

LL.B. (3YRS.) IST SEMESTER
CONSTITUTIONAL LAW OF INDIA-II

UNIT-I

UNIT-I:

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| <ul style="list-style-type: none">✓ Preamble and its significance✓ Definition of state for enforcement of fundamental rights✓ Justifiability of fundamental rights- Doctrine of eclipse, severability and waiver | <ul style="list-style-type: none">✓ Distinction between pre-constitutional law and post constitutional law.✓ Right to equality: doctrine of reasonable classification and principle of absence of arbitrariness.✓ Legitimate expectation. |
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Question 1:- Write down the preamble of the constitution of India. Whether is the preamble of the Constitution amendable? Explain with the help of relevant case laws?

Answer. Preamble is a sort of introduction to the statute and it helps in understanding the legislative intent and policy. It lays down the main objectives which the legislation intends to achieve. Preamble of the Constitution contains ideals which the Constitution seeks to achieve. It does not grant any power but it gives direction and purpose to the Constitution.

In *Re Berubari Union case (1960)* the Supreme Court held that the Preamble is not the part of the Constitution. Later in *Keshavanand Bharti v. State of Kerala(1973)* the Supreme Court held that the Preamble is the part of the Constitution. The court held that the Preamble of the Constitution is of extreme importance and the Constitution should be read and interpreted in the light of the Preamble. The court further held that the Preamble can be amended without altering the basic structure of the Constitution. In *Sajan Singh v. State of Rajasthan(1965)* Supreme Court held that Preamble is the sum and substance of the features of the Constitution.

In *S.R. Bommai v. Union of India(1994)* Supreme Court reiterated the view held in Keshavananda Bharti case and held that Preamble is an integral part of the Constitution. In *K.K. Bhaskaran v. State(2011)* Supreme Court held that the Constitution should be interpreted in such manner so as to secure the goal of social, economic and political justice. In *Nandini Sundar v. State of Chhattisgarh(2011)* Supreme Court said that promise to provide social, economic and political justice given in the Preamble cannot be forgotten or neglected.

(a) Sovereign : The word 'sovereign' is indicative of the fact that India is not subject to any foreign power from internal or external perspective and the State is free to legislate on any subject in conformity with constitutional limitations [*Charan Lal Sahu v. Union of India, AIR 1990 SC 1480*]. The sovereignty lies in the people of India.

(b) Democratic: The term 'Democratic' indicates that the source of power of the government vests in its people. The democratic government is government of the people for the people and by the people. The elected representatives rule the country and they are responsible to the people. Supreme Court has held that 'democracy' is the basic structure of the Constitution. [*Indian Medical Association v. Union of India, AIR 2011 SC 2365*]

(c) Secular : The word 'secular' has been added by 42nd Constitutional Amendment. This concept was already contained in the expression liberty of thought, expression, belief, faith and worship and has been clarified by the above amendment. The term 'secular' means that State does not recognize any religion and is neutral in the matters of religion. It treats all religions equally. Supreme Court in *S.R. Bommai v. Union of India (1994)* held that the secularism is the basic structure of the Constitution. In *Aruna Roy v. Union of India (2003)* the Supreme Court held that the secularism has a positive meaning and it means to develop understanding and respect towards different religion.

(id) Socialist : Constitution does not give any definite definition of word 'socialist', 'socialism' or 'economic justice'. The Supreme Court in *Excel Wear v. Union of India(1979)* held that the courts would give more weightage to the nationalization and State ownership but the principles of socialism should not be interpreted and implemented to the extent it totally ignores the interest of private ownership. Further, in *D.S. Nakara v. Union of India (1983)* the Supreme Court held that the basic purpose of socialism is to provide decent standard of life and social security to people. The purpose of establishing a 'welfare state' in India was always in the mind of Constitution makers. However, there is no mention of this term in the Preamble of the Constitution but it is reflected in the inherent spirit of the Constitution.

(v) Republic: The word 'republic' means that the head of the nation is an elected representative. The tradition of the hereditary rule came to an end by incorporation of this concept. The post of President of India is not hereditary. President is elected for a period of 5 years.

