions.

ii. Secular State

- **Freedom from Payment of Taxes:** Constitution is supreme law of the land which is enacted by human being. India is not governed by religious or divine law. State levy taxes for running the government and for welfare of the people. But state shall not impose taxation for promotion of **any particular religion or religious institutions**, under **Article - 27**. Citizens are bound to pay the taxes. Taxes shall not be levied for maintenance of any particular religious place of worship.
- **Freedoms from Religious Instructions or Worship:** Indian state is a secular because **Article- 25** provides person the **freedom of conscience**. State shall not promote any religion through educational institutions **Article - 28** contains following varieties of **educational institutions-**

- Wholly Maintained by State: Central universities, central schools are an example of educational institutions wholly maintained by state. No religious instruction is allowed in these institutions. Teaching Buddhist study for academic purpose is not considers as religious instruction.

- ii. Institution Established by Trust: DAV school, Saraswati shishu Mandir is an example of educational institutions, establish by trust. There are free to impart religious instruction because religious right is a Fundamental Rights. State shall not prevent trust to impart religious instructions.

- iii. Institutions Recognized by State: Education institution recognized by state means recognition of UGC and CBSE. Education institution receiving aid out of state fund includes any private educational institution. It is partly associated with state and partly related to private person. Therefore religious instructions are allowed in these institutions with consent of students, If student is minor than consent of guardian is needed.

5. Cultural and Educational Rights (Article - 29 to 30)

Protection of Interest of Minorities

Article - 29 says that **any section of citizens** residing in the territory of India or any partentitle to **have distinct-**

- Language;
- Script;
- Or culture.

Of its own, they shall have right to conserve their own **language, script and culture-**

i. No Discrimination in Educational Institutions

Article - 29 is available for citizens only. Citizens shall not be denied admission in to any education institution maintained by the state or **receiving aid** from the state fund. State shall not discriminate on ground only of **religion, race, caste, language or any of them**, according to Article -29 (2). Rights of minorities are significant in constitution, because democracy

automatically promotes rule of majority. '**Minorities**' right protects minority from Undemocratic decisions of majority. Majority cannot impose **language and culture** on **minority**.

Minorities Rights to Establish Education Institutions

All **minorities** shall have right to establish and administer education institution of their **own choice**. **Article - 30 (1)** Mentions **two types of minorities-**

- i. **Religious;**
- ii. **Linguistic.**

But Article - 30 does not define the minorities-

- **Definition of Minorities:** Parliamentary act of 1993 defines that **Muslims, Christians, Sikh, Buddhist, Jain and Parsis** are recognized as minorities. But parliamentary act does not mention base of **identification** of minorities. President by notification can include other communities as minorities. Supreme Court said that identification of minorities should be classified on the basis of state. Court said that States in India is reorganized on the **linguistic basis**, in **TMA Pai foundation case (2002)**. Therefore minorities cannot be recognized on **all India bases**. Although supreme court never propounded **any criteria** for identification of minorities. The most crucial question still exist India, who is minority?

According to the census of 2011, **Muslim** **Constitute-14.2**, **Christians-2.3**, **Sikh-1.7**, **Buddhist-0.7** & **Jain-0.5** are percent. However Muslims are in majority in the union territory of **Lakhsdweep, Jammu & Kashmir, Laddakh**. However Christians are majority in **Nagaland, Mizoram and Meghalaya**. Sikhs are the majority in

Punjab. It seems that determination of minority is more rational on the basis of state. Hindus constitute majorities in entire India, but they are minorities in few state and UTs. Problem still persists because the criteria of minorities is not Propounded by Supreme Court too. Minorities may be defined from **numerical point** of view. Who so ever is less than **50 percent is minority**. It means we should have exact quantification of benchmark like 5 percent, 10 percent of 15 percent may be the number for identifying minorities. Apart from numerical strength, economic status may be a base for recognition of minorities. For example people belonging to Jain religion are less in numerical strength but economically they are well off.

- **Minorities Educational Institutions:** Constitution does not define minority educational institutions. Supreme Court in 2002 said that minority education institutions means the institution which is **establish by minority community**. Educational institution belonging to minority community may be **non-aided** by the government. Institution may be **funded by** the government does not lose its minority status. Article - 30 (2) states that state shall not discriminate any educational institutional under the management of minorities.
- **Right to Establish and Management:** TMA foundation case Supreme Court delivered landmark judgment. And said that right to establish and management **includes the following rights-**
 - Determined fee structure, government shall not determine fee structure.
 - Appointment of teachers and staff of their own community.
 - Determined the percentage of admission for non-minority community.

