

**Comparative Analysis Of Doctrine Of Waiver In Context Of
Fundamental Rights In India And U.S.A.**

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DECLARATION

I, Mr. Prabhat Kumar, a student of LL.M. (International & Comparative Law) in the West Bengal National University of Juridical Sciences (WBNUJS), Kolkata, hereby declare that this article titled "Comparative Analysis of Doctrine of Waiver in Context of Fundamental Rights in India and U.S.A." is a result of a bona-fide research carried out by me under the guidance and supervision of Dr. M.P. Chengappa, Assistant Professor of Law, at the West Bengal National University of Juridical Sciences, Kolkata. I, also, affirm that the references used in the Dissertation have been acknowledged.

I declare that, except where acknowledged this article is my own original work and has not been submitted for a higher research degree at any other university or institution.

ABSTRACT

This project explores the Doctrine of waiver of Fundamental rights taking into consideration the present scenario and its historical development in India and United States of America. The analysis in this project is on the issue whether a person should be allowed to relinquish or surrender his personal rights which are protected under various statues and the Constitution. Further this project examines various landmark judgements of Supreme Court of India and Supreme Court of U.S.A along with various statutes. After taking into consideration various reasons given by the Courts in different cases the author moves to draw similarity between the situations/case laws wherein waiver of rights has been allowed in the context of both U.S. and Indian situation. Also author has tried to investigate the issue that whether a person may be allowed to waive off his fundamental rights even though it may have repercussions extending to his right to live freely while taking into consideration Part III of the Constitution and also jurisprudential aspects in this regards. Further it is argued that whether this doctrine must be made applicable to cases concerning the public rights only or should it be available in case of private rights as well. In the present research the Author is trying to analyse the Doctrine of Waiver from a wholly new perspective rather than putting forth traditional understanding of this Doctrine and its application in India.

STATEMENT OF PROBLEM

There are marked differences regarding the status of doctrine of waiver between India and the USA. However, lately, with incorporation of several changes in the Indian legal system, the conventional application of this doctrine may be subject to substantial variation, particularly after the development that took place in the field of *Plea Bargaining* in 2005 and after the decision by Constitutional Bench of Supreme Court in matter pertaining to *Right to Privacy* in 2017.

In this paper, the researcher will identify problems which the aforementioned ruling will pose to the applicability of the doctrine in India. To be able to adequately understand these lingering problems on a larger plane, a comparative analysis of the doctrine as applicable in the USA, according to the researcher, can also be of great assistance.

RESEARCH QUESTIONS

1. Whether the Indian law contextualises the doctrine of waiver within itself and extends itself to its application to waiver of fundamental rights?
2. Whether waiver of Fundamental Right should be allowed in cases where benefit of individual is there or should it be allowed where benefit of general public is involved?
3. Whether Right to Privacy can be waived off even though being a Fundamental Right under the Doctrine of waiver?

RESEARCH METHODOLOGY

The research methodology adopted in the fulfilment of this project shall be doctrinal in nature. The researcher shall refer to relevant statutes, books, journal articles, and other documentary resources available on this subject-matter.

SCOPE

The research shall be confined to the analysis of doctrine of waiver in India and the USA. During the course of discussion, the Indian position on this doctrine will be evaluated with special reference to the latest 2017 *Right To Privacy* judgement.

HYPOTHESIS

The paper deals with the probable reasons for incorporation of right to waiver in Indian scenario. With the establishment of the concept of plea bargaining in Indian legal framework; Indian statutory position is observing a shift from non waiver of rights to waiver of rights of an individual. The much celebrated privacy judgment also made alterations with regard to waiver of fundamental rights as the private information of an individual going in public domain can also be considered as him waiving off his right to privacy.

The American legal framework has itself witnessed a change from non-waiver to waiver of fundamental rights after incorporation of 14th amendments. Following suit, Indian legal setup is also witnessing significant changes after certain developments with recent case laws and 1statutory expansions.

