

## Chapter - 7

### FUNDAMENTAL RIGHTS

The Fundamental Rights are enshrined in Part III of the Constitution from Articles 12 to 35. In this regard, the framers of the Constitution derived inspiration from Constitution derived inspiration from the Constitution of USA (i.e., Bill of Rights.)

The Fundamental Rights are named so because they are guaranteed and protected by the Constitution, which is the fundamental law of the land. They are ‘fundamental’ also in the sense that they are most essential for the all-round development (material, intellectual, moral and spiritual) of the individuals.

Originally, the Constitution provided for seven Fundamental Rights viz,

1. Right to equality (Articles 14–18)
2. Right to freedom (Articles 19–22)
3. Right against exploitation (Articles 23–24)
4. Right to freedom of religion (Articles 25–28)
5. Cultural and educational rights (Articles 29–30)
6. Right to property (Article 31)
7. Right to constitutional remedies (Article 32)

However, the right to property was deleted from the list of Fundamental Rights by the 44<sup>th</sup> Amendment Act, 1978. It is made a legal right under Article 300-A in Part XII of the Constitution. So at present, there are only six Fundamental Rights.

### FEATURES OF FUNDAMENTAL RIGHTS

1. Some of them are available only to the citizens while others are available to all persons whether citizens, foreigners or legal persons like corporations or companies.
2. They are not absolute but qualified. The state can impose reasonable restrictions on them.
3. Most of them are available against the arbitrary action of the State, which a few exceptions like those against the State’s action and against the action of private individuals.
4. Some of them are negative in character, that is, place limitations on the authority of the State.
5. They are justiciable, allowing persons to move the courts for their enforcement, if and when they are violated.
6. They are defended and guaranteed by the Supreme Court. Hence, the aggrieved person can directly go to the Supreme Court.
7. They are not sacrosanct or permanent. They Parliament can curtail or repeal them but only by a constitutional amendment act and not by an ordinary act.
8. They can be suspended during the operation of a National Emergency except the rights guaranteed by Articles 20 and 21.
9. Their application to the members of armed forces, para-military forces, police forces, intelligence agencies and analogous services can be restricted or abrogated by the Parliament.
10. Their application can be restricted while martial law is in force in any area.
11. Most of them are directly enforceable (self-executory) while a few of them can be enforced on the basis of a law made for giving effect to them.

### LAWS INCONSISTENT WITH FUNDAMENTAL RIGHTS

Article 13 declares that all laws that are inconsistent with or in derogation of any of the fundamental rights shall be void. In other words, It expressly provides for the doctrine of judicial review. This power has been conferred on the Supreme Court (Article 32) and the high courts (Article 226) that can declare a law unconstitutional and invalid on the ground of contravention of any of the Fundamental Rights.

Further, Article 13 declares that a constitutional amendment is not a law and hence cannot be challenged. However, the Supreme Court held in the Kesavananda Bharati case (1973) that a Constitutional amendment can be challenged on the ground that it violates a fundamental right that forms a part of the 'basic structure' of the Constitution and hence, can be declared as void.

