

FUNDAMENTAL RIGHTS AS A TOOL FOR SOCIAL CHANGE

Abhayachandran K

Assistant Professor, NUALS, Kochi

As social animals, humans are endowed with natural or inalienable rights¹ from the very beginning of their life. In a country where the Constitution is the supreme law, if some human rights are included in the Constitution with the protection of special rights, they are called fundamental rights and take precedence over ordinary laws. That is, some human rights and fundamental freedoms are included in the Constitution to place them above ordinary laws. As the Supreme Court observed, all states, whether democratic or authoritarian, purport to govern for the welfare of the people. What distinguishes a democratic State from a totalitarian one is that a free democratic State respects certain basic human rights or fundamental rights and endeavours to achieve its objectives through the discipline of fundamental freedoms.² Hence, modern constitutions enshrine certain basic human rights as fundamental for citizens, and no authority can violate or abrogate such rights without valid reasons. Enshrining such rights in the Constitution and for their protection and development are the result of various struggles, sufferings, and protections organised and participated in by human beings. The history of human rights development in England has one of the longest traditions in the world, including and stemming from the *Magna Carta* of 1215, the Bill of Rights of 1689 and the Human Rights Act of 1998. *Magna Carta*, 1215 is the first written document relating to the fundamental rights of citizens. 1689 the Bill of Rights³ was written, consolidating the English people's important rights and liberties.

¹ John Locke in his book '*Two Treatises of Government*' pointed out that natural right such as life, liberty etc existed in the state of nature and could never be taken away or given up by individuals. These rights were "inalienable rights".

² *Minerva Mills Ltd. v. Union of India* (1980) 3 SCC 625

³ The Bill of Rights 1689 is an original Act of the English Parliament and has been in the custody of Parliament since its creation. The Bill firmly established the principles of frequent parliaments, free elections and freedom of speech within Parliament – known today as Parliamentary Privilege. The Bill of Rights was used as a model for the US Bill of Rights 1789. Its influence can also be seen in other documents establishing the rights of humans, such as the United Nations Declaration of Human Rights and the European Convention on Human Rights.

It includes no right of taxation without Parliament's agreement, freedom from government interference, the right to petition, and just treatment of people by courts. The American Constitution was the first to give the Bill of Rights constitutional status. The original Constitution drafted in 1787 did not contain any fundamental rights. Following the spirit of the *Magna Carta* of the British and the Declaration of the Rights of Man and the citizens of France, the Americans incorporated the Bill of Rights in their Constitution in the year 1791 in the form of ten amendments. Human rights must be protected from the vagaries of transient political majorities and preserved as permanent rights. Therefore, it is considered imperative that these rights be secured so that they cannot be violated, tampered with or interfered with by an oppressive government. To this end, some written constitutions guarantee certain rights to the people and prohibit the government from interfering with them. In that case, a guaranteed right can be limited or taken away only through an elaborate and formal constitutional amendment process rather than through ordinary legislation. These rights are termed as fundamental rights.

SANCTITY OF THE RIGHTS

Usually, the Constitution has either a list of fundamental rights or without a list of rights. A typical written constitution should contain three sets of provisions in view that fundamental rights, the first of them being "a series of prescriptions setting forth the fundamental civil and political rights of the citizens, and imposing certain limitations on the power of the government, as a means of securing the enjoyment of those rights"⁴. A section of constitutional experts argue that their existence and validity do not depend on the interests of successive governments, they cannot be abolished or improperly altered by majority voting.⁵ Justice Jackson explains the sanctity of fundamental rights in the Constitution in this case *West Virginia State Board of Education v. Barnette*⁶

The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections.

⁴ J. W. Garner, *Political Science and Government*, 529

⁵ Jackson, J., dealing with the purpose of a Bill of Rights observed in *West Virginia State Board of Education v. Barnette*, 87 L.Ed 1628, 1638.

