

CHAPTER III

ENRICHMENT OF FUNDAMENTAL RIGHTS THROUGH JUDICIAL PROCESS

The *Magna Carta* is the first written document relating to the rights of citizens. In 1689 the *Bill of Rights* was written consolidating all important rights and liberties of the English people. Part III, namely articles 12 to 35 of the Indian Constitution pertaining to fundamental rights has been described as the *Magna Carta* of India.¹ The influence of American law on Indian Jurisprudence was significant after the adoption of its constitution. Many areas of Indian law, since 1950, have been inspired by United States Supreme Court decisions. There are several examples of the close intellectual connection between American and Indian Supreme Courts decisions.² The fundamental rights such as right to life, liberty, freedom of speech, freedom of faith should be regarded as inviolable under all conditions and that the shifting majority in the Legislatures of the country should not have a free hand in interfering with these fundamental rights.³ The march of Justice and Liberty in particular from *A.K.Gopalan*⁴ to *Maneka Gandhi*⁵ coincides with several events, and developments in the social, political and economic fields and the great dicta in *Maneka*

¹ V. G. Ramachandran, *Fundamental Rights and Constitutional Remedies*, Vol 1 1964, at 1.

² See for instance *N. M. Thomas*, AIR 1976 SC 490, referring to *Griffin* (1955) 351 US 12 (indigence obstructing access to justice); *Hussainara Khatoon (no2) v. State of Bihar*, AIR 1979 SC 1369, referring to *Gideon* (1963) 372 US 335; *Bennet Coleman & Co. v. Union of India*, AIR 1973 SC 106 citing *Douglas* (1963) 372 US 353 (affirmative duty to equalize un-equals)

³ *A.K.Gopalan v. State of Madras*, AIR 1950 SC 27.

⁴ *ibid.*,

⁵ *Maneka Gandhi v Union of India*, (1978) 1 SCC 248.

Gandhi's ⁶ case that all state action will have to be fair, just and reasonable, in order to be constitutional, and that a procedure which is arbitrary, oppressive or fanciful is no procedure at all.

The Judiciary

Fundamental rights are expressly guaranteed against the State. Therefore, Article 12 of the constitution of India defines the term 'the State'. A non-government company i.e. the United India Insurance Company Limited, which was given monopoly rights on general insurance business under the General Insurance Business (Nationalisation) Act, 1972 was held to be 'the State' under Article 12 because of the trappings of the State it had.⁷ In *Mysore Papers Mills Ltd. v. Mysore Papers Mills Officers' Association*⁸ it was held the government Company falls within the definition of 'the State'. The Government held 97% of its share and its directors were either nominated by the Government or it concurred in their election. Further, the government had control over the company and it was an instrumentality of 'the State'. Though the 'judiciary' is an organ of the state like the executive and legislature, is not specifically mentioned in Article 12. Inclusion of the 'judiciary' in the concept of 'the state' depends on the distinction between the judicial and non-

⁶ *ibid.*,

⁷ *Biman Krishna Bose v. United India Insurance Co. Ltd.*, (2001) 6 SCC 477.

⁸ (2002) 2 SCC 721.

judicial functions of the courts. In the exercise of non judicial functions, the courts fall within the definition of 'the state'. The exercise of judicial functions is not to the infringement of the fundamental rights and, therefore, the question of bringing the courts within the definition of 'the state' (in that aspect) would not arise. It has been held that when a court, in the exercise of its statutory rule-making powers, make rules which contravene the fundamental rights of citizens, the rule could be held *ultra vires* and appropriate remedy under article 32 or Article 226 could be given.⁹

Classification of Fundamental rights

The Fundamental Rights contained in Part III of the Constitution can be grouped under several sub-heads, viz,

1. Right to Equality (Arts.14-18)
2. Right to Freedom (Arts. 19-22)
3. Right against Exploitation (Arts. 23-24)
4. Right to freedom of religion (Arts.25-28)
5. Cultural and Educational Rights (Arts.29-30)
6. Right to constitutional remedies (Art. 32)

The fundamental rights can be further classified into (i) those available to citizens only e.g. Rights contained in Articles 15, 16, 19 and 29 (2), and (ii) those rights which are available to 'Persons' i.e.

⁹ *Prem Chand Garg v. Excise Commissioner*, AIR 1963 SC 996.

to citizens as well as non-citizens e.g., equality before law and equal protection of laws, see art.14, right to life and personal liberty, see Art. 21 and 22 etc. Fundamental rights contained in Art.14, 15 (1), 16, 18 (1), 19, 20 and 21 etc. and rights contained in Art. 15 (2), 17, 18 (2), 23 (1) and 24 etc can be enforced against private citizens also.

Part III of the Constitution which gives an exhaustive list of fundamental rights, has been improved upon by the Supreme Court by propounding the theory of emanation, following the example of the American Supreme Court.¹⁰ Thus, even though a right is not specifically mentioned in Part III, it may still be regarded as fundamental right, if it can be regarded as an integral part of an enumerated fundamental right. It is pertinent to note that a number of human rights have been recognized as part of fundamental rights by the judiciary in India due to the judicial activism, mostly after 1980. Article 19 (1) (a) of the Constitution guarantees the freedom of expression because the governmental functions must be transparent¹¹ and the three instrumentalities¹² of the State should be prevented from deceiving the people. The interpretation of the language of the Article 19 (1) (a) leads to many

¹⁰ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597.