### Fundamental Rights at a Glance

| Category   | Consists of   |
|--|---|
| 1. Right to equality (Articles 14—18)              | <ul style="list-style-type: none"> <li>(a) Equality before law and equal protection of Laws (Article 14).</li> <li>(b) Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth (Article 15).</li> <li>(c) Equality of opportunity in matters of public employment (Article 16).</li> <li>(d) Abolition of untouchability and prohibition of its practice (Article 17).</li> <li>(e) Ablition of titles except military and academic (Article 18).</li> </ul>                               |
| 2. Right to freedom (Articles 19-22)               | <ul style="list-style-type: none"> <li>(a) Protection of six right regarding freedom of: (i) speech and expression, (ii) assembly, (iii) association, (iv) movement (v) Residence and (vi) profession (Article 19).</li> <li>(b) Protection in respect of conviction for offence (Article 20).</li> <li>(c) Protection of life and personal liberty (Article 21).</li> <li>(d) Right to elementary education (Article 21 A.)</li> <li>(e) Protection against arrest and detention in certain cases (Article 22).</li> </ul> |
| 3. Right against exploitation (Article 23—24)      | <ul style="list-style-type: none"> <li>(a) Prohibition of traffic in human beings and forced labour (Article 23).</li> <li>(b) Prohibition of employment of children infactories etc (Article 24)</li> </ul>  |
| 4. Right to freedom of religion (Article 25—28)    | <ul style="list-style-type: none"> <li>(a) Freedom of conscience and free profession, practice and propagation of religion (Article 25).</li> <li>(b) Freedom to manage religious affairs (Article 26.)</li> <li>(c) Freedom from payment of taxes for promotion of any religion (Article 27).</li> <li>(d) Freedom from attending religious instruction or worship in certain educational institutions (Article 28).</li> </ul>  |
| 5. Cultural and educational rights (Article 29—30) | <ul style="list-style-type: none"> <li>(a) Protection of language, script and culture of minorities (Article 29).</li> <li>(b) Right of minorities to establish and administer educational institutions (Article 30).</li> </ul>  |
| 6. Right to constitutional remedies (Article 32)   | Right to move the Supreme Court for the enforcement of fundamental rights including the wits of (i) habeas corpus, (ii) mondamus, (iii) prohibition, (iv) certiorari, and (v) quo warrento (Article 32).  |

### Fundamental Rights (FR) of Foreigners

| FR available only to citizens and not to foreigners   | FR available to both citizens and foreigners (except enemy aliens)   |
|---|--|
| <ol style="list-style-type: none"> <li>Prohibition of discrimination on grounds of religion, race, casts, sex or place of birth (Article 15).</li> <li>Equality of opportunity in matters of public employment (Article 16).</li> <li>Protection of six rights regarding freedom of: (i) speech and expression, (ii) assembly, (iii) association, (iv) movement, (v) residence, and (vi) profession (Article 19).</li> <li>Protection of language, script culture of minorities (Article 29).</li> <li>Right of minorities to establish and Administer educational Institutionals (Article 30)</li> </ol> | <ol style="list-style-type: none"> <li>Equality before law and equal protection of laws (Article 14).</li> <li>Protection in respect of conviction for offences (Article 20).</li> <li>Protection of life and personal liberty (Article 21).</li> <li>Right to elementary education (Article 21A)</li> <li>Protection against arrest and detention in certain cases (Article 22).</li> <li>Prohibition of traffic in human beings and forced labour (Article 23).</li> <li>Prohibition of employment of children in factories etc., (Article 24).</li> <li>Freedom of conscience and free profession, practice and propagation of religion (Article 25).</li> <li>Freedom to manage religious affairs (Article 26).</li> <li>Freedom from payment of taxes for promotion of any religion (Article 27.)</li> <li>Freedom from attending religious instruction or worship in certain educational institutions (Article 28).</li> </ol> |

### RIGHT TO EQUALITY

#### 1. Equality before Law and Equal Protection of Laws

Article 14 says that the State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India. This provision confers rights on all persons whether citizens or foreigners.

The Supreme Court held that where equals and unequals are treated differently, Article 14 does not apply. While Article 14 forbids class legislation, it permits reasonable classification of persons, objects and transactions by the law.

### **Rule of Law**

The concept of 'equality before law' is an element of the concept of 'Rule of Law', propounded by A.V. Dicey, the British jurist. His concept has the following three elements or aspects:

- (i) Absence of arbitrary power, that is, no man can be punished except for a breach of law.
- (ii) Equality before the law, that is, equal subjection of all citizens (rich or poor, high or low, official or non-official) to the ordinary law of the land administered by the ordinary law courts.

### **2. Prohibition of Discrimination on Certain Grounds**

Article 15 provides that the State shall not discriminate against any citizen on grounds only of religion, race, caste, sex or place of birth.

