

Constitutional Studies
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Lecture No. 10
Introduction to Fundamental Rights

Good day. Welcome back to Constitutional Studies and week 5. This week, we will deal with the topic of fundamental rights. It is a topic that those of you have seen the course outline will realize stretches across the next 3 to 4 weeks. And today we will begin Introduction and a broad summary of that topic.

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The slide is titled "Review of the Course" and features a grid of topics for Weeks 1 through 4. A small video inset in the bottom right corner shows Professor Sudhir Krishnaswamy speaking. The NLSIU logo is visible in the top right corner of the slide.

Week 1	Week 2	Week 3	Week 4
Why have a constitution? How does a constitution help in a democracy?	How should we make a constitution? Who should make the constitution? How did India make a Constitution?	What is the role of the Preamble in a Constitution? What does the Preamble to the Indian constitution settle? How is the Preamble enforced?	What principles help determine who should be a citizen in a political society? How does the Indian constitution and statutes define citizenship? What model of citizenship will treat immigrants in India and Indian expatriates equally?

So let me begin by conducting a quick overview of the course. So, if you have made it all the way into week 5, you know that in the last 4 weeks, we have taken up discrete questions in constitutional law and constitutional studies. Like in week 1, we asked, why have a constitutional power? Especially when we already have an electoral democracy? Do we need a constitution? If so, what is the relationship between ideas for democracy and constitution?

In week 2, we answered that question said, okay, we must have a constitution that we can ask, how should we make a constitution and who should make constitution? We noticed that in India, we chose especially representatives to make a constitution because laypeople elected for the most part, but it was uniquely representative of the people of India. In week 3, we examine begin

our reading of the Constitution. And we begin where most people might start at the, at the opening stanzas, which happened to be the preamble to the Constitution.

We asked specifically, what is the role of a preamble in constitution? Do you need a preamble? And if so, is it just a preface or introduction? Or is it something of a manifest? And then we asked after reading the preamble, how should we interpret it? And how should we enforce it? If at all? In week 4, we, we moved on to the next significant quiz on, on while interpreting the Constitution, which is to ask who are citizens in the country who belongs in this constitutional thing? And how should we recognize this?

So last week, we spent some time going over principles of use. So you send me to examine how citizens should be confer in a modern state. We asked whether all residents in a country are automatically citizens. If not, what are the special connection must be asked residents to show before citizenship is a show? We then went on to exam in some detail what the Indian Constitution and the relevant statute in this case the Citizenship Act, 1955 tells us about citizenship.

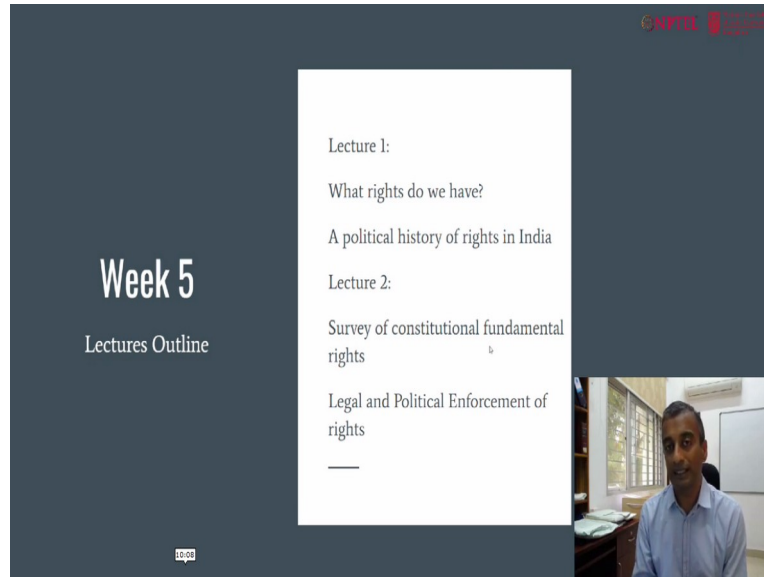
We understand that the constitution and legal framework adopt all models of citizenship, some birth, citizenship have used so like kind of citizenship, some descent basic use and rename, type citizenship, and some voluntary citizenship by registration and financialization. So, all models of citizenship are find a place in the citizenship Act. And the question that we have to ask is, what model of citizenship are you moving towards? For that we need to understand the challenges, the controversies around citizenship in India.

