

Fundamental Rights, Directive Principles and Fundamental Duties

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The constitution of a country is *suprema lex*. A written constitution with a Bill of Rights, like ours, seeks to place certain human rights and fundamental freedoms beyond the reach of ordinary laws because these rights do not depend on the whims of an amoral majority or the outcome of any election. Such rights are not the gift of any law or the constitution. Instruments like Bills of Rights respond by recognising rather than creating or conferring them. As Prof Edwin Corwin said, "They owe nothing to their recognition in the constitution, such recognition was necessary if the constitution was to be regarded as complete." The debt of constitutional concepts to Natural Law cannot be overlooked. Natural rights become entrenched rights under the constitution as limits on State power. Thomas Jefferson writing to James Madison in 1787 said that 'a bill of rights is what the people are entitled to against every government on earth.'

The moral worth of a society is reflected in its aspirations, the ideals it pursues and the values it cherishes. Throughout history humanity's chief concern has been the search for and the preservation of values which impart grace and significance to civilization and also to individual human lives. The genesis of a bill of rights may be traced to the Magna Carta in 1215. Formal human rights principles came to be drafted and adopted in the UN Charter in 1945 and in the more detailed Universal Declaration of Human Rights in 1948. Those principles were subsequently expanded upon in the two International Covenants in 1966. While the Covenant on Civil and Political Rights formulated legally enforceable rights of the individual, the one on Economic, Social and Cultural Rights was addressed to the States to implement by legislation.

The Constitution of a country, it is said, embodies and expresses the goals and aspirations of the people depending upon the history of that society. It contains certain core political values and beliefs which cannot be tinkered with by transient public opinion. "This narrative of the progressive expansion of the types of rights available to individuals seeking to defend their liberties from invasion- from natural rights to common law rights and finally to fundamental

rights-is consistent with the account of the development of rights that important strands in constitutional theory present.”

The Indian Constitution reflects the best in our past, is responsive to the needs and aspirations of the present and is resilient to cope with the demands of the future. The values of the Constitution are reflected in the Preamble and in Parts III and IV. The Preamble has been spoken of as the guiding light and the Directive Principles of State Policy as the Book of Interpretation. The ideal is to achieve the goals in Part IV while protecting the rights in Part III. The Constitution provides for stability without stagnation and growth without destruction of essential values.

The historical and political developments in India made it inevitable that a Bill of Rights or Fundamental Rights as we call them should be enacted in the Constitution. Constitutional guarantee for human rights was one of the persistent demands of the leaders of our freedom struggle. It was made as early as in 1895 in Lokmanya Tilak’s Swaraj Bill, repeated by Annie Besant in 1925, the Motilal Nehru Committee in 1928 and the Tej Bahadur Sapru Committee in 1945. The incorporation of a Bill of Rights was a feature of the U.S. Constitution which the British Parliament consistently eschewed in the Constitution Acts it enacted for Canada in 1867, Australia in 1900 and India in 1919 and 1935.

The movement in favour of legally enforceable human rights grew after World War II. “What was deplorable became recognised as inevitable and was next applauded as desirable”, as deSmith remarked. The case for guaranteed rights is simple and irrefragable. The limitations imposed by constitutional law on the actions of Government are essential for the preservation of public and private rights, notwithstanding even the representative character of political institutions. The philosophy underlying Bill of Rights and judicial review is that constitutional limitations are the only way of ensuring the survival of basic human freedoms. When human rights are incorporated into the municipal law and guaranteed by a written constitution they are justiciable and enforceable.

A written constitution with judicial review is adopted by a country because it refuses to believe in ‘the Divine Right of Parliaments’, which Herbert Spencer called ‘the great superstition of the present.’ Rene Cassin, the principal

architect of the Universal Declaration of Human Rights when asked as to why an entrenched Bill of Rights was necessary said, “Because men are not always good.”

As the Supreme Court significantly observed in *Minerva Mills*: All States – whether communist or democratic- purported 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.

The subject of fundamental rights was debated in the Constituent Assembly for 38 days. Thereafter the Assembly adopted a fairly comprehensive array of basic human rights covering a wide spectrum. It is a very elaborate and complex Bill of Rights, now covering 27 articles dealing with fundamental rights, divided into 8 sections.

The American Constitution declares rights in terms apparently absolute, leaving it to the courts to limit the rights thus declared. Our Constitution declares the rights and prescribes the limitations/ restrictions in the Constitution itself. The Constitution created a new fundamental right –Art 32, the right to move the Supreme Court for enforcement of fundamental rights. This is a unique feature of the Indian Constitution; such right is not available in any other constitution. Thus it is not merely a declaratory Bill of Rights but a judicially enforceable one. The bulk of the fundamental rights is what is contained in the Universal Declaration of Human Rights and other international instruments.