Amendment of the Preamble : The question whether Preamble can be amended came up for consideration for the first time before Supreme Court in *Keshvanand Bharti v. State of Kerala(1973)*. The court in this case laid down two fundamental propositions with respect to Preamble;

- (1) Preamble is the part of the Constitution and;
- (2) Preamble can be amended subject to basic structure of the Constitution.

As regards first proposition the court overruled its previous decision in *Re Berubari Union case* which laid down that Preamble is not a part of the Constitution. With respect to the second proposition the court held that the words and expressions used in the Preamble are not ambiguous and amending power of the Parliament cannot be interpreted to confer the power to take away basic and fundamental policy of the Preamble. Hence, the Preamble can be amended but in doing so the basic structure of the Constitution should not be disturbed. 42nd Constitutional Amendment (1976): The amendment inserted three words i.e. Secular, Socialist and Integrity.

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Question 2:- Explain the concept of 'State'. What is the scope of 'Other Authority' under Article 12 of the constitution of India? (2012, 2016, 2018, 2019)

Answer:- Most of the Fundamental Rights, contained in Part III of the Constitution, are guaranteed against the State. Therefore, it becomes absolutely necessary to understand the scope and import of the term 'State'. The actions of any of the bodies comprised within the term 'State' as defined in Article 12 can be challenged before the court for violation of fundamental right. Article 12 defines the term 'State' for the purpose of Part III of the Constitution. According to Article 12 the term State includes the following:

1. The Government and the Parliament of India i.e. the executive and the legislative of the union.
2. The Government and the Legislature of each State i.e. the executive and the legislative of the State.
3. All local and other authorities within the territory of India.
4. All local and other authorities under the control of the government of India.

In reference to Article 12 the word 'authority means power to make laws, orders, regulation, by-laws etc.

Local Authority: The term 'Local Authority' is defined in **Section 3(31) of the General Clauses Act**. It refers to authorities Municipalities, District boards, Village councils (Gram Panchayats), Improvement Trusts, Mining Settlement etc. For an authority to be characterized as 'local authority' it must have a separate legal existence. It must not be a mere government agency but must be legally an independent entity. It must function in a defined area and must ordinarily be elected by inhabitants of the area.

Other Authority: It is the most significant expression used in Article 12. The expression has not been defined in the Constitution and therefore, it has attracted a lot of judicial attention. It is quite obvious that the wider the meaning attributed to the term 'other authorities' the wider will be the scope of the definition of the term "State and more and more authorities will be susceptible to trappings of fundamental rights. Supreme Court has developed the concept of 'instrumentality of State'. Anybody which is regarded as instrumentality of State falls under Article 12.

The expression 'other authorities' has been interpreted differently by courts. In *University of Madras v. Santa Bai (1954)* **Madras High Court** held that 'other authorities could only be interpreted by using the principle of *ejusdem generis*. Therefore, it could only mean authorities exercising governmental or sovereign functions. Supreme Court in *Electricity Board, Rajasthan v. Mohan Lal, 1967 SC* rejected interpretation given in Santa Bai's case and held that the expression 'other authorities' is wide enough to include all authorities created by the Constitution or state on whom the power is conferred by law. It is not necessary that the authority must be engaged in performing governmental or sovereign function. Therefore it includes Rajasthan Electricity Board.

In *Sukhdev Singh v. Bhagatram, 1975 SC* Supreme Court held that if the functions of the Corporations are of public importance and closely related to government functions then it should be treated as agency or instrumentality of government i.e. 'State within the meaning of Part III. The court also observed that even a 'non-statutory body can be regarded as State. In this case the Supreme Court held three statutory bodies viz. Life Insurance Corporation (LIC), Oil and Natural Gas Corporation (ONGC) and Finance Corporation as State'.