And we asked pointedly, whether we could adopt a model of citizenship in the constitution that speaks both to the concerns of Indian expatriates living in West Asia, or the United States, or Europe, and Australia and other parts of Asia, as well as those who are immigrants into it, is there a single model of citizenship, that we can offer both these constituencies that would be grounded and common principles and be moderately defense.

That is the challenge we set ourselves. And we try to show that in a in a globalized world, we might want to adopt models of citizenship that primarily rested on voluntary commitments to being part of a citizen of English. And that model of citizenship would accommodate the large

movement of people across national political boundaries. So that is week 4, we now move in week 5.

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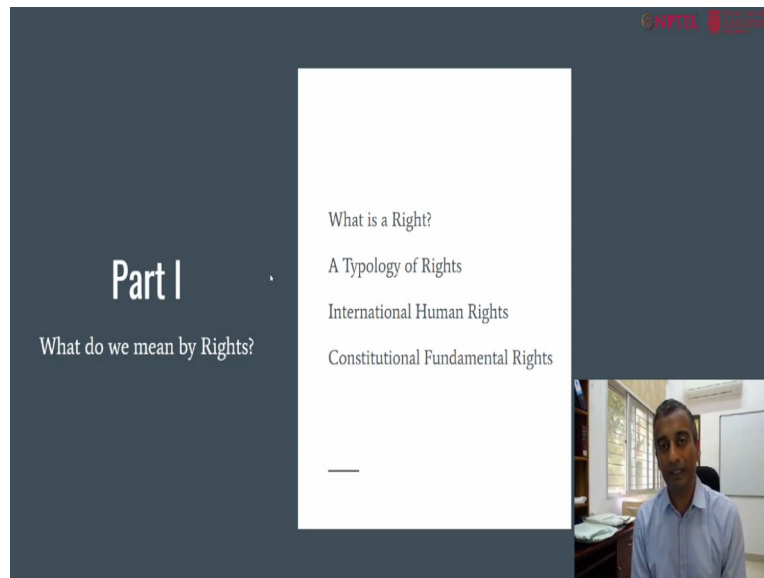
To open up a very, very important topic. And that is the topic of Fundamental Rights. This is a topic that we will stay for the next 4 to 5 and 6 weeks and deal with several case studies, several controversies that arise both in understanding and interpretation of citizenship. We will get to that. But let me just in this week in week 5, give you a broad outline of how we might think about fundamental rights, what are these fundamental rights?

I asked in lecture 1, what does it mean to have a right? Now, in the law school, we spend much time trying to analyze the legal technical aspects of what it means to have Rights. For this lecture, I will strike present this, this rather complex area in a in a simpler form, we must understand that the political rights that we have in the constitution are not accidental, we have emerged, much like debates around citizenship and preamble out of an almost 100 year political churning the freedom movement.

And we want to understand when particular rights emerged, and how we should appreciate historical significance. So both of these things, I will do in lecture 1. In lecture 2, I will present the broad outlines of the fundamental rights in the Constitution, and, and identify key different types of rights that we have in Constitution. And conclude in lecture 2, which will by far be a shorter lecture with a broad outline of the legal and political enforcement of rights.

It is alright to have some constitution fundamental rights. How do we anticipate that these legal, fundamental rights will be enforced? That is the topic I mentioned. So, let us get started with lecture 1.

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In the first part of this lecture, I will focus on a very broad question. What do we mean by rights? What does it mean to have a right, right to what? Or is a right in somebody? I will then present a broad typology of rights. What are the different types of rights, we have in common language and discourse? We use the language of rights all the time, you might use them in a family, you might use them in the workplace, what kinds of rights? Are they the same rights in the family in the workplace and in constitutional law? Or are they different kinds?

