

Constitutional Studies
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Lecture No. 11
Fundamental Rights

Hello. Welcome back to week 5 on Fundamental Rights. In lecture 1 in week 5, I covered the question – what rights do we have. I explored the typology of rights, the nature of rights in power of human rights and international law as well as a broad outline of fundamental rights in Constitution.

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In lecture 2, we will explore 3 different topics. First, I will outline a political history of constitutional rights in India. We will then outline and spend a little more time in detail on the types of constitutional and fundamental rights that we have and I will conclude with a very brief sketch of how fundamental rights may be enforced legally and politically. So, this is the coverage for lecture 2 and it is the last of the lectures in week 5.

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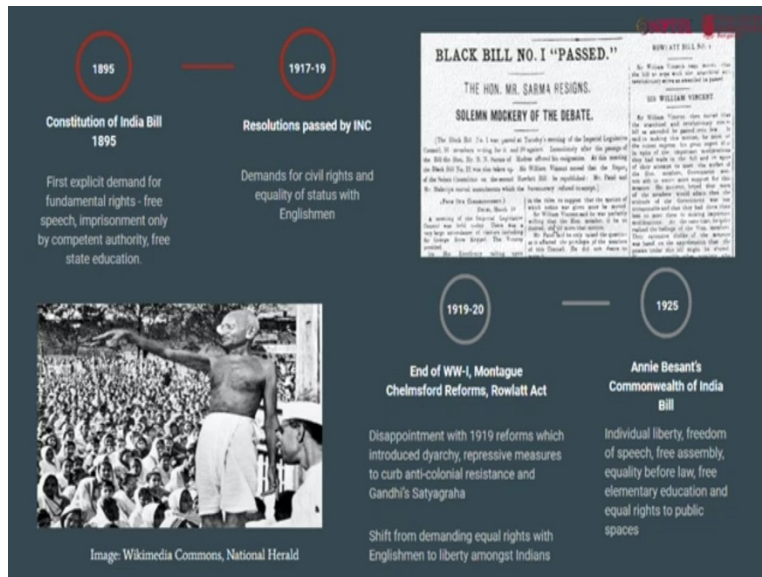


So, let us get started. Many people consider fundamental rights of the Constitution to be a unique gift of the Constitution. But somehow, fundamental rights found their way there and this was something of a historical or political accident. Nothing could be further from the truth because Indian debates and political movements around civil rights began very early in the nineteenth century. So, we have been thinking and talking about this question for 2 centuries in Indian political movements.

By the early twentieth century, civil and political rights began to emerge as important demands of the freedom movement. After World War 1, a further dimension gets added and the economic and social rights come to the fore of the demands of the national movement. Finally, in the in the decades leading up to the drafting of the Constitution of India, special provisions for minorities, the lower castes and women were agitated as being essential for the social and political transformation that India required.

Finally, fundamental rights and directive principles in the Constitution of India 1950 capture this long history of agitation and concern with fundamental rights in the Constitution. So, let us move on and begin in the early nineteenth century.

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So in 1895, the Constitution of India Bill which was drafted by anonymously at the time but seemed to be generated by some leading figures in the freedom movement made an explicit demand of fundamental rights. The early demand was for free speech and protections against arbitrary imprisonment as well as a free state education. Notice the broad demands, not just the normal civil and political rights against the criminal law excesses of the state, but the entire range of social rights, or including state, states supported education as well as the liberty rights of free speech.

So, 1895 the Constitution of India Bill which was produced by the freedom movement is the first (crystal) crystallized document where such demands for rights were made. In 1917, in 1919, the Indian National Congress which was an umbrella organization around which the freedom movement was organized, made demands for civil rights equality of status between native Indians and the English. So, you will notice that the early demands are made as demand seeking parity with the English. In 191-1920, this is all post World War 1, the Montague Chelmsford Reforms and Rowlett Act come into being and these generate fresh demands for our rights protections.

The 1919 reforms, for those of you who paid attention in your civics class, introduced the model of government called diarchy but moreover after World War 1, the Imperial State got far more serious about suppressing dissent and anti-colonial resistance, especially with Gandhi Satyagraha

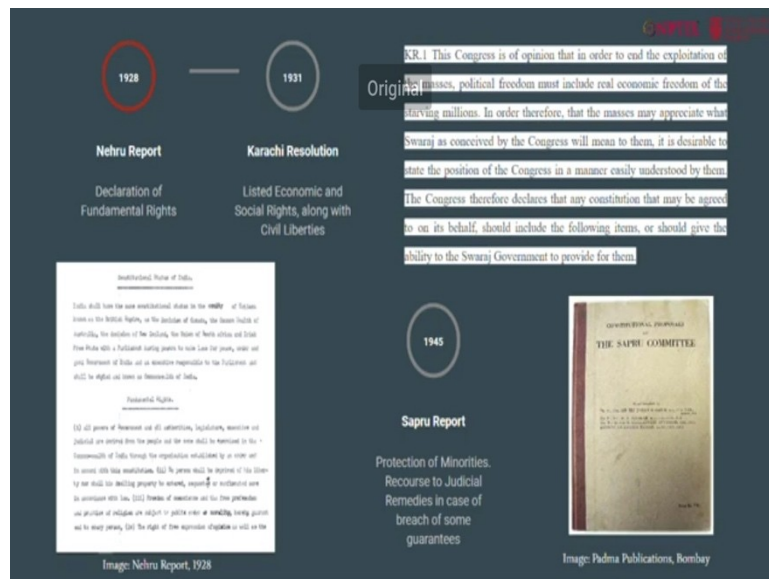
around the same period you see a far more stronger use of the criminal law to suppress dissent. What occurs in the period, especially after the Rowlett Act which was egregious form of criminal law legislation.

