



Fundamental Rights - A Critical Analysis

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OBJECTIVES

To study Constitutional provisions related to the Fundamental Rights.

To understand the features of the Fundamental Rights

To analyse the implications of the rights provided.

To evaluate the rights in their true perspective.

To study the various freedoms in the light of case studies.

To understand its significance of the Fundamental Rights in the parliamentary democratic system.

To evaluate the role of Judiciary in protecting the Fundamental Rights.

INTRODUCTION

The basic right of an individual is to live life with safety and security.

Fundamental Rights: Part III, Art 12 to 35 – Inspiration from the USA.

Meant for promoting the idea of political democracy – preventing authoritarianism

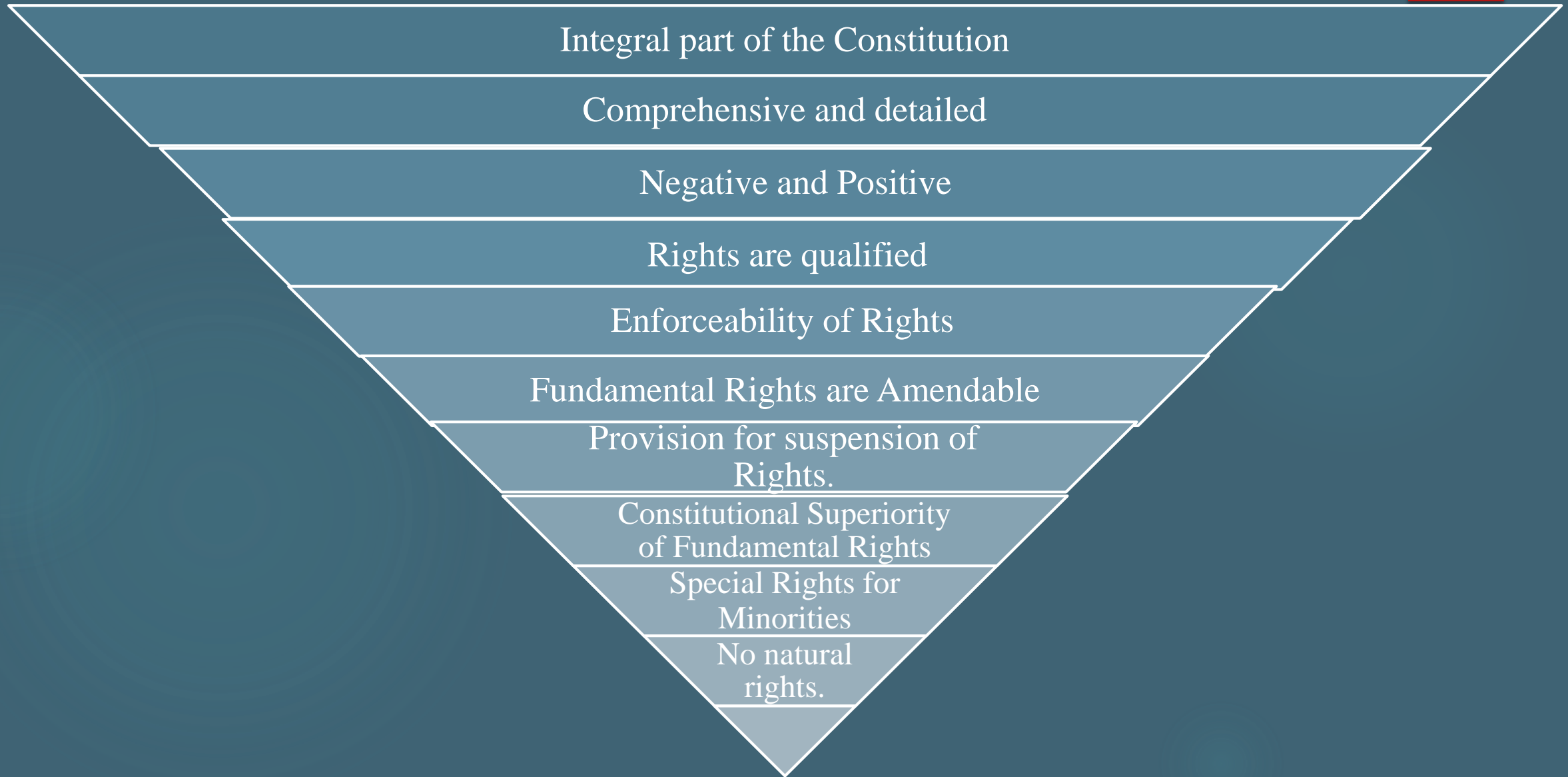
Named so because

Guaranteed and protected by the constitution

Essential for all-around development

Originally 7, however, Right to Property deleted by 44th Amendment Act and now only Legal Right under Art. 300-A.

SALIENT FEATURES OF FUNDAMENTAL RIGHTS IN INDIAN CONSTITUTION



SCOPE OF OPERATION
LIMITED BY:

- Art 31A – saving of laws providing for the acquisition of estates...
- Art 31 B – 9th Schedule...
- Art 31C – Effect to Directive Principles
 - Restricted to Armed forces etc., or in Martial Law areas
 - Directly enforceable or law need to give effect
 - Not permanent but, curtail or repeal through a constitutional amendment

FUNDAMENTAL RIGHTS AVAILABLE TO THE CITIZENS ONLY

1. Article 15: Prohibition and discrimination on the grounds of religion, caste, language, gender and place of birth.
2. Article 16: Equality of opportunity in the matters of public employment.
3. Article 19: Six freedoms mentioned under it.
4. Article 29: Protection of language, script and culture of minorities.
5. Article 30: Right of minorities to establish and administer educational institutions.

FUNDAMENTAL RIGHTS AVAILABLE TO BOTH CITIZENS AND NON-CITIZENS