¹¹ *K. Ravikumar v. Bangalore University*, AIR 2005 Karn. 21

¹² *Executive, Legislature and Judiciary*.

derivative provisions. Justice Mathew in his vivid constitutional and juristic mind in *Keshavanand Bharathi case* ¹³ stated in these significant words that 'fundamental rights themselves have no fixed content; most of them are empty vessels into which each generation must pour its content in the light of its experience. It is relevant in this context to remember that in building up a just social order it is sometimes imperative that the fundamental rights should be subordinated to directive principles'.

Article 19 (1) (a) pertaining to the freedom of speech and expression as observed in *Indian express Newspapers Bombay Ltd. v. Union of India*,¹⁴ also covers the following perceptions:

- (1) It helps and individual to attain self fulfillment
- (2) It assists in discovery of truth
- (3) It strengthens the capacity of an individual in Participating in decision making
- (4) It provides a mechanism by which it would be possible to establish a reasonable balance between stability and social change.

Right to information emerges from Article 19 (1) (a) of the Constitution of India. The fundamental right of free expression and imparting information has been recognised at common law for

¹³ *Keshavanand Bharathi v. State of Kerala*, AIR 1973 SC 1461.

many years.¹⁵ In Europe a Divisional court in a case¹⁶ held that the European Court of Human Rights is prepared to accept the obvious need in limited circumstances for the court to protect in the public interest immunity from production of documents. Article 10 of European Convention for the Protection of Human Rights and Fundamental Freedom establishes a presumptive right to impart information. The Public has a fundamental right to know what the government has been doing in its name.¹⁷

Freedom of expression constitutes one of the essential foundations of society. The Supreme Court of India in *Secretary, Ministry of Information and Broadcasting, Government of India v. Cricket Association of Bengal*,¹⁸ narrowly expanded its view on the provision of Article 19 (1) (a) towards the right to information. It held that the right to freedom of speech and expression also includes the right to receive and impart information. For ensuring the freedom of speech, the right of citizens of this country, it is necessary that the citizens have the complete benefit of plurality of views and a range of

¹⁴ AIR 1986 SC 515.

¹⁵ *Regina v. Shayler*, (2003) 1 AC 247; *Attorney General v. Guardian Newspaper Ltd.*, (1987) 1 WLR 1248; and *Attorney General v. Guardian Newspapers Ltd.*, (1990) 1 AC109.

¹⁶ *R., Director of Public Prosecutions v. Action Youth Court*, (2001) 1 WLR 1828; *Jasper v United Kingdom*, 30 EHRR 441; *Rowe and Davis v. United Kingdom*, (2000) 30 EHRR 1; *Fitt v. United Kingdom*, (2000) 30 EHRR 480.

¹⁷ *Regina v. Shayler*, (2003) 1 AC 247; (2002) UKHL 11; *R. v. Secretary of State for the Home Deptt, Ex P McQuillan*, (1995) 4 All ER 400; *Tinnely & Sons v. United Kingdom*, (1998) 27 EHRR 249.

¹⁸ (1995) 2 SCC 161.

opinions on all public issues. The Apex Court in *S. P. Gupta v. Union of India*,¹⁹ held that right to know is implicit in right to free speech and expression. Disclosure of information regarding functioning of the government must be the rule.

The Supreme Court, in 1975, in *State of Uttar Pradesh v. Raj Narain*,²⁰ observed that the freedom of speech and expression includes right of citizens to know every public act, everything that is done in a public way, by their public functionaries. In the year 1997 the Court ²¹ also held that freedom of speech and expression includes right of the citizens to know about the affairs of government. The freedom of speech and expression, as has been held repeatedly by the Supreme Court is basic to and indivisible from a democratic polity. The restrictions to the said could be only as provided in Article 19 (2). The Supreme Court in *Peoples Union for Civil Liberties v. Union of India* ²² held that true democracy cannot exist unless the citizens have a right to participate in the affairs of the policy of the country. Article 19 of the Constitution gives to every citizen the right to freedom from unwarranted government intrusion. It bestows upon the citizen, the right to be let alone by the State subject to 'reasonable restrictions'. Freedom

¹⁹ (1981) Supp SCC 87.

²⁰ (1974) 4 SCC 428.

²¹ *Dinesh Trivedi, M.P. v. Union of India*, (1997) 4 SCC 306.

of thought is ensconced in the freedom of speech and expression. This enumerated freedom is the constitutional manifestation of the freedom to think as speak as one desire. Privacy is that sphere of the life of an individual into which the Government cannot interfere. It may at times be a pure right i.e. the right literally to be left alone in the confines of one's house, so long as no unlawful activity is carried out. It may also be the right to an unhindered exercise of some or the other constitutional right, so long as the right is exercised in a private or personal arena. It is a protection of the basic inviolable nature of the human personality. Similarly, the freedom to assemble peacefully and without arms, to form associations and unions, to move freely throughout the territory of India and to practice any profession, or to carry out any occupation, trade or business are all manifestations of the right to be alone.

