

## Chapter : 2

## Constitution of India

The constitution of India is supreme law popularly known as "Mother of all laws". The constituent assembly under the chairmanship of Dr. B.R. Ambedkar took almost 3 years to the draft the constitution.

Constitution was adopted on 26<sup>th</sup> November 1949. It came into force on 26<sup>th</sup> January 1950.

## Preamble -

It declares India to be a sovereign, social, secular, democratic Republic and secure to all its citizen Justice, Liberty, Equality & Fraternity.

Currently there are 448 Articles, 25 parts and 12 schedules in The Constitution of India.

## Structure

Constitution of India is basically federal but with certain unitary features. (quasi-federal)

In *Kesavananda Bharati v. State of Kerala* to decide whether our constitution is federal unitary or quasi federal, it would be better to have a look at the contents of the constitution.

The essential features of a federal Policy or system are -

- > Dual Government
- > Distribution of power
- > Supremacy of the constitution
- > Independence of judiciary
- > written constitution & a
- > rigid process for the amendment of constitution

Unitary features of constitution are -

- > Residuary power
- > Strong Centre
- > Emergency power
- > Single citizenship

Article 12 Unless the context otherwise requires, the "state" includes -

- (a) the Government and Parliament of India
- (b) the Government legislature of each of the state
- (c) all the local authorities and other authorities
  - (i) within the territory of India and
  - (ii) under the control of the Government of India

In Electricity Board Rajasthan V. Mohanlal, The Supreme court held that 'other authorities will include all authorities created by the constitution on whom power are conferred by law & it is not necessary that it should perform

government functions.

In *Angwa Bala Puri Calcutta H.C* held that electricity authorities being state within the meaning of Article 12.

In *University of Madras V. Shanta Bai* It has also been held that a university is an authority.

In *Haroo bhai V. State of Gujarat Gujarat H.C* held that the President is "State" when making order under Article 359 (Emergency Power)

In *A.R. Antulay V. R.S. Nayak* it was held that Court can be considered as state under Article 12 if it exercises non-judicial functions.

In *R.D. Shetty V. International Airporty Autho. and Ajay Hasia V. Khalid Mujib*, the S.C. has enunciated the following test for determination of an instrumentality or agency of the Government -

The entire share capital of corporation is held by government.

Corporation enjoys monopoly conferred or protected by Government.

State exercise deep & pervasive control over corporation

Function of Corporation are of public importance and closely related to gov. function. Department of government transferred to a Corporation.

Financial assistance of the State is much to meet almost the entire expenditure of Corporation.

In Pradeep Kumar Biswas v. Indian Institute of Chemical Biology. A seven Judge Bench of the SC by a majority of 5:2 held that CSIR is an instrumentality of "the state" falling within the scope of Article 12. The multiple test will be applied to check whether body is instrumentality of state + nature of financial, functional and administrative control of the state over it and whether it is dominated by the S.G.

In Zee Telefilms v. Union of India it was held that BCCI was not state for purpose of Article 12.

Justifiability of Fundamental Rights -

Existing Laws : Article 13(1)

All the pre-constitution laws are void to the extent to which they are inconsistent with the fundamental rights.

Pre-constitution: Law already existing in force i.e. law which were in force before the commencement of the constitution.

Future laws : Article 13(2)  
 state shall not make any law which contradicts<sup>with</sup> the fundamental rights and if such a law is made, it shall be void to the extent to which it is inconsistent with any such right.

### Doctrine of Severability -

In Article 13 is that, it is not the entire law which is affected by the provision, but the law becomes invalid only to the extent to which it is inconsistent with fundamental right. So, only that part of law will be declared invalid which is inconsistent and the rest of the law will stand.

Clarification made by court that invalid part of the law shall be severed and declared invalid if really it is severable.

After separating the invalid part the valid part is capable of giving effect to the legislature's intent, then only it will survive otherwise the entire law is invalid.

This is doctrine of severability.

