

Supplement to **Public Affairs** for Jan.-Feb. 1978

Rajaji Birthday Lecture, 1977

FUNDAMENTAL RIG

BY

ACHARYA Sri J. B. KRIPALANI



Public Affairs Pamphlet No. 22

THE INSTITUTE OF PUBLIC AFFAIRS
BANGALORE - 560 019

Jan. 1978]

[Rs. 1-25

RAJAJI

Sri C. Rajagopalachariar, popularly known by affectionate abbreviation as Rajaji, was born in the year 1878 in Torapalli, a village near Hosur, Salem District in the State of Tamil Nadu. He was a student of the Central College, Bangalore, and completed the B.A. course in the Presidency College, Madras. He took his B.L. degree from the Law College in Madras and joined the Bar in 1900. His early practice as a lawyer was in Salem and later in Madras upto 1919, he was a delegate to the Indian National Congress at Calcutta in 1906. Responding to the call of the Mahatma in 1920, he joined the non-co-operation movement for the independence of India. He edited Mahatma Gandhi's weekly *Young India* during the latter's imprisonment. He was General Secretary to the Indian National Congress in 1921-22, and a member of the Congress Working Committee from 1922 to 1942, and again in 1946-47. He suffered imprisonment on five occasions during his political campaigns between 1921 and 1947.

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INTRODUCTION

It was the good fortune of the G.I.P.A. that the Rajaji Birthday Lecture this year, which happens to be the centenary year of Rajaji's birth, was delivered by Acharya J. B. Kripalani, the doyen of Indian Politics and of Indian Public Life. Most appropriately, he chose as his topic 'Fundamental Rights', of which, he has been like Rajaji himself, a fearless exponent all his life. It is worthy of remembrance that, the Acharya, as is stated by him in the lecture, was the Chairman of the Fundamental Rights Committee appointed by the Constituent Assembly. It is also a matter of interest that Rajaji's birthday falls on December 10, which is universally observed as the Human Rights Day.

The subject is one of basic importance and the Acharya has made a significant contribution of permanent value by his cogent narration of the historical development of the concept of Fundamental Rights in human history and by his lucid exposition of the vital part they play in the life of a People.

The G.I.P.A. has great pleasure in placing before the public the Thirteenth Rajaji Birthday Lecture as Public Affairs Pamphlet No. 22.

30th January, 1978

NITTOOR SREENIVASA RAU
Hon. Secretary, G.I.P.A.

FUNDAMENTAL RIGHTS

By

ACHARYA Sri J. B. KRIPALANI

(Being the Thirteenth Rajaji Birthday Lecture
delivered on 7th January 1978 at the GIPA, Bangalore)

Introduction

I do not these days accept invitations to deliver set and written lectures. But, the present demand came from an institution started in the name of a great patriot of ours, Gopal Krishna Gokhale. Though we attained our freedom not through the constitutional methods he advocated but through direct action, satyagraha, we cannot forget the great services he rendered as a pioneer in the national effort to achieve Swaraj. He was great in his time.

The lectures are organised in memory of another great patriot, C. Rajagopalachari. He was not only a freedom fighter but a great statesman and scholar. My obeisance to him.

The demand of the Gokhale Institute of Public Affairs was also backed by Smt. M. S. Subbulakshmi and Shri T. Sadasivam, two dear friends of mine, whose munificence has helped to make this lecture-series possible.

The subject which I have to treat this evening is a vast one. It will require a volume to treat it adequately. Here, I can touch only its salient features. The scholars and the lawyers will raise many questions but they cannot be answered in the limited time of a lecture.

Origin

It would be of interest to know how the idea of Fundamental Rights rose in the West. In India, the idea is brought out by laying down the duties of the rulers and the subjects, their respective *Dharma*. But, in the West, it has a historical and philosophical origin. It was first conceived by the Stoic philosophers of Greece. The Stoics considered that there is a 'law of nature', and laws to be valid and useful must follow this law of nature. This law is implanted in every human heart. Conduct in conformity with this law is good and desirable. The contrary conduct is neither good nor desirable. This law of nature gave to the individual certain rights which cannot be abrogated even by a government whatever its form.