Lord Denning, an admirer of the Supreme Court of India, has said that the Supreme Court of India has upheld the rule of law in the most challenging period of the whole history of India. Lord Denning has said that 'it is the role of the judges in developing the law. Many of the judges of England have said that they do not make law. They only interpret it. This is an illusion which they have fostered.

²² AIR 2003 SC 2363.

But it is a notion which is now being discarded everywhere. Every new decision – on every new situation – is a development of the law. Law does not stand still. It moves continuously. Once this is recognized, then the task of the judge is put on a higher plane. He must consciously seek to mould the law so as to serve the needs of the time. He must not be a mere mechanic, a mere working mason laying brick on brick, without thought to the overall design. He must be an architect – thinking of structure as a whole – building for society a system of law which is strong, durable and just. It is on his work that civilized society itself depends’.

The Supreme Court has held that several unenumerated rights fall within the ambit of Article 21 since personal liberty is of widest amplitude. They can be called the un-enumerated human rights in the form of fundamental rights. They are the right to privacy, an emanation from Art. 19 (1) (d) and 21,²³ right to speedy trial, as a part of right to life and personal liberty under Art.21,²⁴ right against illegal detention,²⁵ right to health,²⁶ right against cruel and

²³ *Govind v. State of M.P.*, AIR 1975 SC 1378, *Kharak Singh v. State of U.P.*, AIR 1963 SC 1295, *T.Sareetha v. Venkata Subbaiah*, AIR 1983 AP 356; and *Mr. X v Hospital Z*, AIR 1999 SC 455.

²⁴ *Kadra Pahadia v. State of Bihar*, AIR 1981 SC 939; *State of Maharashtra v. M.P. Vashi*, AIR 1996 SC 1; *Hussainara Khatoon v. Home Secretary, Bihar*, (1980) 1 SCC 81; and *Raj Deo Sharma v. State of Bihar*, AIR 1998 SC 328.

²⁵ *Sant Bir v. State of Bihar*, AIR 1982 SC 1470; and *Rudal Shah v. State of Bihar*, AIR 1983 SC 1086,

²⁶ *CERC v. Union of India*, AIR 1995 SC 922; *State of Punjab v. Mohinder Singh Chawala*, (1996) 2 SCC 682; and *Paramanand Katara v. Union of India*, (1995) 2 SCC 248.

inhuman punishment,²⁷ right to pollution free environment,²⁸ right against bonded labour,²⁹ right to safe drinking water.³⁰ In *Union of India v. Democratic Reforms*,³¹ it was held that a voter has right under Art.19 (1) (a) to know the antecedents of the candidate, and the directives of supreme court did not impinge upon right to privacy of the candidate.

In *State of Punjab v. Ramdev Singh*,³² the apex court has held that rape is a crime against basic human rights and is violative of right to life enshrined in Art. 21. In *Zahira Habibulla H.Sheikh v. State of Gujrat*,³³ the apex court has held that any indifference, inaction or lethargy shown in protecting guaranteed rights will erode the faith in the government. Criminal trials should not be reduced to mock trials or shadow-boxing or fixed trials. In *State of Karnataka v. (Dr.) Praveen Bhai Thogadia*,³⁴ the apex court in the contest of Art. 25, has held that secularism means that the State should have no religion of its own, and each person, whatever his religion, must get an assurance from the state that he has the protection of law to freely profess, practice and propagate his religion and freedom of

²⁷ *Bachan Singh v. State of Punjab*, AIR 1980 SC 898.

²⁸ *M.C.Metha v. Union of India*, AIR 1987 SC 965.

²⁹ *Bandhua Mukti Morcha v. Union of India*, AIR 1984 SC 802; and *Neeraja Chowdhary v. State of M.P.*, AIR 1984 SC 1099.

³⁰ *A.P.Pollution Control Board v. M.V.Naidu*, AIR 1999 SC 812.

³¹ (2002) 5 SCC 294.

³² (2004) 1 SCC 421.

³³ (2004) 4 SCC 158.

conscience. This list is in only illustrative and not exhaustive. Further, the Supreme Court has interpreted many Directive Principles of State Policy, as fundamental rights in a number of cases; right to health, right to education, right to pollution free environment and right to minimum wages, to name a few.

The apex court in *Society of St. Joseph's college v. Union of India*,³⁵ while interpreting art.30 (A) for the first time held that the property of minority educational institutions could not be acquired under the general law of the land such as Land Acquisition Act, 1894. A special provision was required for the purpose of acquiring such property. A minority educational institution can be established even by a single member of the community. In so far reservation of 50% for admission of minority students it was held that restriction cannot be ordered and it has to be left to the authorities to prescribe a reasonable percentage having regard to the type of institution, population and educational needs of minorities.

In *T. M. A. Pai Foundation v. State of Karnataka*,³⁶ while interpreting Art. 30, an eleven judge Bench of the apex court has held 'minority' includes both linguistic and religious minorities and for

³⁴ 2004 (9) SCC 684.

³⁵ 2002 (1) SCC 273.

³⁶ 2002 (8) SCC 481.

determination of minority status, the unit would be the state, and not the whole of India. It was further held that the right of minorities to establish and administer educational institutions, including professional, was not absolute and regulatory measures could be imposed for ensuring educational standards and maintaining excellence thereof.