In *Ramana Dayaram Shetty v. The International Airport Authority of India, 1979 SC*, Supreme Court followed the broader test laid down in Sukhdev Singh's case. The court developed a general proposition that an instrumentality or 'agency' of the State can be regarded as "other authority within the meaning of Article 12. The court laid down following test to determine whether a body is an agency or instrumentality of the State-

1. Financial resources of the State is the chief funding source of the body.
2. Existence of deep and pervasive State control. State control
3. Functional character of the body is governmental in essence.
4. Department of government is transferred to the corporation.
5. Whether the Corporation enjoys monopoly status which is State conferred or State protected.

The court held that these tests are not conclusive. They are illustrative and should be used with great, Care and caution.

In *Som Prakash v. Union of India, 1981 SC* Supreme Court held that the true test for the purpose whether a body is an authority' under Article 12 depends on its functionality' and not whether it is statutory or non- statutory. In this case Bharat Petroleum Corporation is a State under Article 12.

In *Ajay Hasia v. Khalid Mujib, 1981 SC*, Supreme Court held that a Society registered under the Societies Registration Act, 1898, is an agency or instrumentality of the State and hence a 'State within the meaning of Article 12. The court observed that the test is not how a juristic person is created but why it has been brought into existence.

Once a body becomes 'authority for the purpose of Article 12 it becomes amenable to fundamental rights i.e. its actions can be challenged with reference to fundamental rights and also subject to the writ jurisdiction of Supreme Court and High Courts.

CONSTITUTIONAL LAW OF INDIA-II

UNIT-I

Question 3:- write a short note on the following:-

- a) **Doctrine of eclipse. (2012, 2015, 2019)**
- b) **Doctrine of severability. (2012, 2016)**
- a) **DOCTRINE OF ECLIPSE:** The power to check constitutionality of any law rest with Supreme Court or the High Court but what would be the effect of any law which is held unconstitutional due to it being declared inconsistent with the fundamental rights. The answer to this question lies in the doctrine of eclipse.

The doctrine of eclipse is based on the principle that a law which violates fundamental right it is not nullity or void-ab-initio but becomes only unenforceable that is remains in a moribund condition. It is overshadowed by the fundamental rights and remains dormant but it is not dead. Such laws are not wiped out entirely from the statute book.

They exists for all past transactions and for the enforcement of rights acquired and disabilities incurred before the present constitution came into force and for determination of any right of person who have not been given fundamental rights by the constitution that is non citizens. (*Bikhaji Narayan v. State of MP, 1955, SC*)

Bikhaji Narayan v. State of MP is an excellent example of the doctrine of eclipse.

In this case it was also held that such laws become enforceable against citizens as well as against non citizens after the constitutional impediments was removed. This law was merely eclipsed for the time being by the fundamental rights. As soon as the eclipsed is removed the law begin to operate from the date of such removal.

DOES THE DOCTRINE OF ECLIPSE APPLIES TO THE POST CONSTITUTIONAL LAWS: In *Deep Chand v. State of UP 1959* the Supreme Court of India held that a post constitutional law made under Article 13 clause 2 which contravenes a fundamental right is nullity from its Inception and still born law. It is void-ab-initio. The doctrine of eclipse does not apply to the post constitutional law and therefore a subsequent Constitutional Amendment cannot revive them. But this view of Supreme Court was modified in *State of Gujarat v. Ambica Mills, 1974* and it was held that a post constitutional law which is inconsistent with the fundamental right is not nullity or non-existent it in all cases and for all purposes.

- b) **DOCTRINE OF SEVERABILITY:** Where a part of a statute is declared unconstitutional a question arises whether the whole of the institute is to be declared unconstitutional or only that part which it is unconstitutional should be declared as such to resolve this problem the Supreme Court has devised the doctrine of severability the Doctrine means that it if an offending provision can be separated from that it which is unconstitutional then only that part which is offending is to be declared void and not the entire statute. This notion also reflects from the words used in Article 13 “to the extent of such inconsistency”.

In *AK Gopalan v. State of Madras 1950 SC* while declaring section 14 of Preventive Detention Act 1950 as Ultra-vires the court held that the omission of the section will not change the nature for the structure of the subject of the legislation. Therefore the decision that section 14 is ultra-vires does not affect the validity of the rest of the act.