The second provision of Article 15 says that no citizen shall be subjected to any disability, liability, restriction or condition on grounds only of religion, race, caste, sex, or place of birth with regard to (a) access to shops, public restaurants, hotels and places of public entertainment; or (b) the use of wells, tanks, bathing ghats, road and places of public resort maintained wholly or partly by State funds or dedicated to the use of general public. This provision prohibits discrimination both by the state and private individuals, while the former provision, prohibits discrimination only by the State.

There are three exceptions to this general rule of non-discrimination;

- (a) The state is permitted to make any special provision for women and children.
- (b) The state is permitted to make any special provision for the advancement of any socially and educationally backward classes of citizens or for the scheduled castes and scheduled tribes.

The last provision was added by the 93<sup>rd</sup> Amendment Act of 2005. In order to give effect to this provision, the Centre enacted the Central Educational Institution (Reservation in Admission) Act, 2006, providing a quota of 27% for candidates belonging to the Other Backward Classes (OBCs) in all central higher educational institutions.

### **3. Equality of Opportunity in Public Employment**

Article 16 provides for equality of opportunity for all citizens in matters of employment or appointment to any office under the State. No citizen can be discriminated against or be ineligible for any employment or office under the State on grounds of only religion, race, caste, sex, descent, place of birth or residence.

There are three exceptions to this general rule of equality of opportunity in public employment:

- (a) Parliament can prescribe residence as a condition for certain employment or appointment in a state or union territory or local authority or other authority.
- (b) The State can provide for reservation of appointments or posts in favour of any backward class that is not adequately represented in the state services.
- (c) A law can provide that the incumbent of an office related to religious or denominational institution or a member of its governing body should belong to the particular religion or denomination.

### **Mandal Commission and Aftermath**

In 1979, the Morarji Desai Government appointed the Second<sup>6</sup> Backward Classes Commission under the chairmanship of B P Mandal, a Member of Parliament, in terms of Article 340 of the Constitution to investigate the conditions of the socially and educationally backward classes and suggest measures for their advancement.

The commission recommended for reservation of 27% government jobs for the OBCs. So that the total Reservation for all (SCs, STs and OBCs) amounts to 50% it was after ten years in 1990 that the V.P. Singh Government declared Reservation of 27% Government Jobs for the OBCs.

#### **4. Abolition of Untouchability**

Article 17 abolishes 'untouchability' and forbids its practice in any form. The enforcement of any disability arising out of untouchability shall be an offence punishable in accordance with law.

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The term 'untouchability' has not been defined either in the Constitution or in the Act. Under the Protection of Civil Rights Act (1955), the offences committed on the ground of untouchability are punishable either by Rs 500 or both.

The Supreme Court held that the right under Article 17 is available against private individuals and it is the constitutional obligation of the State to take necessary action to ensure that this right is not violated.

#### **5. Abolition of Titles**

Article 18 abolishes titles and makes four provisions in that regard:

- (a) It prohibits the state from conferring any title (except a military or academic distinction) on any body, whether a citizen or a foreigner.
- (b) It prohibits a citizen of India from accepting any title from any foreign state.
- (c) A foreigner holding any office of profit or trust under the state cannot accept any title from any foreign state without the consent of the president.
- (d) No citizen or foreigner holding any office of profit or trust under the State is to accept any present, emolument of office from or under any foreign State without the consent of the president.

##### **RIGHT TO FREEDOM**

#### **1. Protection of Six Rights**

Article 19 guarantees to all citizens the rights. These are:

- (a) Right to freedom of speech and expression.
- (b) Right to assemble peaceably and without arms.
- (c) Right to form association or unions.
- (d) Right to move freely throughout the territory of India.
- (e) Right to reside and settle in any part the territory of India.
- (f) Right to practice any profession or to carry on any occupation, trade or business.