Part III of the Constitution enumerates fundamental rights. We begin with the concept of ‘State’ in Art 12. The constitutional mandate in many of the provisions is to the State not to violate fundamental rights. ‘Fundamental’ in Part III as qualifying rights means that the rights are basic to or essential for the liberal democracy set up by the Constitution. Their essential character is fortified by limiting legislative power, providing that any transgression of the limitations would render the offending law void and the aggrieved party can seek redress- vide Arts 13 & 32. Thus Fundamental Rights are backed by legal sanction. The State is prohibited from making laws inconsistent with Part III. The objectives of the Constitution as declared in the Preamble are guaranteed

by the various fundamental rights. Fundamental Rights are to the Indian democracy what 'the Tenth Legion was to Julius Caesar, the Old Guard to Napoleon and the Eighth Army to Montgomery', as Palkhivala picturesquely put it. Fundamental Rights are enforceable against 'State' as defined in Art 12 whose import has been expanded over a period of time. The question remains whether judiciary is 'State' in case of violation of fundamental rights. Justice Hidayatullah's powerful dissent in *Mirajkar* is beckoning. The Supreme Court's view in that case perhaps calls for a revisit.

Part IV of the Constitution contains the Directive Principles of State Policy. This is taken from the Constitution of the Irish Republic-Directive Principles of Social Policy which in turn had taken the idea from the Constitution of Republican Spain. The idea can be traced back to the Declaration of the Rights of Man (France) and the Declaration of American Independence.

Directive Principles are non-justiciable, there is no legal or judicial remedy for violation thereof. The sanction is political, namely, the next election. Directive Principles are fundamental in the governance of the country. Art 37 mandates that the State shall apply them in making laws. 'Fundamental' in Art 37 also means basic or essential, but it is used in the normative sense of setting before the State goals which it should try to reach. Fundamental Rights are backed by legal sanction. Directive Principles are left to the sense of duty of those charged with governance of the country.

Both Fundamental Rights and Directive Principles are an integral part of the Constitution which 'aims at bringing about a synthesis between Fundamental Rights and Directive Principles by giving to the former a pride of place and to the latter a place of permanence. Together they form the core and constitute the true conscience of the Constitution.' Taking together they form a charter of social and economic democracy in India and represent the basic principles which aim at the creation of a welfare State.

The real importance of Directive Principles is that they contain positive obligations of the State towards its citizens. These are not insignificant; if fulfilled, the pattern of society will change. They are revolutionary and yet to be achieved in a constitutional manner. Herein lies the real value of embodying them as an integral part of the Constitution. Through the Directive Principles

the Constitution will steer clear of the two extremes – a proletarian dictatorship which destroys the liberty of the individual and a capitalist oligarchy which hampers the economic security of the masses.

The Indian constitutional experience and the role of the judiciary in protecting liberties, upholding constitutional values and enforcing constitutional limitations has, on the whole, been fascinating and heart warming. The judicial endeavour has been in the direction of integration of Parts III & IV in the process of constitutionalising socio economic rights some of which are expressly included in Part III and a large number of which have been read into and derived from them.

What Justice Chandrachud said in *Kesavananda* set the tone for all this: “What is fundamental in the governance of the country cannot surely be less significant than what is fundamental in the life of an individual. That one is justiciable and the other not may show the intrinsic difficulties in making the latter enforceable through legal process. But that does not bear on their relative importance.... The basic object of conferring freedoms on individuals is the ultimate achievement of the ideals set out in Part IV... If the State fails to create conditions in which the fundamental freedoms can be enjoyed by all, freedom of the few will be at the mercy of the many and then all freedoms will vanish.”

Judicial interpretation and creativity led to the theory of penumbra and emanation and inclusion of many other rights as fundamental rights. For instance, the right to freedom of expression was held to include the freedom of the press and the freedom to know the credentials of those contesting elections. The expanding horizons of the right to life and personal liberty in Art 21 have embraced a variety of rights- more than 25, the latest being the right to privacy. It has been underscored that life is not mere animal existence. It is to live with dignity and enjoy all the faculties which make life and living worthwhile and meaningful.