That is a shift in the demand from equal rights between Indians and the English to our demand for fundamental, civil and political rights to Indians and all those who reside in India. The tenor of the demand has changed in that period 1920. In 1925, Annie Besant's Commonwealth of India Bill makes a broad set of demands which starts resembling in some ways the Constitution of India as we now have.

These demands include individual liberty, freedom of speech, free assembly as well as free elementary education and equal rights to public spaces. Now this kind of wide range demand is a precursor to what will follow, which is stronger and stronger demands for a comprehensive Bill of Rights. It is worth remembering at this point, even at this early stage that Britain in its domestic law England did not have a Bill of Rights instrument. As we all know the English Constitution was famously unwritten, not set down in a single charter and disavowed a rights declaration.

That was an American legal instrument at that point of time. The English did not use it in their own jurisdiction. So, the normal claim that India must do this, that the English must do this in India was subject to much scepticism both for its novelty of form a charter of rights enforceable by law, as well as the fact that Imperial government could not tolerate such demands from the native people.

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In 1928, we get a strong document called the Nehru report. This was Motilal Nehru who was commissioned by the Congress to develop a document that could serve in some ways as a proto-Constitution, but more directly a declaration of fundamental rights. The language of fundamental rights can be traced directly to the Nehru report and that language continues all its way into the constitution of India, 1950 and all close reading of the Nehru report would suggest that it anticipates many of the rights and phrasings that finds way in to the Constitution of India.

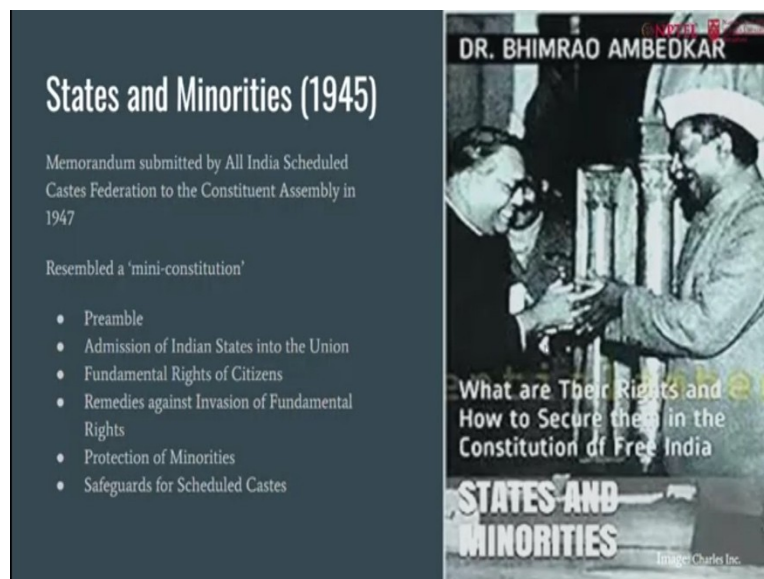
In 1931, the Karachi Resolution, which is a resolution of the All India Congress in Karachi adopts a wide range of a broad platform and the Karachi Resolution is worth reading for the nuanced and novel way in which it understands the relationship between civil and political rights on one hand and social and economic rights on the other. So, let me read this out you and it is worth reading slowly.

“This Congress, that is the All India Congress of the in Karachi in 1931 is of the opinion that in order to end the exploitation of the masses, political Freedom must include real economic freedom of the starving millions. In order therefore, that the masses may appreciate what swaraj is conceived by the Congress will mean to them, it is desirable to state the position of the Congress in a manner easily understood by them. The Congress therefore declares that any Constitution that may be agreed to on its behalf shall include the following items or should give the ability to the Swaraj Government to provide for them.”

This dovetailing, this constant emphasis that civil and political rights standing alone would not have meaning unless they were accompanied by economic freedom and social freedom is a strong position that has developed in India.

Please remember that at this point in time the Constitutional traditions and let us just take the United States as an example, have not embraced the position that social and economic freedom must be provided for in Constitution. They were sceptical of that possibility. The Indian Freedom Movement was much further ahead and provides for this possibility as early as 1941. In 1945, in the Sapru report this not only is the fundamental rights and economic and social freedom positions further develop but we get a full account of the protection to minorities, religious minorities and to the use of the courts as a as a mechanism to enforce these rights. So, a full-fledged judicial protection of fundamental rights.

