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Waiver of Fundamental Rights

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Waiver of Fundamental Rights

In the United States, a person can sometimes give up a constitutional right.

Can an Indian citizen do the same with a Fundamental Right?

Say a man signs a paper that gives up his right to equality.

Is the paper valid?

The Supreme Court looked at this question in 1958.

The answer is less simple than most notes make it sound.

1. Can you sign away a Fundamental Right?

What waiver means

A **waiver** is a voluntary giving up of a right you hold.

In daily life people often give up small claims.

Can a person give up a right that the Constitution itself gave?

The Constitution does not answer this in a single line.

The answer comes from Article 13 and from Supreme Court judgments.

Sources: constitutionofindia.net

Article 13 and void laws

Article 13(2) is the starting point.

The State shall not make any law that takes away or abridges the rights in Part III.

A law made against this rule is void to the extent of the contravention.

Article 13(1) says the same for older laws that clash with Part III.

The word “void” matters.

It makes the State, not the citizen, the one under a duty.

That idea shapes the whole waiver debate.

Sources: constitutionofindia.net; indiankanoon.org

Why Article 32 matters here

Article 32(1) guarantees the right to move the Supreme Court to enforce Part III rights.

This is itself a Fundamental Right.

Courts later used this idea of public purpose.

They said Fundamental Rights serve society and not only the holder.

That is why the waiver question is not a private matter.

Sources: constitutionofindia.net; indiankanoon.org

> **Quick check 1.** Article 13(2) says a law that takes away a Part III right is void to the extent of the contravention. *(True or False?)*
>
> See answer ↓

2. Which case decided the waiver question?

Behram Khurshed Pesikaka (1954)

Behram Khurshed Pesikaka was an Officiating Regional Transport Officer in Bombay.

He was convicted under section 66(b) of the Bombay Prohibition Act, 1949.

Basheshar Nath's Judges later referred to this case.

The decision was given on **24 September 1954**.

Mahajan C.J.'s view in this case later became important.

Bhagwati and Subba Rao JJ. said in 1958 that his view correctly laid down the law.

Sources: indiankanoon.org

Basheshar Nath (1958)

Basheshar Nath had a tax case before the Investigation Commission.

The Commission found that Rs. 4,47,915 had escaped assessment.

He then applied for a settlement under section 8A.

He agreed to pay Rs. 3,50,000 as tax and penalty at a concessional rate.

Later, the Court struck down section 5(1) of the Act as discriminatory in the Muthiah case.

Nath now said the settlement was void too.

The other side replied that he had waived his Article 14 right by settling.

A five-Judge Bench decided the case on **19 November 1958**.

It is reported in 1959.

Sources: indiankanoon.org

How the Judges split

The Bench did not speak with one voice.

- **Chief Justice Das and Justice Kapur**: Article 14 cannot be waived. Whether other rights can be waived was left open.

- **Justices Bhagwati and Subba Rao**: no Part III right can be waived. They saw no reason to import American ideas.
- **Justice S. K. Das**: the word “void” in Article 13 does not rule out waiver. He said there is no absolute rule. The answer depends on the nature of each right.

All the Judges agreed the settlement did not bind Nath.

So the Court ruled in his favour.

Sources: indiankanoon.org; constitutionofindia.net

The three opinions at a glance

Judges	View on waiver
Das C.J. and Kapur J.	No waiver of Article 14; other rights left open
Bhagwati and Subba Rao JJ.	No waiver of any Part III right
S. K. Das J.	Waiver possible, depending on the right

Think it through: Why did Chief Justice Das link Article 14 to public policy?

Show the answer

Article 14 is written as a command to the State.
So the State cannot be relieved of it by one person’s consent.
The Chief Justice said the right rests on sound public policy.

Quick check 2. In Basheshar Nath, all five Judges agreed that no Fundamental Right can ever be waived. *(True or False?)* See answer ↓

3. Can a concession or promise defeat a right?

Olga Tellis (1985)

The next big step came in 1985.

The case is **Olga Tellis v. Bombay Municipal Corporation**.

The petitioners lived on pavements and in slums in Bombay.

The State decided to evict them and the Corporation began to demolish their huts.

Before the High Court, they conceded that they had no Fundamental Right to put up huts on pavements.

They also gave an undertaking to vacate by 15 October 1981.

In the Supreme Court, they argued that evicting them took away their livelihood, which is part of Article 21.

Sources: indiankanoon.org

No estoppel against the Constitution

A five-Judge Bench decided the case on **10 July 1985**.

The Court asked whether the earlier concession barred the petitioners.

It held that there can be no estoppel against the Constitution.

The Constitution is the paramount law and its provisions serve a public purpose.

A concession made even by mistake cannot create an estoppel against a Fundamental Right.

The Court said such a concession, if enforced, would defeat the purpose of the Constitution.

It also noted that waiver and estoppel are close ideas.

It then recalled how the Judges had divided in Basheshar Nath.

Sources: indiankanoon.org

> **Quick check 3.** In Olga Tellis, the Court held that an earlier concession could bar a Fundamental Right claim. *(True or False?)*
>
> See answer ↓

Think it through: A person promises in writing never to approach the Supreme Court. Does Article 32 still help them?