Since the job of state is to maintained education standard therefore shall have right to regulate

education institutions-

- Donation is not allowed because education institutions are not profit institution.
- They are bound to follow academic standard and academic qualification of teachers.
- In academic session should be based on the regulation of the government.
- Various Cases related to minorities is settled by Supreme Court like Unnikrishnan case, Saint Stephan case earlier.
- **Right to Property and Right to Establish Education Institutions:** Educational institutions established and administered by minority still enjoy right to property. Compulsory acquisition of any property belonging to minority education institutions is restricted by law made by the state.

Right to Property in Original Constitution

Right to property was incorporated as a Fundamental Rights Article - 19 (1) (f) which said that any citizen can acquire and dispose property. Article - 31 (1) also provided right to property. Any person can be deprived from right to property according to procedure establish by the law. State was empowered to acquire the property of **any person provided that-**

- Property is acquired for public purposes.
- State shall give adequate compensation.

In order to enforce **Directed Principles of State Policy (DPSP)** government tried to curtail right to property. Indian state is welfare state, therefore launched the program of **land reform** after 1950. India is a **federal state** and land belong to **state subject** thus various state government enacted law for land reform. Act related to land reform of land reform was challenged in **Supreme Court** on account of violation of right to property.

i. First Amendment

Bihar government became first state in India which enacted land reform act. Land reform act of Bihar government first time challenged in Supreme Court in **Kameshwar Singh case**. Supreme Court nullified land reform act. For protecting land reform act parliament brought about the **First Constitutional Amendment**. Article - 31 (A) inserted in the constitution, which restricted **right to property therefore-**

- State is given the right to acquisition any estate or modification of such right or abolition of this right.
- State can take over the management of any property.
- The amalgamations of two or more corporations and management of corporation.
- Changing or abolishing the ownership and voting rights in corporation.
- Modifying or abolishing agreement, lease or licence related to mines.

In nutshell Article - 31 (A) established the foundation of welfare state. It was an attempt to promoting socialism in India. Before Independence the mode of economic development in India was capitalist. **Jagir, inam, Ryotwari** was various types of estate. It was curtailed by 1st constitutional amendment.

ii. 9th Schedule

Schedule is needed for extension of an article. Article - 31 (B) is incorporated in the constitution resulted in the inclusion of ninth schedule. It means original constitution kept only **8 Schedule**, because 9th schedule was added by first **Constitutional Amendment**. It is created exclusively for protection of land reform act. **Land reform** act were kept away from **judicial review**. Any act included in ninth schedule shall not be challenged in court of law on the basis of violation of Fundamental Rights of Part - III.

iii. Issue of Compensation

After first amendment right to property was limited by the Article - 31 (A) and Article - 31 (B). But Article - 31 also provides for **compensation**, Supreme Court in **Bela Banerjee case** said that compensation should be adequate. Therefore 4th constitutional amendment (1955) added in the constitution. According to **4th constitutional amendment** judiciary cannot inquire about the sufficiency of compensation.

iv. Repealing of Compensation

Indira Gandhi brought about **26th constitution amendment (1971)** and abolished the **privy purses**. Compensation means compensation at market rate paid by Supreme Court in **R. C. Cooper case** which is popularly known as **Bank nationalization case**. Consequently 25th Constitutional Amendment Act (1971) passed by parliament and the **term amount** is inserted in Article - 31 (2). Term compensation is repealed from the Article - 31. Compensation denotes the payment due to damage of the person by the government. But amount does not indicate any harm to individual. It depends upon the government to pay amount to the person.

v. Abolishing of Right to Property

Janta party government in 1978 passed **44th Constitutional Amendment**. Therefore Article - 19 (1) (f) and Article - 31 (1) (2) is deleted from Part - III of constitution. It means Fundamental Rights of property is no longer available for the citizens. **Consequently Article - 32** cannot be utilized for protection of right to property. Today right to property is a **legal right** under **Article - 300(A)**, which says that no person shall be deprived of his property save by authority of law. Any person can approach **High Court** under **Article - 226** for protection of right to property.

vi. Left out Element of Right to Property

Although right to property is deleted from Part - III by 44th constitutional amendment (1978). But ironically Article - 31 (A) and Article - 31 (B) still exist in Part - III of the constitution. Therefore some exceptional element of right to property is left **out in constitution-**

- If government want to acquire property of any minority educational institution government shall provide amount to the institution at **market rate**.
- Government is acquiring agriculture land within the limitation of ceiling government is bound to pay the amount on **market rate**.