Originally, Article 19 contained seven rights But, the right to acquire, hold and dispose of property was deleted by the 44th Amendment Act of 1978.

These six rights are protected against only state action and not private individuals.

#### **Freedom of Speech and Expression**

The Supreme Court held that the freedom of speech and expression includes the following :

- (a) Right to propagate one's views as well as views of others.
- (b) Freedom of the press.
- (c) Freedom of commercial advertisements.
- (d) Right against tapping of telephonic conversation.
- (e) Right to telecast, that is, government has no monopoly on electronic media.
- (f) Right against bundh called by a political party or organisation.

- (g) Right to know about government activities.
- (h) Freedom of silence.

## **2. Protection in Respect of Conviction for Offences**

Article 20 grants protection against arbitrary and excessive punishment to an accused person, whether citizen or foreigner or legal person like a company or a corporation. It contains three provisions in that direction :

- (a) No *ex-post-facto* law : No person shall be (i) convicted of any offence except for violation of a law in force at the time of the commission of the act, nor (ii) subjected to a penalty greater than that prescribed by the law in force at the time of the commission of the act.
- (b) No double jeopardy : No person shall be prosecuted and punished for the same offence more than once.
- (c) No self-incrimination : No person accused of any offence shall be compelled to be a witness against himself.

## **3. Protection of Life and Personal Liberty**

Article 21 declares that no person shall be deprived of his life or personal liberty except according to procedure established by law. This right is available to both citizens and non-citizens.

The Supreme Court has reaffirmed its judgement in the *Menaka* case in the subsequent cases. It has declared the following rights as part of Article 21 :

### **4. Right to Education**

Article 21 A declares that the State shall provide free and compulsory education to all children of the age of six to fourteen years in such a manner as the State may determine. Thus, this provision makes only elementary education a Fundamental Right and not higher or professional education.

This provision was added by the 86th Constitutional Amendment Act of 2002.

### **5. Protection Against Arrest and Detention**

Article 22 grants protection to persons who are arrested or detained. Detention is of two types, namely, punitive and preventive. **Punitive detention** is to punish a person for an offence committed by him after trial and conviction in a court. **Preventive detention**, on the other hand, means detention of a person without trial and conviction by a court.

Article 22 also authorises the Parliament to prescribe (a) the circumstances and the classes of cases in which a person can be detained for more than three months under a preventive detention law without obtaining the opinion of an advisory board; (b) the maximum period for which a person can be detained in any classes of cases under a preventive detention law; and (c) the procedure to be followed by an advisory board in an inquiry.

## **RIGHT AGAINST EXPLOITATION**

### **1. Prohibition of Traffic in Human Beings and Forced Labour**

Article 23 prohibits traffic in human beings, *begar* (forced labour) and other similar forms of forced labour. Any contravention of this provision shall be an offence punishable in accordance with law. This right is available to both citizens and non-citizens. It protects the individual not only against the State but also against private persons.

The expression 'traffic in human beings' include (a) selling and buying of men, women and children like goods; (b) immoral traffic in women and children, including prostitution; (c) *devadasis*; and (d) slavery. To punish these acts, the Parliament has made the Immoral Traffic (Prevention) Act, 1956.

### **2. Prohibition of Employment of Children in Factories, etc.**

Article 24 prohibits the employment of children below the age of 14 years in any factory, mine or other hazardous activities like construction work or railway. But it does not prohibit their employment in any harmless or innocent work.

In 2006, the government banned the employment of children as domestic servants or workers in business establishments like hotels, dhabas, restaurants, shops, factories, resorts, spas, tea-shops and so on.

## **RIGHT TO FREEDOM OF RELIGION**

### **1. Freedom of Conscience and Free Profession, Practice and Propagation of Religion**

Article 25 says that all persons are equally entitled to freedom of conscience and the right to freely profess, practice and propagate religion. the implications of these are :

- (a) Freedom of conscience
- (b) Right to profess
- (c) Right to practice
- (d) Right to propagate

## **2. Freedom to Manage Religious Affairs**

According to Article 26, every religious denomination or any of its section shall have the following rights :

- (a) Right to establish and maintain institutions for religious and charitable purposes;
- (b) Right to manage its own affairs in matters of religion;
- (c) Right to own and acquire movable and immovable property; and
- (d) Right to administer such property in accordance with law.