Generally to obtain bail persons have to produce as a surety one who is of some means. This is impossible for the thousands of persons who are poor or indigent. The court has held that bail cannot be refused to indigent persons who are unable to procure a solvent surety.³⁷

In *Prem Shankar v Delhi Administration*,³⁸ the court laid down strict guidelines on when an under trial or prisoner being taken to a court could be handcuffed. This could be only done if there was a risk of the prisoner escaping or being violent and if it was not practicable to secure his safety by other means such as having more guards. When a person was handcuffed, reasons for doing so should be contemporaneously recorded and submitted to the court concerned

³⁷ *Hussainara Khatoon v State of Bihar*, AIR 1979 SC 1360. Also see *Altemesh Rein v. Union of India*, AIR 1998 SC 1768; *Citizens for Democracy v. State of Assam*, AIR 1996 SC 2193; *Charles Shobraj v. Superintendent, Central Jail*, AIR 1987 SC 1514; *T. Vaitheeswaran v. State of Tamil Nadu*, AIR 1983 SC 361; and *Sunil v. State of Madhya Pradesh*, (1990) 2 SCC 409.

³⁸ AIR 1980 SC 1535.

for its approval. The Supreme Court has also held to be illegal the handcuffing of TADA detenus in a hospital, observing that if there was any apprehension of their escaping, additional guards should have been provided.³⁹ Where a person accused of an offence was handcuffed and paraded through a public street, the court has confirmed the order of high court order awarding compensation to him.⁴⁰

Even in prison, a prisoner could not be kept in solitary confinement as this amounted to the imposition of a second punishment for the same offence; even keeping a prisoner in fetters should only be done if it is necessary for his safety.⁴¹ Directions have also been given to segregate under trails from convicts in prisons, and keep young persons separately; further, the prison authorities cannot impose prison punishments without judicial scrutiny.⁴²

Art. 22 (1) provides that any person who is arrested and detained in custody shall not be denied the right to consult, and be defended, by a legal practitioner of his choice. The court has held that an accused person was entitled to free legal aid as a part of the right guaranteed by Art. 21. The court relied in this connection on Art.

³⁹ *President, Citizens for Democracy v. State of Assam* , AIR 1996 SC2193.

⁴⁰ *State of Maharastra v. Ravikant S. Patil*, (1991) 2 SCC 373.

⁴¹ *ibid.*,

39-A, a directive principle enjoining free legal aid being made available.⁴³

In *Sheela Barse v. State of Maharashtra*⁴⁴ it was held that the necessary funds must be made available by the state. It was also incumbent on the authorities to inform the accused of the availability of legal aid, and if this was not done, the conviction would be set aside. A detenu is entitled to consult a legal practitioner and also to receive visits from members of the family.⁴⁵ It has been held that that a right to file one appeal is an inherent part of a fair and reasonable law, and a person convicted must be promptly served with a copy of the judgment to enable him to appeal.⁴⁶

The mandatory death sentence required under section 303 of the Indian Penal Code to be imposed on a life convict who was convicted of murder has been held to be violative of Articles 14 and 21. The court observed that taking away judicial discretion in

⁴² *Sunil Batra v. Delhi Administration*, AIR 1980 SC 1579.

⁴³ *Khatri v State of Bihar*, AIR 1981 SC 928.

⁴⁴ (1987) 4 SCC 373.

⁴⁵ *Francis Coralie v. Union territory of Delhi*, AIR 1978 SC 746.

⁴⁶ *M.H. Hoscot v State of Maharashtra* AIR 1978 SC 1548.

sentencing was arbitrary.⁴⁷ It has been held that detention of non-criminal lunatics in jail is illegal.⁴⁸

Though Art. 21 is couched in negative terms, in several decisions the apex court has held that it was an obligation of the state to protect and save life. Applying this principle, the state has been directed to pay compensation for the killing of a convict in jail by another convict.⁴⁹ In *Harvinder Chaudhary Srivastava v. Union of India*,⁵⁰ compensation was ordered to be paid to the victims of a hutment colony fire caused due to a short circuit which was found to be caused by illegal electricity connection given by the employees of the *Delhi Electricity Supply Undertaking*, a public sector body. Similarly, compensation has been awarded where the victim of an accident did not receive prompt medical treatment in a public hospital.⁵¹

In *National Human Rights Commission v. State of Arunachal Pradesh*,⁵² the court directed the state to ensure protection to Chakma and Hajong tribals who were facing threats of being driven out of the state by the Arunachal Pradesh Students Union. The

⁴⁷ *Mithu v State of Punjab*, AIR 1983 SC 473.

⁴⁸ *Sheela Barse v Union of India* 1993 (4) SCC 204.

⁴⁹ *Kewal Pati v State of UP* 1995 (3) SCC 600.

⁵⁰ (1996) 8 SCC 80.

⁵¹ *P.B.Khet Mazdoor Samity v. State of West Bengal*, AIR 1996 SC 2426.

⁵² AIR 1996 SC 1234.

Union of India was directed to make available to the state the necessary paramilitary personal.