- Article 14 :Equality before law and protection of law.
- Article 20:Protection in respect of conviction of offences.
- Article 21: Protection of life and personal liberty.
- Article 21A: Right to elementary education.
- Article 22: Protection against arrest and detention in certain cases
- Article 23 & 24: Right against exploitation
- Article 25 to 28: Right to religion.

Definition of State (Art.12)

- Government and Parliament of India+
- Government and Legislature of States+
- Local authorities + statutory authorities +
- Bodies LIC, ONGC, SAIL+
- Private body working an instrument of State Laws inconsistent/derogation with/of Fundamental Rights– Void (Art.13)
- Judicial Review – Supreme Court (Art.32) and High Courts

ARTICLE-13 - WHAT CONSTITUTES THE LAW?

- Permanent laws enacted by Parliament or State legislatures
- Temporary laws like Ordinances
- Statutory instruments in the nature of delegated legislation
- Non-legislative sources of law
- Even the constitutional amendment act can be challenged (Keshava Nanda Bharati case- 1973 SC.)

RIGHT TO EQUALITY- ARTICLE-14

Equality before Law
[British] and Equal
protection of Law
[American]

– applicable for all,
including legal
persons

Equality before
Law – No person
above Law

Rule of Law i.e. Absence
of arbitrary power, equal
subjection of all citizens
and primacy of individual
rights.

Equal protection of Law
– equal treatment under
equal circumstance,
Privileges and
Liabilities of Law

EXCEPTIONS TO RIGHT TO EQUALITY

- President of India and Governors not answerable to court performing duties
- No criminal proceedings initiated/continued during term of office No arrest/imprisonment during the term of office
- Civil proceedings shall be instituted - 2 months after notice
- Art – 361-A person free to publish proceedings without malice
- MPs/MLAs in Parliament/Legislature
- Art.31-C to implement DPSP
- Foreign Ambassadors/diplomats and UNO agencies immune from criminal & civil proceedings