## **3. Freedom from Taxation for Promotion of a Religion**

Article 27 lays down that no person shall be compelled to pay any taxes for the promotion or maintenance of any particular religion or religious denomination. In other words, the State should not spend the public money collected by way of tax for the promotion or maintenance of any particular religion. This provision prohibits the State from favouring, patronising and supporting one religion over the other.

## **4. Freedom from Attending Religious Instruction**

Under Article 28, no religious instruction shall be provided in any educational institution wholly maintained out of State funds. However, this provision shall not apply to an educational institution administered by the State but established under any endowment or trust, requiring imparting of religious instruction in such institution.

### **CULTURAL AND EDUCATIONAL RIGHTS**

#### **1. Protection of Interests of Minorities**

Article 29 provides that any section of the citizens residing in any part of India having a distinct language, script or culture of its own, shall have the right to conserve the same. Further, no citizen shall be denied admission into any educational institution maintained by the State or receiving aid out of State funds on grounds only of religion, race, caste, or language.

Article 29 grants protection to both religious minorities as well as linguistic minorities.

#### **2. Right of Minorities to Establish and Administer Educational Institutions**

Article 30 grants the following rights to minorities, whether religious or linguistic :

- (a) All minorities shall have the right to establish and administer educational institutions of their choice.
- (b) The compensation amount fixed by the State for the compulsory acquisition of any property of a minority educational institution shall not restrict or abrogate the right guaranteed to them.
- (c) In granting aid, the State shall not discriminate against any educational institution managed by a minority.

The right under Article 30 also includes the Right of a minority to impart education to its children in its own language.

### **RIGHT TO CONSTITUTIONAL REMEDIES**

A mere declaration of fundamental rights in the Constitution is meaningless, useless and worthless without providing an effective machinery for their enforcement, if and when they are violated. Hence, Article 32 confers the right to remedies for the enforcement of the fundamental rights of an aggrieved citizen. This makes the fundamental rights real. That is why Dr. Ambedkar called Article 32 as the most important article of the Constitution—'an Article without which this constitution would be a nullity. It is the very soul of the Constitution and the very heart of it'. It contains the following four provisions :

- (a) The right to move the Supreme Court by appropriate proceedings for the enforcement of the Fundamental Rights is guaranteed.
- (b) The Supreme Court shall have power to issue directions or orders or writs for the enforcement of any of the fundamental rights.

- (c) Parliament can empower any other court to issue directions, orders and writs of all kinds.
- (d) The right to move the Supreme Court shall not be suspended except as otherwise provided for by the Constitution.

The purpose of Article 32 is to provide a guaranteed, effective, expeditious, inexpensive and summary remedy for the protection of the fundamental rights. Only the Fundamental Rights guaranteed by the Constitution can be enforced under Article 32 and not any other right like non-fundamental constitutional rights, statutory rights, customary rights and so on.

In case of the enforcement of Fundamental Rights, the jurisdiction of the Supreme Court is original but not exclusive.

However, the Supreme Court has ruled that where relief through high court is available under Article 226, the aggrieved party should first move the high court.

### **WRITS-TYPES AND SCOPE**

The Supreme Court (under Article 32) and the high courts (under Article 226) can issue the writs of *habeas corpus*, *mandamus*, prohibition, *certiorari* and *quo-warranto*. Further, the Parliament (under Article 32) can empower other court to issue these writs. Since no provision has been made so far only supreme court and the high courts can issue writs and not any other court.

