

DOCTRINE OF WAIVER: A MEASURE OF PROTECTIONISM OR A RESTRICTION OF CHOICE?

by

Nivruthi Pasupunuri

ABSTRACT

India is a constitutional country which has always strived to protect its people from injustice and has always strived to safeguard the rights of the citizens. In order to do the same, the constitution provides citizens with fundamental rights which are absolute and inherent. We have always depended on Doctrines and theories to substantiate and further elucidate the principles enshrined in the constitution. One such Doctrine is the Doctrine of Waiver which says that the individual must be allowed to waive his rights for he is the best judge of his wellbeing. This paper discusses how the Indian Courts have dealt with waiver with reference to fundamental rights and discusses the possible arguments put forth against the set precedents while providing contemporary examples such as euthanasia to substantiate their arguments.

Indian Journal of Contemporary
Legal and Social Issues

Chapter 1- Introduction

India is a constitutional country and is the owner of a dynamic constitution. The Indian Constitution, enforced in 1950, has a set of core, guiding values as enshrined in the preamble such as Liberty, Equality and Fraternity to name a few, which have set in concrete the essence of the Indian Constitution. In order to protect its citizens from injustice and to prevent any deviation from the core principles of what our founding fathers believed our constitution's country should be, Part III of was inserted in the Indian Constitution. Part III deals with Fundamental Rights. Fundamental Rights are the rights which are provided to all citizens, are inalienable and are guaranteed in the form of rights which are justiciable. This was done to mitigate the stratification of the past and to ensure that there is liberty and freedom that the citizens can enjoy at their discretion. Citizens can also file writs in the High Courts and the Supreme Court under Article 226¹ and Art 32 respectively to safeguard their rights.² These fundamental rights are divided into 6 broad categories.³ Articles 14-18 deal with the Right to Equality.

Article 14 of the Indian Constitution states that "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."⁴ Article 14 stems out of the existence of the Rule of Law and the Principles of Natural Justice to ensure equality before the law. This right is not limited to citizens of India and is available to everybody residing in India. There are a few exceptions to this Right such as the President of India and Foreign Diplomats who are granted immunity. Another exception to the same is positive discrimination, as borrowed from the USA.⁵ Positive Discrimination allows for the State to make a differentiation between people and make special provisions and laws for them provided that they justify their reason for doing so and they must be able to satisfy the criteria of intelligible differentia.

At the very offset, the Drafting Committee was faced with the challenge and dilemma to ensure that the dead hand of the past doesn't haunt India's present and future. Moreover, they needed to set mechanisms in place to ensure that the indefinite tussle between the three organs of the government doesn't hamper the enforceability and availability of fundamental

¹ INDIA CONST, art. 32

² INDIA CONST, art. 226

³ KNOWINDIA.GOV, <https://knowindia.gov.in/profile/fundamental-rights.php> (accessed on October 13th, 2020)

⁴ INDIA CONST, art. 14

⁵ BBC, [https://www.bbc.co.uk/bitesize/guides/zpbsjty/revision/5#:~:text=Affirmative%20Action%20\(AA\)%20or%20,help%20African%20Americans%20overcome%20disadvantage.](https://www.bbc.co.uk/bitesize/guides/zpbsjty/revision/5#:~:text=Affirmative%20Action%20(AA)%20or%20,help%20African%20Americans%20overcome%20disadvantage.) (accessed on October 13th, 2020)

rights and hence resorted to 3 doctrines to secure these rights namely Doctrine of Severability, Doctrine of Eclipse and Doctrine of Waiver. This paper will examine Doctrine of Waiver with reference to Article 14.

Chapter 2- Doctrine of Waiver and Past Application of Waiver

Doctrine of Waiver says that an individual is the best judge of his/her situation and with full knowledge is capable to make the decision to forego his/her right.⁶ Waiving a right means that a person can no longer assert his/her right and is specifically precluded from challenging the validity of the law as far as the right waived in that scenario is concerned.

There has been a lot of debate on the validity of this doctrine for it is the very function of the State to protect and safeguard the rights of the citizens and especially in cases of Fundamental Rights, these rights are deemed to be inalienable and non-negotiable. In that event, to ensure that selective enforcement of the law happens to cater waiver of rights by certain citizens is not only tedious but is also problematic.

A string of judgements from the Honourable courts have settled the position of the Doctrine of Waiver in the Indian fabric-

1. Basheernath Vs. Commissioner of Income Tax, 1949⁷

Facts- In this case, the petitioner was referred to the Investigation Commission under Section 5(1) of the Taxation of Income (Investigation Commission) Act, 1947 and was found to have concealed a large amount of money in order to evade taxes.⁸ In order to escape higher punishment, the plaintiff agreed to a settlement by way of tax and penalty of Rs 8 lakh under Section 8 of the act.⁹ This was to be paid in installments.

In the meantime, the Supreme Court in *Suraj Moll Mohta & Co Vs A.V Vishwanatha Shastri*,¹⁰ AIR 1954 SC 545 said ruled that Section 5(1) of the Taxation of Income (Investigation Commission) Act, 1947 was ultra vires the constitution because it is inconsistent with Article 14 and violates the Right to Equality.

⁶ Collin P. Campbell, *The Doctrine of Waiver*, Vol No 3 Michigan Law Review, Pg No 9, Pg 10, (1904)

⁷ *Basheernath Vs. Commissioner of Income Tax, 1949* (AIR 1959, SC 149)

⁸ Taxation of Income (Investigation Commission) Act, § 5, Cl 1, No 30, Acts of Parliament, 1949

⁹ Taxation of Income (Investigation Commission) Act, § 8, No 30, Acts of Parliament, 1949

¹⁰ *Suraj Moll Mohta & Co Vs A.V Vishwanatha Shastri*,¹⁰ AIR 1954 SC 545

The petitioner approached the court with the contention that if the section is no longer enforceable, he too, cannot be held liable under it and should not be made to pay. The respondents argued that when the petitioner agreed to a settlement under Section 8 of the act, he was consenting to a waiver of his right to equality and thus, should pay his dues.