PROHIBITION OF DISCRIMINATION ON CERTAIN GROUNDS – ARTICLE 15

- State - no discrimination on grounds of religion, race, caste, sex or place of birth
- No citizen shall be subjected to any disability, liability, restriction or condition on grounds of religion, race, caste, sex or place of birth with regard to public spaces- state/private individuals
- Exceptions to non-discrimination [Special provisions]
- For Women & Children
- Socially & educationally backward classes citizens, SCs & STs – including private education {except minority }

EQUALITY OF OPPORTUNITY IN PUBLIC EMPLOYMENT- ARTICLE 16

- No discrimination by the state on grounds only of religion, race, caste, sex descent or place of birth or residence
- Exceptions to non-discrimination in Public Employment [Special provisions]
- Parliament can prescribe residence for appointment in-state/UT/local authority/Authority- at present- Not applied except for AP
- For non-represented backward class
- Office related to religious/denominational institution

ABOLITION OF UNTOUCHABILITY-ARTICLE -17

- Term untouchability has not been defined anywhere in the constitution
- It is available against even private individuals.
- Using the power given to the Parliament under Article 35 the government created the Untouchability (offences) Act, 1955, later this act was amended and a new act is made which was named The Protection of Civil Rights Act, 1955.
- **People's Union for Democratic Rights v. Union of India, AIR 1982**
The Supreme Court said that when the rights under Article 17 will be violated by any private individual then it will be the responsibility of the state to take action immediately.
- In 2018, an Amendment was brought to the Schedule Caste and Schedule Tribe (Prevention of Atrocities) Act 1989, inserting Section 18A.

ABOLITION OF TITLES – ARTICLE 18

- Prohibition state to confer title[Except Military or Academic]
- Prohibition – citizen to accept any title from foreign
- Foreigner working for Government of India/State take consent from President to accept a title from foreign
- Citizen/Foreigner working for Government of India/State take consent from President to accept present/emolument/office from foreign
- 1977 – M. Desai Gov. discontinued but 1980 Gandhi Government- Revived
- In 1996, Supreme Court upheld the validity of National Awards like Bharat Ratna but, not to be used as suffixes or prefixes.(Balaji Raghavan vs Union of India-1996)

RIGHT TO FREEDOM – ARTICLE 19

- Protection of Six Rights
- Originally 7 rights-right to acquire, hold and dispose of the property was deleted by 44th Amendment Act 1978.
- Against state only, not private
- Only to citizens and shareholders of the company
- Not to foreigners/legal persons
- State can impose reasonable restrictions
- Restrictions should be based on the grounds mentioned in Article 19 and not on any other grounds

Freedom of Speech & Expression Art-19 (i)

- Includes freedom of commercial advertisements
- Right against bundh called by a political party
- Freedom of silence (Emanuel vs State of Kerala 1986)
- It does not include the right to strike.(Kameshwar Prasad vs State of Bihar1962)
- **Reasonable restrictions**
- Sovereignty and integrity of India
- Security of the state
- Friendly relations with foreign states
- Public order
- Decency or morality
- Contempt of court
- Defamation and
- Incitement to an offence

2. Freedom of Assembly –Article 19(i) (b)

- Can be exercised only on public land
- Assembly must be peaceful and unarmed
- Reasonable restriction: sovereignty and integrity of India and public order.

3. Freedom of Association –Article 19 (i) (c)

- Right to obtain recognition of the association is not a fundamental right.
- Right to strike is not a constitutional right that can be regulated by appropriate law.
- **Reasonable Restriction:**
- Interest of general public and protection of interests of any scheduled tribes.
- Article 19 does not deal with movement outside the country.
- Freedom of residence is complementary to the above right.
- Freedom of profession.

4. Freedom of Movement throughout the territory of India- Article 19 (i) (d)

Restricted: Interest of general public, Protection of interest of STs Public health Public morals

- Art.19 right to move inside the country only
- Art.21 right to move out of the country and return.