#### **Habeas Corpus**

It is a Latin term which literally means 'to have the body of'. It is an order issued by the court to a person who has detained another person, to produce the body of the latter before it. The court then examines the cause and legality of detention. It would set the detained person free, if the detention is found to be illegal. Thus, this writ is a bulwark of individual liberty against arbitrary detention.

The writ of *habeas corpus* can be issued against both public authorities as well as private individuals.

#### **Mandamus**

It literally means 'we command'. It is a command issued by the court to a public official asking him to perform his official duties that he has failed or refused to perform. It can also be issued against any public body, a corporation, an inferior court, a tribunal or government for the same purpose.

The writ of *mandamus* cannot be issued (a) against a private individual or body; (b) to enforce departmental instruction that does not possess statutory force; (c) when the duty is discretionary and not mandatory; (d) to enforce a contractual obligation; (e) against the president of India or the state governors; and (f) against the chief justice of a high court acting in judicial capacity.

#### **Prohibition**

Literally, it means 'to forbid'. It is issued by a higher court to a lower court or tribunal to prevent the latter from exceeding its jurisdiction or usurping a jurisdiction that it does not possess. Thus, unlike *mandamus* that directs activity, the prohibition directs inactivity.

The writ of prohibition can be issued only against judicial and quasi-judicial authorities. It is not available against administrative authorities, legislative bodies, and private individuals or bodies.

#### **Certiorari**

In the literal sense, it means 'to be certified' or 'to be informed'. It is issued by a higher court to a lower court or tribunal either to transfer a case pending with the latter to itself or to squash the order of the latter in a case. It is issued on the grounds of excess of jurisdiction or lack of jurisdiction or error of law. Thus, unlike prohibition, which is only preventive, *certiorari* is both preventive as well as curative.

Till recently, the writ of *certiorari* could be issued only against judicial and quasi-judicial authorities and not against administrative authorities. However, in 1991, the Supreme Court ruled that the *certiorari* can be issued even against administrative authorities affecting rights of individuals.

Like prohibition, *certiorari* is also not available against legislative bodies and private individuals or bodies.

#### **Quo-Warranto**

In the literal sense, it means 'by what authority or warrant'. It is issued by the court to enquire into the legality of claim of a person to a public office. Hence, it prevents illegal usurpation of public office by a person.

The writ can be issued only in case of a substantive public office of a permanent character created by a statute or by the Constitution. It cannot be issued in cases of ministerial office or private office.



Unlike the other four writs, this can be sought by any interested person and not necessarily by the aggrieved person.

### **ARMED FORCES AND FUNDAMENTAL RIGHTS**

Article 33 empowers the Parliament to restrict or abrogate the fundamental rights of the members of armed forces, para-military forces, police forces, intelligence agencies and analogous forces.

The power to make laws under Article 33 is conferred only on Parliament and not on state legislatures. Any such law made by Parliament cannot be challenged in any court on the ground of contravention of any of the fundamental rights.

### **MARTIAL LAW AND FUNDAMENTAL RIGHTS**

Article 34 provides for the restrictions on fundamental rights while martial law is in force in any area within the territory of India. It empowers the Parliament to indemnify any government servant or any other person for any act done by him in connection with the maintenance or restoration of order in any area where martial law was in force.

### **PRESENT POSITION OF RIGHT TO PROPERTY**

Originally, the right to property was one of the seven fundamental rights under Part III of the Constitution. It was dealt by Article 19(1)(f) and Article 31. Article 19(1)(f) guaranteed to every citizen the right to acquire, hold and dispose of property. Article 31, on the other hand, guaranteed to every person, whether citizen.

Therefore, the 44th Amendment Act of 1978 abolished the right to property as a Fundamental Right by repealing Article 19(1)(f) and Article 31 from Part III. Instead, the Act inserted a new Article 300A in Part XII under the heading 'Right to Property'. It provides that no person shall be deprived of his Property except by authority of law. Thus, the right to property still remains a legal right or a constitutional right, though no longer a fundamental right. It is not a part of the basic structure of the Constitution.