The Romans were an imperial people. They conquered many lands. They had their own system of laws. With the expansion of their empire, the question arose as to what laws should apply to the non-Romans. Was there anything common in the laws of the different countries which they (Romans) had conquered that would be of general application? They soon found that there were certain rules or legal precepts which were not local or municipal but were of universal application, throughout the countries over which Rome ruled. The latter were called '*jus gentium*', the law of the peoples. This law somehow came to be identified with the law of nature of the Greek philosophers.

After the spread of Christianity in Europe, the law of nature of the Stoics and the '*jus gentium*' of the Romans were conceived in terms of the law of Christian conscience, which, like the law of nature, was implanted in every human heart. From this arose the idea of the rights and the freedom of the individual. In so far as man followed the dictates of his conscience, he is not bound by the laws of the State, whatever its form. It was just like satyagraha; as long as the satyagrahi renounced violence, he can civilly break the State-made law.

In the beginning of modern times, philosophical thought and speculation as in ancient Greece, came to be separated from religion. Yet, some principle had to be found, binding people together in a social order. The French philosophers, Rousseau, Voltaire and the Encyclopaedists discovered this principle in Human Reason, which was common to all human beings. In the French Revolution, those

who had dispensed with God, worshipped in His place the Goddess of Reason. Reason indicates certain principles ; conduct, according to these principles is moral and desirable, and conduct contrary to them is undesirable and immoral. Reason postulates that all men are born equal and free. As such, they have certain inviolable rights, which cannot be taken away by any authority, religious or political. Governments are formed among men by a social contract between such free and equal individuals. But even while agreeing to join in the social contract, the people did not part with all their rights and liberties. Some rights were considered paramount. They were inviolable. It was in consonance with these ideas that democracy was found to be the only justifiable form of Government. It came into existence by the mutually agreed contract among free individuals.

The ideas that men are born free and equal, and Governments are formed by a social contract were philosophical speculations. They were not based on historical or sociological investigation of the origin of society or the government. Study in the social sciences was in its infancy in the 18th Century. But, whether these ideas were in conformity with social sciences or not, they caught the imagination even of the learned. They opened the door out from the tyranny of despotic kings, rulers and governments, which had resulted in the age-long slavery of man. They refuted the idea of the Divine Right of kings claimed by the 18th century monarchs. That is how philosophic thought sometimes serves the practical ends of a generation!

American Constitution

These ideas travelled to America and were the basis of the freedom fight of the Americans against British imperialism of those days. The Founding Fathers of the American Revolution in their Declaration of Independence, the preamble to their Constitution, state:

“We hold these truths to be self-evident, that all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these, are life, liberty and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that, whenever any form of government becomes destructive of

these ends, it is the right of the people to alter or to abolish it, and to institute a new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness.”

From these ideas follow other inalienable rights of free speech and expression, of freedom of association, of conscience, of religion, etc., which can be enforced in law courts, even against a democratic Government and its legislature.

British Practice

The British have no written Constitution. It has evolved, as the British say, from ‘precedent to precedent’. The British Parliament is the supreme legislative body. It can make, abridge or abrogate any law. The judiciary cannot question this legislative power of the British Parliament. It is said that “the Parliament of Britain can do everything except turn a man into a woman”. Yet, despite the fact that Britain has no written Constitution and its Parliament is supreme, the people in no other country enjoy more civil liberties than the British. It is said that the ‘Englishman’s house is his castle’. How does this happen? By long-standing custom, usage and convention, certain statutes passed by the British Parliament, like the Habeas-corpus Act and the Bill of Rights, have come to be regarded as fundamental. They guarantee the basic rights of the Englishman. No government can dare to change them. Even in wartime emergency, the Habeas-corpus Act is not kept in abeyance.

In many other democratic countries in the West, where there is a controlled Constitution, as we have in India, certain rights guaranteeing the freedom of the citizen are stated to be fundamental. They can be enforced in law courts.

Moral Values and Democracy

The ideas of the natural and fundamental rights of the individual have strengthened democracy where its foundations had already been laid, as in England. In other countries, where democracy did not exist, they worked for its establishment. Slowly, democracy which at first gave the right to vote only to the upper classes, widened and developed into the right of vote to the whole adult population without distinction of caste, class, creed or sex.