Case : A.K. Gopalan v. State of Madras

### Doctrine of Eclipse -

A law made before the commencement of the constitution remains

eclipsed or dormant to the extent it comes under the shadow of the fundamental rights i.e. is inconsistent with it, but the eclipsed or dormant to the parts become active and effective again if the prohibition brought about by the fundamental rights is removed by the amendment of the constitution.

This is known as the doctrine of eclipse.

Case: Bhikaji Narain Dhakras v. State of M.P.

## Waiver

The doctrine of waiver is based on the premise that a person is his best judge and that he has the liberty to waive the enjoyment of such right as are conferred on him by the state. The person must have the knowledge of his right and waiver should be voluntary.

In Basheshwar Nath v. CIT It was held that it was not open to citizens to waive any of the fundamental rights.

Equality before the law and equal protection of laws. {Article - 14 }

"The state shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

## Equality before Law -

This expression is borrowed from English common law a declaration of equality of all persons within the territory of India implying thereby the absence of any special privilege in favour of any individual. It is a negative term. It means law will not give any special privilege to any individual. Law cannot favour someone.

## Equal protection of Law -

This is of American origin which directs that equal protection shall be secured to all persons within the territorial jurisdiction of the union in the enjoyment of their rights and privileges without favouritism or discrimination.

## Classification -

Possession of high qualification can be treated as a valid base or classification of 2 categories.

Classification may be founded on different basis such as geographical, occupational, there must be a nexus between the basis of classification.

## Legislative classification -

Article 14 forbids class legislation but not class classification.

Even a single individual may be treated as a class under some special circumstances.

(Ram Kishan Dalmiya v. Justice Tendulkar)

In *RK Garg v. Union of India* The legislation under Special Bearer Bonds (Immunities and Exemptions) Act 1981, permitted investment of black money in purchase of these bond without any question being asked as how this money come into the possession and it was contended that Article 14 has been violated because honest tax payers were adversely discriminated. But the SC rejected, taking note of magnitude to the problem of black money which had brought into being a parallel economy.

## Article : 15 Prohibition of discrimination on grounds of religion -

Article 15(1) : prohibits state from discriminating against any citizen on ground of

Religious . Race . Caste . Sex . Place of birth . Any of them

Article 15(2) : no citizen shall subjected to any disability, restriction or condition regard to

- a) access to shops, public restaurants, hotels and place of public entertainment
- b) use of wells, tank, bathing ghats, roads and place of public resort dedicated to the use of general public.

Article 15(3): State can make special provision for women and children.

Article 15(4): Permits state to make special provisions for —

- i) socially and educationally backward class of citizen
- ii) SC and
- iii) ST

Article 15(5): Inserted by 93<sup>rd</sup> amendment permits the state to make provision for socially and educationally backward class of citizen or ST or SC special provision related to their admission in educational institution including private institution.

Article 15(6): inserted by 103<sup>rd</sup> amendment permits the state to make any special provision for economically weaker sections of citizen related to their admission in educational institution including private institution subject to maximum reservation of 10% of total seats in each category.

## Article 16 Equality of Opportunity in matters of Public Employment.

Article 16(1) : guarantees to all citizens equality of opportunity in matters of employment or appointment of office under the state.

Article 16(2) : prohibits discrimination on grounds of religion, race, caste, sex, place of birth or residence, descent.

Exceptions -

Article 16(3) Parliament can make a law that prior to such employment or appointment shall be an essential qualification.

Article 16(4) Provision can be made for reservation of appointments in favour of any backward class of citizens.

Article 16(4A) State can make special provision for reservation in favour of ST & SC.

Article 16(4B) Any unfilled vacancy in this year which are to be filled by reservation under clause (4A) shall be filled up in the any succeeding year or years.

Article 16(5) A law shall not be invalid if provides that the governing body in any religious

or denominational institution shall be a person professing a particular religious or belonging to particular denomination.

Article 16 (6) : State <sup>can</sup> make for reservation of appointment in favour of any economically weaker sections of citizens subject to maximum 10%.

