

## The Judiciary and the Civil Liberties

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The Constitution of India framed in the wake of India's freedom very appropriately guaranteed certain fundamental rights which are justiciable. Centuries of alien rule had generated an irrepressible urge for independence and a longing for individual liberty. The fundamental rights enshrined in the Constitution are thus the fruits of the historic struggle for freedom. The Founding Fathers had displayed great statesmanship in constituting the Supreme Court and the High Courts the custodians of these cherished rights. With the coming into force of the Constitution in 1950 a new and fascinating chapter in the life of the Indian Judiciary has opened itself. The Judiciary has become the vigilant guardian of civil liberties in India.

During these sixteen years, the Supreme Court and the High Courts have been called upon time and again to protect the liberties of the individual against legislative and executive encroachments. It is indeed gratifying that the interpretation of the fundamental rights by the Courts, notwithstanding occasional disappointments, has, by and large, tended to inspire and sustain the faith of the common man in this great institution. That the Supreme Court had begun to appreciate its role as the guardian of the fundamental rights became clear in the first few years itself. In the State of Madras Vs. V. G. Row (1952 SCR 597=AIR 1952 SC 196). Patanjali Sastri, C. J., observed:

"We think it to point out, what is sometimes overlooked, that our Constitution contains express provision for judicial review of legislation as to its conformity with the Constitution, unlike in America. . . if then, the Courts in this country face up to such important and none too easy task, it is not out of any desire to tilt at legislative authority in a crusader's spirit, but in discharge of a duty plainly laid upon them by the Constitution. This is especially true as regards the fundamental rights as to which this Court has been assigned the role of a sentinel on the qui vive. While the Court naturally attaches great weight to the legislative judgment, it cannot desert its own duty to determine finally the constitutionality of an impugned statute. "

The power to issue orders or writs, including those in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, for the enforcement of any of the fundamental rights is conferred both on the Supreme Court, under Art. 32, and the High Courts, under Art. 226. But the nature and scope of the power differ in the two cases. It was contended on behalf of the respondent in Romesh Thapar Vs. State of Madras (1950 SCR 594= AIR 1950 SC 124) that, as a matter of orderly procedure, the petitioner should have first moved the High Court of Madras which had concurrent jurisdiction to deal with the matter under Art. 226 before he could come up to the Supreme Court under Art. 32. Rejecting this contention, Patanjali Sastri, J., observed:

"Art. 32 does not merely confer power on the Supreme Court, as Art. 226 does on the High Courts to issue certain writs for the enforcement of the rights conferred by Part III or for any other purpose, as part of its general jurisdiction. Art. 32 provides a 'guaranteed' remedy for the enforcement of those rights, and this medial right is itself made a fundamental right by being included in Part III. The Supreme Court is thus constituted the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against infringements of such rights. The jurisdiction thus conferred on the Supreme Court by Art. 32 is not concurrent with the one given to High Courts by Art. 226." It is regrettable that the force of this pronouncement should have been diluted by later decisions and in particular, the decision in Daryao Vs. State of Uttar Pradesh [1962 (I) SCR 574 = AIR 1961 SC 1457], where the Supreme Court held that, if a petition under Art. 226 had been considered on merits as a contested matter and dismissed by the High Court, the decision would be binding on the parties unless modified or revesed in appeal or other appropriate proceedings under the Constitution of India, and a fresh writ petition under Art. 32 regarding the same matter would be barred.

In Bashesharnath Vs. Commissioner of Income Tax (1959 Supp. I SCR 528=AIR 1959 SC 149),

the Supreme Court took a lofty view of the nature of fundamental rights. The main question was whether it was open to a citizen to waive his fundamental rights. The Court held that, as fundamental rights were guaranteed to the people as a matter of public policy, it was not open to anyone to waive his fundamental rights. The opinion delivered in this case is truly instructive and inspiring.

The right to equality is guaranteed in Arts. 14 to 18. Art. 14 says: "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India". Thus, arbitrary discrimination on the part of the State between person and person is prohibited. The Courts were quick to strike down any law that discriminated against any person or group' of individuals without reasonable basis. In *Ram Pershad Vs. State of Bihar* (1953 SCR 1129=AIR 1923 SC 215), the Supreme Court observed: 'It is impossible to conceive of a worse form of discrimination than the one which differentiates the particular individual from his fellow Subjects and vests him with a disability which is not imposed upon anybody else and against which the right of complaint is taken away'. The other day, the Supreme Court struck down as void a section of the Osmania University Act, 1959.: 'which sought to reduce the term of existing Vice-Chancellor without any justification. Legislation based upon the reasonable classifications is, however, permitted. In order that a classification may be referred as reasonable, two conditions must be fulfilled; namely, (i) that the classification must be founded on an intelligible differential which distinguishes persons or things that are grouped together from others left out of the group and (ii) that the differential must have a rational relation to the object sought to be achieved by the Statute in question.