⁶ 319 US 624

Since they are fundamental and inherent, it is impossible to hold that an Act of Parliament can abolish fundamental rights.⁷ Bhagwati J. explained the root of the fundamental rights incorporated in the Constitution⁸. These rights represent the basic values of civilised society, and therefore, the Constitution makers elevated them to the status of fundamental rights. Its roots of the rights are in very deep in the struggles for independence⁹. India's entire cultural and spiritual history formed the background against which these rights were enacted¹⁰. India's historical and political developments made it inevitable that fundamental rights should be enacted in the Constitution¹¹. By defining 'the state' and 'law' in different ways, the makers of the Constitution ensured that fundamental rights operated over the widest field. It prevents governmental and other forces from 'alienating' the individual from his creative impulses. The constitution-makers conceived fundamental rights in their widest sweep, not in a narrow limited sense. The aim and objective was to build a new social order where man would not be a mere plaything in the hands of the state or a few privileged persons. It provides full scope and opportunity to achieve maximum development of his personality, creativity and the dignity of the individual. Fundamental rights are not gifts given to citizens by the state. They are the recognised human rights of individuals to live freely as members of the human race. The Constitution of India enshrines these human rights in its third part, affirms their existence, and protects them¹².

INDIAN FUNDAMENTAL RIGHTS ARE UNIVERSAL BUT UNIQUE.

During the framing of the Constitution, the question naturally arose as to whether a list of fundamental rights should be included¹³. Major political parties and organisations representing

⁷ Propositions submitted before the Supreme Court by Sri. N.A.Palkhivala, (1973) 4 SCC 1(J), 10 Constitutional guarantees which are away from extinction only by a bare majority or a two-thirds majority of a five year Parliament are no guarantees at all. The word "law" was construed by the Supreme Court in *Golak Nath v.State of Punjab*, (1967) 2 SCR 762 as including constitutional amendments; and it was held in that case that Parliament could not abridge or take away the Fundamental Rights in exercise of its power under Article 368 to amend the Constitution. The ratio, however, in *Golak Nath Cae* was overruled by the Supreme Court in *Kesavananda Bharati case*, it was held that Article 368 does not enable Parliament to alter the basic structure or frame work of the Constitution.

⁸ *Maneka Gandhi v. Union of India* (1978) 1 SCC 248

⁹ *ibid*

¹⁰ *ibid*

¹¹ H. M. Seervai, *Constitutional Law of India*, 349

¹² *M. Nagaraj v.Union of India* (2006) 8 SCC 212, 241

¹³ M. Venkatarangaiya, *Fundamental Rights in a New Indian Constitution*, The Indian Journal of Political Science, Vol. 6, No. 2 (October-December, 1944), 114-127

different sections of the people and movements supported the incorporation of fundamental rights in the future Constitution of India¹⁴. As there are different views on the nature of fundamental rights, which are likely to change from time to time, they are also gaining importance from a social rights perspective.¹⁵ Fundamental rights are not human rights in its content because some of the rights in Part III of the Constitution are not available to foreigners. In connection with the question of abrogation of fundamental rights, Mr Seervai boldly asserted that there was no such thing as natural or inalienable rights because the scheme of Part III itself shows that non-citizens have not been given all the fundamental freedoms; for example, Article 19 speaks of only citizens. He says that if there were natural rights, why were they not conferred on non-citizens¹⁶? However, the court clarified that they are natural rights, but our country does not think it expedient to confer these fundamental rights, mentioned in Article 19, to non-citizens. Other rights have been conferred on non-citizens because the Constitution-makers thought it would not be detrimental to the country's interests to do so.¹⁷

Rights are sacrosanct because the government does not interfere with exercising rights enshrined in Part III of the Constitution. It enshrines the most fundamental right of a citizen to live and participate in a democratic social order. The interpretations of the courts enrich its regular growth and development. Dr. B. R. Ambedkar clarified that any existing law inconsistent with the fundamental rights enacted in this part of the Constitution is void.¹⁸ Further, he stated that any existing law shall stand abrogated in so far as they are inconsistent with the provisions of this Constitution. Article 13 expressly lays down the Supremacy of the fundamental rights over any other law in case of inconsistency between the two. According to this article, pre-constitutional

