

Fundamental Rights

By SRI JAGDISH NARAIN AGARWALA

Advocate, Supreme Court and High Court, Allahabad

Fundamental Right is one which is protected and guaranteed by the written Constitution of a State. Ordinary Rights may be changed by a Legislature in the ordinary process of legislation; but a Fundamental Right being guaranteed by the Constitution cannot be altered by any process shorter than that required for amending the Constitution itself.

The object behind the inclusion of certain Fundamental Rights in a Constitution or Bill of Rights is to establish a "Limited Government", i.e. a Governmental system in which absolute power is not vested in the hands of any of the organs of a State. The concept of "Limited Government" is what the Americans know as "Government of Laws and not of men". This concept being the antithesis of the English doctrine of Parliamentary Sovereignty can be explained only if we analyse the ideological differences involved in the two concepts.

In England the birth of democracy was due to a protest against absolutism of an autocratic executive, and the English people discovered in Parliamentary sovereignty an adequate solution of the problem that faced them. The English political system is founded on the unlimited faith of the people in the good sense of their elected representatives and that faith does not seem to have waned through the lapse of centuries. Thus, they have not placed any limitation on the sovereign authority of the Parliament which is supreme in that country.

Lord Wright of the House of Lords, in the case of *Liversidge versus Anderson*, 1942 A. C. 206, observed:

"All the courts today and not the least this House, are as jealous as they have ever been in upholding the liberty of the subject. But that liberty is a liberty confined and controlled by law. . . . it is in Burke's words a regulated freedom. . . . In the Constitution of this country there are no guaranteed or absolute rights. The safeguard of British liberty is in the good sense of the people and in the system of representative and responsible Government which has been evolved."

In the United States, the founding fathers of the American Constitution, on the other hand, had the painful experience that even a representative body of the Government might be tyrannical. Thus, the Bill of Rights couched in positive form imposes limitations on Legislative body to prevent dictatorship and despotism of Government.

Justice Jackson in the case, *Board of Education versus Barnette*, reported in (1943) 319 U. S. 624, observed:

"The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitude of political controversy, to place them beyond the reach of majority, . . . and to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, free press, freedom of worship and assembly and other Fundamental Rights may not be submitted to votes, they depend on the outcome of no election."

Russia is also one of the most prosperous, highly industrialized and sophisticated nation in the world in modern times. The conception of the Constitution is alien to Soviet Union. Its ruling group is self-perpetuating and it cannot be dislodged save by revolution. Its powers are all embracing and without limit. Citizens have duties, obligations and rights which depend on the precarious beneficence of the ruling group. But there are Constitutional documents of the U. S. S. R., which make the formal Governmental structure explicit. Legal controls over administrations are primarily exercised through three channels:

(1) The Procuracy, (2) The Courts, and (3) The system of State arbitration (*Gosarbitrazb*) for settling disputes between Government enterprises.

Article 113 of the Constitution of the U. S. S. R. vests the Procurator General with supreme supervisory powers over the execution of laws by all Ministers and institutions subordinate to them. The hierarchy of procurators operates independently of local authority. They are the guardian of State interest and constitute an important instrument in restraining bureaucratic excesses. The judicial system also imposes curbs on the Bureaucracy and inflicts heavy penalty on administrators who misuse their power. Another form of legal control over officialdom is exercised through the system of arbitration known as *Gosarbitrazb*. The chief arbitrator who is attached to the Council of Ministers of the U. S. S. R. supervises a hierarchy of arbitrators. The jurisdiction of *Gosarbitrazb* embraces disputes concerning the execution of a contract or the quality of goods and also other property dispute between institutions, enterprises and organizations of the socialized sector of the national

economy.

Part III of the Indian Constitution relating to Fundamental Rights is more elaborate than a Bill of Rights contained in any other existing Constitution of importance and covers a wide range of topics. The width of the subject has been primarily due to the special problems of religion, culture and social condition of huge Indian populations of heterogeneous elements.