The guarantee of equal protection is not only against substantive laws but against the procedural laws as well. In the *State of West Bengal Vs. Anwar Ali Sarkar* (1952 SCR 284=AIR 1952 SC 75), I had the privilege to challenge the validity of Section 5 (1) of the West Bengal Criminal Law Amendment (Special Courts) Act, which empowered the Provincial Government to pick and choose cases from among the specified cases and send them to the Special Courts and thereby discriminate between man and man within the same class. The Special Courts were required to follow a procedure less advantageous to the accused as compared to the one laid down in the Criminal Procedure Code. Striking down the said Section as void, the Supreme Court held that the language of Section 5(1) clearly and unambiguously vested the State Government with unrestricted discretion to direct any case or class of cases to be tried by the Special Court. There was no classification 'at all in the real sense of the term, as it was not based on any characteristics which were peculiar to the persons or cases which were to be subject to the special procedure prescribed by the West Bengal Act.

The Court, however, was not consistent in its pronouncements on the validity of the Special Courts Act. In the very next case, i. e. *Kathi Raning Rawat Vs. State of Saurashtra* (1952 SCR 435=AIR 1952 SC 123), the Court, by a majority, upheld the impugned Saurashtra Ordinance which was analogous to the West Bengal Act referred to above.

Art. 15 of the Constitution prohibits discrimination against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them, while Art. 29(2) prohibits discrimination on similar grounds and on the ground of language in regard to admission to educational institutions maintained by the State or receiving aid out of the State funds. In the *State of Madras Vs. Champakam Doarairajan* (1951 SCR 525=AIR 1951 SC 226), the Supreme Court declared that reservation of seats in medical and engineering colleges made on communal basis by the State of Madras was unconstitutional. This decision led to an amendment of the Constitution adding Clause 4 to Art. 15 which now enables the State to make special provision for the advancement of the socially and educationally backward classes of citizens or for the Scheduled Castes and the Scheduled Tribes. In *Balaji Vs. State of Mysore* (1953 Suppl. I SCR 439=AIR 1963 SC 649), the Supreme Court considered the scope of permissible reservation of seat in educational institutions. Striking down the order of the said State reserving 68% of the available seats in the technical colleges as a fraud on the Constitution, the Supreme Court observed that a special provision contemplated under Art. 15(4) or Art. 16(4) must be within reasonable limits and, therefore, should be, speaking generally and in a broad way, less than 50%. More recently, in *Chitralekha Vs. State of Mysore* (AIR1964 SC 1833), the Court declared that, for purposes of Art. 15(4), classification of socially and

educationally backward classes could be made on the basis of economic condition and occupation, ignoring caste altogether Caste, according to the Court, is only a relevant, but not a compelling or dominant, consideration in making the said classification.

As regards the right to equality of opportunity in matters relating to employment under the State guaranteed in Art. 16, the Court seems to be inclined to resile from the extreme view taken in Rangachari's case [(1962) 2 SCR 586 = AIR 1962 SC 36]. In Devadasan Vs. Union of India (AIR 1964 SC 179), the Court struck down the so-called carry-forward rule, according to which, if the number of posts reserved under Art. 16(4) in any year could not be filled in that year, the unfilled posts could be carried forward to the subsequent years till suitable candidates belonging to the Scheduled Castes and Scheduled Tribes were available.

The interpretation of Art. 19 by the Judiciary has been the subject-matter of severe criticism. Art. 19 guarantees to all citizens the right to freedom of speech and expression, freedom of assembly and association, freedom of movement and residence, freedom to acquire and dispose of property and last, but not the least, freedom to practise any profession or carry on any trade or business all subject to the power of the State to impose reasonable restrictions by law on each freedom on the grounds specified in Clauses 2 to 6. In the very first case on fundamental rights, viz. A. K. Gopalan Vs. State of Madras (1950. SCR 88=AIR 1950 SC 27), the Supreme Court was called upon to define the scope of Arts. 19, 21 and 22. Art. 21 says that no person shall be deprived of his life or personal liberty, except according to procedure established by law. Art. 22 provides safeguards against the arrest and detention in certain cases. In an attempt to give a harmonious construction to the above Articles, which, to some extent, appeared to overlap one another, the Court took a very narrow view of the right to personal liberty and propounded the test of direct infringement as a pre-condition to the enforcement of rights under Art. 19. To quote Mr. M. C. Setalvad, "In reaching the result it did in Gopalan's case, the Court may be well said to have almost negatived the right of personal freedom". Subsequently, while interpreting the rights to property guaranteed by Art. 19(1) (f) and Art. 31, the Court merely extended the reasoning of Gopalan's case. Almost a decade later, the Court seemed to have realised that the view taken in Gopalan's case was not sound. In K. K. Kochinni Vs. States of Madras and Kerala [(1960) 3 SCR 887=AIR 1960 SC 1080], Subbarao, delivering the majority Judgment, referred to Gopalan's case and remarked significantly: "Had the question been res integra, some of us would have been inclined to agree with the dissenting view expressed by Fazal Ali, J. . ."