I will present a very brief introduction to the core international human rights. Often, we come to think of international human rights as some kinds of fictional claims not to be taken seriously. And I want to present a very broad outline of how these international human rights came to be. And why they continue to inspire and motivate political action across the world today. I will close with a broad outline of constitution fundamental rights, and paying attention to both terms, what is constitutional? And what is fundamentally about those rights?

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Rights - Form and Function

The term 'right' may be used and understood in different senses.

- A right to do something (Privilege or liberty) eg to speak and express oneself
- A right to have others do things for or to oneself (Claim) eg treated equally
- A right to do an act that changes another's legal position (Power) eg to enter into a contract to buy a car
- A right to be free from a liability or legal duty (Immunity) eg a right to remain silent in a criminal investigation

What do rights do for the persons who have them?

- Protect their will or choice to do something (eg to speak)
- Protects their certain important interests (eg in education, healthcare)

Elevate individual choices or interests above the ordinary social interests that may override them.

- Ordinarily any person has the right to procure or forage for food to satisfy their hunger
- However, a right to food imposes obligations on the society to ensure that no one is left hungry

Let us begin with a broad understanding of what it means to have when we use the term rights in common language, we use that all the time in casual conversations, when we get caught up in heated argument, and structured contexts, like the workplace, or the university. Students use rights claims all the time, what kind of rights? What do they mean when they say they have a right?

So, let us unpack at least a few different senses in which the right might be used. First to have arrived may mean the right to do something. For example, you might say I have the right to speak, or the right to express myself. This kind of a right or right to do some is commonly understood as a privilege, or a liberty. When I say I have the rights to speak, I often mean that you do not have the right to stop me.

So this kind of right, the rights to do something is, is one rather large species of rights claims that we commonly use in our everyday language. The second sense in which we might use a right is to is to say that I have a right meaning that someone else has to do things for me. This kind of right is a right that imposes obligations on us. It allows me to clean off, off others. For example, I might say that I have the right to be treated equally.

When we ask, what does that mean? What does it mean? What does it mean to say that you have the right to be treated equally? The sense that we would give to that rights claim is to say that you have the obligation, those on to whom my right flies have the obligation to treat me equally

with others. So, this is a very different sense, from the first sense in which we use rights as a privilege or liberty.

The third, in which we might say that I have a right is to have a right to do some, that changes another person's legal. This kind of right the power to change someone else's legal position is often civil rights. It is not constitutional fundamental right. And let me just use a simple example. I have a contract, for example, to buy a car. If I enter into such a contract with a potential seller of a car, by closing that contract, I have the right to have the other person and over the car, I have changed their legal position as the owner of the car and I become the owner, I am using a very simple example. There could be far more complicated examples of the right to change and others the capacity of a rights holder to change another person's legal position.

The fourth way in which we use rights schemes is often to say that by saying that I have a right, I am free from a liability or legal duty to some. For example, a right to remain silent in a criminal investigation. When I have a right to remain silent, no matter what legal powers and authority a criminal investigator might exercise, my rights to remain silent, gives me an immunity to whatever statutory or legal power the criminal investigator is using. It is a sort of a right is in an immunity sense is like a bubble. It is a bubble that prevents interference of others with my life. So, whenever we use the word, right, we might be using it in any one of these four senses discussed here.

We might be using it in other senses as well. But for now, let us just work with these 4 senses of, of a Right. The next question that we need to unpack is to understand the form and function right is what is the effect on the person who claims a right? As the slide suggests, what do rights do for the persons who have rights? Often times, whenever one says that you have a right, it means that the, the person has an autonomy, the will or the choice to do something or not to do something. So, it empowers the rights holder to either do or not do something.

The second important element to having the right is that it elevates some of the rights holders interests, for example, education and health care and places it about the common free. This ability that what rights in this sense is a power shifting device. It takes my will, my choice, my interests and elevates these individual choices of interests and elevates them above the ordinary social interests that might otherwise override. You might say, for example, that I have the right

to sit in the middle of the road. But we understand that the presence of rules and regulations on the use of the road that serves the common interests of the community might ordinarily override your rights.