STATEMENT OF PURPOSE

The objective of the paper is to assess the possible implications of the landmark Judgment on Right to Privacy and introduction of an amendment relating to Plea Bargaining and its possible implication on the traditionally understood application of doctrine of waiver in India. Also, with a comparative study involving the USA's doctrine of waiver, the researcher wants to engage readers into a comprehensive explication of this subject-matter because the American legal system accords a fundamentally different treatment to this doctrine, offering varying angles to this study.

LITERATURE REVIEW

Books

- *M.P.Jain Indian Constitutional Law*, (6th edn., Wadhwa Nagpur 2010)
This book talks a great deal about whether a person can waive off his fundamental right. It went to extreme extent in its explanation by providing the researcher with various case laws, judgments and other facts which is essential for explaining the doctrine of waiver.
- *Durga Das Basu, Commentary on the Constitution of India*, (8th edn., Wadhwa Nagpur 2007)

The book heavily discusses the differences between doctrine of waiver and estoppel which has helped the researcher in his pursuit to explain the waiving off of fundamental rights. It also specifically deals with the position of doctrine of waiver in the U.S. Context. It has further explained the nature of waiver.

- *H.M.Seervai, Constitutional Law of India*, (4th edn., Universal Law Publishing Co. Pvt. Ltd 2005)

This book has relied on the assumptions of various scholars regarding the fundamental rights and how it benefits every human being. It has further explained how doctrine of waiver cannot be applied in respect of fundamental rights.

Also the book has focused on dissenting judgments on waiving off of fundamental rights by comparing with the U.S constitution.

JOURNAL

- *Waiver of Constitutional Rights in Indian and American Constitutional Law*, Nathaniel L. Nathanson Journal of The Indian Law Institute Vol 4, pp 157-166 (1962).

ARTICLE

- *Rights and Waiver: what the law is and what the law ought to be*, Sandeep Menon Nandakumar ISSN 2321-4171.

Table of Contents

Sr. No	Subject	Page No.
1	INTRODUCTION	7
2	DOCTRINE OF WAIVER IN CONTEXT OF FUNDAMENTAL RIGHTS	8
3	DOCTRINE OF WAIVER IN U.S.A.	11
4	EXTENT OF DOCTRINE OF WAIVER IN U.S.A.	12
5	WHAT THE LAW OUGHT TO BE?	14
6	CONCLUSION	15

INTRODUCTION

Courts generally recall essential constitutional rights as inviolable, requiring heightened enquiry before allowing the right to be renounced¹. Waiver means relinquishment of rights. Doctrine of waiver says that people have some rights and if they relinquish such rights then in future he does not claim over it². The voluntary surrender of a known right conduct supporting an inference that a particular right has been relinquished. In other word waiver is essentially a unilateral act of one person that results in the surrender of a legal right. The term waiver as used in many legal contexts..

It mainly talks of a legal or a statutory right which can be relinquished by the citizens of India. In Indian context it has been established that no fundamental rights can be waived off. The Supreme Court in *Behram Khurshid Pesikaka*³ case said that you cannot waive off your fundamental rights. Even in *Bashesar Nath*⁴ case, the Supreme Court clearly laid down that the citizen of India cannot waive off his fundamental rights, the reason being fundamental right is a basic right and for an ideal society there must be some fundamental rights and without which we cannot imagine an ideal modern welfare state. Art. 14 articulate right to equality, but you cannot say that you can waived off your right to equality. There are some societal laws which prohibit state not to discriminate against citizens' fundamental rights. The Supreme Court also says that fundamental right should not be waived off because it is essential for an individual to achieve his/her potential and without these rights one cannot achieve his/her potential. In context of India, a large number of citizens are not aware of their rights, extreme poverty and illiteracy makes the citizens vulnerable for encroachment of basic rights. Fundamental rights guaranteed by the Indian Constitution are in nature of 'negative rights'. These rights ensure that government does not infringe upon basic rights of its citizens, therefore even state is under obligation to respect these rights and it is thought to be against the spirit of fundamental rights if state itself direct its citizens to waive off their fundamental rights.

¹ *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 307 (1937)

² Nathaniel L. Nathanson, *Waiver Of Constitutional Rights In Indian And American Constitutional Law* (1962) 4 *Journal of The Indian Law Institute*
<http://14.139.60.114:8080/jspui/bitstream/123456789/1097/1/018_Waiver%20of%20Constitutional%20Rights%20in%20Indian%20Law%20and%20American%20Constitutional%20Law.pdf> accessed 11 August 2008.