Similarly in *State of Bombay v. Balsara*, a case under Bombay Prohibition Act 1949 it was observed that the provision which have been declared as void do not affect the entire legislation, therefore there is no necessity of declaring the whole law as invalid.

But if the valid portion is so closely mixed with the invalid portion that it cannot be separated without leaving an incomplete law then the court will hold the entire Law as void. The primary test is whether water remains is so inextricably mixed with the path declared invalid that what remains cannot survive independently. (*Romesh Thappar v. State of Madras*)

OTHER CASES

- *RMDC v. Union of India, 1957* (sec. 2d of prize competition Act)
- *Kihota Hollohan v. Zachithu* (para 7 of Schedule 10 was held severable.)

UNIT-I

Question 4:- write a short note on the following:-

- a) **Doctrine of waiver. (2012, 2018)**
- b) **Doctrine of Legitimate Expectation.**
- a) **DOCTRINE OF WAIVER:**

As part III of Indian constitution gives certain rights and the nature of the rights are generally such that they depend upon the will of the person to whom they are granted. Therefore can a citizen to whom the fundamental rights are given waive his fundamental rights?

This question was directly arose in *Bheshar Nath v. CIT, 1959, SC* the majority expressed the view that the doctrine of waiver as formulated by some American judges interpreting the American constitution cannot be applied in interpreting the Indian Constitution. The court held that it is not open to any citizen to waive any of the fundamental rights conferred by the Indian Constitution. These rights have been put in constitution not merely for the benefit of the individual but as the matter of the public policy for the benefit of general public. It is an obligation imposed upon the State by the constitution. No person can relieve the State of this obligation.

Case:- *Behram Khurshed Pesikaka v. The State of Bombay (1954):-* The appellant, who was the Regional Transport Officer in Bombay, was driving towards a bus stand when his vehicle knocked down three people. The appellant was arrested by the police. He was then taken to the hospital to check whether he had been consuming liquor. Although his breath smelled like alcohol, his speech was coherent, he could walk in a straight line, and his pupils were semi-dilated and reacting to light. The doctor concluded that he wasn't under the influence of alcohol but had consumed it in some form or another. The appellant was tried before the Presidency Magistrate for causing grievous harm to three individuals by his rash and negligent acts (Section 338 of the Indian Penal Code) and under Section 66(b) of the Bombay Prohibition Act. During the trial, he stated that he had not consumed liquor but had taken the medicine prescribed to him, which contained a small percentage of alcohol. The Presidency Magistrate acquitted him of both offences. The respondents filed two appeals before the High Court (HC) against both of these cases. The HC confirmed the acquittal under Section 338 but reversed the order under Section 66(b). The same was appealed before the Supreme Court.

Issues involved:- The offence under Section 66(b) with which the appellant was charged was alleged to have occurred four days after the judgment in the case *State of Bombay v. F.N. Balsara (1951)*. The *Balsara* case challenged the constitutionality of certain provisions of the Bombay Prohibition Act. This Act came into force in 1949 and was found to impose unreasonable restrictions on the rights guaranteed under Article 19(1)(f) of the Constitution. The court, therefore, declared certain provisions of the Act invalid. While delivering the judgment in the case of *Behram Khurshed*, neither the Presidency Magistrate nor the High Court bench mentioned the *Balsara* judgment. The Supreme Court, on hearing the appeal in this case, made its decision after accepting the position of the court in the *Balsara* case.