It is possible that an enlightened autocrat or a dictator may sometimes do more good to his people and more quickly but such exceptional individuals are rarely found in history. However, even they cripple the people from being self-reliant. It is only free individuals who can develop this capacity of the people. Even a beneficent ruler impairs the incentives of the individual citizen and his development. Also, the discipline which the autocrat imposes is that of the slave and not that of a free man. It is said: "Good government is no substitute for self-government". Notwithstanding all its tardiness and delays, democracy is the best form of Government. Its bases are moral. It stands for the dignity of man and for his freedom and equality. With its vote, it stands for freedom, truth, justice and peaceful functioning. It stands for self-government. If there is widespread impersonation at the polls, it becomes null and void. If there is widespread violence, democracy is again defeated. It is said that democracy works by 'counting heads and not by breaking heads'.

Professor Harold J. Laski says: "Democracy involves a frame of government in which men are given the chance of making the government under which they live at stated intervals. . . . It involves the securing to the citizens certain fundamental human rights and the maintenance of these rights by the separation of the judicial from the executive powers. It involves the bringing into existence of a Bill of Rights for safeguarding the fundamental human rights, such as, freedom of speech, press, protection from arbitrary arrest and the like".

These fundamental and inalienable rights form the basis of the individual's civil liberty in a democratic society. As a matter of fact, democracy is accepted as the best form of government, for the preservation of these rights and civil liberties. Unfortunately, democracy has largely, if not exclusively, concerned itself with the formation of a government through the voting power of the people. It is unfortunate that democracy has not yet been accepted as an ideology in itself, that is, it has not become the 'way of life' of the people. The result is that the holders of power, even though they are installed in their high positions of command by the people, have developed a tendency to take more and more power in their hands, till the fundamental rights and civil liberties of the people, for the preservation of which governments are formed, have suffered a set back.

Need for Vigilance

It is, therefore, necessary that people, beyond exercising their vote, should be vigilant about the actions of those whom they have put in power. It is rightly said that, "Eternal vigilance is the price of liberty". In this connection, Professor Laski says: "I do not trust the executive power to act wisely in the presence of any threat, or assumed threat, to public order. Every State contains innumerable stupid men who see in unconventional thought the imminent destruction of social peace. They become ministers; and they are quite capable of thinking that a society of Tolstoyan anarchists is about to attempt a new gunpowder plot. If you think of men like Lord Eldon, like Sir William Joynson-Hicks, like Attorney-General Palmer, you will realise how natural it is for them to believe that the proper place for Thoreau or Tolstoy, for William Morris or Mr. Bernard Shaw, is a prison". He further says: "Whether you study repression in Ireland or Russia, Bavaria or Hungary or India, its history is always the same. The fact always emerges that once the operation of justice is transferred from the ordinary courts to some branch of the executive, abuses always occur. The proper protection of the individual is deliberately neglected in the belief that a reign of terror will minimise disaffection. There is no evidence that it does. If it could, there would have been no Russian Revolution; and there would have been no movement for Indian self-government. The error inherent in any invasion of individuality, such as a system of special courts implies, is that it blinds the eye of Government to the facts not only by suppressing illegitimate expression of opinion, but by persuading it that most opinion which finds expression is illegitimate if it is not in the nature of eulogy. Executive justice, in fact, is simply a euphemism for the denial of justice; and the restoration of order at this cost involves dangers of which the price is costly indeed".

It would be interesting to know what the great English jurist, Dicey, has to say about the legal obligations of the members of the executive. "A Secretary of State is governed by the ordinary law of the realm both in his official conduct and in his private life. If, in a fit of anger, the Secretary of State for Home Affairs assaulted the leader of the opposition or had him arrested because he considered the liberty of his political opposition dangerous for the State, this minister would, in either case, expose himself to proceedings and to all the other formalities laid down by the law, for the

case of violence. Although the arrest of an influential politician, whose speeches might excite disorder, is a strictly administrative act, that would not excuse either the minister or the policeman who had obeyed his order".