So, we had discussed very briefly in the last session at, the elevation of individual choices of interest is visible in a, in a case, like the case decided last week by the Indian Supreme Court on the question of whether people may choose to protest in the middle of the road. You notice that the courts circumscribe the rights of the protesters to the use of the public group. If the court held that protesters, anyone who wanted to raise their voice and protest have the right to occupy the road, then the common public interest in the use of the road would give way to the protected right in this case.

So, this is the effect the power shifting effect of having other a right. Let us use another example, to better understand this, and in this case, let us talk about food. Ordinarily, any person as the right to procure a forage for food to satisfy their hunger, we might say of any person, any human being, you can either procure using whatever market facilities, you have access to or fine find your food. So yes, you can satisfy your hunger in this way. But when we say that the person has a right to food, what has changed?

The right to food has an effect imposes an obligation on society or maybe the state to ensure that no person is left hungry. So, notice the effect of the right the presence of a right imposes obligations on other actors, whether the society or the state to ensure that no one is left hungry. This kind of power shifting effect is what rights have and rights the form and function of rights is to shift power, the power balance between the rights holder on the one hand and society at large. This is the effect that that rights have. And as we explore this question, in greater detail in the Constitution, we will come to understand this function at in a, in a more significant way.

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The slide, titled "Typology of Rights" with a GNPFD logo in the top right, is divided into four sections:

- Natural Rights**
 - Moral power, dignity or capacity inherent in a person as the foundation
 - Basic entitlements to life, liberty and property
 - Some consider natural rights to be god given while others would ground it in human morality
- Legal Rights**
 - 'Positive' Rights recognized and enforced by statutory law (by the State)
 - Can be erased by legislative changes
- Human Rights**
 - Both negative rights and positive rights (requiring affirmative action by the State)
 - Universal, inalienable, fundamental
 - Some are moral rights, while others are legal rights
- Constitutional Rights**
 - Qualitatively different from and superior to ordinary legal rights
 - Enjoy constitutional protection and can be taken away only by amending the Constitution

What are the various kinds of Rights that we have? And mind you I have yet to talk about constitutional rights so far, which is talking about rights more, general? The first, broad typology of rights that we must become familiar with, is the distinction between natural rights on the one hand, and legal rights on the other. Natural rights we when we use the, the language of rights in everyday language, we may not clarify, am I talking about a Natural Rights? Am I talking about Legal Rights? Am I talking about Human Right? Am I talking about Constitutional Rights?

I mean, I never ever say what right am I talking about in ordinary language, but we might want to then further specify rights so that we have an understanding of the specific types of rights and what obligations to give rise. So, let us begin with Natural rights. Natural rights seem to be grounded in the moral power, the dignity and the capacity inherent in every human being. Notice that the person is the foundation of natural rights. It is rare that we give such rights claim or we believe that rights are inherent in animals, there is something specific to the nature of the human species to which we attach rights.

So, whenever we say that someone has natural rights, that natural rights emerges from them being human, what kinds of natural rights could we have? We normally speak in the language of the basic entitles to Life, Liberty and Property. These are the natural rights that have been spoken about in the intellectual traditions of talking about rights for, for centuries, why life, liberty and

property? Because we see these 3 elements as being inherent and emerging from the dignity of human beings themselves?

Where do natural rights come from? And there is much controversy and intellectual debate about whether we have natural rights at all? And if so, where do they come from? And let me just identify for the purposes of this lecture 2 broad traditions of thinking about natural rights, we may think about natural rights as being God given an emerging from, you know, that literally the heavens, or we might see rights as emerging from the human condition, from the nature of the human species, and human morality, or natural human morality.