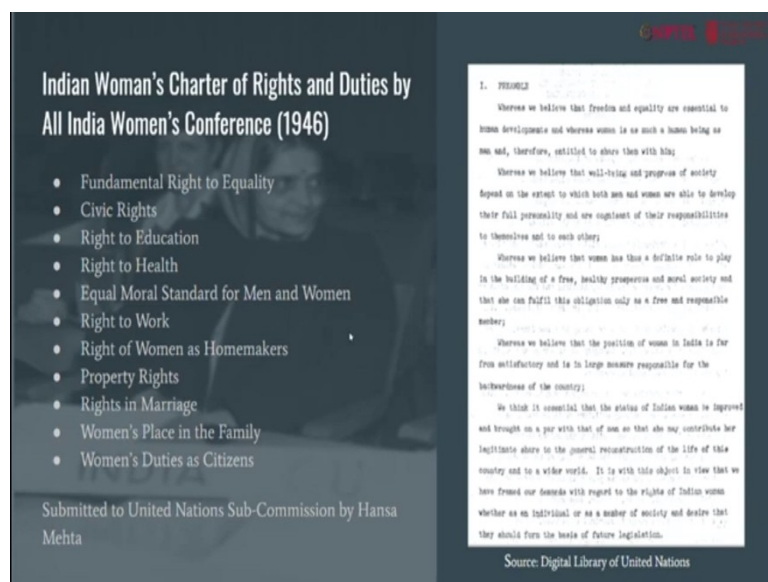
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Our next step is the states and minorities, which is compiled by the All India Schedule Caste Federation led by Dr. Bhimrao Ambedkar and submitted to the Constituent Assembly. So, it was oddly called the States and Minorities Report but as you can see with the with the subtitle on the screen: What are their rights and how to secure them in the Constitution of free India and this is about the Scheduled Caste, what are the rights and how do we secure. This particular document, States and Minorities Report, resemble something like a mini Constitution.

It had a preamble. It provided for the admission of the Indian princely states that we discussed in week 1 into the Union, it provided for fundamental rights for citizens and also it expressly provided for remedies against the invasion of fundamental rights. It provided for the protection of minorities as well as safeguards to the Scheduled Caste. When we look at this document and we know that it is just very close to the dates on which the Constitution of India begins to sit, the constituent assembly of India begins to sit and draft the Constitution of India. We notice that we have a proto constitution in shape, at least one that is fashioned by Dr. Ambedkar with the All India Scheduled Caste Federation.

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In around the same time, in 1946, Hansa Mehta was a member of the constituent assembly of India as well as the United Nations drafting committee and the United Nations Sub-Commission drafted an Indian woman's charter of rights and duties to the auspices of the All India Women's Conference. The Indian women's charter provided not only for rights of equality but also rights to education, health and work. It has a striking phrasing of the right of women as homemakers as both a recognition that women played that role and the conferral of certain rights and protections on women who did play that role as well as a focus on property, marriage and family.

Now this kind of framing of women's rights finds its way into the Constitution in small paths but maybe not as fully as could have been in that period. So, notice that you have documents drafted by the All India Congress, documents drafted by sub-committees of the Congress, documents

drafted by my actors like Hansa Mehta and Dr Bhimrao Ambedkar were not fully within the Congress system at that point in time.

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FR and DPSP : "Conscience of the Constitution"

- The Constituent Assembly distinguished between negative and positive obligations of the State
- Negative obligations are contained in Part III as Fundamental Rights
 - Civil and Political Rights
 - Justiciable or can be enforced through the Courts
- Positive obligations are contained in Part IV of the Constitution as Directive Principles of State Policy
 - Socio-Economic Rights
 - Non-justiciable or cannot be enforced through the Courts
 - Art. 37 - "[...] but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws"

The slide also features a book cover for 'The Indian Constitution: Cornerstone of a Nation' by Granville Austin, published by Oxford India Paperbacks. The cover shows a dome structure and the text 'OXFORD INDIA PAPERBACKS', 'A 50th Anniversary Edition', 'The INDIAN CONSTITUTION Cornerstone of a Nation', and 'GRANVILLE AUSTIN'. A small inset video shows a man in a white shirt speaking.

Finally, in the Constitution of India 1950, we got a broad set of rights as well as principles. The constituent assembly appears to have distinguished between negative and positive obligations of the state where the state undertook negative obligations, the rights were given the language fundamental rights where the state undertakes positive obligations, the rights to call then directive, the principles were called the Directive Principles of State Policy. This distinction anticipates the debates in the international forum about the place of these two different rights.

You will note that Universal Declaration of Human Rights was adopted at about the same time though the International Convention on civil and political rights, the international convention on economic and social rights had not emerged making this bifurcation between civil and political rights and social and economic rights. Very very strongly, the Indian Constitution adopts this distinction in a slightly different way by creating 2 separate chapters: Fundamental Rights chapter which is Part 3 and a Directive Principles of State Policy chapter which Part 4.

