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Doctrine of Eclipse, Severability and Waiver

Doctrine of Eclipse, Severability and Waiver: The Unofficial Provisos to Part-III of the Indian Constitution

1. Doctrine of Severability

Doctrine of severability is also known as doctrine of separability. It helps in the protection of our fundamental rights. It is mentioned in clause (1) of Article 13 of the Constitution of India that all laws which were enforced in India, before the commencement of Constitution, in so far as they are inconsistent with the provisions of fundamental rights shall to the extent of that inconsistency be void. But the whole law or act would not be held invalid, only the provisions of the law or act which are not inconsistent with the fundamental rights will be held as void. This whole hypothesis is known as the doctrine of severability. But the application of this doctrine is only possible if the part which is inconsistent with the law can be separated from the whole legislation. If both the valid and invalid

are so closely weaved with each other that it can't be separated, then, the whole law or act will be held as invalid. This doctrine can be better understood by help of case laws.

In A.K. Gopalan v. State of Madras^[1] The Supreme Court held that in case when a part of legislation is repugnant to the Constitution, only that repugnant provision of the impugned Act will be void and not the whole of the legislation, and every attempt should be made to save as much as possible of the act. If the omission of the invalid part will not change the nature or the structure of the object of the legislature, it is severable. In this case, the Apex Court, held that except Section 14 all other sections of the Preventive Detention Act, 1950 were valid, and since Section 14 could be severed from the rest of the Act, the detention of the petitioner was not illegal as the Preventive Detention Act, 1950 is not void.

In State of Bombay v. F.N. Balsara^[2], eight Sections of the Bombay Prohibition Act were declared invalid by the Apex Court, the Supreme Court said that the portion which was invalid to the extent of fundamental rights was separable from the rest of the act, and thus by the application of the doctrine of severability only those eight sections would be deleted from the code and the rest of the provisions of the code will remain the same.

In **R.M.D.C. v. Union of India**^[3], the Supreme Court of India, in this case laid down the guidelines for the application of doctrine of severability, they are as follows:

1. In ascertaining that whether the valid parts of a statute can be separated from the invalid parts thereof, it is the intention of the legislature that is the determining factor. The test which should be applied is whether the legislature would have enacted the valid part without the impugned part if it had known that the rest of the impugned part of statute was invalid.
2. If the valid and invalid provisions are so inexorably mixed up with each other that they cannot be separated from one another, then the invalidity of a portion would result in the invalidity of the Act in its entirety. On the other hand, if they are so distinct and independent that after striking out the invalid part, what remains is in itself a complete code independent of the rest, then it will be upheld notwithstanding that the rest has become void in law.
3. Even when the provisions which are valid and distinct and separate from those which are invalid, if they all form part of a single scheme which is intended to be operative as a whole, then also the invalidity of a part will result in the failure of the whole.
4. When the valid and invalid parts of a statute are independent of one another and do not form part of the same scheme but what is left after omitting the invalid portion is so thin and different from what it originally was when it emerged out of the legislature, then also the Act will be rejected in its entirety.
5. If after the invalid portion is repealed from the statute, but if the provisions which remain, cannot be enforced without making alterations and modifications therein, then the whole of it must be struck down as void, or else it will amount to judicial legislation.
6. In determining the legislative intent on the question of separability, it will be legitimate to take into account the history of legislation, its object, the title and preamble to it.



2. Doctrine of Eclipse

The doctrine of eclipse says that any law which is inconsistent with fundamental rights is not valid. Such a law is not totally dead but is overshadowed by the fundamental right.

The inconsistency (conflict) between the impugned law and fundamental right can be removed by introducing constitutional amendment to the relevant fundamental right so that eclipse vanishes and the entire law becomes valid.

In other words, till the time a provision of law violates a fundamental right guaranteed by the Indian Constitution, it is dormant and inoperative. But if such fundamental right is amended by the Parliament and thereby, the law no more violates such fundamental right, then in such a situation the law becomes alive and operative.

These eclipsed laws exist for all post transactions and for the enforcement of the rights acquired and liabilities incurred before the commencement of the Constitution. It is only against the citizens of the country that they remain dormant and inoperative, but they remain in operation against the non-citizens who are not entitled to fundamental rights guaranteed by the Constitution.

In *Bhikhaji v. State of Madhya Pradesh*^[4], the provisions of C.P. and Berar Motor Vehicles (Amendment) Act 1948 authorized the State Government of M.P to take up the entire motor transport business in the Province to the exclusion of motor transport operators. This provision was valid when enacted, but became void when the Constitution in 1950 commenced as it violated Article 19(1)(g) of the Constitution. However, in 1951 Clause (6) of Article 19 of the Constitution was amended by the Constitution (1st Amendment) Act, which authorized the Government to monopolize any business. The Supreme Court observed that the objective of the amendment was to remove the eclipse and to make the impugned Act free from any infirmity. It became enforceable against citizens as well as non-citizens after the constitutional impediment was removed.

In *Keshava Madhava Menon v. State of Bombay*,^[5] the petitioner was prosecuted under a Press law for publishing a pamphlet without permission. While the prosecution was ongoing, the Constitution commenced and the petitioner challenged the act as unconstitutional. Issues arose

- whether sections 15(1) And 18(1) read with the definitions contained in sections 2(6) and 2(10) of the Indian Press (Emergency Powers) Act, 1931, were inconsistent with article 19(1)(a) read with clause (2) of that article?
- Assuming that they were inconsistent, whether the proceedings commenced under section 18(1) of that Act before the commencement of the Constitution could nevertheless be proceeded with?