¹⁴ *Ibid*

¹⁵ V.G.Ramachandran, "Summary of Arguments in the Fundamental Rights Case", (1973) 4 SCC 34 (J). The arguments are propounded by H.M. Sreevai, that "Fundamental Rights are not human rights. These rights did not belong to the people of India before January 26, 1950 and as such could not be claimed by them. They are only social rights conferred on citizens by civilized society at a given time....During emergency the freedoms in Article 19 can be suspended from operations. ...That most of the rights vouchsafed in Part III of the Constitution are not available to foreigners clearly prove that they are not human rights or natural rights. Further the Preamble to the Constitution which is clearly a part of it seeks to secure only for the *citizens* of India, Justice, Liberty, Equality and Fraternity. Right to the freedoms in Part III is clearly subject to the paramount interest of society i.e., social good of society and are regulated by considerations such as of public interest, morality, health, public order, friendly relations with foreign states, etc. the objectives set out in Part IV operate as the yardstick for imposing reasonable restrictions for regulation of the Rights in Part III. "

¹⁶ *Supra n. 12*

¹⁷ S.M.Sikri, C.J., *Kesavanada Bharati v. State of Kerala*, AIR 1973 SC 1461, para. 319

¹⁸ Dr. B.R.Ambedkar, CAD,P.740

laws shall be invalid only to the extent they fall within the category of law in force. Clause 2 says the state is prohibited from making any law which takes away or abridges any of the rights in this part. Therefore, any law made in contravention of this clause shall be void to the extent of contravention. Thus, rights have, in fact, proved to be the most significant constitutional control over the government, particularly legislative power.¹⁹ Negative state interference is the policy of fundamental rights enshrined in the Constitution. Still, positive state interferences in realising certain fundamental rights are generally recognised and interpreted as such. Article 16 (4) of the Constitution expressly provides that the state may reserve appointment or post in favour of any backward classes which, in its opinion, are not adequately represented in the services under the state²⁰.

In a broad sense, the fundamental rights guaranteed by the Constitution of India lay down the political and socio-economic rights that an individual needs to live with dignity in a democratic social order. Articles 14 to 18 guarantee the right to equality. It also prohibits discrimination based on religion, race, caste, sex, and place of birth. Article 19 guarantees fundamental freedoms such as freedom of expression and peaceful assembly; freedom to form associations or unions; freedom to move, reside and settle freely in any part of India; and freedom of employment, trade and business. Article 21 guarantees freedom of life. Articles 23 and 24 enshrine freedom, not against exploitation. Articles 25 to 28 guarantee freedom of religion, or the freedom to practice, believe and propagate one's religion, while Articles 29 and 30 guarantee the rights of minorities to preserve their language, script and culture, and to establish and manage educational institutions. But although the right to property was included in the list of fundamental rights, it was repealed by the Forty-fourth Amendment of the Constitution.

The constitutional developments concerning the infringement of fundamental rights by laws have undergone radical change since the decision of the *A.K Gopalan v. State of Madras*²¹ case.²² Fundamental rights are a limitation on the power of the state. The rights have, in fact, proved to be the most significant constitutional control on the government, particularly legislative power.²³ The court examined comprehensively and briefly the nature, content and constitutional development of fundamental rights. The court has observed as follows:

¹⁹ *I.R.Coelho v. State of Tamil Nadu*, (2007) 2 SCC 1

²⁰ The clause was added to the Constitution through the (First Constitutional Amendment) Act, 1951, to overcome the decision of the Supreme Court in *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226.

²¹

²² Bhagwati, J., gave a clear depiction in *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248

²³ *Supra n. 20*

It is a fallacy to regard fundamental rights as a gift from the state to its citizens. Individuals possess basic human rights independently of any constitution by reason of the basic fact that they are members of the human race. These fundamental rights are important as they possess intrinsic value. Part-III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts..... A Constitution, and in particular that of it which protects and which entrenches fundamental rights and freedoms to which all persons in the state are to be entitled is to be given a generous and purposive construction²⁴.

Thus, a right becomes a fundamental right because it has foundational value.²⁵ Fundamental rights occupy a unique place in the lives of civilised societies. They constitute the ark of the Constitution. Therefore, a narrow interpretation of fundamental rights is a thing of the past. Thus, in the clash between the fundamental rights and the larger and broader interests of the society, the latter would have prevailed. Legislature is one of the best ways to bring social reforms for the upliftment of the backward and the weaker sections of the society and for the improvement of marginalised sections of the people. Economic growth and social equality, the two goals of independent India, were linked to freedom of equal opportunity. Hence, fundamental rights have always had a special and unique place in the Constitution. This is further corroborated by the observation of the Supreme Court as follows.