We have in the picture, a book that captures for you, those of you are interested in the history, a careful account of how the bifurcation of the 2 parts took place and how we might read and understand the pressures that were on the constituent assembly as a split Part 3 and Part 4 at that point. So, Part 3 and we can go over this one more time to emphasize and maybe give better

detail to that distinction. Part 3 of the Constitution ostensibly contains civil and political rights but we do know that as from the lecture 1 week 5 that there are aspects of Part 3 fundamental rights that deal with social, economic and cultural considerations.

Let us take a few on social issues. We have the ban on untouchability on economic issues. We have a right to education, the provisioning of the right to education albeit by amendment. On cultural issues, we have rights for religious minorities both to maintain their culture as well as to establish institutions. So notice, in all these cases that the civil and political descriptor fundamental rights chapter of the Constitution Part 3 seems to go beyond the description but what is critical about Part 3 is all of them may be enforced through the courts.

They are legally enforceable and this distinction is a sharp and notable one between Part 3 rights and Part 4 principles. Part 4 states a range of principles which are fundamental in the governance of the country, but not enforceable by through the courts. I could take out that expression not justiciable because that is not the language of Article 37. Article 37 simply says that the principles laid down in Part 4 are fundamental in the governance of the country and it shall be the duty of the state to apply these principles in making laws.

So, there is a binding state obligation but not one that can be enforced by the courts and this distinction between the model of enforcement and the nature of the rights has shaped Indian constitutional history. Right from the 1950s right up until now to call the principles in Part 4 of the constitution socio-economic rights maybe inadequate to the extent that some Part 4 principles include a range of matters that are not just social and economic types. For example, we know that a much discussed Article in Part 4 of the Constitution deals with questions of the killing of cows.

Now, one can make the argument that this is a social or economic right, but anyone who is familiar with that part of the Constitution, will know that it is not structured either in the terms of rights and it is focused on a very specific aspect, controversial political aspect of pre-independence India which was regarding the place of cows in Hindu religious thought.

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Let us move on from Part 2 which is a broad political history of early conversations around rights all the way into the Constitution of India 1950 to Part 3 where we will look quite closely at the core rights in this chapter. We look at one rights that the Constitution of India granted in the 1950s and has come to be changed substantially. We want to pay attention briefly to who can claim rights and whether rights are absolute or relative, what rights to we have?

This is the broad coverage in Part 3 and I encourage all of you to equip yourself with the bare texts of the Constitution, download a pdf easily available on the India code website and use this as a companion to browse through these provisions as we discuss them in this section and elsewhere in this course.

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Equality	Liberty	Equality & Liberty
Art. 14 - Equality before law	Art. 19 - Freedom of speech etc.	Art. 15 (2) - Access to public spaces
Art. 15 - Prohibition of discrimination	Art. 20 - Protection from conviction for offences	Art. 17 - Abolition of untouchability
Art. 16 - Equality of opportunity in public employment	Art. 21 - Life and Personal Liberty	Art. 21A - Right to education
Art. 18 - Abolition of Titles	Art. 22 - Protection from arrest and detention	Art. 23 - Prohibition of human trafficking and forced labour
Art. 29 (2) Non discrimination in admission to educational institutions maintained by the State	Arts. 25 to 28 - Religious Freedom	Art. 24 - Prohibition of child labour
		Art. 29 to 30 - Protection of interests of minorities



Broadly, we can break up the rights as rights relating to equality, life and liberty and then equality and liberty. Now, we understand that rights are intersecting and often speak to each other but in terms of organizing the rights there are many ways in which we may choose to organize a discussion of fundamental rights, and this is just one way to help you begin that conversation. On equality, Article 14 guarantees all of us equality before the law and the equal protection of the laws. Now, these are very broad phrases and we will spend some time unpacking what these phrases mean but article 14 is not the only equality Article. Article 15 puts in place a prohibition against discrimination so that there can be no discrimination on the basis of race, caste, sex and other grounds.

Article 16 assures us equality of opportunity in public employment, an essential requirement for a society where all may seek to participate in the structures of government. Article 18 talks about the abolishing of titles. These are primarily targeted at monarchical and imperial titles, but have come to take on new meaning subsequently and Article 18 was seen as an essential requirement of a republic which was not a monarchy. Article 29 Clause 2 also puts in place an anti-discrimination provision with regard to educational institutions. I might add here that Article 16 Clause 2 puts in place an anti-discrimination requirement with respect to public employment.

So, let us look at the broad dimensions of the right to equality. First statements proclamation of equality before the law and equal protection of the law as well as inequality of opportunity. And

then second and a requirement that there would be no discrimination against on the basis of race, caste, sex as well as other grounds in generally by the state but also especially in the fields of public employment as well as a public educational institutions so that those are subsets of equality provisions protections that we have in the Constitution.

The second broad type of protection we might describe as life and liberty protection. The life and liberty protection is anchored on Article 21 which guarantees that we all have the right to life and personal liberty and this cannot be taken away from us unless procedure established by law is followed. So, you must have a law that can and deprive anyone of life and personal liberty and unless such a law exists, all persons are guaranteed this right. The state cannot tamper it.