Judgment and observations by the court:- It was in this case that the Supreme Court held that the concept of doctrine of waiver that was borrowed from the American Constitution could not be replicated blindly in the Indian Constitution, i.e., without proper thought. The bench quashed the conviction of the appellant. The court believed that the fundamental rights mentioned in Part III of the Constitution are an essential part of the Constitution since India is a sovereign democratic republic. It was also observed by the court that these rights were based on fundamental principles specified in the Preamble. Further, apart from guaranteeing privileges and rights to an individual, since these rights played an important role in public policy, the Court reasoned that they could not be waived. Thus, the Supreme Court ruled that the doctrine of waiver did not apply to all those laws that have been established on the basis of constitutional policy.

b) DOCTRINE OF LEGITIMATE EXPECTATION:-

Legitimate expectation applies the principle of fairness and reasonableness to a situation where a person has an expectation or interest in a public body or private parties retaining a long-standing practice for keeping a promise. For example a person has a reasonable legitimate expectation of privacy in his house. The doctrine of legitimate expectation has been judicially recognised by the Indian Supreme Court and this recognition has paved the way for the development of borders and more flexible doctrine of fairness. Article 14 incorporates this doctrine.

In *Union of India v. Hindustan Development Corporation, 1993, SC* the court observed that legitimate expectation is not the same thing as anticipation. A mere disappointment would not give rise to legal consequences. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law, custom or established procedure followed in regular and natural consequences. The legitimate expectation rule cannot be allowed to override on public interest or change in public policy.

In *Madras City wine merchants Association v. State of Tamil Nadu, 1994, SC* the rule relating to removal of liquor license were statutorily altered by repealing existing rules. It was held that the rapine being result of change in policy, the principle of legitimate expectation cannot be invoked.

UNIT-I

Question 5:- “Article 14 permits classification but prohibits class legislation.” Explain. (2015, 2019)

Answer:- Article 14 of Indian Constitution provides equal protection of law. But it does not mean that all law must be general in character. It does not mean that same law should apply to all persons. It does not mean that every law must have Universal application because all persons are not by nature attainment it or circumstances in a same position. The varying needs of difference classes of person often require separate treatment. From the very nature of the society there should be different laws in different places and legislature controls the policy and enacts the law in the best interest of safety and security of the State. In fact identical treatment in unequal circumstances would amount to inequality. So a reasonable classification is not only permitted but is necessary if society is to progress. (*Jagjit Singh v. State, 1954*)

Then what Article 14 forbids is class legislation but it does not forbid classification. However the classification must not be arbitrary artificial or evasive. It must fulfil the following two conditions:-

1. The classification must be based on some intelligible differentia which distinguishes the two groups.
2. The differentia must have some rational relation to the object sought to be achieved by the law.

So it is necessary that there must be a substantial basis for making the classification and there should be a Nexus between the basis of the classification and the object of the statute under consideration.

In *RK Dalmia v. Justice Tendulkar, 1958* it was laid down that classification may be based on different groups as geographical occupational social logical and economical. Classification need not to be mathematically perfect.

In *K. A. Abbas v. Union of India, 1973, SC* the Supreme Court held that classification of films into two categories of ‘U’ films and ‘A’ films is a reasonable classification.

In *D. S. Nakara v. Union of India, 1983, SC* the Supreme Court struck down rule 34 of Central service rules 1972 as unconstitutional on the ground that classification made by it between pensioner retiring before a particular date and after such date is not reasonable.

In *Mithu Singh v. State of Punjab, 1983, SC* the court struck down section 303 of IPC as unconstitutional on the ground that the classification between person who commits murder whilst under the sentence of imprisonment and those who commits murder whilst they were not under the imprisonment for life, for the purpose of making the sentence of death mandatory in the case of former class and optional in the latter class, was not based on rational principles.

In *Mohan K. Singhania v. Union of India*, the Supreme Court held that each of the various civil services namely IAS, IFS, IPS, group A services and group B services are the separate and distinct group, it is formed on the basis of intelligible differentia. So such classification is valid.

BASIS OF CLASSIFICATION:

GEOGRAPHICAL BASIS: In *Clearance Pais v. Union of India, 2001* the Supreme Court held that geographical consideration may form a valid basis of classification for the purpose of legislation in appropriate cases.

MONOPOLY BY STATE IN ITS FAVOUR: In *Sagir Ahmad v. State of UP, 1954* it was held that a Monopoly created by State in its favour was held not to be violative of Article 14.