³ AIR 1955 SC 123

⁴ AIR 1959 SC 149

There is a need to change our view of doctrine of waiver of fundamental rights. The traditional view of the doctrine has been under a lot of criticism and there is a need to change our constitutional framework to adapt new ideas. The 2005 amendment that incorporated the plea bargaining and the recent right to privacy judgment paves a way towards this development. Perhaps, this is the most apt time for us to change our mindset towards the progressive ideas and to avail our citizens of a certain class of waiver rights⁵.

DOCTRINE OF WAIVER IN CONTEXT OF FUNDAMENTAL RIGHTS

Fundamental Rights are special class of the rights under Indian constitution. These rights although sacrosanct aren't absolute in nature. Our Constitution imposes certain restrictions upon the exercising of fundamental rights.

The definition of the nature of waiver might be as such:

“Waiver proceeds on the basis that a man not under legal disability is the best judge of his own interest and if, with knowledge of a right or privilege conferred on him by statute, contract or otherwise, for his benefit, he intentionally gives up the right or privilege, or choose not to exercise the right or privilege to its full extent, he has a right to do so”⁶.

The Supreme Court has tried to define the concept of waiver of rights with the help of certain landmark judgements:

In *M.P. Sugar Mill Co. vs. State of U.P.*⁷ the Supreme Court defined the Waiver as following:

“Waiver means abandonment of a right and it may be either express or implied from conduct, but its basic requirement is that it must be an intentional act with knowledge. There can be no waiver unless the person who is said to have waived is fully informed as to his right and with full knowledge of such right, he intentionally abandons it.”

In *Behram vs. State of Maharashtra*⁸ Justice Venkatrama Aiyar in his minority opinion classified the fundamental rights into two broad categories:

⁵ Sandeep Menon Nandakumar, 'RIGHTS AND WAIVER: WHAT THE LAW IS AND WHAT THE LAW OUGHT TO BE' (*Jsslawcollege.in*, 2013) <http://jsslawcollege.in/wp-content/uploads/2013/12/RIGHTS-AND-WAIVER_-WHAT-THE-LAW-IS-AND-WHAT-THE-LAW-ought-to-be.pdf> accessed 9 September 2018.

⁶ Durga Das Basu, *Commentary On The Constitution Of India* (8th edn., Wadhwa Nagpur 2007.), p 805

⁷ AIR 1979 SC 621

⁸ AIR1955 SC 123: (1955) 1 SCR 123

- i) Rights conferring benefits on the individuals, and
- ii) Those rights conferring benefits on the general public.

The purpose for this classification here is that after we look at the concept of waiver of rights, we are probing those rights that basically fall below the class of rights for the advantage of individuals. He further concluded that it was open to any person to waive his Fundamental Right⁹. However the majority opinion turned into that the fundamental rights have been no longer stored inside the constitution simply for individual benefits and therefore doctrine of waiver doesn't apply in cases of Fundamental Rights¹⁰.

In *Bashesar Nath v. Commissioner of Income-tax*¹¹ the Supreme Court in Five Judge Constitution Bench asserted that Fundamental Rights cannot be waived. The Supreme Court rightly points out that the Taxation on Income (Investigation Commission) Act, 1947 is unconstitutional and violative of Article 14 of Constitution of India¹² and asserted that earlier act where succinct and imperative in comparison to Indian Income Tax Act where the Income Tax Officers randomly pick any person and can discriminate against those person by putting them on more severe situations.¹³ However even after this judgement the appellant continued to make their payments due to settled agreements but after some time he stopped paying payment and due to this, certain properties were seized in spite of non payment. The appellant then demanded for the release of their property as the said Act is declared unconstitutional. The commissioner in response said that the settlement was not affected with the decision. The appellant later on file Special Leave Petition¹⁴ to Supreme Court were Attorney General argued that invalidity of Act did not affect the agreement since that agreement does not affect the said Act and petitioner never challenged the validity of Act therefore the petitioner is not entitled for the benefits arising from the invalidity of the Act and it will be presumed that petitioner has waived off his right to take advantage that has arisen from the invalidity of the Act. All the five judges unanimously came to the conclusion that appellant is relieved from the settlement, however there is some disagreement between them regarding the views upon the doctrine of waiver and the U.S judgement stated by

⁹ Mahabir Prashad Jain, Samaraditya Pal and Ruma Pal, *Indian Constitutional Law* (6th edn, Lexis Nexis Butterworths Wadhwa Nagpur 2010).p. 1212

¹⁰ Ibid.