Now that you have a foundational right to life, other rights get tagged onto it. The first right I would like to discuss is the protection from arrest and detention. This is an extension of the personal liberty protection that is that once we put in place certain restrictions in the Constitution on state authorities as to how they might deprive your personal liberty though you cannot even make a law that goes against it. Article 20 puts in place some protections in the criminal law area against retrospective laws as well as some protections against self-incrimination. So, we will discuss some of these laws and these constitutional provisions in greater detail.

But notice the cluster Article 21, which is a basic life and personal liberty protection and around Article 21 you have Article 20 on the one hand which prevents the creation of certain kinds of criminal law and Article 22 on the other which prevents the state from exercising its really low powers in a way that infringes on life of personal liberty. Apart from these liberties, we have a range of other freedoms and those are contained in Article 19 of the Constitution.

The 6 freedoms of Article 19 include the freedom of speech and expression as well as the freedom of movement, the freedom of assembly and so on and we will study them at greater length later in this course. Articles 25 to 28 cover range of religious freedom. Religious freedoms are owed in that in some cases the guarantees are to individuals, in the other cases the guarantees are to group exercises of these religious freedoms and so one must be attentive to who is the claimant of the right is each of these cases.

Finally, about the deal with the cluster of provisions that we might call combinations of equality and liberty. Let me start from the bottom. We have a range of Articles. Articles 29 and 30 that

put in place some freedoms for religious minorities while at the same time requiring that they be treated in a manner that allows them to emerge and find full cultural expression in an independent India. So, 29 and 30 deal with the problem of creating religious groups equally while at the same time assuring them some freedom in how they might.

Article 24 and Article 23 deal with specific problems of the social sphere peculiar to India. The problem of human trafficking and forced labour, these were initially very closely tied to the caste system and then find later manifestations related to the caste system and beyond as well as a prohibition child labour. So, for various reasons the issue of child labour was significant and agitated in the pre-independence India by the All India Congress and it finds its way into the Constitution so that it is not simply an option left to the to to legislators, a prohibition is placed in the Constitution.

A similar provision with respect to caste is on the abolition of untouchability Article 17. I discussed it briefly in the last last slide and the point of Article 17 is to ensure us equality, but to also prevent curtailment of the liberty of factors based in social practices like that of caste and untouchability. Article 15 too continues in a similar wing as it tries to remove all disabilities, civil disabilities that might attach to any person in the use of public resources and public spaces. Now this body of provisions can be understood purely as liberty provisions. They operate against backgrounds of social discrimination, which are expressly sought to be overcome by the Constitution in particular Part 3 of Constitution.

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Right to Property

Art 19 (1) (f)

- All citizens shall have the right to acquire, hold and dispose of property

Article 30

- No person shall be deprived of their right to property except according to procedure established by law

By the 1st to the 44th Constitutional Amendment 1978

- Right to property is not a fundamental right
- Excluded from purview of Arts. 13 and 32
- Art 300A contains the constitutional guarantee that no person shall be deprived of their property except by authority of law

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Let us turn our attention to the right to property for a moment. When we think and we talk in the language of fundamental rights constitutional fundamental rights, there is a tendency to assume that once these rights are granted, once these rights are written into the Constitution, they are there forever. Now, one would be one, this would be a reasonable conclusion for someone to reach but this is not the case and let us look at one example. The Right to Property was placed in the Constitution in 2 different Articles in the Constitution of India 1950.

Article 19 provided that all citizens shall have the right to acquire, hold and dispose of property. Article 30 provided that no person shall be deprived of the right to property except according to procedure established by law. You will notice that Article 19, the right to property is very similar to the other Article 19 rights of freedom of speech and so on whereas the Article 30, right to property is very similar to the guarantee in Article 21 of the right to life and personal liberty.

However, these strong constitutional protections of the property right ran into a constitutional litigation almost from the get-go from 1950 and the reason for this litigation is rather complicated, but if we take for a moment that the Constitution had adopted strong social and economic transformative goals in the Constitution and directed parliament an executive government to secure these goals, parliament then started passing a range and enacting range of land acquisition laws and tenancy reform laws and all of this was motivated by the need to redistribute land, a vital resource of production.

The Supreme Court when it was confronted with citizen petitioners were challenging the right of the state to enact such laws often found these laws constitutionally deficient and struck down these laws. What could Parliament do? Parliament immediately set about amending the property clauses of the Constitution. So, by the first Constitutional Amendment which began this process 1950-51 to the forty fourth constitutional amendment. In 1978, the right to property was almost entirely taken out of the Constitution. It is no longer a fundamental constitutional right. It no longer is protected by Article 13 and Article 32, so it is not judicially enforceable.

It is instead replaced by an Article 300A, a constitutional guarantee, but not a constitutional fundamental right that no person shall be deprived of their property except by authority of law. A tamer version of Article 30 is found in article 300A. Why do I bring up this this discussion? I mean the right property, you know, is in some way the history of Indian Constitutional Law and Indian Constitutional Experience can be told through the litigation and controversies arising out of the right to property but the small reason that I placed this slide here today is to alert you to the fact that the right to property that no fundamental constitutional right, even the right to property is immune from change.