Show the answer

Article 32(1) guarantees the right to move the Supreme Court.
Olga Tellis says a concession cannot create an estoppel against such a right.
So the promise is a weak shield for the State.
The case on a promise of this exact kind is not covered here.

Remember This

- **Art. 13(2)**: laws against Part III rights are void to that extent.
- **Behram Khurshed Pesikaka**: decided 24 September 1954.
- **Basheshar Nath**: five-Judge Bench, 19 November 1958, reported 1959.
- **Das C.J. and Kapur J.**: Article 14 cannot be waived.
- **Bhagwati and Subba Rao JJ.**: no Part III right can be waived.
- **Olga Tellis (10 July 1985)**: no estoppel against the Constitution.

4. What traps do exams set on waiver?

Common traps

- “Fundamental Rights can never be waived” is the safe exam line, but it goes with **Bhagwati and Subba Rao**.
- Chief Justice Das and Justice Kapur held only that **Article 14** cannot be waived.
- The case is dated **19 November 1958**, and reported in **1959**.
- Olga Tellis adds **no estoppel against the Constitution**.

> **Quick check 4.** Chief Justice Das and Justice Kapur held that Article 14 cannot be waived. *(True or False?)* See answer ↓

5. What is the short answer?

Fundamental Rights are not ordinary private benefits.

The State owes a duty under Article 13(2).

So a person cannot easily trade a right away.

The Supreme Court divided on how far this goes in 1958.

By 1985, it said no estoppel can arise against the Constitution.

For the exam, remember the bench split and the two later ideas of public policy and estoppel.

> **Quick check 5.** Justice S. K. Das held that the doctrine of waiver could apply to some Fundamental Rights. *(True or False?)* See answer ↓

Practice MCQ

Practice MCQs

1. Which Article of the Constitution declares that a law made against the Fundamental Rights is void to the extent of the contravention?

A. Article 12

B. Article 13(2)

C. Article 368

D. Article 32

See answer ↓

2. In Basheshar Nath v. Commissioner of Income-Tax, the appellant had earlier settled his tax case.

Which Fundamental Right did the Court say he could not waive?

A. Article 14

B. Article 19(1)(f)

C. Article 21

D. Article 32

See answer ↓

3. In the Basheshar Nath case, Justices Bhagwati and Subba Rao held that:

A. Only Article 14 rights cannot be waived

B. Fundamental Rights can be waived if the person is willing

C. No Fundamental Right in Part III can be waived

D. Waiver depends on the nature of each right

See answer ↓

4. In Olga Tellis, what had the pavement dwellers conceded before the Bombay High Court?

A. That they had no Fundamental Right to build huts on pavements

B. That they would pay a fine

C. That Article 21 did not apply to them

D. That Article 32 was unavailable

See answer ↓

5. Which statement from Olga Tellis (1985) about the Constitution is correct?

A. There can be no estoppel against the Constitution

B. A concession in court binds the petitioner forever

C. A written undertaking waives a Fundamental Right

D. The Constitution can be waived by the State

See answer ↓

6. Under which Article can a person move the Supreme Court directly to enforce a Fundamental Right?

A. Article 136

B. Article 226

C. Article 131

D. Article 32

See answer ↓

Answer Key

1. **B.**
   Article 13(2) bars the State from making a law that takes away or abridges Part III rights.
   Such a law is void to the extent of the contravention.
   Sources: Text of Art. 13 \u00b7 Basheshar Nath headnote.
   ↑ Q1

2. **A.**
   All the Judges agreed the settlement was void under **Article 14**.
   Chief Justice Das and Justice Kapur held that the right to equality could not be waived.
   Sources: Basheshar Nath judgment (1958) · Basheshar Nath headnote.
   ↑ Q2

3. **C.**
   Justices **Bhagwati and Subba Rao** held that no right in Part III can be waived.
   They saw no reason to import American ideas.
   Justice S. K. Das took a different view.
   Sources: Basheshar Nath judgment (1958) · Basheshar Nath headnote.
   ↑ Q3

4. **A.**
   The petitioners **conceded** in the High Court that they could not claim a Fundamental Right to put up huts on pavements.
   The Supreme Court said this concession could not create an estoppel against them.
   Sources: Olga Tellis judgment (1985) · Olga Tellis headnote.
   ↑ Q4

5. **A.**
   The Court held that there can be **no estoppel against the Constitution**.
   Its provisions are conceived in public interest and serve a public purpose.
   Sources: Olga Tellis judgment (1985) · Olga Tellis headnote.
   ↑ Q5

6. **D.**
   Article 32(1) guarantees the right to move the Supreme Court by appropriate proceedings.
   The right is itself a Fundamental Right.
   Sources: Text of Art. 32 · Olga Tellis judgment (1985).
   ↑ Q6

Quick-check answers

1. **True.** This is the text of Article 13(2). ↑ 1
2. **False.** Only Bhagwati and Subba Rao went that far. S. K. Das J. differed. ↑ 2
3. **False.** The Court held that there can be no estoppel against the Constitution. ↑ 3
4. **True.** This is stated in the headnote of Basheshar Nath. ↑ 4
5. **True.** He said there is no absolute rule and it depends on the nature of the right. ↑ 5

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