¹¹ AIR 1959 SC 149.

¹² *Suraj Mall Mohta and Co. v. A. V. Visvanatha Sastri*, [1955] 1 S.C.R. 448

¹³ *M. Ct. Muthah v. Commissioner of Income-tax*, A.I.R. 1956 S.C. 169.

¹⁴ Article 136 of the Constitution of India.

Attorney General in the instant case. S.R.Das C.J. and Kapur J. confined their view only upon whether rights under Article 14 of the Constitution will be waived, since the said case relates to violation of Article 14, placing aside the question "Whether any of the other essential rights enshrined in Part III of our Constitution can or cannot be waived off"?¹⁵ And held that doctrine of waiver does not apply in Article 14, however both of them agreed that doctrine of waiver may or may not be applied in other fundamental rights.

Justice Bhagwati instead differing from the view of Chief Justice gave wider interpretation to the application of doctrine of waiver. Justice Bhagwati holds that "it isn't open to a citizen to waive the fundamental rights conferred via Part III of the Constitution."¹⁶ Justice Subba Rao also said that none of the Articles in Part III of the Fundamental Rights can be waived off by the people of India.

S. K. Das J. on the contrary opined a dissent opinion and stated that there should be some classification between rights which can be waived off and which cannot be waived off. He concluded that "where a right or privilege guaranteed by the Constitution rests in the individual and is primarily intended for his benefit and does not fringe on the rights of others, it can be waived provided that such waiver is not forbidden by law and does not contravene public policy or morals"¹⁷

In view of the majority decision in *Bheshar Nath Case*¹⁸, it is now an established proposition that an individual cannot waive any of his fundamental rights. This proposition has been applied in number of cases¹⁹. In *Olga Tellis Case*²⁰, the Supreme Court said that if any individual either by mistake or otherwise waives his Fundamental Right that does not create estoppels against him. If estoppel is applied it would defeat the very purpose of the constitution. In *Nar Singh Pal v. Union of India*²¹ the Supreme Court Observed: "No individual can barter away the freedoms conferred on him by the constitution".

After some wavering, it has been held in India that since the fundamental rights have been included in the Constitution by way of limitations upon State action, it would not to be open

¹⁵ *Bheshar Nath v. Commissioner of Income Tax*, A.I.R. 1959 S.C. 157.

¹⁶ *Ibid* at 160.

¹⁷ Dissenting opinion of J. Das, *ibid* pg. 178.

¹⁸ *Bheshar Nath v. Commissioner of Income Tax*, A.I.R. 1959 S.C. 157.

¹⁹ *Yousuf Ali Fazalbhoy v. M.S.Kasbekar*, AIR 1982 Bom. 135; *Omega Advertising Agency v. State Electricity Board*, AIR 1982 Gau. 37.

²⁰ *Olga Tellis v. Bombay Municipal Corporation*, AIR 1986 SC 180.

²¹ AIR 2000 SC 1401.

to any particular individual to say that he would not take advantage of his fundamental right or his right to challenge the constitutionality of a law for its infringement²².

DOCTRINE OF WAIVER IN U.S.A.

The Supreme Court strives with it whether any special doctrine governs waiver of constitutional rights and, in that case, whether any special doctrine apply to the entire constitutional rights. These waiver problems, like lots of the relaxation of constitutional law, took on large new extent with the fast enlargement of constitutional rights in the Nineteen Sixties and Seventies. Before that period, there were exceptionally a small number of rights entitled for waiver. These rights are generally legal rights and that has to be distinguished from Constitutional Rights.