The court held that the constitutional rights came from the date of commencement of the Constitution, so the question of the inconsistency between the existing laws and fundamental rights must necessarily arise on and from the date those rights came into being.

In **Deep Chand v. State of Uttar Pradesh**,^[6] the Supreme Court held that a post-Constitutional law is void from its inception if it is found to be inconsistent with the Fundamental rights, but, a pre-Constitution law having been validly enacted earlier to the commencement of the Constitution would continue in force so far as non-citizens are concerned after the Constitution came into force. This is so because prior to commencement of constitution legislature had the competence to pass such act but after the commencement of the Constitution, the legislature does not have the competence to pass.

In **Shankri Prasad v. Union of India**,^[7] the constitutional validity of Constitution (1st Amendment) Act, 1951, which curtailed the right to property, was challenged. The Court held that the power to amend the Constitution under Article 368 also included the power to amend fundamental rights enumerated in Part III of the Constitution and that the word "law" in Article 13(3) of the Constitution includes only an ordinary law made in exercise of the legislative powers and does not include Constitutional amendment which is made in exercise of constituent power. Therefore, a Constitutional amendment will be legally valid even if it abridges or takes any of the fundamental rights.

In **Mahendra Lal Jaini v. State of U.P.**,^[8] the Court said that Article 13(1) of the Constitution recognizes the existence of pre-Constitutional laws which were valid when enacted, and therefore could be revived by the doctrine of eclipse and Article 13(2) provides for a direction to the State to not to make a law which takes away or abridges the rights conferred by Part III of the Constitution. The legislative power of Parliament of India and State Legislatures under Article 245 is subject to the other provisions of the Constitution and therefore, subject to Article 13(2).

3. Doctrine of Waiver

According to the doctrine of waiver, any person who is entitled to any right or privilege can waive off such a privilege, if he does so with his free will. This doctrine operates on the assumption that a man is the best judge of his interest under any legal liability, and that he has the knowledge of the consequences while intentionally giving up the privilege of such right.

But, the doctrine of waiver does not apply to fundamental rights of the people guaranteed under the Constitution of India. The fundamental rights were kept in the Constitution for the public at large and not merely for the individual's benefit. Thus, the 'doctrine of waiver' cannot be used for giving up the fundamental rights.

In **Bashesar Nath v. Commissioner of Income Tax**,^[9] a similar question arose whether a fundamental right may be waived off by the person who has it. In that case, the petitioner was found to conceal a large amount of his income under Section 5(1) of Taxation of Income (Investigation Commission) Act, 1947. The petitioner to escape a heavy penalty agreed to enter into settlement under Section 8A with the Commissioner. In the meantime the Supreme Court in another case, held the Section 5(1) as ultra vires of the Constitution, and as a result it was struck down. Relying on this decision of the Court, the petitioner approached the Apex Court and contended that he is no longer liable to pay any penalty and to absolve of Section 5(1) of the impugned act. The respondent on the other hand, contended that even if Section 5(1) was invalid, the petitioner, by making the settlement had waived his right under

Article 14. It was held that Article 14 cannot be waived off as it is a public policy of the state. No person can relieve the state of this obligation.

In *Olga Tellis & Ors vs Bombay Municipal Corporation*,^[10] the pavement dwellers gave an undertaking to the MCD that they would not claim any fundamental right to put up huts on pavements and public roads, and also that they would not obstruct the demolition of the huts after a certain date. But, later when the huts were sought to be demolished after the specified date, the pavement dwellers pleaded that they are protected under Article 21 of the Constitution of India. The municipal corporation contended that the dwellers cannot raise any such plea in the view of their previous undertaking. The Supreme Court, overruled the objection of the municipal corporation saying fundamental rights cannot be waived off by any person. There can be no estoppel against the fundamental rights guaranteed under the Constitution.

References

1. The Constitution of India.
2. Shukla, V.N, Constitution of India, Eastern Book Company, 2018.
3. Pandey, J.N, Constitutional Law of India, Central Law Agency, 2018.
4. All India Reporter
5. SCC online
6. Livelaw.in
7. LawTeacher.net

Questions

1. What is the doctrine of severability? Explain with the help of case laws.
2. Write a short note on the case of *R.M.D.C. v. Union of India*, explaining the guidelines laid down for application of doctrine of severability.
3. Explain the doctrine of eclipse with respect to the Constitution of India. Support your answer with relevant case laws.
4. Is the doctrine of eclipse applicable on pre constitutional laws? Explain with the help of established precedents.
5. What is the doctrine of waiver? Can it be applied on fundamental rights of the people enumerated in the Constitution of India?

[1] 1950 AIR SC 27.

[2] 1951 AIR SC 318.

[3] 1957 AIR SC 628.

[4] AIR 1955 S.C. 781.

[5] 1951 AIR 128.

[6] 1959 AIR SC 648.

[7] AIR 1951 SC 455

[8] 1963 AIR SC1019.

[9] AIR 1959 SC 149.

[10] AIR 1986 SC 180.

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- Micheal Newdow

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