The role of the judiciary assumes importance in the context of enforcing socio-economic rights which are positive as distinguished from protecting personal freedoms which is negative in nature. The nature of the protection that the citizens need depends upon the interpretation of the content of entrenched

rights in the changing times. This is done by an activist, responsive and responsible judiciary and the task requires vision and statesmanship.

The theory that fundamental rights are watertight compartments has long been discarded since *Cooper* followed by *Maneka*. Arts 14, 19, 21 form the vital trilogy of constitutional provisions whose ethos informs one another. They have been said to be the three sides of the golden triangle. Each freedom has different dimensions and there may be overlapping between different fundamental rights. It has been rightly said that no article in Part III is an island but part of a continent. Cardinal rights in an organic constitution have a synthesis.

As observed by the Supreme Court, “The Indian constitutional experiments with the right to property (Arts 19 (1) (f) & 31) offer an interesting illustration of how differences in the interpretation of the fundamental law sometimes conceal- or perhaps expose- conflicts of economic ideologies and philosophies. With the right to property conceived as a fundamental right at the inception of the Constitution, it found so strong an entrenchment that in its pristine vigour it tended to be overly demanding and sought the sacrifice of too many social and economic goals at its altar and made the economic cost of social and economic change unaffordably prohibitive. Inevitably the constitutional process of de-escalation of this right in the constitutional scale of values commenced culminating, ultimately, in the deletion of this right from the Fundamental Rights Part.”

Despite the fact that some rights have been substantially modified in scope as a result of Constitutional amendments, the chapter on Fundamental Rights taken as a whole remains a formidable bulwark of individual liberty, a code of public conduct and a strong and sustaining basis of Indian democracy.

But all rights have corresponding duties. While we are obsessed with our rights, we need to pay heed to our duties and responsibilities. No right can ever be absolute. Fundamental rights are no exception. Their exercise can be reasonably restricted so as not to conflict with the rights of others. Under the Constitution no values or rights being absolute, all important rights and values must be qualified and balanced against other important and often competing rights and values. This is imperative and inevitable in the very nature of things.

Such balancing of fundamental rights is a constitutional necessity. It is the duty of the Court to strike a balance so that the values are sustained. The Supreme Court is not only the sentinel of the fundamental rights but also a balancing wheel between the rights, subject to social control.

Every right gives rise to a corresponding duty articulated beautifully by Mahatma Gandhi: "I learned from my illiterate but wise mother that all rights to be deserved and preserved come from duty well done. Thus the very right to live accrues to us when we do the duty of citizenship of the world. From this one fundamental statement, perhaps it is easy enough to define duties of man and woman and correlate every right to some corresponding duty to be first performed..."

Walter Lippmann the renowned American political commentator echoed the same idea: "For every right that you cherish you have a duty which you must fulfil. For every hope that you entertain, you have a task you must perform. For every good that you wish could happen... you will have to sacrifice your comfort and ease. There is nothing for nothing any longer."

Even the Universal Declaration of Human Rights recognises the vital link between human rights and responsibility. Art 29 states: Everyone has duties to the community in which alone the free and full development of his personality is possible.

Freedom of speech and expression does not give one the right to defame and harm the good name and reputation of others. If we have a right to life we have the obligation to respect life. If we have a right to liberty we have the obligation to respect other people's liberty. If we have a right to freedom of thought, conscience and religion, we also have the obligation to respect the thoughts, religious principles and beliefs of others.

No freedom is absolute. If it were it would soon degenerate into licence and destroy the freedom itself and work against public interest and public good. It has rightly been said that liberty must be measured against the community's needs for security against internal and external peril. Liberty is not, as Learned Hand said, the ruthless, unbridled will, it is not freedom to do so as one likes. Liberty cannot rest upon anarchy, it is conditioned upon an ordered society.

Similarly equality must be measured against the need for a hierarchy of social functions by which the community integrates its life and work.

When we talk of Fundamental Rights and Directive Principles, we cannot forget Fundamental Duties. The statement of objects and reasons of the Constitution 42nd Amendment Act considered it necessary to specify the fundamental duties of the citizens and make special provisions for dealing with anti-national activities of individuals and associations. Article 51A in Part IVA laid down the fundamental duties. The intention is to place before the country a code of conduct which the citizens are expected to follow. It is the duty of every citizen to obey the constitutional mandate.

What is true about Directive Principles applies equally to Fundamental Duties. Although Fundamental Duties cannot be enforced the Court can certainly take them into consideration while interpreting a law which is amenable to more than one interpretation. In the ultimate analysis the only way to bring adherence to Fundamental Duties is through a vigorous public opinion that there is need to adhere to them for the orderly progress of our society.