5. Freedom of residence –Article 19 (i) (e)

Right to reside and settle in any part of the country

Restricted Interest of general public Protection of interest of STs

6. Freedom of Profession – .Article -19 (i) (g)

Restricted Interest of general public

The state can prescribe qualifications and regulate trade and business through licensing.

ARTICLE 20: PROTECTION IN RESPECT OF CONVICTION FOR OFFENCES

- Grants protection against arbitrary and excessive punishment to an accused person
- Applicable to almost everyone
- No ex-post-facto law (not on civil or tax laws or even on criminal trials, preventive detention cases)
- No double jeopardy (not available in proceedings before departmental or administrative authorities)
- No self-incrimination (not applicable to civil proceedings)

ARTICLE-21 PROTECTION OF LIFE AND PERSONAL LIBERTY

- No deprivation of life & liberty except Procedure established by Law, Citizens/Non-citizens ,1950
- Gopalan case – Narrow View – only against arbitrary executive action 1978
- Menaka Gandhi case – Wider View – including legislative action
- Right includes life with dignity, privacy, shelter, health, free education, legal aid, against solitary confinement, speedy trial, delayed execution, timely medical, reputation etc.
- Right to Education- Art. 21A
- State to provide free & compulsory education – children 6 to 14 1993 Supreme Court recognized 2002, 86th Amendment Act 2009, RTE Act.

PROTECTION AGAINST ARREST AND DETENTION – ART. 22

- Two parts -1st part:
- Rights of detained under ordinary law:
- Grounds of detention
- Consult and defended by the legal practitioner
- Before magistrate 24 hours (excluding journey)
- To be released after 24 hours unless magistrate authorizes
- These safeguards are Not available to alien/preventive detention detainee/ arrest under the orders of a court, civil arrest, arrest on failure to pay the income tax.

ART.22, 2ND PART: PROTECTION TO PREVENTIVE DETENTION DETAINEE

- Available to both citizens/aliens
- Detention period, not more than 3 months – after that advisory board [High court judges]
– Parliament can prescribe more than 3 by law.
- Grounds of detention informed
- An opportunity to make representation
- 44th Amendment. Act, 1978 reduced detention period to 2 months – not yet brought into force so 3 months is applicable.

VALID PREVENTIVE DETENTION LAWS

- Conservation of Foreign Exchange & Prevention of Smuggling Act, 1974
[COFEPOSA]
- National Security Act [NSA], 1980
- Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act [PBMSECA], 1980
- Prevention of Illicit Traffic in Narcotic Drugs & Psychotropic Substances Act [PITNDP], 1988

RIGHT AGAINST EXPLOITATION- ARTICLE-23 and ARTICLE-24

- Available to citizens/non-citizens Not only against state against private persons
- Prohibition of Traffic in Human Beings and Forced Labour/beggar – Art.23
- Immoral Traffic (Prevention) Act Force in ‘Forced Labour’ includes physical, economic compulsion State can impose compulsory service/without pay but not discrimination on Religion, Race, Caste or Class
- Prohibition of Employment of Children in Factories, etc. – Art. 24
- It prohibits the employment of children below the age of 14 years in any factory, mine or other hazardous activities. But it does not prohibit their employment in any harmless innocent work.
- Commission of Protection of Child Rights Act- 2006-Government banned employment of children in domestic servants/Dhaba's...

RIGHT TO FREEDOM OF RELIGION-ARTICLE 25-28

- **Article 25:** Freedom of conscience and free profession, practice and propagation of religion
- No forcible conversions allowed
 - Available to both citizens and non-citizens
- Covers both rituals and practices
- It guarantees the rights of individuals
- State can regulate these religious institutions
- State can provide for social welfare and reform

Article 26: FREEDOM TO MANAGE RELIGIOUS AFFAIRS

- To establish institutions
- To manage its religious affairs
- To own property
- To administer such property
- It guarantees the rights of religious denominations
- These are not subject to other provisions relating to Fundamental Rights
- **Religious denomination**
- Group of people with a common belief.
- Common organization.
- Distinctive name .