If the majority is the stable majorities in Parliament and in some cases the states feel that the Constitution architecture is preventing change in a manner that they seek they may amend our Constitution including the fundamental rights chapter. So, this is the range, so while Constitutional rights are fundamental and Constitutional, they are subject to change.

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Beneficiaries of FRs

All fundamental rights are not granted to all persons

Some rights are available to *all persons*, some are available to *only citizens* and some are restricted to *specific groups*

Corporations and companies (legal persons) cannot claim benefits of fundamental rights available to citizens

- Only natural persons can be citizens under the Citizenship Act, 1955

Group Rights

Different groups have been provided different degrees of protection under the Indian Constitution.

- Full recognition and protection to minorities (Arts. 26, 29 (1) and Arts. 30 (1))
- State can make special provisions for SC, STs and BCs (Arts. 15 (4), (5) and 16 (4)), women and children (Art. 15 (3))

The aims and objectives behind each group right also differ:

- Protect of tribal groups from exploitation (Art. 19 (5))
- Protection the distinct identities of religious, linguistic and cultural minorities
- Undo historical inequalities due to caste-based discrimination

In our discussion around citizenship, I had briefly reviewed the range of beneficiaries of fundamental rights. We had discussed the distinction, citizens, persons, residents and so on. So, let us try and let us try and understand and locate who might be able to claim fundamental rights. The first and important general principle that we must appreciate is that all fundamental rights are not granted to all persons. So, there is no uniform grant in Part 3 of the Constitution. Some fundamental rights are granted to all persons. For example, the right to life Article 21, while some are available only to citizens. For example, the right to equal opportunity in public employment Article 16(1) and some are restricted to specific groups.

For example, Article 15(3) allows the state to make special provisions for women and children. Only women and children can take the protection of Article 15(3). So, whenever we read Constitutional Article, we must be attentive to who has a claim under this constitutional Article. There is some doubt about whether corporations and companies other legal persons, trust societies can claim the benefit of fundamental rights available to citizens and to this we must say that generally speaking, only natural persons can claim fundamental rights, but through some mechanisms of litigation procedure, companies may also seek to gain benefit, especially if one of their shareholders can claim to be particularly aggrieved by a by a rights violation.

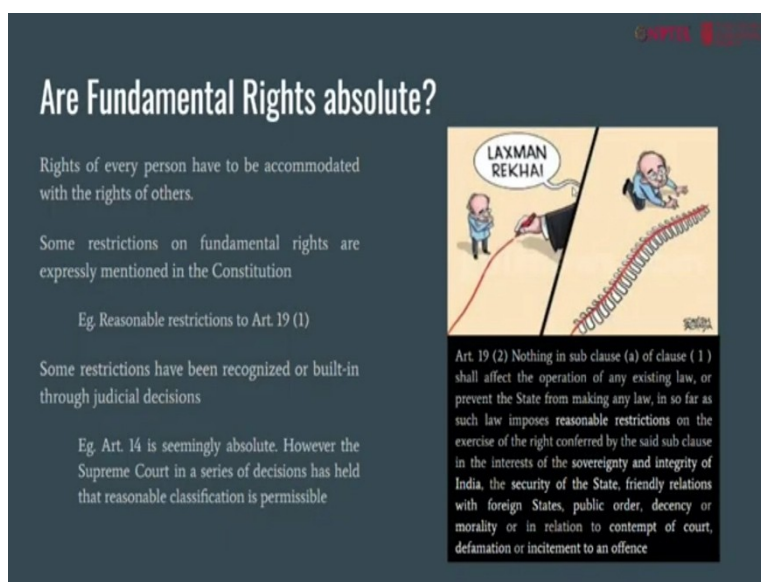
So, this is the range of claimants, except the individual claims except for group rights and let us let us pay attention to group rights a little bit so that we get alert to what kinds of groups and

under what conditions can they claim rights. So, different groups have been provided different levels of protection under the Constitution. There has been a recognition and protection to linguistic and religious minorities in Articles 26 29 30. There has also been, protections for Scheduled Caste, Scheduled Tribes and Other Backward Classes as well as women and children. In this case, the state can make special provisions to benefit.

The aims and objectives for protecting every single group are very different. The protection of religious minorities occurs against the background of the adoption of the secular state point of distinction between India and Pakistan at the time of partition, but also a point of distinction between a secular theocratic state more generally. At a later point, the protection of religious, linguistic and cultural minorities was seen as essential Constitutional protection not only for religious groups but also for minority language group in order to protect their cultural vitality.

The protection for special groups like SC, ST and OBC groups as well as for women and children are attempts to turn back a historical disadvantage which has persistent effects into post-independence India. So, the motivation for protection and the nature of protection for each of the groups is distinct and requires some careful historical understanding to help us along the way.

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Are Fundamental Rights absolute?

Rights of every person have to be accommodated with the rights of others.