Issue concern even in America i.e. whether or not a civil litigant had waived his right to trial which is added by Seventh Amendment. This issue is resolved in *Hodges v. Easton*²³ wherein the Supreme Court mentioned that individual waived his right but they must always be very cautious about their constitutional rights and further held: “every reasonable presumption should be indulged against its waiver”²⁴.

In *Pierce v. Somerset Railway*²⁵ the Supreme Court held that position under Constitution of America is that from his acts or omission a person may waive his fundamental rights which he has under the constitution and also statutes.

In *Shepard v. Barron*²⁶ the Supreme Court of U.S.A. held that the protection provided to property owner under its constitutional provisions is allowed to be waived if the property owner waives it voluntarily by act or omissions.

In *Wall v. Parrot Silver & Copper Company*²⁷ the suit was filed by some stockholders to set aside sell of property of the corporation to other company and statutes as it infringes the Fourteenth Amendment which talks of due process of law and equal protection of laws which says that if such type of sale is done then that must be approved by stockholders comprises of two-thirds of the whole. The Supreme Court held it didn't undermine the validity of statutes

²² H. M. Seervai, *Constitutional Law Of India* (4th edn., Universal Law Pub Co. Pvt Ltd 2005).

²³ 106 U.S. 408 (1882).

²⁴ <https://caselaw.findlaw.com/us-supreme-court/106/408.html> accessed 17September 2018.

²⁵ 171 U.S. 641.

²⁶ 194 U.S. 553.

²⁷ 244 U.S. 407.

as unconstitutional because stakeholders pursuant to these Act shows their willingness to enter into it.

In *Pierce Oil Company v. Phoenix Refining Company*²⁸ the oil company challenged the order passed by the Corporation Commission as it contravenes the due process of law. The Supreme Court said the order was passed by the commission matter pertaining to when company established under this statutes, the claim “must be manifest ineffectual to the face of almost being frolicsome”²⁹.

In *Edward Boykin Jr. V. State of Alabama*³⁰ the Supreme Court in 6-2 majority decision alleged that a statement given by accused that he has committed a crime comes under the confession and the admissibility of such confession as he remains silent confirms that he made it voluntarily. However Justice John M. Harlan & Hugo L. Black argue that Court faultily followed precedents.

The case of *Fay v. Noia*³¹ becomes the cornerstone of doctrine of waiver of Fundamental Rights. In this case the appellant didn't earlier file an appeal for their conviction and later on file review petition as a *coram nobis* of his conviction.³²

Extent of Doctrine of Waiver in India and U.S.A.

Primary fundamental distinguishable feature in the situation in India and U.S.A. can be analysed by the comparison of American Cases with that of Indian cases. In all the American cases the route of conduct followed the idea of waiver or estoppels result from the intentional initiative of Complainant. The volume to which, in each individual case, this act must be appeared as definitely voluntary instead of the result of tortuous compulsion varies of route in the particular case, and in a few of them may additionally also be so controversial as to raise a few question concerning the justice and effectiveness of the verdict. However the situation becomes very different after the evolution of plea bargaining. There are umpteen number of cases³³ in which it deals with the situation where the rights are waived in case of Plea bargaining. In our country there are certain rights which confer benefits only to the

²⁸ 259 U.S. 125.

²⁹ *Idib* at 128.

³⁰ 395 U.S. 238.

³¹ 372 U.S. 391 (1963).

³² <https://supreme.justia.com/cases/federal/us/372/391/> accessed 23 September 2018.

³³ *Miranda v. Arizona* (1966); *North Carolina v. Alford* (1970).

individuals when read jointly with other Act. Likewise when these rights are waived it is also waiver of some Fundamental Rights. For Example: Right against self incrimination³⁴, right to fair trial, right to legal counsel³⁵, right to cross examine witnesses, etc. Presently in India there is no waiver of Fundamental Rights provided under Part III of the Constitution of India. However there are certain legal rights which can be waived off in India. For instance, Plea Bargaining provided under Sections 265A-L of CrPC, 1973, waiver of Contractual obligation provided under Section 63 of I.C.A, 1872, etc.