Article 27: FREEDOM OF TAXATION FOR PROMOTION OF A RELIGION

- It prohibits levy of a tax.

Article 28: FREEDOM FROM ATTENDING RELIGIOUS INSTRUCTION

- Institution wholly set up by the use of state funds: prohibited
- Institution administered by state but established by a trust: allowed
- Institutions recognized by a state: voluntary basis
- Institution receiving aid from the state: voluntary basis

CULTURE AND EDUCATIONAL RIGHTS-ARTICLE- 29&30

Article 29: the right to conserve distinct language, script or culture of its own

- No discrimination can be made on the basis of language in educational institutions
- This is applicable not just to minorities
- It provides protection to both religious and linguistic minorities

Article 30: To administer educational institutions

- Applicable to both religious and linguistic minorities
- Here, protection is confined only to minorities

RIGHT TO CONSTITUTIONAL REMEDIES- ART-32

- President can suspend the enforcement of Fundamental rights during a National Emergency (Article 352)
- Article 32 can be invoked in only those cases where there is a violation of fundamental rights
- **Writs**
- Before 1950, the only High court of Bombay, Madras and Calcutta could issue writs.
- Parliament can empower any other court to issue directions, orders and writs of all kinds
- **The five types of writs are:**
- Habeas Corpus.
- Mandamus.
- Prohibition.
- Certiorari.
- Quo-Warranto.

MARTIAL LAW AND FUNDAMENTAL RIGHTS- ARTICLE-33

- Article 33 provides for the restrictions on FRs while martial law is in force in any area within the territory of India
- Parliament is authorized to indemnify any government servant for restoration of law and order whilst martial law is in force even if those actions were violative of Fundamental Rights.
- The concept of Martial law has been borrowed from the British.
- Despite its mention, the term ‘martial law’ has not been defined in the constitution
- There are no grounds mentioned for the imposition of Martial law
- During the operation of martial law, the military authorities are vested with abnormal powers to take all necessary steps.
- However, the Supreme Court held Habeas Corpus is not suspended when martial law is in force

ARTICLE 34 & 35-EFFECTING CERTAIN FUNDAMENTAL RIGHTS

- The Parliament shall have the rights and the State legislature shall not have the right to make laws in the following provisions:
- Prescribing residence as a condition for certain employments or appointments in a union territory or local authority or other authority
- Empowers courts other than Supreme Court and High courts to issue directions, orders and writs of all kinds
- Restricting or abrogating the application of fundamental rights to members of armed forces, police forces etc.
- Indemnifying any government or any other person for any act done during the operation of martial law in any area
- Punishment for acts involving untouchability.
- Traffic in human beings and forced labour.

EXCEPTIONS TO FUNDAMENTAL RIGHTS

Article 31A: Saving of laws providing for the acquisition of estates etc.

- It saves five categories of laws from being challenged and invalidated on the ground of contravention of Article 14 and Article 19
 - 1.Acquisition of states and related rights by the state.
 - 2.Taking over the management of properties by the state.
 - 3.Amalgamation of corporations
 - 4.Extinguishment or modification of rights of directors or shareholders of corporations and
 - 5.Extinguishment or modification of mining leases.

Article 31B: Validation of certain acts and regulations

- It saves the acts and regulations included in the 9th schedule from being challenged and invalidated on the ground of contravention of any of the fundamental rights
- SC in one of its judgments ruled that there could not be any blanket immunity. Laws enacted after Keshav Nanda Bharati judgment can be challenged in court if they violate Fundamental Rights guaranteed by 14, 15, 19 and 21

Article 31C: Saving of laws giving effect to certain Directive Principles

- It contains the following two provisions:
- No law shall be deemed void if it seeks to give effect Article 39 (b) or 39 (c) even if it violates Article 14 or Article 19
- Barring of courts to question such laws made so that it does not give effect to such a policy. (This provision was deemed unconstitutional by the court in the Keshav Nanda Bharati judgment)