The fundamental rights have always enjoyed a special and privileged place in the Constitution. Economic growth and social equity are the two pillars of our Constitution, which are linked to the rights of an individual (right to equal opportunity), rather than in the abstract. Some of the rights in Part III constitute fundamentals of the Constitution, like Article 21, read with Articles 14 and 15 which represent secularism, etc. As held in Nagaraj [(2006) 8 SCC 212] egalitarian equality exists in Article 14 read with Articles 16(4), (4-A), (4-B) and, therefore, it is wrong to suggest that equity and justice finds place only in the directive principles²⁶.

Therefore, the court should interfere in this process only when the statute clearly violates the right conferred on the citizen under Part III of the Constitution or when the Act is beyond the legislative competence of the legislature or such other grounds.²⁷ The judiciary settled the position after a long wrangle between Parliament and the judiciary about the violation or taking away any rights

²⁴ *M. Nagaraj v. Union of India*, (2006) 8 SCC 212

²⁵ *Supra n.20*

²⁶ *Ibid.* at 99

²⁷ *Pathumma v. State of Kerala*, 1978 SCR (2) 537, 544

in the part third of the Constitution. Any provisions of the Constitution, including part III, can be amended by the Parliament invoking Article 368 except the basic structure of the Constitution. Another technique usually used by the Parliament to save ordinary laws from invalidity on account of contrary to fundamental rights is to put such laws in the Ninth schedule of the Constitution. Even the laws declared by the judiciary as unconstitutional can be saved through this technique. After a law is placed in the Ninth Schedule, its validity has to be tested on the touchstone of basic structure doctrine²⁸. Parliament has the power to amend the provisions of Part III so as to abridge or take away fundamental rights, but that power is subject to the limitation of basic structure doctrine. Whether the impact of such amendment results in a violation of basic structure has to be examined with reference to each individual case²⁹.

CONTEMPORARY INTERPRETATION OF FUNDAMENTAL RIGHTS

The Constitution is a dynamic document; therefore, its interpretation may not be static or outdated. Many Supreme Court judgments have clarified it particularly when interpreting Part III of the Constitution. Fundamental Rights have no fixed content; most are empty vessels into which each generation must pour its content in the light of its experience.³⁰ Thus, the court deduced fundamental features not specifically mentioned in Part III on the principle that certain unarticulated rights are implicit in the enumerated guarantees.³¹ The court relinquishes the narrow interpretation of fundamental rights through the landmark judgement in *Maneka Gandhi v. Union of India*³² and accepts the expansive interpretation of a fundamental right. The court should keep in mind certain things while it interprets: a complete consciousness and deep awareness of the growing requirements of the society, the increasing needs of the nation, the burning problem of the day, the complex issues facing the people, etc. It must take into consideration the changing trends of economic thought, the temper of the times and the living aspirations and feelings of the people³³.

Fundamental rights should be interpreted in such a way that they can be fully enjoyed or experienced within the allowed fields. This view was upheld by the Supreme Court in *Sakal Papers (P) Ltd. v. Union of India*³⁴. The Supreme Court has held that while considering the nature

²⁸ *Supra n.* 20 at 90

²⁹ *Ibid.* at 100

³⁰ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225, 880

³¹ (2006) 8 SCC 212

³² (1978) 1 SCC 248

³³ In this regard, Fazal Ali J., has rightly said about the approach of the Court when interpreting the constitutional provisions in *Pathumma v State of Kerala* AIR 1978 SC 771

³⁴ AIR 1967 SC 305

and content of fundamental rights, the court must not be too astute to interpret the language literally to whittle them down. The court must interpret the Constitution to enable the citizens to enjoy the rights guaranteed by it to the fullest extent.