Judgment- The court, in a 4:1 ratio said that the Right under Article 14 cannot be waived and that it is not open to the citizen to waive any of the fundamental rights conferred by Part III of the Indian Constitution. The dissenting judge said that like in the Case of the United States, the person who is awarded the rights and privileges is inherently given the right to waive such right provided that it does not violate public policy and is not forbidden by law.

2. Narsingh Pal Vs. Union of India¹¹

Facts- The appellant was an employee of the Telecomm Department at Agra and was given a temporary employee status in lieu of being accused and prosecuted under Section 324, 427 and 504 of the Indian Penal Code. The appellant was then fired for cause and was given a severance package in the form of a cheque. This cheque was encashed by him.

Following this, the magistrate acquitted him on the aforementioned charges and so the appellant asked to be reinstated. He approached the Labour tribunal on rejection but that plea was dismissed by the tribunal so he appealed on the grounds of violation of Right against Discrimination and Right to Equality. The respondents argued that he has given up his rights when he agreed to the severance package and when he signed that contract.

Judgment- The court said that the termination was wrongful and that he must be reinstated immediately. The court further ruled that fundamental rights cannot be waived regardless of anything.

¹¹ Narsingh Pal Vs. Union of India, AIR 2000 SC 1401, 84 (2000) DLT 31 SC, 2000 (85) FLR 458, JT 2000 (3) SC 593, (2000) ILLJ 1388 SC, 2000 (2) SCALE 685, (2000) 3 SCC 588, 2000 2 SCR 752, (2000) 2 UPLBEC 1298

3. In Motilal Padampat Sugar Mills v. State of UP, the court clarified that Doctrine of Waiver can only be applied in cases where the right is not a fundamental right provided that the individual is making a conscious and informed choice to do so.¹²

Chapter 3- Doctrine of Waiver and Right to Equality

The courts have been vigilant in passing judgements which push closer to equality. But there is a small proportion which argues that this push for equality and enforcement of a right is in violation of their liberty to waive rights, such as in the Sabarimala Judgment, it was argued that this judgment will violate the liberty of the women to waive their right to equality. However, this argument didn't hold water for the Supreme Court has strictly set precedent in the applicability of Fundamental Rights. Similar concerns were brought in the case of euthanasia where it was argued that people should be allowed to apply waiver and that they must be treated equal before the law and should be allowed to waive Art 21. In the case of the recent ban on websites who are said to intrude privacy such as tik-tok and now even whatsapp, it is argued that a blanket ban on these is in violation as one should have the right and the liberty to waive his/her right, provided that it does not disrupt public order.¹³

That being said, it is pertinent to recognise the fact that the onus of the protection of one's rights lies with the State and that the Supreme Court's judgement has time and again reiterated that fundamental rights are inalienable and hence cannot be waived and that that it is not a violation of personal liberty because ultimately, all these judgements do not force one to go out of their way to do something they do not agree with but in fact, only attempt to allow the same liberty of choice to those who want such inclusion or exclusion.

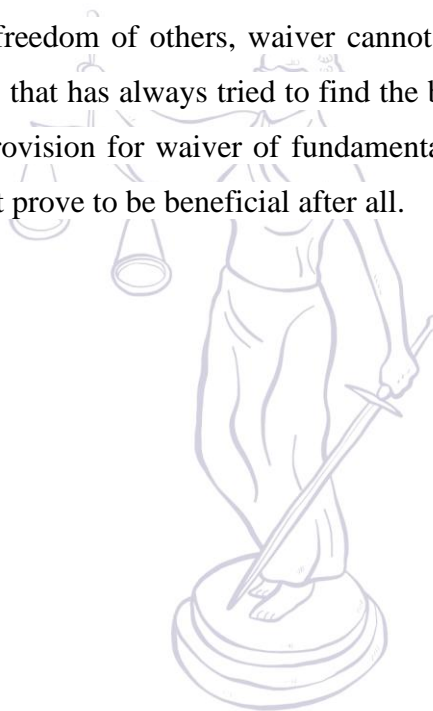
Indian Journal of Contemporary Legal and Social Issues

¹² Motilal Padampat Sugar Mills v. State of UP, SCC 409: AIR 1979, SC 621, 628.

¹³ Gautam Bhatia, Aadhar Waiver of Fundamental Rights and the Doctrine of Unconstitutional Conditions, Indian Constitutional Law and Philosophy (accessed on March 15th, 2021), <https://indconlawphil.wordpress.com/2015/10/06/aadhar-waiver-of-fundamental-rights-and-the-doctrine-of-unconstitutional-conditions/>

Conclusion and Analysis

India being a constitutional country, being the proud owner of a living constitution has always strived to learn from not just the history and the errors of not just our own country but that of others too. There are numerous apprehensions attached with the Doctrine of Waiver for it may lead to a severe compromise in the fundamental rights of the people and stands to breach the ideals of the constitution makers. And the Supreme Court has time and again reiterated the invalidation of waiver with regard to Fundamental Rights. Liberty, in this case is conditional but it is important to note that no right is absolute and this is no exception. Moreover, in cases where judgments and laws are passed to benefit a larger community, without disregarding the freedom of others, waiver cannot and should not be an argument. Overall, India is a country that has always tried to find the balance between the ideal and the real. In this case too, a provision for waiver of fundamental rights with strict guidelines on how and what rights might prove to be beneficial after all.



Indian Journal of Contemporary
Legal and Social Issues