CRITICISM
OF
FUNDAME
NTAL
RIGHTS

Excessive limitation

No and social-economic rights

No clarity

No permanency

Suspension during emergency

Expensive remedy

Preventive detention

No consistent philosophy

SIGNIFICANCE OF FUNDAMENTAL RIGHTS

- . They are the foundation of the country's democratic system.
- . They are a powerful bulwark of individual liberty.
- . They help to establish the rule of law in the country
- . They defend the rights of minorities and the weaker sections of society
- . They contribute to the Indian State's secular fabric
- . They check the absoluteness of the government's authority
- . They lay the groundwork for social equality and social justice
- . They protect people's dignity and respect
- . It provides the judiciary with clear criteria for regulating relations between citizens and the government.

IMPORTANT JUDGMENTS ON FUNDAMENTAL RIGHTS

❑ **The Secretary, Ministry of Defence Vs Babita Punia and Others**

Upholds the Constitutional commitment to the equality and dignity of women in all spheres.

❑ **Union of India and Others Vs Lt. Cmdr. Annie Nagaraja and Others**

Priya Khurana Vs Union of India

The Court held that the public interest in the maintenance of the Armed Forces have to be treated equally in balancing the restrictions of Fundamental Rights of the officers in the Armed Forces.

Accordingly, Article 33 which imposes restrictions on Fundamental Right's guaranteed in Part-III in application to the members of Armed Forces is overridden in these cases in the realm of gender equality.

❑ **State of Jharkhand and Others Vs Brahmaputra Metalics Limited, Ranchi**

Denial of legitimate exception is an infringement to Article 14.

❑ **Siddaraju Vs State of Karnataka**

The Supreme Court held that the people with disabilities Persons with Disability Act,1995 are capable of discharging full functions to their post, reservations in promotion is not forbidden under 16(i).

Accordingly the Union was also directed to reserve promotions up to 3% for people with disabilities.

❑ **Anuradha Bhasin Vs Union of India**

Writ petition was filed challenging order under Section 144 of Code of Criminal Procedure was implemented by District Magistrate which restricted unlawful gathering and internet in Jammu and Kashmir-after Article 370 was revoked.

The Court held that Right to Internet is one of the integral parts of Article 19 (1) (a).It also acknowledged the internet being the medium of terrorism-which could not be done unless necessary. So is the Section 144 to be imposed only on drastic situations.

❑ **Arnab Ranjan Goswami Vs Union of India**

In this case the petitioner moved to Supreme Court under Article 32 for the protection of Journalists Fundamental Rights to the freedom of speech and expression under Article 19(1)(a).

The Supreme Court held the journalists freedom lies at the core of speech and expression protected by Article 19 (1) (a) but its not absolute and is answerable to the legal regime as per Article 19(2).

It was held the Journalist under Article 19(1)(a) is higher than the right of the citizen to speak and express.

❑ **Prithivi Raj Chouhan Vs Union of India**

The three Judge bench decided the constitutional validity of Section 18A of the Schedule Caste and Schedule Tribes Amendment Act 2018.

Anticipatory bail is neither a statutory Right nor Fundamental Rights under Article 21

QUIZ

1. Which among the following Fundamental Rights is/are available to non-citizen?

- i) Freedom of speech
- ii) Protection against self incrimination
- iii) Freedom of conscience
- iv) Non discrimination the matters of employment

A. i), ii) and iii) only

B. i) and iii) only

C. ii) only

D. ii) iii) and iv) only

2. Consider the following statement in view of Article 20 of the Constitution-

- i) Give his signature or thumb impression for identification
- ii) Give oral testimony either in or out of the court.

Which of the above statement is/are correct?