ARTICLE 14 AND TAXATION LAW: In *Indian Express newspaper Limited v. Union of India, 1985* it was held that the classification of newspaper into small medium and big newspaper on the basis of their circulation for the purpose of Levying custom duty on newspaper is not violative of Article 14.

SPECIAL COURTS AND SPECIAL PROCEDURES: In *State of West Bengal v. Anwar Ali Sarkar, 1953, SC* the Bengal law permitting setting up of special courts. These courts want to follow a procedure less advantageous to the accused in defending himself then the procedure followed by the ordinary criminal courts. Such Act was held invalid as it made and reasonable classification.

A SINGLE INDIVIDUAL MAY CONSTITUTE A CLASS: In *Chiranjit Lal v. Union of India, 1951* the Supreme Court held that law may be constitutional even though it applies to a single individual only on the account of some special circumstances or reason applicable to him alone and not applicable to others.

This case was related to constitutionality of ‘*Sholapur Spinning and Waving company Emergency provision Act.*’

UNIT-I

Question 6:- “Equality and arbitrariness are sworn Enemies; one belongs to the rule of republic while the other to the whim and caprice of absolute monarch.” Explain.

Answer:- As a traditional view Article 14 prohibits discrimination and not classification provided that the classification fulfill the two tests-

1. That it is based on intelligible differentia.
2. The differentia has the rational Nexus with the object which the law seeks to achieve.

This was just a negative aspect of Article 14. The content and the reach of Article 14 cannot be determined on the basis of doctrine of classification. Therefore there was need of new formula to establish equality as provided by Article 14.

A very fascinating aspect of Article 14 which the court of India has developed from time to time is that Article 14 embodies guarantee against arbitrariness on the part of Administration.

The Supreme Court has warned against overemphasis on classification. The doctrine of classification is only a subsidiary rule evolved by the courts to give practical content to the doctrine of equality. The over emphasis on classification would inevitably the over emphasis on classification would inevitably result in substitution of doctrine of classification for doctrine of equality.

The Supreme Court of India in *E.P. Royappa v. State of Tamil Nadu, 1974*, propounded a new concept of equality in the following words, ***“Equality is a dynamic concept with many aspects and dimensions and it cannot be cribbed, cabined and confined within the traditional and doctrine limits. From the positive point of law equality is antithesis to arbitrariness. In fact equality and arbitrariness are sworn Enemies; one belong to the rule of republic while the other to the whim and caprice of absolute monarch.”***

Thus where an act is arbitrary it is implicit in implicit that it is an equal and therefore violative of Article 14. In *Maneka Gandhi v. Union of India, 1978, SC Justice PN Bhagwati* again affirmed this concept and held that Article 14 strikes at arbitrariness in State action and ensure fairness and equality of treatment.

In *RD Shetty v. Airport Authority of India* case the Supreme Court reaffirmed the above decision of *Maneka Gandhi* case.

In *Air India v. Nargis Mirza* The Court struck down the Air India regulation on the retirement and pregnancy bar the service of air hostess as unconstitutional on the ground that the condition laid down therein were entirely unreasonable and arbitrary.

In *Pradeep Jain v. Union of India, 1984, SC* the Supreme Court held that the whole sale reservation of the seats in MBBS, BDS courses made by the State Government of Karnataka Uttar Pradesh and Union Territory of Delhi on and the basis of domicile was unconstitutional and violative of Article 14.

In *Presidential Reference In 2G Case 2012* that is *Centre for Public Interest Litigation v. Union of India 2G case, 2010* it was held that alienation natural resources is a policy decision. When such policy decision is not baked by a social or welfare purpose and Limited natural resources are alienated for commercial pursuit of profit maximizing private entrepreneur adoption of mode other than those that are competitive may be arbitrary and may face the Wrath of Article 14.

The bench said that ***“The State action has to be fair reasonable, not discriminatory, transparent, unbiased without favouritism or Nepotism in pursuit of promotion of healthy competition and equitable treatment and these principles are inherent in the fundamental conception of Article 14.”***