

ARTICLE 13 VIOLATION OF FUNDAMENTAL RIGHTS
 ("Law" and Fundamental Rights)

Contents

1. Article 13 - Bare Act.
2. Aim of Article 13.
3. What is "Law" and "Law in force"
4. Is Amendment, "law" under Article 13(3)
5. Article 13(1) - Analysis (Pre-Constitutional Law)
 - a. Doctrine of Retrospectivity -
Keshavan Madhav Menon case (Das J.)
 - b. Doctrine of eclipse: -
Bhikaji v. State of M.P.,
 - c. Doctrine of Severability: -
F. N. Balsara case
6. Post-Constitutional Law (Article 13(2))
7. Doctrine of waiver
 - a. Bhasheshwar Nath Case

Laws inconsistent with or in derogation of the fundamental rights. Art 13

Pre constitutional Law Art. 13(1)	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 III), shall, to the extent of such inconsistency, be void.
Mandate to State Art. 13(2)	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.
Meaning of words "Laws" and "Law in Force" Art. 13(3)	3. In this article, unless the context otherwise required, - a. "law" includes any Ordinance, order, bye-law, rule, regulation, notification, custom or usage having in the territory of India the force of law; b. "laws in force" includes laws passed or made by a Legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas.
Non Applicability Art. 13(4)	4. Nothing in this article shall apply to any amendment of this Constitution made Under Article 368

Commentary

Art. (4) Inserted by the Constitution (24th Amendment) Act 1971,)

THE MEANING OF "LAW" AND "LAW IN FORCE"

Before considering the ambit of Article 13, it is necessary to consider the meaning of "law" and "Law in force".

Meaning of Law	<p>Article 13(3) (a) defines "Law" very widely by an inclusive definition. It does not expressly include a law enacted by the legislature, for such an enactment is obviously law. The definition of law includes:</p> <ol style="list-style-type: none"> i. An ordinance, because it is made in the exercise of the legislative powers of the executive; ii. An order, bye-laws, rule, regulation and notification having the force of law, because ordinarily they fall in the category of subordinate delegated legislation and are not enacted by the legislature; iii. Custom or usage having the force of law, because they are not enacted law at all. This extended definition of "law" appears to have been given, in order to forestall a possible contention that law can only mean law enacted by the legislature.
Meaning "law in force"	<p>The expression "law in force" used in Article 13(1) and 13(3)(b) has not been defined but in <i>Edward Mills Co. Ltd. v. Ajmer</i> (1995) SC held that "law in force" means</p> <p style="padding-left: 40px;">the same thing as existing law" which has been defined in Article 372 to mean: "any law, ordinance, order, bye – law, rule or regulation passed or made before the commencement of this Constitution by any legislature, authority, or person having power to make such a law, ordinance, order, bye - law, rule or regulation."</p>

Whether "Amendment to the Constitution is 'Law' As per Article 13?"

- ⇒ Article 13(4) declares, "Nothing in this Article shall apply to any amendment of this Constitution made under Article 368. This clause was inserted by the (24th Amendment) Act, 1972.
- ⇒ Amendment of the constitution is not "law" within Article 13(3); - In *Sankari Prasad case* (1952) the SC unanimously held that an amendment of the Constitution under Article 368 was not "law" within the meaning of Article 13(3) (a).
- ⇒ The court distinguished between a law made in the exercise of legislative power and a law made in the exercise of Constituent power, and held that Article 13(3) (a) applied only to a law made in the exercise of legislative power. This distinction was affirmed by a majority of 3 to 2 in *Sajjan Singh y, State of Rajasthan* (1965).

- ⇒ These cases were overruled in *I.C. Golak Nath v. State of Punjab (1967)* but Golak Nath was decisively overruled in *Keshvananda Bharti v. State of Kerala (1973)*. However no conclusive comment was made on the above issue in this case as well.
- ⇒ However, the matter was set at rest by the Constitution (24th Amendment) Act 1972, which inserted a new clause (4) in Article 13 which expressly excluded an amendment of the Constitution from Article 13. (This interpretation is possible because the keshvananda Bharti Case was silent on this point)

EFFECTS OF ARTICLE. 13

We now consider the effect of Article 13 on

- i. Existing laws (Law in force), i.e., Pre-Constitutional Laws, and
- ii. Laws made by the legislators setup vide our Constitution i.e., Post-Constitutional Laws.