In *P. Rathinam v. Union of India*,⁵³ it has been held that Art. 21 included right to die. But a larger Bench of the Apex Court has reversed this decision and upheld the validity of section 309 of the Penal Code which makes an attempt to commit suicide an offence.⁵⁴

In *Olga Tellis v. Bombay Municipal Corporation*,⁵⁵ the court held that the right to life conferred by Art. 21 included the right to a livelihood and that fundamental rights were incapable of waiver. The court, therefore, restrained the Bombay Municipal Corporation from evicting slum and pavement dwellers without providing alternate accommodation within a reasonable distance. This decision was followed in *Ahmedabad Municipal Corporation v. Khan Gulab Khan*.⁵⁶ It has however clarified that there was no absolute obligation to provide alternate accommodation.

In *People's Union for Civil Liberties v. Union of India*,⁵⁷ the court, dealing with the question of telephone tapping, has held that the right to privacy is included in the right to life, and extends to having

⁵³ AIR 1994 SC 1844.

⁵⁴ *Gian Kaur v. State of Punjab*, AIR 1996 SC 946.

⁵⁵ AIR 1986 SC 180.

a telephone conversation. As there were no statutory rules prescribing when telephones could be tapped, though there was power to make such rules, the court laid down guidelines as to how the power should be exercised.

In *Satwant Singh v. APO, New Delhi*,⁵⁸ it was held that the right to travel abroad was a part of the right guaranteed by Art.21 and that such right could only be curtailed by a valid law. This led to the enactment of the Passport Act, 1967. In *Maneka Gandhi v Union of India*,⁵⁹ the court reiterated that the right to travel abroad was a part of the right to life guaranteed by Art. 21. The court has held that the right to clean air and water is a part of the right to life.⁶⁰ According to Art. 41 the state shall, within the limits of its economic capacity and development, make effective provision for securing the right to work, to education and to public assistance in cases of unemployment, old age, sickness and disablement, and in other cases of undeserved want. The un-amended Art. 45 enjoins on the state to provide, within a period of ten years from the commencement of constitution, free and compulsory education to children till they attain the age of fourteen.

⁵⁶ 1997 (11) SCC 121.

⁵⁷ AIR 1997 SC 568.

⁵⁸ AIR 1967 SC 1836.

In *Mohini Jain v State of Karnataka*,⁶¹ it was held, after exhaustive discussion of Art. 21 and other provisions of the Constitution, that the fundamental rights guaranteed under Part III could not be appreciated and fully enjoyed unless citizens were educated and further observed that the 'right to education', is concomitant to the fundamental rights enshrined under Part III of the Constitution. As *Mohini Jain* ⁶² appeared to hold that there was a fundamental right to higher education, the question was placed before a five-judge bench in *Unni Krishnan, J. P. v. State of Andhra Pradesh*.⁶³ In the actual case before the bench, the question of primary education was not directly in issue. It was held that it was permissible to read the constitutional mandate to provide education till the age of fourteen into the right to life guaranteed by Art. 21. Therefore, right to education was found as a part of the right guaranteed by Art. 21. Merely holding that Art. 21 includes the right has little practical effect till such directions are issued. Few states, in fact, offer free education till the age of fourteen to all children.

Consequently, the Parliament by the Constitution (Eighty-Sixth Amendment) Act, 2002, has added Art. 21A ⁶⁴ which makes the

⁵⁹ AIR 1978 SC 597.

⁶⁰ *M. C. Mehta v Union of India*, (1991) 2 SCC 353.

⁶¹ AIR 1992 SC 1858.

⁶² *ibid.*,

⁶³ AIR 1993 SC 2178.

⁶⁴ But date is not yet notified.

right to education for children of age of 6 to 14 years a fundamental right. It also substitutes Art. 45, which now reads as follows: 'the state shall endeavour to provide early childhood care and education for all children until they complete the age of six years'. It has also added a new fundamental duty to Part IV of the constitution that every parent or guardian shall provide opportunities for education to his children between age 6 and 14 years. The amendment shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint. But the date is not yet notified.

In *Jagmohan Singh v. State of U.P.*,⁶⁵ the constitutionality of imposing death sentence was challenged. The Supreme Court held that if the entire procedure for criminal trial under the Cr. P. C. for arriving at a sentence of death is valid then the imposition of death sentence in accordance with the procedure established by law cannot be said to be unconstitutional. In *Bachan Singh v. State of Punjab*,⁶⁶ it was argued that the Supreme Court in the *Maneka Gandhi* case has given a new interpretative dimension to the provision of Articles 21, 19 and 14, and their inter-relationship in every law of punitive detention both in their procedural and

⁶⁵ AIR 1973 SC 947.

⁶⁶ AIR 1980 SC 898.

substantive aspects must pass the test of all the three articles. This argument was not accepted by the court (four to one). It was held that Article 19, unlike 21, does not deal with the right to life and personal liberty and it is not applicable for judging the constitutionality of provisions of section 302, IPC. The condition precedent for the applicability of Art. 19 is that the activity which the impugned law prohibits and penalized must be within the purview and protection of Art. 19 (1). Thus it was observed that death penalty either *per se* or because of its execution by hanging by rope does not constitute an unreasonable, cruel or unusual punishment.⁶⁷ However, a provision for keeping the dead body suspended for half an hour after the execution of death sentence has been held as inhuman and violative of Art. 21.⁶⁸

In *T. V. Vaitheeswaran v. State of Tamil Nadu*,⁶⁹ it was held that delay exceeding two years in the execution of death sentence entitles a convict to get it commuted to life imprisonment. But it was overruled in *Sher Singh v. state of Punjab*.⁷⁰ It was held that no such limit could be fixed for the execution of death sentence without regard to the facts of every case. Finally, a constitutional

⁶⁷ *Deena v Union of India*, AIR 1983 SC 1155.