Right to property is abolished from the constitution in order to implementation of DPSP (Directive Principles of State Policy).

6. Right to Constitutional Remedies (Article - 32 to 35)

Article - 32 is Fundamental Rights is **in itself**, in addition to that **Article - 32 enforce** other Fundamental Rights too. Without Article - 32 other Fundamental Rights become meaningless, because Article - 32 allow Supreme Court to issue direction order or writs for enforcement of Fundamental Rights. Supreme Court **exercise following writs-**

- Habeas Corpus;
- Mandamus;
- Prohibition;
- Quo-Warranto;
- Certiorari.

Parliament by law can empower any **other court** to exercise writs mention, above without limiting power of Supreme Court. Rights guarantees in this article shall **not be suspended**.

i. Habeas Corpus

It is a **Latin term**, which literally means have our own body. Article - 21 gives right to life and personal liberty. Person can approach Supreme Court in case of arbitrary arrest and detention. Court examines the reason behind arrest. Court can realize the person in case of arbitrary arrest. Habeas corpus is available against the state and it can be utilized against any person too. For search of missing person, we can approach Supreme Court. It is obligation of police to search the person. Habeas corpus is not available in **following matters-**

- Person is under arrest due to conviction by judiciary.
- Person arrested because of contempt of court.
- Person arrested under preventive detention.

ii. Mandamus

It is also a **Latin term** which literally means **we command**. It is an order issues by Supreme Court to any sub ordinate authority. By and large Fundamental Rights is available against the state. Therefore a person heading a public office is bound to fulfill his **duty**. Police commissioner is responsible for maintaining public order. Any person can approach Supreme Court against police officer. Mandamus cannot be utilized against any private person. There are two public offices, who are given immunity from **mandamus-**

- President,
- Governor,

President and governor act according to aid and advice of Council of Minister. Therefore they are kept away from the domain of Mandamus.

iii. Prohibition

Literally means it prevents subordinate court over the hearing of any case pending before subordinate court. Article - 21 says that right life and personal liberty shall be deprived according to procedure establish by

law. **District court** is bound to follow **procedure**, while adjudicating any case. **Supreme Court** can stay the matter pending before subordinate court. Popularly it is known as **stay order**. Prohibition is exercise in the first stage of case, when it is **pending before** the subordinate court. Logically it is not available against **private persons**.

iv. Quo-Warranto

A **Latin term** which means by what an authority. Fundamental Rights includes right to equality in employment and appointment under the state. Therefore any unauthorized person is not illegible for appointment in **public office**. For example junior police officer is not entitled to hold the office of Director General of police. Quo-warranto is **not applicable** against any **private office**. For example the appointment of chief executive officer (CEO) of TATA Company is not fit for use of quo-warranto.

v. Certiorari

A Latin term denotes **certification**. Criminal and civil matters originated from **district court** or subordinate court. But subordinate court shall act according to **procedure** establish by law. In case of violation of procedure **Supreme Court** issues certiorari. Supreme Court also examines, whether subordinate court exceeded its jurisdiction. Certiorari is issued in **later stage** of any case, when subordinate court already delivered its decision.

Restriction over Fundamental Rights

Fundamental Rights are not absolute in the constitution. Certain limitations are imposed in every article. Apart from that, **Article - 33 and Article - 34** put further restrictions over the Fundamental Rights. **Article - 33** maintain a balance between Fundamental Rights and **discipline** for members several classes of services. Article - 33 empower **parliament** to enact

law for curtailing the Fundamental Rights of **following persons serving under the state-**

- Members of **arm forces** like army, navy, air force.
- Members of forces charge with the maintenance of **public order**. Police and Central Arm Forces like BSF, CISF.
- Persons employed in any **bureau** or other **organization** established by state for purposes of **intelligence** or **counter intelligence**. Various intelligence agencies operate in India like intelligence bureau (IB), research and analysis wing (RAW), and Military intelligence.
- Persons employed in connection with **telecommunication** systems setup purpose of any force, bureau or organization mention above.