Pre constitutional laws- Article 13(1)	- Article 13(1) reads 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.
Contents	<ul style="list-style-type: none"> i. The Law in question must have been in force in the territory of India immediately before the Commencement of the Constitution. i.e. 26. 01. 1950 ii. Some part of the law in question is inconsistent with the Fundamental Rights under part III of the constitution. iii. In the above events, the law in question will be void only to the extent of inconsistency and not wholly.
Issue.	The issue that arises is, 'is the inconsistent law, void ab initio' or does it still apply against acts done prior to the commencement of the Constitution?"
Example.	<ul style="list-style-type: none"> ⇒ Suppose a person commits an act in 1930 which is an offence according to a law then existing. ⇒ On 26-1-1950 that law becomes void as it is inconsistent with Fundamental Rights. ⇒ The <i>Question</i> is, Can the person never be Convicted or punished due to the voidness of Law since 26-1-1950 or can he still be punished in say 1960 under the old law? ⇒ One thing is clear if the person had committed the offence in 1960, he would not have been punished as the old law has become void. but if the person committed an offence before 26-1-1950 he can very well be

- punished under an existing law (though inconsistent and void since 26-1-1950)
- ⇒ As the Fundamental Rights become operative only from 26-1-1950, the question of inconsistency of the existing law with the Fundamental Rights must arise from 26-1-1950 only and not before (as there were no Fundamental Rights as per Article 13, before 26-1-1950) thus the voidness of the existing law is limited to the future exercise of Fundamental Rights. *Article 13(1) does not wipe out completely. the inconsistent laws from the statute book, they still remain valid for past acts (before 26-1-1950).*

Principle of Retrospectively.

<p>Principle of retrospectively.</p>	<ul style="list-style-type: none"> ⇒ The provisions of the Constitution relating to the Fundamental Rights have no retrospective effect. ⇒ All inconsistent existing laws therefore become void only from the commencement of the Constitution. ⇒ Acts done before the commencement of the constitution in pursuance or in contravention of the provisions of any law, which after the commencement of the constitution became void because of inconsistency with the Fundamental Rights, are not affected.
<p>Prosecution could be continued, because the provisions of the Constitution were not Retrospective</p>	<p>In Keshavan Madhava Menon v. State of Bombay (1951) SC,</p> <ul style="list-style-type: none"> ⇒ the effect of Article 13(1) was considered in order to decide whether a prosecution commenced under Section 18, India press (emergency powers) Act, 1931 before the coming into effect of the Constitution, could be continued after the constitution came into force if the Act became void or violative of Article 19(1) (a) and (2). ⇒ Das J., speaking for the majority held that the prosecution could be continued, because the provisions of the Constitution were not retrospective, unless made so expressly or by necessary intendment, and because there was nothing in the language of Article 13(1) which indicated that it was retrospective.

Doctrine of Eclipse:

Pre Constitutional Law is not altogether void but it is inoperative

- ⇒ From the above, flows the concept of eclipse, which envisages that, the inconsistent Pre Constitutional law is not wiped out completely it rather remains dormant or eclipsed. It revives with the same force the moment the defect is cured by a legislative enactment.
- ⇒ In light of the above doctrine of retrospectively, it is clear that a Pre-Constitutional law which is inconsistent with the provisions of part III (Fundamental Rights) of the Constitution is not a nullity.
 - ⇒ It is not void ab initio rather it exists for Pre-Constitutional Acts.

	<p>⇒ It also remains valid for those persons who have not been given the Fundamental Rights (i.e., non-citizens in some cases) even for Post Constitutional acts.</p> <p>⇒ Thus, if a law becomes void from 26-1-1950 as it is inconsistent with the Fundamental Rights, it will still be applicable against a citizen or a non-citizen who committed an offence under the said law before 1950. Also, it will be applicable only against a non-citizen if he commits the offence after 26-1-1950.</p>
<p><i>The question arises that if the law is not void ab initio and is not completely wiped out; can it be revived and made effective by an amendment of the law in question?</i></p>	<p>The law otherwise valid becomes void, merely because the Fundamental Rights came into operation, from 26-1-1950 and the shadow of these Fundamental Rights falls upon the said law. In other words, the said law, in so far as it is inconsistent with the Fundamental Rights, becomes eclipsed by the Fundamental Rights.</p> <p>This shadow or eclipse, is removed the moment, the defect in the said law is removed by a constitutional amendment. The reason being that the law never became non-existent;</p> <p>It was always there behind the shadow of the Fundamental Rights. The moment the shadow is removed, the law will automatically come to the force or revive.</p>
<p><i>Bhikaji v. State of M.P. (1955)</i></p>	<p>⇒ The SC in <i>Bhikaji v. State of M.P. (1955)</i> decided the case on the above grounds. In that case, the C.P. and Berar Motor Vehicles (Amendment) Act, 1947 authorised the state government to take up the entire motor transport business in the state to the exclusion of the private operators. This law became void on 26-1-1950 as it was violative of Article 19(1) (g). However this defect was cured in 1951 by the 1st Amendment Act, which amended Article 19(6) so as to authorise the government to monopolise any business.</p> <p>⇒ It was held that the amendment had removed the shadow and therefore the law became operative from the date of the amendment against the citizens also.</p>