⁶⁸ *Parmanand Katra v. Union of India*, (1995) 3 SCC 248.

⁶⁹ AIR 1983 SC 361.

⁷⁰ AIR 1983 SC 465.

bench of the Supreme Court in *Triveniben v. state of Gujrat*,⁷¹ has expressly overruled *Vaitheeswaran* and held that it 'may consider the question of inordinate delay in the light of all circumstances of the case to decide whether the execution of sentence should be carried out or should be altered into imprisonment for life'.

In calculating the delay in the disposal of mercy petition is also taken into account. Two years' delay in such disposal has been found enough to convert death sentence into life imprisonment.⁷² It would be desirable to adopt the standard set down in the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment⁷³ in interpreting the Criminal Law. It is to be kept in mind that India has signed this Convention, but has not ratified it yet in spite of the constant pressure to do so brought in by the NGOs as well as the National Human Rights Commission. Right to claim monetary compensation for the violation of the rights under Art. 21 has also been recognized in several cases.⁷⁴

⁷¹ AIR 1989 SC 1335.

⁷² *Daya Singh v. Union of India*, AIR 1991 SC 1548.

⁷³ U.N.Doc. A/39/51 (1984). Entered into force June 26, 1987. India signed it on October 14, 1997.

⁷⁴ *Rudal Sah v State of Bihar*, AIR 1993 SC 1086; *Bhim Singh v State of J & K*, AIR 1986 SC 494; *D. K. Basu v. State of West Bengal*, AIR 1997 SC 610; *Meera v. State of Tamil Nadu*, (1991) Cri LJ 2395 (Mad); *P. V. Kapoor v. Union of India*, (1992) CriLJ 140 (Del); *Pepoples Union for Civil Liberties v. Police Commissioner*, (1989) 4 SCC 730; and *M. C. Mehta v Union of India*, AIR 1987 SC1086.

The courts have held that the right to know/ to receive information stands contained in Art. 21 as a necessary ingredient of participatory democracy.⁷⁵ The court has underscored the right of the people to know. The court has pointed out that in the instant case it has to balance two interests of great public importance—freedom of speech and administration of justice.

In *Hamdard Dawakhana v. Union of India*,⁷⁶ the apex court held that ‘commercial advertisement’ does not fall within the protection of freedom of speech and expression. Promoting drugs and commodities, is not in public interest, and therefore, it could not be regarded as propagating any idea: social, political, or economical and, as such, could not claim the protection of Art.19 (1) (a). An advertisement meant to do business falls within the concept of trade or commerce.

A commercial advertisement advertising an individual’s business cannot be regarded as a part of freedom of speech. But the apex court in later cases has modified its view expressed in *Hamdard Dawakhana*.⁷⁷ In *Sakal Papers v. Union of India*,⁷⁸ and *Bennett*

⁷⁵ AIR 1989 SC 190.

⁷⁶ AIR 1960 SC554.

⁷⁷ *ibid.*,

⁷⁸ AIR 1962 SC 305.

Coleman & Co. v. Union of India,⁷⁹ and in *Indian Express Newspapers v. Union of India*,⁸⁰ the court has observed that 'we are of the view that all commercial advertisements cannot be denied the protection of Art. 19 (1) (a) of the Constitution merely because they are issued by business men'.

For a democratic press the advertising 'subsidy' is crucial. With the curtailment in advertisements, the price of newspaper will be forced up and this will adversely affect its circulation and this will be direct interference with the right of freedom of speech and expression guaranteed under Art.19 (1) (a).

The Apex Court in *K.A.Abbas v. Union of India*,⁸¹ has upheld censorship of films under Art. 19 (1) (a) on the ground that films have to be treated separately from other forms of art and expression because a motion picture is able to stir up emotions more deeply than any other product art. A film can therefore be censored on the grounds mentioned in Art.19 (2). The court sought to protect the diffuse interest of the many against the commercial interest of the producer.

⁷⁹ AIR 1973 SC 106.

⁸⁰ AIR 1986 SC 515.

⁸¹ AIR 1971 SC 481.

Telecasting is a system of communication either audio or visual or both. Organisation of an event in India is an aspect of the freedom of speech and expression protected by Art. 19 (1) (a) and reasonable restrictions can be imposed thereon under Art.19 (2). In *Secretary, Ministry of Information and Broadcasting v. Cricket Association, Bengal*,⁸² the right of the cricket association to telecast the cricket match came up for consideration before the Supreme Court. The court has taken a very significant step by way of freeing the activities of broadcasting and telecasting from the governmental monopolistic control. It has been held that the Board of Cricket or the Cricket Association functions on the basis of 'no profit no loss'. Their main aim is to promote the game of cricket. Therefore, telecasting by such a body of a cricket match can hardly be regarded as a commercial activity. Because of its educational and entertainment values, this activity falls more appropriately under Art.19 (1) (a).