Discourse on fundamental rights cannot be divorced from fundamental duties or else we do disservice to both. That is the philosophy underlying Part IV A. It is now accepted that while we aim at the greatest amount of freedom possible, it is necessary to develop the fullest sense of responsibility that will allow that freedom itself to grow. When rights and responsibilities are balanced, then freedom is enhanced and a better world can be created.

All rights and freedoms are subject to imposition of restrictions. What was evolved by the U.S. Supreme Court in its judgements was incorporated into the constitutional provisions in India as Dr. Ambedkar pointed out while moving the Draft Constitution. The several grounds of reasonable restrictions enumerated in the Constitution relate to societal interests of ensuring and maintaining conditions in which rights can be meaningfully exercised and enjoyed.

While we heed Jefferson's warning: 'To lose our country by a scrupulous adherence to the written law would be to lose the law itself, with life, liberty and all those who are enjoying with us, thus absurdly sacrificing the end to the means,' we cannot also lose sight of Lincoln's classic dilemma: 'Must a

Government of necessity, be too strong for the liberties of its own people or too weak to maintain its own existence.'

All this underscores the need and the philosophy of having restrictions on entrenched rights.

Such restrictions are prescribed and imposed by law. The judiciary is to uphold the constitutional values and enforce the constitutional limitations. The Court exercising the power of judicial review is the arbiter of the reasonableness of the restrictions. In this area it is not the *Wednesbury* unreasonableness or the Administrative Law standard of reasonableness- where the test is that of a reasonable man. Here the constitutional standards of reasonableness of the restrictions on fundamental rights are those of the Court itself, the Court of judicial review is the arbiter.

This is virtually akin to substantive due process, atleast in this area. But the parameters are prescribed as regards the reasonable restrictions under Art 19. It is a subjective assessment by prescribed objective standards. The Court cannot travel beyond what is laid down in Arts 19 (2)-(6). So also in the case of Art 14 as regards classification it would be valid if there is rational nexus between the classification and the object sought to be achieved. In Art 21 when the right to life and personal liberty is sought to be restricted, the Constitution does not lay down any standards or parameters for testing the validity of such restrictions. It is for the Court – for the judicial conscience to be satisfied.

The Court examines whether a limitation or restriction is excessive or justified, whether the legislative objective is sufficiently important to justify the restriction, whether the measures designed to achieve the objective have a rational connection to it and whether the means used to impair or restrict the right are no more than necessary to accomplish the objective. The doctrine of proportionality comes in here. All this has been elegantly and effectively enunciated in one of the earliest cases- *V.G.Row* on which subsequent cases have built. It is also settled that restriction can extend to prohibition in appropriate cases vide *Narendra Kumar*. The point to note is that the greater the restriction, the more the need for strict scrutiny by the Courts. It is

interesting that even in UK without a Bill of Rights, they have moved towards the same position.

The protection and enforcement of fundamental rights and freedoms is both the power and the duty of the Courts and the grant of appropriate remedy is not discretionary but obligatory. Even in England with no Bill of Rights it was said over a century ago: "To remit the maintenance of constitutional right to the region of judicial discretion is to shift the foundations of freedom from the rock to the sand." The US Supreme Court has also held likewise with respect to knocking at its doors to vindicate a basic right.

It is well settled that the Supreme Court cannot, consistently with its responsibility, refuse to entertain applications seeking protection against infringement of fundamental rights. A petition under Art 32 has to be entertained if the existence of a fundamental right and its breach, actual or threatened, is alleged and prima facie established. The position of the High Courts is no different in this behalf.

Eternal vigilance is the price of liberty. A keen public awareness and an informed vigilant and assertive public opinion are essential for safe guarding our rights and liberties. Justice Douglas' caution is worthy of recall, "Nightfall does not come at once, nor does oppression- in both instances there is a twilight when everything remains seemingly unchanged. It is in such twilight that we must all be aware of change in the air- however slight- lest we become unwitting victims of the darkness."

Eleanor Roosevelt highlighted the need for these universal rights to be available to all. She cautioned that unless these rights have meaning in small places, close to homes, so close and so small that they cannot be seen on the map of the world they have little meaning elsewhere. These rights should be a living reality known, understood and enjoyed by everyone everywhere. Otherwise they would be mere teasing illusions. And even the right to constitutional remedy under Art 32 would be a sonnet writ on water. Effective enforcement of fundamental rights for the ordinary Indian is possible only when it becomes less expensive, less complex and more speedy. How to address and overcome this problem is a question for another day.