It means freedom of speech and expression is restricted for member of arm forces. Religious freedom is also curtailed and parliament enacted Army act (1950), Air Force act (1950) and Navy act (1950). Parliament also passed police force powers limitation act 1966 and Border security force 1968. **Martial Law**.

Article - 34 suspends Fundamental Rights in a particular geographical area. Law related to martial law is enacted by the parliament. Martial law is imposed for maintaining or restoration order in any area within the territory of India. Persons responsible for maintaining martial law shall be given exemption. Parliament can **validate any sentence** or punishment given by the person employed for maintaining law and order. Parliament passed Armed Forces Special Powers Act, 1958, which is known as AFSPA. It is first time enforced in Assam and Manipur in 1958. It is also implemented in Jammu & Kashmir in 1988. It is also come into operation in Arunachal Pradesh, Meghalaya, Mizoram and Nagaland. AFSPA can be imposed by **home ministry** notification. Ministry notify the **disturb area**, therefore enforce AFSPA. **Disturb area** means civil administration is unable to maintain public

order, thus arm forces or central arm forces can be deployed for maintaining public order. Arm forces are given special power under Armed Forces Special Powers Act, 1958 (**AFSPA**) like-

- They can check any person and restrict the movement of person.
- Arm forces can shoot any person.
- They are capable to demolish any building.
- Arrest any person without warrant and enter in any house at any time.
- For these acts they are not accountable to any court.

i. Armed Forces Special Powers Act, 1958 (AFSPA) and Human Rights

Human rights activist said that Armed Forces Special Powers Act, 1958 (**AFSPA**) is an example of **state terrorism**. It negates the Fundamental Rights available in **Article - 19 and Article -21**. It is against the notion of **rule of law** and promotes the concept of **police state**. Citizen should be empowered in democracy rather than state. It is draconian and undemocratic law, which is misused by the arm forces.

ii. View point of Government

Unity and integrity of the nation is still under threat. It is not permanent therefore in April, 2019 Armed Forces Special Powers Act, 1958 (**AFSPA**) was partially removed from three of nine district of **Arunachal Pradesh**. Armed Forces Special Powers Act, 1958 (**AFSPA**) is also removed from **Meghalaya** and **Tripura** too. Nobody can enjoy liberty without protection of security of nation. Kashmir is still facing problem of cross border terrorism. Therefore Armed Forces Special Powers Act, 1958 (**AFSPA**) is a necessary evil.

iii. The Approach of Arm Forces

Arm forces said that condition in disturb areas are still grim. Without some exemption member of arm forces will unable to perform their job. They are working in a **war like condition**. They are facing a kind of **proxy war**. Indian Arm Forces are known for less collateral damage across the world. Arm forces are also deployed for various humanitarian acts they provide schooling and sports activities thus they are not only for applying force.

iv. Supreme Court in Armed Forces Special Powers Act, 1958 (AFSPA)

Supreme Court said that exemption given to member of arm forces under Armed Forces Special Powers Act, 1958 (**AFSPA**) is **not absolute**. Court said that in case of **blatant violation** of human rights blanket immunity to member of arm forces is not allowed it means FIR can be registered against the member of arm forces deployed under Armed Forces Special Powers Act, 1958 (**AFSPA**). Court observed that Armed Forces Special Powers Act, 1958 (**AFSPA**) cannot be imposed for 30 years.

Conclusion

Armed Forces Special Powers Act, 1958 (**AFSPA**) is like a **shock therapy** which should be used in exceptional cases. Prolong continuation of Armed Forces Special Powers Act, 1958 (**AFSPA**) is not justified. In a democratic country like India problems should be solved by the ballot not by the bullet. Political problems should be solved politically rather than through violence.

Amendment of Fundamental Rights

i. Primacy of Parliament

Parliamentary form of government adopted in India and parliament is given the task of social justice. Nehru government tried to amend of fundamental rights for seeking of **social justice**. Fundamental Rights is only part of the constitution which is protected by **special**

Clause. Article - 13 states that any law enacted by the state, violate the Fundamental Rights, shall be declared null and void. Parliament passed the first constitutional amendment act in 1951. Parliament amended Fundamental Rights and inserted the Article - 15 (4) and Article - 31 (A) and (B). Parliament encroached the Fundamental Rights, which is heard by Supreme Court in **Shankari Prasad case (1951)**.