In a democratic society, freedom of speech and expression is a prized privilege and a salutary right of the people. But, at the same time, no less important is the maintenance of independence and integrity of the judiciary and public confidence in the administration of justice. It thus becomes necessary to draw a

⁸² AIR 1995 SC 1236.

balance between the two values. The freedom of speech and expression guaranteed by Art.19 (1) (a) is subject to Arts. 19 (2), 129 and 215. A newspaper published a news item that sons of Supreme Court judges had been allotted petrol pumps by the Minister out of his discretionary quota. However, on verification the news was found to be incorrect. The court held the printer, publisher, editor and the reporter guilty of the contempt of the court. None of them took the necessary care in evaluating the correctness and credibility of the information published by them as news item in the newspaper in respect of the allegation of a very serious nature causing an embarrassment to the court.⁸³

Article 32 (1) guarantees the right to move the Supreme Court by 'appropriate proceedings' for the enforcement of the fundamental rights conferred by Part III of the Constitution. Clause (2) of Art. 32 Confers power on the Supreme Court to issue appropriate directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo-warranto* and *certiorari* for the enforcement of any of the rights conferred by Part III of the Constitution. Under clause (3) of Article 32 Parliament may by law empower any other court to exercise within the local limits of its jurisdiction all or of the powers exercisable by the Supreme Court

⁸³ *Harijai Singh, In re*, (1996) 6 SCC 466.

under clause (2). Clause (4) provides that the right guaranteed by Article 32 shall not be suspended except as otherwise provided for the Constitution. Art.32 provides for an expeditious and inexpensive remedy for the protection of fundamental rights from legislative and executive interference.⁸⁴ The words 'any other court' can only mean any other court than the High Court as High Courts have already been invested with such power.

The right guaranteed under Art. 32 is for enforcement of fundamental rights only, whereas, the right conferred by Art. 226 can be exercised not only for the enforcement of fundamental rights but also for 'any other purpose'. The jurisdiction conferred on the Supreme Court by Art. 32 is an important part of the '*basic structure*' of the Constitution because it is meaningless to confer fundamental rights without providing an effective remedy for their enforcement when they are violated.⁸⁵ An order by the Supreme Court under Art. 32 will supersede the orders of the High Court previously passed. *Res judicata* is a rule of public policy that there should be finality to binding decisions of courts of competent jurisdiction and the parties to the litigation should not be vexed with the same litigation again. Thus, if a question has been once decided by the Supreme Court under Art. 32, the same question

⁸⁴ *S. P. Gupta v. Union of India*, AIR 1982 SC 149.

cannot be re-opened,⁸⁶ again under Article 226. In *Daryao v. State of U.P.*,⁸⁷ it was held that where the matter had been 'heard' and 'decided' by the High Court under Art 226 the writ under Art. 32 is barred by the rule of *res judicata* and could not be entertained. But in matter of preventive detention and in relation to the writ of *habeas corpus* the view expressed by the Supreme Court in *P.L. Lakshpal v. Union of India*,⁸⁸ does not hold good in view of the latest decisions. In this case, the Supreme Court held that where the earlier writ petition challenging detention order failed, the subsequent writ petition, challenging the extension of the detention order, cannot be maintained as no new ground has arisen to challenge the detention order again, the plea taken in the first writ petition and the second writ petition being the same.

Subsequently, the Supreme Court in two successive decisions *Kavita v. State of Maharashtra*,⁸⁹ and *Lallubai v. Union of India*,⁹⁰ expressed the view that the principle of constructive *res judicata* is applicable in civil proceedings only and it has no application in matter of illegal detention. The court held that the principle of *res judicata* is not applicable in case of preventive detention.

⁸⁵ *Fertilizer Corpn. Kamagar Union v. Union of India*, AIR 1981 SC 345.

⁸⁶ *Ramesh Thapper v. State of Madras*, AIR 1956 SC 124.

⁸⁷ AIR 1961 SC 1457.

⁸⁸ AIR 1981 SC 2084.

⁸⁹ AIR 1981 SC 2084.

⁹⁰ AIR 1981 SC 728.

Subsequent writ petition for a writ of *habeas corpus* on some additional ground is maintainable under Art. 32 of the Constitution even though the earlier writ petition assailing the same detention order had failed. As an important exception, the rule of *res judicata* is not applicable in the writ of *heabeas corpus*, and where the petitioner has been refused a writ by the High Court he may file a petition before the Supreme Court for the same writ under Article 32. This curative petition developed by the Supreme Court has modified the principle of *res judicata* in the interest of complete justice.

Article 32 is the last of the fundamental rights. Unlike other rights, it is remedial and not substantive in nature. But in no way it is less important than the other rights. In England, the remedy of *habeas corpus* is called the bulwark of liberties. Article 32 has been called as the heart and soul of the Indian Constitution. In the words of Dr. Ambedkar:

‘If I was asked to name any particular Article in this Constitution as the most important-an Article without which this constitution would be a nullity- I could not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it’.⁹¹

⁹¹ Constituent Assembly Debates, vol. VII, at 953.