### Rights Relating to freedom

~~Article~~ Article -19 of the constitution, guarantees to the citizen of India six freedoms, namely

- 19(1)(a) Freedom of speech and expression
- (b) Assemble peacefully and without arms
- (c) Form association or union or co-operative societies
- (d) Move freely throughout the territory of India
- (e) Reside and settle in any part of the territory of India.
- (f) Practice any profession or carry any occupation, trade or business.

However restriction can be imposed on following grounds.

- i) Sovereignty and integrity of India
- ii) Public order
- iii) morality

### Monopoly \*

The S.C. in *Chintamani Rao V. State of MP* the constitutionality of MP Act was challenged. State law prohibited the manufacture of bidis in the villages, during the agriculture season. No person residing in village could employ any other person nor engage himself, in the manufacture of bidis during the agriculture season. The object of the provision was to ensure adequate supply of labour for agriculture purpose. The bidi manufacturer could not even import labour from outside and so, had to suspend manufacture of bidis during the agriculture season. Even villager incapable to engaging in agriculture, like old people, women & children who supplemented their income by engaging themselves in <sup>manufacturing</sup> bidis were prohibited without any reason.

The prohibition was held unreasonable.

It has been held in *Assn. of Registration Plates v. Union of India* that the state is free to create monopoly in favour of itself. However, the entire benefit arising thereon must ensure to the benefit of the state and not be used as for conferring private benefit upon a limited class of person.

Protection in respect of conviction for offence -

Article 20(1) Protection against ex-post facto laws.

No individual can be convicted for actions that were committed before the ~~ent~~ enactment of the laws, which declared those actions illegal.

Even penalty of offence cannot be increased retrospectively.

- ✓ Applies only in criminal cases not in civil cases.
- ✓ Only to substantive laws not procedural.

Article 20(2) Protection against double Jeopardy

No person can be prosecuted or punished for the same offence more than once.

If person has been let off after prosecution without punished he can be prosecuted again. Protection can be given only when person is prosecuted as well as punished.

Article 20(3) Protection against self incrimination.

No person accused of any offence shall be

Compelled to be a witness against himself.  
Protection available when 3 conditions fulfilled-

- i He must be accused of an offence.
- ii There must be a compulsion to be a witness.
- iii The compulsion should result in his giving evidence against himself.

### Protection of life and personal liberty

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

Right to live in freedom from noise pollution is a fundamental right protected by Article 21.

Refusal of an application to enter a medical college cannot be said to affect person's personal liberty.

In *Satwant Singh Sawhney v. Assistant Passport Officer New Delhi*, it was held that right to travel abroad is included within the expression 'personal liberty' and no person can be deprived of his right to travel except according to the procedure of law, the denial of a passport amounts to deprivation of personal liberty.

In *Maneka Gandhi v. Union of India* it was stated that personal liberty within the meaning

of Article 21 includes within its ambit the right to go abroad and no person can be deprived of this right except according to procedure of law.

In *KS Puttaswamy v. Union of India* court held that right to life and personal liberty includes right to privacy. The S.C. held that the right to privacy is protected by the constitution of India and it applies across the gamut of fundamental rights including equality, dignity, speech, expression, life and liberty.

*Swapnil Tripathi and Ors v. Supreme Court of India*

In this case, petitioners sought a declaration that SC case proceedings of "constitutional importance having an impact on the public at large then it should be live streamed in a manner that is easily accessible for public viewing.

It was stated in this case -

"Live-streaming of proceedings is crucial to the dissemination of knowledge about judicial proceeding and granting full access to justice to the litigant."

## Article : 21 A Right to Education

The state shall provide free and compulsory education to all children of the age of 6 to 14<sup>th</sup> years in such manner as may the state may.

In *Fahima Shareen Ak V. State of Kerala* and others the H.C of Kerala, upheld that 'Right to Internet Access' as a fundamental right.

## Article : 22 Right against Arrest

A person who is arrested cannot be detained in custody unless he has been informed on the grounds for such arrest.

Such person shall have the right to consult & to be defended by a legal practitioner of his choice.