As to the test of reasonableness of restrictions imposed by the State on the rights guaranteed in Art. 19(I), the Supreme Court observed in the State of Madras V s. V. G. Row (1952 SCR 597 = AIR 1952 SC 196), "It is important.... to bear in mind that the test of reasonableness wherever prescribed should be applied to each individual Statute impugned) and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict." The Supreme Court, however, held in Narendra Kumar Vs. Union of India [(1960) 2 SCR=AIR 1960 SC 430], that a reasonable restriction contemplated under Art. 19 includes cases of prohibition also. It provoked the criticism that the decision tended to whittle down the fundamental right guaranteed in Art. 19.

In interpreting the scope of freedom of speech and expression, the Court took an enlightened view of the freedom of Press. In Romesh Thappar Vs. State of Madras (1950 SCR 594=AIR 1950 SC 124), Patanjali Sastri, observed, "Thus, very narrow and stringent limits have been set to permissible legislative abridgment of the right of free speech and expression and this was doubtless due to the realisation that freedom of speech and of the press lay at the foundation of all democratic organizations, for, without free political discussion, no public education, so essential for the proper functioning of the processes of popular Government, is possible. A freedom of such amplitude might involve risks of abuse. But the framers of the Constitution may well have reflected, with Madison, who was 'the leading spirit in the preparation of the First Amendment of the Federal Constitution', that it is better to leave a few noxious

branches to their luxuriant growth, than by pruning them away to injure the vigour of those yielding the proper fruits,' (quoted in *Near Vs. Minnesota*, 283 U. S. 607 at pp. 717-8)". In that case, the Court declared a section of the Madras Maintenance of Public Order Act, 1949, which authorized the imposition of a ban on the entry and circulation of newspapers in the State as unconstitutional and void. The same year, in *Brij Bhushan V s. State of Delhi* (1950 SCR 605=AIR 1950 SC 129), the Court declared that "there, can be little doubt that the imposition of pre-censorship is a restriction on the liberty of the press which is an essential part of the right to freedom of speech and expression, declared by Art. 19( 1 )(a)". A more recent decision of the Court in the *Sakal Papers Limited Vs. Union of India* [(1962) 3 SCR 842=AIR 1962 SC 305] marks an improvement in the position of the freedom of Press in India. There, the Supreme Court declared that the State could not make a law which directly restricted one guaranteed freedom for securing the better enjoyment of another guaranteed freedom.

The Emergency declared in 1962 has, however, cast a gloomy shadow on the Rule of Law in the country in general, and on the most vital fundamental rights enshrined in Arts. 14, 19, 21 and 22 of the Constitution in particular. As a result of the automatic operation of Art. 358 all the rights guaranteed in Art. 19 remain suspended for the period of emergency. By an Order by the President, under Art. 359(I), the right of enforcement is suspended in respect of Arts. 14, 21 and 22 as against the action taken under the Emergency Laws, viz. the Defence of India Act and the Defence of India Rules, which admittedly violate the above fundamental rights. The validity of the Defence of India Act and the Rules was questioned before the High Courts of Uttar Pradesh, Maharashtra and Punjab. It was only the Allahabad High Court, where I had the privilege to appear on behalf of certain detenus, which showed the judicial insight to declare that the Defence of India Act and the Rules were unconstitutional and void-a view shared by many eminent jurists and which was subsequently vindicated by the strong and sound dissenting judgment of Subba Rao, J., in *Malkhan Singh Vs. State of Punjab* (AIR 1964 SC 381).

Recently, in *Sadanandhan Vs. State of Kerala*, the Supreme Court observed: "We feel rudely disturbed by the thought of continuous exercise of the very wide powers conferred by the Rules (DIR) on the several authorities which is likely to make the conscience of the said authority insensitive, if not blunt, to the paramount requirement of the Constitution that, even during the Emergency, the freedom of the Indian citizen could not be taken away without the existence of justifying necessity specified by the Rules themselves. The tendency to treat these matters in a somewhat cavalier manner, which may conceivably result from the continuous use of such unfettered powers, may ultimately pose a serious threat to the basic value on which the democratic way of life in this country is founded."

The Judiciary in India, with all great traditions behind it, has been playing a vital role in striking a fair balance between the rights of the individual and the needs of the community. Till such time as democracy becomes a settled way of life in the country, the Judiciary will have to discharge its onerous duty as the watchful custodian of citizens' rights. It is disquieting to note that there has been practically no sincere effort on the part of the Government to improve the conditions of service of the Judiciary, despite the recent resignations by some of the judges in the State of Maharashtra. It is the course of wisdom to take preventive measures in order to forestall possible deterioration of the standards in the administration of justice. Let us not forget that the future of the country depends as much on the Judiciary as on the other organs of the State, if not more. Only a strong and independent Judiciary can hold aloft the torch of liberty.