The Rule of Severability.

only that part of an Act is inoperative which is inconsistent with FR

According to Article 13(1), it is not the whole Act, which is rendered void, if it violates any Fundamental Right, but only that part of an Act is held inoperative which is inconsistent with Fundamental Rights and only to the extent of such inconsistency. The rest of the Act, minus the impugned provision(s) may remain active.

State of Bombay v. F. N. Balsara, 1951 SC	In <i>State of Bombay v. F. N. Balsara, 1951 SC</i> , the provisions of Section 8 of the Bombay Prohibition Act, 1949 was held ultra vires on the ground that they infringed the Fundamental Rights of the citizens, but the Act, minus the invalid provisions, was allowed to stand.
To what extent the severed Act would be valid?	<p>⇒ The SC said: "The decision declaring some of the provisions of the Act to be invalid does not affect the validity of the Act as it remains".</p> <p>⇒ In certain cases, Provisions of an act may be so closely related and mixed up that the valid and invalid portions cannot be separated from one another. In such case, the invalidity of the impugned portion shall result in the invalidity of the Act in entirety.</p> <p>Since what remains valid is so inextricably wound up with the parte declared invalid, that the valid part cannot survive independently.</p> <p>In determining whether the valid parts of a statute are severable from the invalid parts, the intention of the legislature is lite determining factor <i>i.e.</i> it should be asked whether the legislature would have enacted all that which survives without enacting the part found ultra vires.</p>

POST CONSTITUTIONAL LAW

Declaration of Article 13(2).	<p>⇒ 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</p> <p>⇒ This clause, deals with , Laws made after the commencement of the Constitution.</p> <p>⇒ The state is prohibited from making any law which takes away or abridges any of the right conferred by part iii.</p>
Contents	<p>Article 12 Provides</p> <ol style="list-style-type: none"> 1. State Shall not make any <i>law</i>, which contrives or abridge the Fundamental Rights 2. In case, a law in contravention is made, such a law shall be void 3. The voidness of the law is only to the extent of the contravention <i>i.e.</i>, if only a part of the law is in contravention, only that part will be void and not the whole law.
Questions	<p>The main three questions with respect to Article 13(2) are: -</p> <ol style="list-style-type: none"> 1. Is the law declared to be void under Article 13(2), void ab initio <i>i.e.</i> a complete nullity? 2. Whether the law declared void under Article 13(2) would be non-est with respect to non-citizens also. 3. Whether the doctrine of eclipse applies to Article 13(2).

<p>Solution to Question (1).</p>	<p>Article 13(2) enjoins a duty upon the state not to make laws in contravention of the Fundamental Rights. Thus if such a law is made, it is ultra vires and hence void.</p> <p>Unlike a law under Article 13(1), a law under Article 13(2) is void ab initio and a stillborn law. This is so because such a law could never have been validly made whereas the law under Article 13(1) was valid in the Pre-Constitutional times.</p> <p>It is important to note that the above view does not hold good now as the Ambica Mills Case has modified the concept. The actual position now is that like pre-constitutional laws even the post-constitutional laws are not void ab initio or non-est.</p> <p>However a declaration of the voidness by the court is required. Nevertheless, whether such a law is a non-est has to be seen.</p> <p>Even convictions made under the unconstitutional laws have to be set aside as the law is void ab initio.</p>
<p>Solution to Question (2): As to the voidness of law in respect on non-citizens.</p>	<p>The Fundamental Rights are available to citizens only (except some) and the directive under Article 13(2) is with respect to the Fundamental Rights only. Therefore the law in question has to be void with respect only to those people to whom the Fundamental Rights are available.</p> <p>Hence the law has to be void ab initio or non-est only with respect to citizens and not non-citizens.</p>
<p>Solution to Question (3): As to applicability of doctrine of eclipses to Article 13(2).</p>	<p>In this regard initial arguments were:</p> <p>As the Inconsistent law is void ab initio or a nullity with respect to citizens (because as the directive under Article 13(2), the said law could never have been validly made), the question of its being shadowed or eclipsed by the Fundamental Rights does not arise. If there is no valid law at all, then what is to be eclipsed by the Fundamental Rights. Therefore the doctrine of eclipse should not apply to Post-Constitutional Laws with respect to citizens. .</p> <p>As to non-citizens the question of applicability of Article 13(2) does not arise as the law cannot be inconsistent hence void for non-citizens as far as Fundamental Rights are not available to them.</p> <p>The law is and with always be valid and applicable for non-citizens.</p> <p>Taking a clue from above it can equally be argued, that as the law still remains valid against non-citizens, it cannot be said to be non-est or a nullity against citizens also, and therefore the law should become valid and applicable against citizens also once the defect is cured. i.e, the doctrine of eclipse should apply against citizens also.</p> <p>This seems to be logic behind the decision by SC in <i>Dulare Lodh v. IIIrd Additional District Judge, Kanpur (1984) SC</i>. There in, an ejectment order was passed by the court of small causes in 1973 against tenant under a 1972 Act, However an amendment was subsequently made to</p>