- A. Only i)
- B. Only ii)
- C. Both i) and ii)
- D. Neither i) nor ii)

3. Consider the following statement-

i) The writ of Mandamus is available not only against judicial authorities but also against administrative authorities.

ii) The writ of prohibition is issued only against judicial and quasi – judicial authorities.

Which of the above statement is /are correct-

- A. Only i)
- B. Only ii)
- C. Both i) and ii)
- D. Neither i) nor ii)



4. Which of the following statement is/are correct-

i) There is no provision in the Constitution of India for reservations in the matters of promotion in favour of the Schedule caste and Schedule tribe

ii) As per the provision of the Constitution of India, for getting reservation for the appointment and post under the State, a class must be backward and adequately represented in the services under the State.

A. Only i)

B. Only ii)

C. Both i) and ii)

D. Neither i) nor ii)




5. Which of the following pairs is not correctly matched?

A. Freedom of speech and expression—include the freedom of press

B. Freedom of conscience—include the right to wear and carry kirpan by Sikhs

C. Right to personal liberty—include the right to carry any trade or business

D. Right to Equality –include the principle of natural justice



6. As far as the Armed Forces are concerned the Fundamental Rights granted under Articles 14 and 19 are-

A. Not available to All.

B. Available to Armed Forces but not to other forces

C. Available at the discretion of the Chief of Army Staff.

D. Available only according to the laws made by the Parliament

7. Which of the following are envisaged by the Right against Exploitation:

i) Prohibition of traffic in human beings

ii) Prohibition of untouchability

iii) Protection of the interest of minorities


iv) Prohibition of employment of children in factories and mines

A. ii) & iv)

B. i) & iv)

C. iii) & iv)

D. i) & ii)




8. Under the 'Double Jeopardy' implied in Article 20 of the Constitution, a person-

A. Convicted by the Court of law cannot be punished under Departmental proceedings for the same offence.

B. Punished departmentally cannot be prosecuted in the Court of law for the same offence.

C. Shall not be prosecuted and punished for the same offence more than once.

D. Cannot be subjected to proceedings in Civil Courts for disobedience of an injunction along with criminal proceedings.



9. Which of the following rights are not explicitly mentioned in Fundamental Rights but has been upheld in several pronouncements of the Supreme Court-

- A. Right to Equality before Law.
- B. Right to non-discrimination in public employment
- C. Right to form association and unions
- D. Right to freedom of press.

10. Which of the following are true with regard to the Fundamental Rights of the minorities in educational matters-

i) The minorities have the right to administer the educational institutions.

ii) The minorities have the right to establish and administer educational institutions.

iii) The right is absolute and not subject to any restriction.

iv) Reasonable restrictions may be imposed to promote efficiency and prevent maladministration.

A. i) ii) & iii)

C. ii) iii) & iv)

B. ii) & iv)

D. i) & iii)




11. Which are the following pairs not correctly matched-

A. Article-15 - Special provisions for socially and economically backward classes.

B. Article 22 - Safeguard under Preventive Detention


C. Article 20 - Immunity from double punishment

D. Article 16 - Discrimination in favour of women in services under the state.



12. Under the Indian Constitution which one of the following is not specific ground on which the State can place restrictions on freedom of religion –

- A. Public Order
- B. Morality
- C. Social Justice
- D. Health



13. The scope of ‘life and personal liberty as envisaged in Article 21, has expanded considerably over the years one of the following can still not be the subject of this protection-

A. Right to good health

B. Right of bonded labour to the rehabilitation after releases.

C. The Right under a settlement to claim bonus.

D. Right to livelihood by means of which are not illegal




14. Which of the following is not included in Article-19

A. Right to reside or settle in any part of India.

B. Right to minorities to establish and administer educational institutions

C. Right to form associations and unions.

D. Right to assemble peacefully without arms



15. Under Article 22 of the Constitution of India with exception of certain provisions stated there in, what is the maximum period for detention of person under preventative detention?

- A. 2 months
- B. 3 months
- C. 4 months
- D. 6 months

THANK YOU