Some restrictions on fundamental rights are expressly mentioned in the Constitution

Eg. Reasonable restrictions to Art. 19 (1)

Some restrictions have been recognized or built-in through judicial decisions

Eg. Art. 14 is seemingly absolute. However the Supreme Court in a series of decisions has held that reasonable classification is permissible

LAXMAN REKHAI

Art. 19 (2) Nothing in sub clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality or in relation to contempt of court, defamation or incitement to an offence

I have spoken about, for a moment, that the fundamental rights in the Constitution may be amended, but while they are in the Constitution are they absolute, should we think that when we have a right to free speech that rights to free speech must overcome all other considerations

restrictions that maybe places on free speech right. Now, the Indian Constitution does not desire an overall exceptions and limitations clause.

Some constitutions, newer constitutions like the Canadian or the South African Constitution have exceptions of limitations clause where they broadly set up the circumstances under which a Fundamental Right may be regulated but the Indian Constitution does not have such an omnibus clause. So, how should we read the Indian Constitution? The first point that we might pickup is that some Fundamental Rights do have do have specific restrictions which are set out in corollary articles.

For example, Article 19 (1) has a corollary restriction in Article 19 (2) and if you look at the small cartoon picture on your right and you recognize the context in which these issues have arisen around the contempt of court. Recent controversies on the contempt of court 19 clause 2 clearly provides for reasonable restrictions on the exercise of the free speech right in relation to contempt of court. So, in a contempt of court proceeding if one is prevented from speaking, the Constitution anticipates that this is a reasonable restriction on free speech rights.

Now, not all contempt type proceedings are reasonable restrictions but the Constitution permits such a reasonable restriction to commit. Other kinds of descriptions are not expressly set out in Clauses like Article 19 Clause 2 but maybe read into a Clause which at first looks absolute but through judicial interpretation application admits to some exceptions. Article 14 which guarantees to all of us equal protection of the law and equality before the law seems to be one such absolute proclamation.

What indeed occurs is that the Supreme Court of India has introduced the doctrine of reasonable classification and reasonable classification allows us to not apply Article 14 in a binary, either it applies strikes down the action or it does not like the kind of way but allows us to build some nuance, some detail into how the equality protection of the Constitution operates. We will spend some time on that a little later in this course when we talk about equality cases.

Overall, we might understand that while citizens, persons and groups are granted rights of various types, these rights taken together are ultimately likely to be balanced off against each other. This task of balancing and you know according appropriate weight to the rights is a complicated one and often left to the Supreme Court of India in the most complicated cases but

this balancing with the rights of others might best be done through a simple test like a proportionality test in or balancing proportionality test but the Indian Supreme Court is yet to articulate such a test in a in a direct way.

So, we might imagine what such a balancing and accommodation perspective might be. So, we move with the idea that not all rights are absolute and though fundamental rights may be drafted in this broad sense, we should not make the mistake of assuming that they are absolute.

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The slide features a dark blue background with white text. The title is 'Are there any unenumerated Fundamental Rights?'. Below the title, there are three paragraphs of text. The first paragraph states: 'Specific enumeration of certain rights in the Constitution does not foreclose the scope of claiming other fundamental rights'. The second paragraph states: 'Courts have undertaken creative interpretations of fundamental rights under Part III to include other rights where the provision are broad enough'. The third paragraph states: 'If the language is not broad enough, then Courts have recognized 'concomitant rights' or rights which are necessary for effective and meaningful enjoyment of fundamental rights'. To the right of the first paragraph is a black and white photograph of a group of people, possibly a court scene. To the right of the second paragraph is a text box that reads: 'Shift in SC's interpretation of FR since Maneka Gandhi v. Union of India (1973)'. Below the text is a newspaper clipping from 'The Indian EXPRESS' with the headline 'Privacy Supreme'. In the bottom right corner, there is a small video inset showing a man speaking.

While are we all have rights that are clearly stated in the Constitution, do we have rights that go beyond what is stated in the Constitution and that is the question that we ask in this in this slide: are there unenumerated fundamental rights, rights that were either discussed in the Constituent Assembly and denied which we can now reassert or rights that were never imagined in the early stages of the Indian Constitution framing but we would now take to be standard rights. What kinds of unenumerated fundamental rights do we have?

In the Maneka Gandhi case, which many of you might know, the Supreme Court of India took the view that the protection of life and personal liberty also included the protection to the right to travel abroad, a right which is not otherwise recognized in the Constitution even in so far as we have a right to feel movement, it is only a right within the territory of India. So, this this right which is generated in Maneka Gandhi case as well as a complicated interpretation of that right is an example of the Court creating new rights, but more recently, I think many of you would have

read that the court announced a new right to privacy and a very broad and substantive right to privacy.

Please note that there is nothing in the Constitution either in 19 or 21 that expressly uses language approach. So, this is a judicial creation that has created a new right. You might ask where did it come from. The court found that the privacy right was embedded in Article 21, which is the right to life and personal liberty as well as Articles 14 and 19 rights to equality and rights to liberty. So, we might understand that the new rights that we might find in our Constitution are a result of judicial interpretation but our Court has been alive to this possibility and used it significantly.