Now, this might be an unsatisfactory explanation, one might expect a greatest specification of the sources of natural rights. But for the moment, let us stop here for a course like this, this broad introduction would suffice. In the body of natural rights, we broadly have moved towards claims about human rights. Now, you might ask, are human rights natural rights? Or are human rights, what is on the other side of the column, Legal rights? And the answer is that some human rights are moral rights natural, seen as moral rights or natural rights while some human rights are seen as legal.

But that body of human rights are usually quite wide, they have both negative and positive rights, sometimes requiring states to be affirmative acts, while at other times, requiring states to just do to carry out some to prevent interference in our personal lives. Often, when we speak about human rights, we speak in terms of them being universal to all human beings, not contingent on the nation state that we live in, or the particular political constitution under which we live.

We also see human rights as being inalienable, nobody can take away your human rights, and as being fundamental, overriding all other rights, all other legal and political rights that you might claim, and binding on all actors. This language of human rights is very important to understand and appreciate. And I sense that many of us grew up being exposed to the language of human rights, but not being able to precisely locate what human rights might be.

So, I began with natural rights. I then briefly introduced the idea of human rights, I now want to get onto the, onto the, onto the legal side. And we recognize that legal rights are created by the law in various ways and forced by statutory law, and we call them positive rights. But positive here, we do not mean that they only impose obligations on the state, what we really mean is their

positive rights in that they are enforced and created by the state. So, legal rights are created by the state, but they can also be erased by the state, so legislation can take away legal rights. So, no matter what the legislation is, we need continue to insist that we have human rights, contrary to legislation, we may also continue to insist that we have natural rights, contrary to legislation.

But legal rights are always focused on the question, what has the state created, in this case? The fourth category of rights with which I conclude my typology of Rights, is to talk in is to explore what it means to call something a constitution. Constitutional rights are qualitatively different from and superior to legal rights. So, let us assume for a moment we discussed some legal rights merging from the Citizenship Act of 1955.

These legal rights are created by Parliament, and applicable to all those residents in India citizens or not or those who seek to become citizens of Indian. Constitutional rights are superior to legal rights in this important way. If any legal statute or decision, often an administrative body, or sometimes even a full court violates constitutional rights, then those, those decisions can be declared invalid.

So, constitutional rights sit above the ordinary legal rights, natural rights and human rights of others, they are specially protected by the Constitution. But when we say they enjoy constitutional protection, it does not mean that they are immutable. It does not mean that they can never be changed, it only means that they can be changed by amending the Constitution, which is far more difficult than just changing a statute.

So, let me bring this together before we, move away from the Typology of Rights, we have discussed 4 kinds of rights. So, every time you use, we use rights language in a common sense and common conversation, we will do well to ask the question, what rights are you claiming? Are you claiming natural rights, human rights, legal rights or constitutional rights? By bringing this kind of clarity to our everyday conversation, we make considerable progress in understanding the nature of constitutional fundamental rights.

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Universal Declaration of Human Rights

International Bill of Human Rights

- Universal Declaration of Human Rights (1948)
- International Covenant on Civil and Political Rights (1976)
- International Covenant on Economic Social and Cultural Rights (1976)

Three Generations of Human Rights

Civil and Political rights Economic, Social and Cultural Rights Collective Rights or Solidarity Rights

All human beings are born free and equal in dignity and rights ...
UNIVERSAL
Everyone is entitled to all the rights and freedoms set forth in this Declaration without distinction of any kind...
HUMAN RIGHTS
Everyone has the right to life, liberty and security of person
Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality

Image: The British Library

I said that I would briefly introduce the Universal Declaration of Human Rights, and the language and the tenor of international human. The Universal Declaration of Human Rights, which was created in 1948, by the several nations that came together, and we are talking about 150 nations plus came together to create the Universal Declaration of Human Rights and international government.

What, kinds of rights does it have? Notice how the Universal Declaration of Human Rights begins. It begins with the broad proposition that all human beings are born free, and equal in dignity and rights. Notice the emphasis on human beings, being born with dignity and rights. And this is not conferred by states, or conferred by God, but natural in its origin, just by virtue of hard work. It continues to assure us that everyone is entitled to all the rights and freedoms set forth in this declaration, without distinction, meaning without discrimination.