- **Shankari Prasad Case**

Parliament settled the conflict between Fundamental Rights and constitutional amendment act. Supreme Court said that first **constitutional act is valid because-**

- Law included in Article - 13 (2) is not referring towards **constitutional law**.
- Law in Article - 13 (2) is an **ordinary law** made by parliament or state legislature.
- The restriction mention in Article - 13 (2) does not apply over constitutional amendment act. It is applicable for an ordinary law.
- Thus Fundamental Rights included in Part - III cannot be amended by an **ordinary law**.
- But Fundamental Rights can be amended by constitutional amendment act.
- Supreme Court admitted the **differences** between ordinary laws of parliament enacted Article - 246 and constitutional amendment act enacted under Article - 368.
- Parliament play **dual role** it enacts an ordinary law by **simple majority** and it also amend the constitution with **special majority**.

ii. Triumph of Fundamental Rights

- **Golaknath vs State of Punjab (1967)**

Supreme Court over ruled the decision of **Shankari Prasad case**. Court again interpreted

Article - 13 (2)-

- Court observed that the law mention in Article - 13 (2) also includes Constitutional Amendment Act.
- It means Fundamental Rights cannot be amended either by ordinary law or by constitutional amendment act.
- It implies that Fundamental Rights are beyond the amendment power of parliament.
- Supreme Court said that there is no **difference** between ordinary law and constitutional amendment act.
- Court observed that **Article - 246 is source of power** both for ordinary law making and for constitutional amendment act.
- In interesting case court said that Article - 368 only tells about the procedure of Constitutional Amendment not power of constitutional amendment act.
- For Supreme Court Fundamental Rights are **sacrosanct** and most important parts of the constitution. Therefore it cannot be amended.

Golaknath case created numerous problems before Indira Gandhi Government. Indira Gandhi government tried to amend of Fundamental Rights for the implementation of **DPSP**. Thus parliament brought about 24th constitutional amendment for over ruling the decision of Supreme Court in **Golaknath case**. Parliament was committed to restore previous power of parliament, when parliament was entitled to amend the Fundamental Rights. **Article - 13 (4) is inserted** in the constitution, which believes that Fundamental Rights can be amended by Constitutional Amendment. 24th constitutional Amendment also restores the difference between ordinary law and constitutional amendment act. This amendment is again challenge in Supreme Court in **Keshavanand Bharti case**.

Harmonious Relation

1. Keshavanand Bharti Case (1973)

Supreme Court over ruled the decision of **Golaknath Case** and validated 24th constitutional amendment. Supreme Court again restored pre 1967 scenario. **Therefore court said that-**

- Law included in Article - 13 (2) is not referring towards **constitutional law**.
- Law in Article - 13 (2) is an **ordinary law** made by parliament or state legislature.
- The restriction mention in Article - 13 (2) does not apply over **Constitutional Amendment** act. It is applicable for an ordinary law.
- Thus Fundamental Rights included in Part - III cannot be amended by an ordinary law.
- But **Fundamental Rights** can be amended by constitutional amendment act.
- Supreme Court admitted the differences between ordinary law of parliament under Article - 246 and **constitutional amendment** act under **Article - 368**.

2. Basic Structure and Fundamental Rights

Parliament play **dual role** it enacts an ordinary law by **simple majority** and it also amend the constitution with special majority. Supreme Court said that Fundamental Rights can be amended but **basic structure** of the constitution cannot be amended, although what is basic structure of the constitution shall be determined by Supreme Court. Court said that right to privacy is basic structure of the constitution. Therefore **Article - 21** is basic structure of the constitution which shall not be amended. **Article - 21** and **Article - 19** are complimentary with each other. Therefore **Article - 19** also appears as basic structure of the constitution. For Supreme Court secularism is the basic structure of the constitution thus **Article - 25** is also part of the basic structure. **Article - 14** is the soul of right to equality and rule of law therefore it is also part of basic structure. Supreme Court itself said that **Article - 32** is the basic structure of the constitution because it is the base of judicial review, which is basic structure.