Indian Constitution

In India, the Constituent Assembly appointed a Committee, the Fundamental Rights Committee, to go into the question of the rights and liberties of the citizen and suggest suitable provisions to safeguard them. I, as the then President of the Congress, was invited to be the Chairman of this Committee. At the outset, I pointed out to my colleagues that the idea of fundamental rights was an 18th century idea. Modern governments may not respect it or abide by it. After some discussion, it was decided that the Committee in the recommendations it made will so fortify the fundamental rights of the Indian citizen that no government or legislature could interfere with them, much less abrogate them. They shall be made enforceable in law courts. The results of our labours are incorporated, with slight modifications, in Part III of our Constitution.

In the preamble of our Constitution we have, therefore, followed not the British but the American model. It says:

"We, the people of India, having solemnly resolved to constitute India into a Sovereign Democratic Republic and to secure to all its citizens:

1. JUSTICE, social, economic and political;
2. LIBERTY of thought, expression, belief, faith and worship;
3. EQUALITY of status and of opportunity;
4. FRATERNITY assuring the dignity of the individual and the unity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this twenty-sixth day of November 1949, do hereby adopt, enact and give to ourselves this Constitution."

It is the people of India who have given to themselves the Constitution. They are the masters of the land. The Government and the Parliament are their agents. It is, therefore said that democracy is the Government of the People, for the People and by the People.

The Rights Guaranteed

In conformity with the preamble given above, the Constituent Assembly formulated the Fundamental Rights guaranteed to the Indian citizen. Briefly stated, they are:

1. Right to Equality;
2. Right of Freedom of Expression and Assembly;
3. Right against Exploitation;
4. Right to Freedom of Religion;
5. Cultural and Educational Rights;
6. Right to Property;
7. Right to Constitutional Remedies in law courts.

It will be seen that these fundamental rights are the natural sequence of the Preamble to the Constitution which says, as stated above, that India stands for justice, liberty, equality and fraternity. However, these rights are not absolute as stated here in brief. They are all modified by practical restrictions of rationality, public morality, public interest, public good, law and order, etc.

Article 13(2)

But the overall condition of their fulfilment is that they can be enforced even against the government and the legislatures of the day, through the judiciary. Article 13(2) lays down: "The State shall not make any law which takes away or abridges the rights conferred by this Part (III) and any law made in contravention of this clause to the extent of the contravention, shall be void".

Further, Article 13(1) says, that "All laws in the territory of India, before the commencement of the Constitution in so far as they are inconsistent with the provision of this part (III) of the Constitution shall, to the extent of such inconsistency, be void".

Then, there is a detailed description of what constitutes a law. The whole thing is made quite clear. These rights are designed by the framers of the Constitution as inalienable. The intention of our Founding Fathers is beyond reasonable doubt. They knew that the Fundamental Rights are the guarantee of our freedom. Without them, even democracy may turn into an autocracy, as has happened in several countries, and as happened recently in India.

History in India

It must be remembered that the idea of Fundamental Rights of the citizen was nothing new in India. It had a long history. The All Parties Conference under the Chairmanship of Motilal Nehru opined that: "It is obvious that our first law should be to have our fundamental rights guaranteed in a manner which will not permit their withdrawal *under any circumstances.*" (Italics mine).

In 1945, a non-party Committee under Sapru explained the need for fundamental rights. It said: "In the peculiar circumstances in India, fundamental rights are necessary, not only as assurances and guarantees to the minorities but also for prescribing *a standard of conduct for the legislature, the Government and the judiciary.*" (Italics mine).

In 1945, at Simla, when the leaders of the Congress and the Muslim League met the Cabinet Mission, Jawaharlal insisted that, to the three subjects, Defence, Foreign Affairs and Communications, which the Centre would deal with, must be added the subject of the fundamental rights of the citizen. This suggestion of his was accepted. Even the Muslim League did not object to it.

The Working Committee of the Congress, too, emphasised the need for the "guarantee of fundamental rights of each individual, so that he may have full and equal opportunities of growth and further, that each community should have opportunity to live the life of its choice within the larger framework".