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I am going to close this session with a very brief outline of how Fundamental Rights may be enforced. Is it the responsibility of state? Is it the responsibility of non-state actors? Can private citizens being made responsible for fundamental rights enforcement and should be it be enforced legally or should it be enforcement politically and so let us look at this briefly as we close this section. We will explore these questions in greater detail in the case studies to follow.

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The slide is titled "Fundamental Right Claims" in white text on a dark blue background. Below the title, it is divided into two sections: "Against the State" and "Against private citizens".

Against the State

Art. 12 [-] "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.

Against private citizens

- Art. 15 (2) states that access to public places cannot be denied on the basis of religion, race, caste, sex or place of birth
- Art. 17 abolishes untouchability
- Art. 23 prohibits human trafficking and forced labour

On the right side of the slide, there is a book cover for "FUNDAMENTAL RIGHTS AND THEIR ENFORCEMENT" by Uday Raj Rai. The cover features a photograph of a person in a public space. Below the book cover, there is a small inset video of a man speaking, and the text "Image: PHI" is visible at the bottom.

Now we have noticed that Article 12 of the Constitution primarily imposes an obligation on the state which includes the Executive branch as well as the Legislative branch of the Union and State government as well as local and other authorities to be bound by fundamental rights. So, we have no doubt in our minds that the state is bound, the state in all its manifestations. There is a question on the boundaries of what our local authorities, should courts also be included in local authorities and so on but no final decision and we would need to get into a lot more detail to understand that aspect of the Constitution but what about the broader question.

Can fundamental rights be enforced against private citizens? Is that possible and it is clear that some provisions of the Constitution Article 15 (2) where we spoke about the removal of civil disabilities with respect to access to public spaces as well as Article 17 similarly motivated by caste related disabilities arising out of the practice of untouchability clearly seem to affect private posts persons. Article 23 as well, which prohibits human trafficking and forced labour is not specifically directed towards state so potentially applicable to private citizens.

In the much more complicated way in subsequent cases, the court has applied various fundamental rights to be posing obligations interpreted these fundamental rights to be imposing obligations private citizens and this in legal technical terms is called a horizontal application. Now, while we will not spend too much time in the theory of vertical and horizontal application of fundamental rights in an introductory course like this, we would do well to look at a book like

Fundamental Rights and their Enforcement by Uday Raj Rai which is a very careful analysis of this broad area of fundamental rights enforcement.

So, in this slide, we learn that fundamental rights claims are primarily enforced against the state and secondarily maybe enforced against private citizens.

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The slide is titled "Enforcement of Constitutional Rights" and is divided into three columns. A "Zoomed to fill" label is present at the top. The columns are: Directive Principles of State Policy, Fundamental Rights, and Other Constitutional Rights. The text in the columns is as follows:

Directive Principles of State Policy	Fundamental Rights	Other Constitutional Rights
Article 37 The provisions contained in this Part shall not be enforceable by any court [.]	Article 32 The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed. Art 226 Notwithstanding anything in article 32, every High Court shall have the power, throughout the territories in relation to which it exercises jurisdiction [.] to issue to any person or authority [.] directions, orders or writs [.] for the enforcement of any of the rights conferred by Part III or for any other purpose	Article 226 [.] every High Court shall have the power [.] to issue [.] directions, orders or writs [.] for any other purpose

What we must realize is that the way the wide array of rights and principles are enforced in the Constitution very significantly between Part 3 and Part 4 of the Constitution as well as Article 226 which details the role of the High Courts. So, let me let me just start with Article 37 of which we have read various parts in this lecture so far. So, Article 37, which is the gateway to Part 4 of the Constitution makes it clear that the Directive Principles are not enforceable by any court. While at the same time being fundamental in the governance of the country and being a duty, a constitutional duty of legislators in the executive to implement these principles.

So, clearly the Director Principles of State Policy are meant to be politically enforced by the political branches of the government and the courts if at all they have a role, they have a secondary role. Fundamental rights, on the other hand, are fiercely guarded by the court in particular the Supreme Court and Article 32 as well as the various High Courts, every High Court under Article 226.

So, these provisions are fiercely defended by by the courts and by this we mean for the Fundamental Rights, the Constitutional Courts, the High Courts and the Supreme Court. If you

have other Constitutional Rights they are not, you know, we talked about Article 300A, we talked about Article 326 which dealt with the rights of election who will protect those rights primarily Article 226. The High Courts now may go up and appeal to the Supreme Court but your primary Court of Call is the is the High Court of your respective state. So, notice that while Fundamental Rights and Constitutional Rights are primarily enforced through legal means, the Directive Principles of State Policy are primarily enforced through political means, not through legal means.

So, with that we conclude this lecture, lecture 2 of week 5 and our preliminary introduction to Constitutional Fundamental Rights. For week 6 onwards, we will get into some very interesting cases and I look forward to welcoming you back to discuss these cases and get a deeper understanding of the specific Fundamental Rights in the Constitution like life, liberty and equality. Thank you very much. Look forward to seeing you back next week.