A person who is arrested and detained must be produced before the nearest magistrate within a period of 24 hours exclude the time of travelling.

Aforesaid safeguards are not available to - alien enemies

Persons arrested under preventive detention law.

Preventive detention

means detention of a person without trial. The

object is not to punish a person but to prevent him from doing it.

No offence is proved nor any charge formulated and yet a person is detained because he is likely to commit an act prohibited by law.

Parliament has the power to make a law for preventive detention for reasons connected with defence, foreign affairs or the security of India.

Safeguards against preventive detention -

- a) such a person cannot be detained for a longer period of more than 3 months unless
  - (i) An advisory board constituted or are qualified to be H.C judges is in opinion of detention.
  - (ii) Parliament may by law prescribe maximum period.
- b) The authority shall -
  - i) communicate to him the grounds for detention
  - ii) offer him opportunity of making the representation.

Article 23 & 24

Article 23 : Prohibition of traffic in human beings & forced labours -

Article 23 imposes a complete ban on traffic in human beings, beggar and other similar forms of forced labour.

The contravention of these provisions is declared punishable by law.

- Traffic - in human beings means to deal in men and women like goods such as to sell or dispose them.

- Beggar - means involuntary work without payment.

While imposing such compulsory service, the state cannot make any discrimination on grounds of religious, race, caste or class.

Article : 24 Prohibition of Employment of Child  
 Prohibits the employment of children below the age of 14 in any factory or mine.

### Amendability of the Fundamental Right -

Initially S.C had a view that no part of our constitution are unamendable and as per Article 368 parliament may amend any provision of the constitution including fundamental rights. The decision was upheld in Sankari Prasad v. Union of India.

In Golak Nath v. State of Punjab The S.C revisited its previous decision and contended that parliament had no power to amend fundamental rights.

To nullify the effect of Golak Nath's case, Parliament passed the constitutional (24<sup>th</sup> Amendment) Act 1971 introducing certain changes and amended the fundamental right Act declared that Parliament has power to amend the fundamental right under Article 368.

In Kesavanand Bharti V. State of Kerala the validity of the 24<sup>th</sup> Amendment was challenged. And the court made it clear that Parliament cannot alter the basic structure or framework of constitution.

42<sup>nd</sup> Amendment Act, 1976 this amendment was done during the period of emergency and gave unlimited amending power to parliament by removing the exception of the basic structure.

In Minerva Mill Ltd. v. Union of India The S.C was convinced that the basic structure of the constitution should be preserved and the unlimited power given under 42<sup>nd</sup> amendment Act should not prevail.

(Constitution amendable but basic structure of constitution not.)

## Directive Principles of State Policy -

Directive principles are the ideals which the union and state government keep in mind while formulating policies or pass a law.

The directives are differ from fundamental rights in the following respects -

- > The directives are not enforceable in the courts and do not create any justiciable rights. Require to be implemented by legislation & and so long as there is no law carrying out the policy laid down in a directive.
- > neither the state nor an individual can violate any existing law.
- > do not confer upon or take away any legislative power from the appropriate legislature.
- > cannot be declared by law as void on the ground that it contravenes any of the directive principles. Courts are not competent to compel the gov. to carry out any directive or to make any law for that purpose.

In case of conflict between the two, a fundamental right would prevail over the directive principles.

The Directive Principles of State Policy have to conform to and run as subsidiary to the Chapter of Fundamental Rights.

## Important directive principles -

- 1 State to secure a social order for promotion of welfare of people.
- 2 Certain principles of policy to be followed by the state.
- a Equal right for men and women
- b Equal pay for equal work for both
- c Ensure health and strength of workers
- d Protection of child and youths from exploitation.
- 3 must take steps to organise the village panchayat.
- 4 Develop the state must make effective provision for securing the right to work.
- 5 must endeavour to provide a uniform civil code for all Indian citizens.
- 6 Provision for free and compulsory education
- 7 must promote the educational and economic interest of SC & ST.
- 8 Protection of monuments and places of national importance.