Congress was always anxious to safeguard the fundamental freedoms of the people. When in the thirties, it was not possible to start a civil resistance movement, Jawaharlal initiated the formation of the Civil Liberties Union. Gandhiji, when he did not want to hamper the war effort of the Allies in India, decided to start the individual civil resistance movement on the issue of freedom of speech in connection with the war. By its history and tradition, the Congress always stood for the safeguarding of the citizens' Fundamental Rights.

Conditions in India

In the light of the preamble are formulated the Fundamental Rights of our people. In India, there are additional and special circumstances for guaranteeing fundamental rights. Ours is a big country, divided into several States. It has a Federal Constitution. The old territorial divisions had generated local loyalties to

regional languages and traditions, customs and conventions. These had to be reconciled with the larger loyalty to the whole of India. It was, therefore, necessary that such provisions should be made in the Constitution that an Indian citizen should be able to live in any part of the country and be free to seek employment and carry on any trade and engage in any profession without let or hindrance, in any part of the motherland. Such and other like rights, if they were declared as inviolable, would work for the overall unity of India. It is a fact that some State Governments have put various restrictions in some such matters even today. Fundamental rights which could be enforced in law courts would put a stop to the fissiparous tendencies present in the country.

India is also a land of many religions. Unless the right to freely profess, practise and propagate one's religion is guaranteed in the Constitution, the fanatical religious zeal of the majority may make short work of the liberty of conscience, belief, faith and religion of the minorities. This fact was realised only when the 24th Amendment to our Constitution was discussed in Parliament in the year 1972. At first, the Muslim members were in favour of supporting the amendment but, when they realised the full implication of the amendment, the Muslim and the Christian members of Parliament either remained neutral or voted against it. The danger to the minorities is real and not imaginary. Even today, the overwhelming majority of members in our Parliament are Hindus. If a wave of fanatical Hinduism sweeps over the country and Hindu members come under its influence, they can declare India as a Hindu State, like Pakistan, which is a Muslim State. There, even the members of a Muslim sect, the Ahmediyas, have become second-class citizens. Therefore, for safeguarding the religious rights of the minorities and for the smooth working of our democracy, it was necessary that certain natural and basic rights of the individual be declared as inviolable, beyond the power of interference by the governments and the legislatures.

Totalitarian Trends

It must also be realised that today totalitarian ideologies are placed before the people as progressive. They propose to bring about forcibly what they consider as social justice. In the process, they make short work of the 'rule of law', the freedom of the individual and some other freedoms. To guard against all these

and like dangers were incorporated in the Constitution the Fundamental Rights, guaranteed to the citizens, capable of being enforced through the law courts.

It would not be out of place here to quote from the speeches of some leaders in the Constituent Assembly.

Dr. Rajendra Prasad, the President of the Constituent Assembly said: "I do not know what kind of people will there be in the future Parliament of India. In the heat of extremism or at the altar of some radical ideology, they may like to do away with the provisions which we have made in the Articles of the Constitution. . . . Our leaders have made some commitments. We stand by them. We are sovereign and *not the future Parliaments (because the future Parliaments will be the creation of the Constitution and must abide by it.) We can fetter the discretion of the executive, judiciary or Parliament. It is for this that we are drawing up this Constitution*". (Italics mine).

Dr. Ambedkar said: "The declaration of the rights of man has become part and parcel of our mental make-up. They have become the silent instruments of our outlook".

Dr. Radhakrishnan said: "We must safeguard the liberty of the human spirit against the encroachment of the State. While State regulation is necessary to improve economic conditions, it should not be done at the expense of the human spirit. . . . This declaration which we make today is of the nature of a pledge to our people and a pact with the civilised world."

At the end of our labours in the Constituent Assembly, this is what I said as the President of the Congress: "I want the House to remember that what we have enunciated are not merely legal, constitutional and formal principles but moral principles; and moral principles have got to be lived in life. They have to be lived whether it is in private life or it is in public life, whether it is in commercial life or in the life of an administrator. They have to be lived throughout life. These things we have to remember if our Constitution is to succeed".

All this was said chiefly because the freedoms that the Constitution had guaranteed were invaluable for the most poor and unimportant citizen of India.