The right to move the Supreme Court itself is a guaranteed fundamental right. Ordinarily under Art. 32 of the Constitution the court does not enter into questions of fact.⁹² But it may do so if it finds it necessary in appropriate cases.⁹³ Indeed in a number of cases it had even gathered evidence to ascertain rival contentions and arrive at a right decision. Art. 32 gives the apex court very wide discretion in the matter of framing writs to suit the exigencies of particular cases and the application of the petitioner cannot be thrown out simply on the ground that the proper writ or direction has not been prayed for.⁹⁴ The right conferred under Art.32 being a fundamental right cannot be abrogated, abridged or taken away by an Act of the legislature unless Constitution itself is amended. For this reason the Supreme Court struck down the rule of the court which required the petitioner to furnish security as a condition precedent to the hearing of the petition, since it would impose a financial obligation on the petitioner and if he is not able to comply with it, his petition would fail.⁹⁵

It may be noted that the protection of Art. 32 may not be denied even by an amendment of the Constitution because this article constitutes a part of the basic structure of the Constitution which

⁹² *Major G. S. Sodhi v Union of India*, AIR 1991 SC 1617.

⁹³ *Lakshmi Shankar Pandey v Union of India*, AIR 1991 SC 1070.

⁹⁴ *Chiranjit Lal Chowdhury v Union of India*, AIR 1951 SC 41.

cannot be changed even by an amendment under Art.368. Although both the Supreme Court and High court possess concurrent power to issue orders and writs in the matter of enforcement of fundamental rights, it is no condition for the exercise of the jurisdiction by the Supreme Court that the petitioner must, in the first instance approach the High Court. In *Romesh Thappar case*,⁹⁶ the petitioner had come directly to the Supreme Court for the enforcement of the fundamental rights. Though Art. 142 (1) empowered the Supreme Court of India to pass any order to do complete justice between the parties, the court could not make an order inconsistent with the fundamental rights guaranteed by Part III of the Constitution. If there is one single ideology widely accepted round the world today, it is the concept and ideology of human rights, and several of them stand incorporated as Fundamental Rights in the Indian Constitution.

Questions regarding the limitations on the constitution amending power were raised before the Supreme Court since 1951 through *Shankari Prasad*.⁹⁷ The theory of implied limitations and the doctrine of acquiescence formed the bases of minority opinions in

⁹⁵ *Prem Chand Garg v. Excise Commissioner, U.P.*, AIR 1963 SC 996.

⁹⁶ *Romesh Thappar v State of Madras*, AIR 1950 SC124.

⁹⁷ AIR 1951 SC 458.

Sajjan Singh.⁹⁸ However, in *Golak Nath's*⁹⁹ case, fundamental rights were expressly recognised as limitations on the constitution amending power. The theory of Basic Structure was born in *Keshavananda*¹⁰⁰ echoed in *Indira Gandhi*¹⁰¹ and re-echoed and re-affirmed in *Minerva Mills*.¹⁰² In *Golaknath*¹⁰³ the Indian Supreme Court modified a traditional notion of retroactivity of judgments though the Doctrine of prospective overruling.¹⁰⁴ Thus the decision of the apex Court that Parliament has no power to amend Fundamental Rights was made applicable to the amendment made subsequent the judgment all previous cases stood govern by the supreme courts earlier pronouncement in reliance of which parliament made several amendments.

This total denial power to amend fundamental rights was questioned in *Keshvanada Bharati*¹⁰⁵ and the court modified the position taken in *Golaknath*¹⁰⁶ to identify the amending power as constituent power and not legislative but placed that power under limitations by holding that there was no power to amend the basic features of the Constitution. The Doctrine of prospective overruling

⁹⁸ AIR 1965 SC 845.

⁹⁹ AIR 1967 SC 1643.

¹⁰⁰ AIR 1973 SC 1461.

¹⁰¹ AIR 1975 SC 2299.

¹⁰² (1980) 3 SCC 625.

¹⁰³ AIR 1967 SC 1643.

¹⁰⁴ AIR 1967 SC 1643.

¹⁰⁵ AIR 1973 SC 1461.

has its origin in the U.S.A. This proposition was enunciated by five judges of the Supreme Court in *GolakNath*.¹⁰⁷ Traditionally, a judicial declaration that a law is unconstitutional is deemed effective retrospectively. An unconstitutional law is regarded to have been void from its inception.

The theory is that the judge 'does not make law but discovers or finds true law'. Retrospective overruling may cause administrative inconvenience in some situations and by disturbing vested rights, may cause hardship to those who may have acted on the basis of the old rule. The doctrine of prospective overruling seeks to avoid such harsh results. In the above said case, five out of 11 judges took recourse to the doctrine of prospective overruling.

Perhaps the single strongest protection for fundamental rights can be found in the Supreme Court's pronouncement in *E. P. Royappa*¹⁰⁸ that equality and arbitrariness are sworn enemies. In *Indra Sawney (II)*¹⁰⁹ the Supreme Court held that Art. 14 constituted a basic feature of the Constitution. Natural justice has

¹⁰⁶ AIR 1967 SC 1643.

¹⁰⁷ *ibid.*,

¹⁰⁸ AIR 1974 SC 555.

¹⁰⁹ AIR 1993 SC 477.

been held as implicit in Art. 21 which is part of the basic structure.¹¹⁰

All these are the protective fences that the Apex Court has thrown around fundamental rights when the court perceived that they were under attack by political power holders.

¹¹⁰ *Olga Tellies v. Bombay Municipal Corporation*, AIR 1986 SC 180.