## Fundamental Duties -

Part - IV Article - 51 A

Impose the fundamental duties to every citizen of India was inserted by the constitution forty second Amendment Act 1976.

## fundamental duties -

1. To abide by the constitution and respect its ideals and institutions, the National Flag & the National Anthem.
2. To cherish and follow the noble ideals which inspired our national struggle for freedom.
3. To uphold and protect the sovereignty, unity and integrity of India.
4. To defend the country and national service when called.
5. To promote harmony and brotherhood.
6. To value and preserve the rich heritage of our culture.
7. To safeguard public property and to abjure violence.
8. To provide opportunities for education to ward between 6 to 14 years.

## Ordinance Making Powers -

### Article : 123 President in case of Union

Ordinance-making power of President  
Parliament is vested with legislative powers on union list. The independent power of the executive to legislate by ordinance has the following peculiarities :

The ordinance making power will be available to the President only when both the houses of

parliament are not functioning.

This power is to be exercised by the president on the advice of his council of ministers. The president must be satisfied about the need for the ordinance and cannot be compelled. The Ordinance must be laid before Parliament when it re-assembles and shall automatically cease to have effect at the earlier of the following two dates-

- expiration of 6 months from date of re-assembly.
- Date of passing of a resolution for disapproval.

### Article : 213 Ordinance making power of Governor

This is similar to the ordinance making power of the president and have the force of an Act of the state legislature.

He can make Ordinance only when the state legislature or either the two houses is not in session.

In the following cases the Governor cannot promulgate any Ordinance without instruction from president.

- a) If bill contain some provision which require the previous sanction of the president.

have deemed it necessary to reserve a bill containing the same provisions for the

Consideration of president.

Containing some provision which would be invalid unless been reserved for the consideration of the president, it had received the assent of president.

Ordinance must be laid before the state legislature when it re-assembles and shall automatically cease to have effect at the expiration of six weeks from the date of re-assembly unless disapproved earlier by that legislature.

Writs

Art Article - 32

Habeas Corpus - Means to have the body. It is in the nature of an order calling upon the person who has detained another. In order to let the court know the ground of his detention.

Available to be a person confined without legal justification.

Mandamus: "we command" Issued to direct any person, corporation, inferior court or gov. to do a particular thing.

To keep the public authorities within the limit of their jurisdiction.

Does not lie against president or Governor. It discretionary remedy and the H.C may refuse to give when other remedy is available.

**Prohibition:** Issued to an inferior court preventing from usurping jurisdiction which is not legally vested in it.

Issued before the trial in a case, available only against judicial or quasi-judicial authorities and not against a public officer.

**Certiorari:** Available to any person, wherever any body of persons having legal authority to determine question affecting the rights of subjects and having the duty to act judicially in excess of their legal authority. Quash the decision that goes beyond its jurisdiction.

**Quo warranto:** Enables enquiry into the legality of the claim which a person asserts to an office or franchise and to oust him from such position if he is an usurper.

Power to Parliament to make laws on state list -

In the national interest  
during a proclamation of emergency  
Breakdown of constitutional machinery in state.

On the request of two or more state legislatures enforcing international agreement.

Ad hoc committees :- Ad hoc committees are appointed for a specific purpose, and they cease to exist when they finish the task assigned to them and submit a report. (Special Purpose)

Standing Committees :- Each house of parliament has standing committees like the business advisory committees, the Committee on petition, the Committee of privileges and the Rules Committees.

Other committees :- Act as Parliament's 'watch dogs' over the executives. These are the committees on subordinate legislations, the Committee of Government Assurance, the Committee on Estimates, the Committee on Public acc and more.

## Bill

Ordinary bill - It may be introduced in either house of parliament.

Money bill - It may be introduced in Lok Sabha only.

Finance bill - Category 1: May be introduced only in Lok Sabha.

Category 2: May be introduced in any house.

Amendment to the Constitution Bill - May be introduced in either house of parliament.

Ordinance replacing bill - May be introduced in either house of parliament.