The Constitution is a document created by democratic values, including Fundamental Rights, and their protection is the most important democratic value, so checks on the power of the government are necessary to ensure that they are not unreasonably restricted or violated. The Constitution requires the courts to fulfil this duty. The principle position of fundamental rights under the Constitution depicts that the principle of constitutionalism is now a legal principle which requires control over the exercise of governmental power to ensure that it does not destroy the democratic principles upon which it is based. These democratic principles include the protection of fundamental rights. The principle of constitutionalism advocates a check and balance model of the separation of powers; it requires a diffusion of powers, necessitating different independent centres of decision-making. The principle of constitutionalism underpins the principle of legality, which requires the courts to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights. The legislature can restrict fundamental rights, but it is impossible for laws protecting fundamental rights to be impliedly repealed by future statutes³⁵.

CONSCIENCE OF THE CONSTITUTION

The Indian Constitution distinguished between enforceable fundamental rights, which were protected from incursions by the state, and non-enforceable directive principles of state policy, which were goals and duties of the state and included social and cultural rights to be provided to the Indian citizens on the basis of the economic capacity of governments.³⁶ The directive principles of state policy lay down that the state should promote with special care the educational and economic interests of the weaker sections of the people and protect them from social injustice³⁷; the court in *State of Madras v. Champakam Dorairajan*³⁸ held that the directive principles of a state of policy have to conform to and run as subsidiary to the fundamental rights. The rule of subsidiary to the fundamental rights is not acceptable in the subsequent cases as it is contrary to the spirit of the Constitution. Regarding the importance of fundamental rights and directive principles of state policy, the observation of the 13-judge Constitution Bench in the *Keshavananda Bharti*³⁹ case is very relevant. According to the court, fundamental rights and directive principles

³⁵ *Supra n. 20* at 79

³⁶ K. Sivaramakrishnan, *Environment, Law, and Democracy in India*, *The Journal of Asian Studies*, Vol. 70, 2011, 905, 908.

³⁷ Constitution of India, Article 46

³⁸ *State of Madras v. Champakam Dorairajan*, AIR 1951 SC 226, 228

³⁹ *Kesavananda Bharati v. State of Kerala*, (1973) 4 SCC 225

are the 'conscience' of the Constitution. The aim is to create an egalitarian society, free the Indian people from unnecessary customs and restrictions, and provide freedom to all. It has stated the following words:

No one can deny the importance of the directive principles. The fundamental rights and the directive principles constitute the 'conscience' of our Constitution. The purpose of the fundamental rights is to create an egalitarian society, to free all citizens from coercion or restriction by society and to make liberty available for all. The purpose of the directive principles is to fix certain social and economic goals for immediate attainment by bringing about a non-violent social revolution. Through such a social revolution the Constitution seeks to fulfil the basic needs of the common man and to change the structure of our society. It aims at making the Indian masses free in the positive sense⁴⁰.

The Supreme Court, through its extensive interpretations of fundamental rights and the harmonious construction with the directive principle of state policy, shows the court's role as the protector, guardian and interpreter of fundamental rights⁴¹.

CONCLUSION

In the early years, the scope of fundamental rights was very narrow. Individuals could only claim limited protection against the state. Now, the position has changed a lot. The reach of fundamental rights has widened, and it has even provided a broad check against the violations or excess action by the State authorities. The court relinquishes the narrow interpretation of fundamental rights through the landmark judgement in *Maneka Gandhi v. Union of India*⁴² and accepts the expansive interpretation of a fundamental right. Hence, part III of the Constitution was conceived by the constitution-makers not in a narrow, limited sense but in their widest sweep. The aim and objective was to build a new social order where man would not be a mere plaything in the hands of the state or a few privileged persons. It provides full scope and opportunity to achieve maximum development of his personality, creativity and the dignity of the individual. Obviously, to achieve the goals enshrined in the fundamental rights, certain basic freedoms, such as freedom of speech and expression, freedom of association, personal liberty to move where he likes and so on, are integral to the scheme of the fundamental rights. These are universal in character, and it is difficult

⁴⁰ *Ibid* at 502

⁴¹ M.P.Jain, "The Supreme Court and Fundamental Rights", in K.S.Verma, Kusum, Ed, *Fifty years of the Supreme Court of India: Its Growth and Reach*, 2000, at 2

⁴² (1978) 1 SCC 248

to believe that when the constitution-makers declared these rights, they intended to confine them only within the territory of India.⁴³

IJRSSH

⁴³ *Maneka Gandhi v. Union of India*, (1978) 1 SCC 248, 301