So, all human beings without discrimination, what rights do we have, we have the common rights of life, liberty and security of person, what we what we discussed, when we spoke about natural rights, these are declared as core human rights. But further every month, as a member of society has a right to Social Security, and rights to economic, social, and cultural rights, which are indispensable to one's dignity, and development of one's personality. This kind of language that you find in the Universal Declaration of Human Rights, brings together different kinds of

rights of they are all human rights, but their rights that are sometimes about civil and political goals, and at other times about economic, social and cultural goals.

As we all know, two different treaties, international treaties, came to be signed, called the International Covenant on Civil and Political Rights in 1976, and the International Covenant on Economic, Social and Cultural Rights 1976 that build on the Universal Declaration of Human Rights. So these rights, put together, comprise a corpus of international human rights that operate as a broad framework to guide rights thinking across the globe.

These rights are not dependent on your constitutional guarantees, they go beyond them. And we may always take reference to these International Covenants and the Universal Declaration. When we are trying to evaluate and assess what rights what human rights, we have. Often, while talking about international human rights, we talk about 3 kinds of rights, or 3 generations of international human rights. And let me just refer to them. Some when we talk when we speak in the language of generations, we think of this in terms of a chronology. But we need to do that we can think of these mainly as 3 different types of rights.

The 3 broad types of rights are Civil and Political rights, Economic, Social, and Cultural rights, and Collective rights or Group rights, Solidarity rights. Paying attention to these types of rights is very useful when we begin our discussion of the Indian Constitution.

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Rights under the Indian Constitution

	Civil and Political Rights	Social and Economic Rights	Cultural Rights	Religious Rights
Fundamental Rights	Equality before law (A.14)	Right to access public spaces without discrimination (A. 15(2))	Right to conserve culture (A. 29)	Right of minorities to establish and administer Educational Institutions (A. 30)
Directive Principles of State Policy	Non-discrimination, equality of opportunity in public employment (A. 15, 16)	Abolition of Untouchability (A. 17)	Right to Education (A. 21A)	Right of religious denominations to manage religious affairs (A. 26)
Other constitutional rights	Freedom of speech, association, movement (A. 19)	Prohibition of trafficking, forced labour and child labour (A. 23, 24)		
	Protection from arrest and detention and conviction for offences (A. 20, 22)	Environmental rights (A. 21)		
	Right to Life and Personal Liberty (A. 21)	Directive Principles of State Policy		

In the Indian Constitution, rights and, and Directive Principles, Part 3, and Part 4 of the Constitution make up the corpus of human or natural rights that are crystallized into constitutional rights in the Constitution. In the Indian Constitution, a decision was made to put political and civil rights broadly into Part 3 of the Constitution and call them fundamental rights. And to put socio economic and some cultural rights broadly in Part 4 of the Constitution, and devise a different mechanism for the interpretation and enforce.

There are other constitutional rights, which are not in Part 3, or in Part 4. And these might, and we have identified some of them on the slide for you, Article 265, which deals with no, which is crystallizes the broad principle, that there can be new taxation, without representation. Article 308, which now contains the remnants of a right to property, and something that we discussed earlier in this course, the Right to Vote, which is in Article 326.

You can see in the four columns in on the on your slide, a broad, a broad, presentation of the categories of civil and political rights, which include the rights to equality and non discrimination, as well as the Liberty rights to speech Association movement, and protections against criminal acts, criminal prosecution by the state as well as the core fundamental rights to life and personal liberty.

On the social and economic rights and I think by this point, in this course, you would do well, to equip yourself with a small pocket book of the Constitution so that you can constantly reference their text of the Constitution, something that all of us, as educated citizens should have access to, and should be able to read and understand. The social and economic rights are spread between Part 3 of the Constitution and Part 4 of the Constitution.

Some of them such as the right to access public spaces, without discrimination are broadly set out and impose obligations on various state and non state actors, as does the abolition of untouchability. We have very broad Directive Principles of state policy in Part 4 of the Constitution, which deal with the structure of the economy, the nature of protection of labor, the protection of women and children.