In my view, it is not possible that fundamental right cannot ever be waived off, many astonishing and unexpected results may follow from that. For instance, under Article 30(1) of the Constitution of India the minorities based on religious or linguistic basis have been given right to administer and establish educational institutions of their choice.³⁶ But if minorities want aids from the Government they have to surrender certain rights. That does not mean they waive their fundamental rights. Justice S.K. Das in his dissenting opinion in *Basheshar Nath*³⁷ case held that “where a right or privilege guaranteed by the Constitution rests in the individual, it is primarily intended for his benefit and does not infringe on the right of the others and it can be waived provided such waiver is not forbidden by law and does not contravene public policy or public morals”.³⁸

In *Justice K.S. Puttaswamy v. Union of India*³⁹ the Right to Privacy is recognised as a Fundamental Right. In this case Justice Chandrachud however discussed both the two important landmark judgement related to doctrine of waiver and remarked that “decisional autonomy” is a manifestation of Right to Privacy.

Decisional autonomy means that a person has a choice to waive off his/her rights with respect to Right to Privacy. For instance suppose an individual post something on social networking sites, afterwards that individual does not claim that his/her rights has been violated as he himself cited such information. But if any individual gives information likewise to Government as regards form submission or job vacancy or any other requirement the

³⁴ Article 20(3) of Constitution of India.

³⁵ *Khatri v. State of Bihar* (1981) SCC 216.

³⁶ Article 30(1) of Constitution of India.

³⁷ A.I.R. 1959 S.C. 157.

³⁸ Dissenting opinion of J. Das, *ibid* pg. 178.

³⁹ (2017) 10 SCC 1.

Government cannot squander such information and if he does so, then it is a violation of Right of Privacy.

WHAT THE LAW OUGHT TO BE?

Many of the fundamental rights enshrined in Part III of Indian constitution owe their origin to the original Bill of Rights of America. Therefore the Indian courts are not entirely wrong when they refer to American jurisprudence and law cases at the time deciding of similar questions in law in India. Even D. D. Basu in his book has agreed that once it is established that when the fundamental rights given in “U.S. and Indian Constitution are in pari materia and if public policy does not preclude the waiver of fundamental rights, no rational grounds can be suggested by which such waiver should be precluded in India”⁴⁰

But even after many instances it took a long time for Indian courts to accept the doctrine of waiver till the 2005 amendment in CrPC was introduced. There is no denying the fact that concept of waiver as it exists in U.S. cannot and should not be adopted as it is in our legal system, but there is a clear need for the adoption of this concept in India. The time has come when our legal scholars and our constitutional experts start talking about waiver in the light of general public good. At a time when our Supreme Court is addressing new age ideas of Right to Privacy and rights of LGBT and about the rights of women to enter a particular temple, I believe it is only relatable if Supreme Court inspects this concept as well. The people of India are much more aware of their fundamental rights now and they are capable of deciding the question of relinquishment of their rights as well. People are relatively more conscious about their political and civil rights now. Perhaps it is the right time when we take a relook at our conception of waiver off rights. For more than 6 decades from the enacting of our constitution, we have opposed the idea of waiver off rights but by relooking at this concept now maybe we can pave a way towards progress.

CONCLUSION

The opinion of Justice S.K. Das in *Basheshar Nath's Case* provided the foundation for doctrine of waiver in Indian context. He considered the question whether a constitutional

⁴⁰ Durga Das Basu, *Commentary On The Constitution Of India* (8th edn., Wadhwa Nagpur 2007)., p 806.

right can be waived before they consider the question of a claim of waiver in a particular case. The same kind of approach has been followed in U.S. The whole concept of waiver of rights has been based of a classification of rights that can be waived off and that cannot be waived off in the light of public policy and good conscience. This approach has directed a new progressive way for the development of waiver in Indian legal scenario. The way these concepts have evolved by comparing our laws with that of U.S. and the method that has been taken up by Indian judges is an interesting thing to examine. But may at this juncture the Indian Courts should be cautious in directly referring foreign judgments and we should focus more on developing our own jurisprudence in this particular area. A few developments have already been brought out in this context but it is now more appropriate if we reflect on our own idiosyncrasies of individual justice and our attitudes towards the broader concept of law.

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