Some provisions of this Part are in the nature of Constitutional limitations upon the authority of the State, such as the prohibition of discrimination (Art. 15), or denial of equal protection (Art. 14) or conferment of titles (Art. 18). From the standpoint of individuals they may be termed negative rights; while the remaining Part contains the positive rights of the individual, such as freedom of speech (Art. 19) and protection of life and personal liberty (Art. 21). The former are in the nature of Constitutional limitations. They are binding upon the State; and any act of the State (Legislative or Executive), which contravenes any of these provisions, would be void altogether or to the extent of such contravention (Art. 13).

On the other hand, the latter provisions are in the nature of the individual rights and some are subject to regulation by the State itself within certain prescribed limits (Art. 19).

In the famous Supreme Court case, *Gopalan versus State of Madras*, reported in 1950 S. C. R. 76, Shastri, J., observed:

" . . . the insertion of a declaration of Fundamental Rights in the forefront of the Constitution coupled with an express prohibition against legislative interference with these rights (Art. 13) and the provision of a Constitutional sanction for the enforcement of such prohibition by means of judicial review (Art. 32) is a clear and emphatic indication that these Rights are to be paramount to ordinary State-made law."

Some of the Fundamental Rights are limited to citizens, such as those mentioned in Arts. 15, 16, 19, 29 and 30; while the rest of them are applicable to citizens and aliens alike residing within the territory of India, e.g. the protection of life and personal liberty (Art. 21).

Constitutional remedies are available against unconstitutional acts of State and not against individuals for breach of Fundamental Rights. The remedies against individuals are governed by the ordinary law of the land.

There is prohibition against social abuses, like untouchability (Art. 17), forced labour (Art. 23), discrimination on the ground of sex or religion (Art. 15) where prohibition is not directed against State exclusively but against individual as well.

The most striking feature of the provisions of Part III is that they expressly seek to strike a balance between written guarantee of individual rights and collective interest of the community.

A law, before it can claim to be constitutional, must satisfy two tests, namely (1) that the appropriate Legislature had the competence to make it, and (2) that it does not take away or abridge the Fundamental Rights guaranteed by the Constitution. However, reasonable restrictions can be imposed on the Fundamental Rights to secure a Welfare State. In *Kochuni Versus States of Madras and Kerala*, reported in A. I. R. 1960 S. C. 1080, Subba Rao, J., observed:

"We must reconcile ourselves to the plain truth that emphasis has now unmistakably shifted from the individual to the community. We cannot overlook that the avowed purpose of our Constitution is to set up a Welfare State by subordinating social interest in individual liberty or property to the larger social interest in the right of the community. . . . the Police power of the State is the most essential power, at times most insistent and always one of the least limitable powers of the Government."

In order to ensure orderly progress towards the goal of sovereign democratic Republic and secure justice, liberty, equality and fraternity to all citizens as mentioned in the Preamble to our Constitution, reasonable restrictions can be imposed on some of the Fundamental Rights. The question of reasonableness is justiciable.

In the *State of Madras versus V. G. Rao*, 1952 S. C. R. 597, Patanjali Shastri, the Chief Justice of India, observed:

"It is important in this context 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 the restrictions imposed, the extent and urgency of

the evil sought to be remedied thereby, disproportion of the imposition, the prevailing conditions of the time should all enter into judicial verdict."

The judiciary is the guardian of all individual rights in India as elsewhere. But in England courts are powerless as against legislative aggression upon individual rights. In India, courts are the bulwarks of individual liberty against the tyranny and excesses of the Executive Government.

The entire Government is divided into three parts, namely (1) Judiciary, (2) Executive, and (3) legislature; but our Constitution has assigned a supreme role to Judiciary. The Constitution has empowered the Supreme Court (Art. 32) and all the High Courts in this Country (Art. 226) to grant any appropriate relief to any citizen, whenever his Fundamental Rights are illegally contravened either by the Legislature or by the Executive.