the Act which made **the decree inexcusable**. Hence the execution order could not be obtained for 13 years. Subsequently in 1986, a further amendment in the Act was made, with retrospective effect. The decree once again became executable.

The Court held: The first amendment had merely made the Act dormant, and the IInd Amendment, by removing the defect, had made the Act, applicable once again. Doctrine of eclipse was applied in the present **case to citizens** also.

Important point to be noted is that the law was not void from its inception; it had remained a valid law with respect to citizens till 1973. The court in this case, did not pronounce upon the applicability of doctrine of eclipse in **cases when** the law is void (inconsistent from its very inception).

In Deep Chand v. State of UP (1963) SC, it was observed that a Pre-Constitutional Law is not void from its inception whereas a Post-Constitutional Law is void from its inception and therefore it cannot exist for any purpose (This decision was modified later on)

The view held in the above cases was modified in **State of Gujarat v. Ambica Mills (1974)SC**. The two main issues to be decided were:

Whether the law declared void under Article 13(2) would be non-est with respect to non-citizens also

Whether the doctrine of eclipse applies to Article 13(2)

Mathew J, held that even Post-Constitutional Laws, like Pre-Constitutional Laws, remained operative against non-citizens. The meaning of void is the same for both Article 13(1) and (2). Voidness is not in rem but to the extent of inconsistency or contravention. If a law takes away the Fundamental Right of one class of persons, it does not become inoperative against even the others who have no such Fundamental Rights. Accordingly it was held that the Bombay labour welfare fund Act, 1953, which was void against citizens, was valid in respect of the respondent Company. The respondent Company. was not a citizen for the purpose of Part- iii of the Constitution.

DOCTRINE OF WAIVER.

The citizens (and in some cases, even non-citizens) have been given the Fundamental Rights. The Fundamental Rights protect the basic and inherent rights and liberties of a person.

The purpose of the Fundamental Rights is to act as a check upon the unbridled powers of the state, so that the state does not transgress upon the basic human values, liberty and dignity.

<p>Can an accused person waive his Fundamental Rights and got convicted?</p>	<p>A question that arises is:</p> <p>"If a person has been given the Fundamental Rights for his own benefit, can he not say that he does not need the Fundamental Right and can he not waive his Fundamental Right? Can an accused person waive his Fundamental Rights and got convicted?"</p> <p>The answer to the above question lies in the very concept and purpose of conferring the Fundamental Rights upon the citizens.</p> <p>The purpose of the Fundamental Rights is not merely to protect the individual. The larger purpose is to set up an orderly and just society. They have been granted as a matter of public policy and an obligation has been imposed upon the state to protect the Fundamental Rights of persons. The state cannot be relieved of this duty. In a divergent society like India, where a majority of people are economically, educationally and politically backward, and are unconscious of their rights, it would be unpractical and short sighted to apply the doctrine of waiver which has been formulated by some US. Judges. The doctrine might be suited to U.S. conditions, not to India.</p>
	<p>The issue of waiver of Fundamental Rights directly arose in the case of Basheshar Nath v. ITC (1959) SC.</p> <p>The majority in this case, on the above grounds held that the doctrine of waiver does not apply to India. It is not open to a citizen to waive any of the Fundamental Rights conferred by Part-iii of the Constitution.</p>
	<p>The facts of the case</p> <p>The Petitioner's case was referred to IT investigation commissioner under Section 5(1) of the Income Tax Act. He was found to have concealed a large amount of income. Thereupon, he entered into settlement with the IT Department to pay the tax and penalty in monthly installment later on another case, Section 5(1) was held to be ultra vires of Article 14. Now, the petitioner challenged the settlement. On the other hand, the IT Department contended that by entering into the settlement, the petitioner had waived his Fundamental Right guaranteed by Article 14.</p> <p><i>Held-</i> The doctrine of Waiver does not apply and therefore the settlement is void:</p>