Cultural Rights are once again distributed between Part 3 and Part 4 of the Constitution. But broadly, we have some specific rights that we grant to the protection of language and culture, as well as a right to education. We also protect some religious rights, awaited with respect to the

ability to establish and administer educational institutions, as well as to manage Religious Affairs. So, the constitutional fundamental rights, cover, the constitutional rights and principles cover a very large swade of our collective lives. And when we read Part 3 and Part 4 together, we understand that the constitution places these values to be fundamental in the way our society evolves, and this government.

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The slide is titled "What does 'Fundamental' mean?". It features three text boxes and two images. The top right corner has the CNMPL logo. The first text box, titled "Article 13", contains two paragraphs: "(1) All laws in force in the territory of India immediately before the commencement of this Constitution, in so far as they are **inconsistent with the provisions of this Part**, shall, to the extent of such inconsistency, be **void**." and "(2) The State shall not make **any law which takes away or abridges the rights conferred by this Part** and any law made in contravention of this clause shall, to the extent of the contravention, be **void**". The second text box, titled "Article 12", contains a paragraph: "[...] 'the State' includes the Government and Parliament of India and the Government and the Legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India." The third text box, titled "Article 32", contains a paragraph: "The right to move the Supreme Court by appropriate proceedings for the **enforcement of the rights conferred by this Part** is **guaranteed**." There are two images: one of the Supreme Court of India building and one of a man speaking in a video call. A small caption "Image: Wikimedia Commons" is located below the Supreme Court image.

Why do we call Part 3 rights fundamental? Is an important question. Not only are they constitutional rights, their constitutional, fundamental rights, and let us make 2, 2 or 3 broad legal points that might be useful for all of you as we go off into the case studies in future weeks. The first point is that Article 13 of the Constitution makes it clear that if anyone makes any law against the Constitution, which takes away or abridging any of the fundamental rights in part three of the Constitution, then that law is invalid, or becomes void.

Now, what is voidness mean? It is a legal term as a term of legal art. But broadly, let us assume for the moment that that voidness means we will have no legal effect. So, Article 13 is a very powerful art, because it instructs all those who take and exercise legal public authority, that if such public authority is exercised in a manner that offends rights, it would be invalid and have no legal effect. Who do these fundamental rights applied to?

Broadly, Article 12 tells us that these fundamental rights apply to legislatures, the executive branch of government, as well as other authorities, this would include local authorities, and some

might argue even the court. So, fundamental constitutional rights are primarily protected against state action against the public authorities acting in a way that infringes rights, not against private actors and private associations. So, the state cannot violate my rights, who is going to enforce all of this? Who is going to ensure that indeed, the state follows this, this requirement?

That is taken care of by Article 32, which, which gives the Supreme Court and article 226, as we will see later gives the High Courts the power to enforce these rights and to declare that state action is invalid? Should the courts form a very important part of ensuring the protection fundamental constitutional rights? Now let us put the 3 articles together. 13 tells all actors, state actors cannot make any law that that bridges or takes away fundamental rights. Article 12, clarifies that this is primarily applicable to state actors, meaning the legislature, the executive, and other local authorities and the judiciary, other public authorities.

Finally, Article 32 gives the power to the Supreme Court to enforce these rights. Taken together fundamental constitutional rights, we see a very strong protection.

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The slide is titled "Part II History of demand for Fundamental Rights". It lists the following topics:

- Civil Rights in the 19th Century
- Civil and Political Rights in the early 20th Century
- Civil, Political, Economic and Social Rights after WW-1
- Special Provisions for Minorities, Lower Castes and Women
- Fundamental Rights and DPSP in CQL1950

In the bottom right corner, there is a small video inset showing a man in a light blue shirt speaking. The slide also features the GNPFD logo in the top right corner.

So, let me stop here. With lecture 1, we are just, just south of 40 minutes, I will come back to part 2 in lecture 2 for week 5.