The Social Individual

We have said that democracy must safeguard the liberty of the individual. However, the liberty guaranteed by democracy is that of the social individual. There is no such known person as an individual devoid of social relations. The individual is born, brought up and lives in some kind of society, big or small. There can be no Robinson Crusoe, living in a solitary island, except in fiction. Even there, he had to bring from the wreck of the ship certain essential articles socially produced, to begin his life anew. Fundamental rights are, therefore, concerned with the freedom of the social individual. This means that the freedom he has to exercise is limited by the like freedom of others. It can never be absolute.

The Conflicts

In the life of the social individual, many conflicts arise. There has always been a conflict between the individual and society; between freedom and authority; between the individual and the State; between spontaneity and discipline; and between the individual's awakened conscience and the law. It was this last conflict between the awakened conscience of the individual and the law and the State that forced Gandhiji and other fighters for the independence of the country, to offer satyagraha.

Here, we have to consider only one conflict, that between the individual and the State.

Synthesis

The individual and the collective organisation of the State are both necessary for the smooth functioning of society, its growth and advance. If there is over-emphasis on the rights of the individual, there is likely to be anarchy, in which the very individual will suffer. If there is over-emphasis on the rights of the political or social organisation or the State, it will kill individuality. All progress in the world has been made possible by the initiative of gifted individuals, whether in the religious, moral, social, economic, or political fields. In science and the fine arts too, advance has been made possible by the initiative of gifted individuals, often at the risk of their happiness, and even of life itself. As a matter of fact, it can be said that the progress of mankind is the result of the martyrdom of man. It must further be understood that, while the individual has a soul, the collective man, the group or the State has no soul.

In the political field, with which we are concerned here, it is necessary to achieve a synthesis between freedom and power, between the individual and the State. This was achieved, as it was thought, through democracy, but it has been proved that the liberty of the individual is not quite safe, when it concerns itself merely with the formation of the government through the vote. Real synthesis can be achieved only when there is a guarantee given to the individual that his fundamental rights, civil liberties, and 'the rule of law' are protected by an independent judiciary.

Amendments 24 and 25

In 1972, two amendments to the Constitution, 24 and 25, were passed by the brute majority of the ruling Congress party. The 24th Amendment was passed to make Parliament competent to alter, abridge or take away any of the fundamental rights of the citizen of India guaranteed in the Constitution by a simple amendment under Article 368, which provides the procedure by which possible amendments to the Constitution can be made. This renders redundant Article 13(1) mentioned earlier. It is in consequence of the 24th Amendment that the next amendment, 25th, to the Constitution was passed. This amendment provided that the citizen's property may be taken away by the State on the payment of an 'amount' in place of 'compensation' as in the original Article 31(2). The word 'compensation' means just compensation, as decided upon by law courts. The 'amount' payable for property acquired by the State is now no more subject to the scrutiny of the law courts, whether it is just and adequate or not. Under this amendment, the 'amount' payable by the State may be given in any shape or form, in cash or bonds, redeemable after any period of time. The amount payable may be only nominal or notional, but the owner will not be able to question it in a court of law. The amount payable, in effect, may mean the confiscation of the private property of the citizen, no matter how small it is. This was never the intention of the framers of the Constitution.

While enacting Amendment 25, it was never realised that it will adversely affect some other fundamental rights of the citizen. For instance, freedom to carry on industry and commerce in any part of India may be adversely affected, if proper compensation is not made to the owner when he desires to change his place of operations. The new Article may also affect the freedom of the Press. If the news-

paper wants to shift from one place to another, and if its premises are taken over by the Government, the owner of the premises may get only nominal compensation. The owner in that case may be obliged to discontinue publishing the paper.

That the framers of the Constitution knew that an Indian may possess considerable property is clear from the fact that an adjudged insolvent is disqualified from standing as a candidate for election to the legislatures. It is not the poor but the rich who go to the Insolvency Court!

Fundamental Rights and Directive Principles

It was said that property rights in our Constitution stood in the way of giving effect to the Directive Principles of State Policy. If it was held that property rights in the Constitution stood in the way of the fulfilment of the Directive Principles of State Policy as laid down in Article 39(b) and (c) of the Constitution, all that was necessary was to take away the property rights clauses from the category of Fundamental Rights, and not to make all these rights subject to the vote of a changing legislature! Articles 39(b) and 39(c) in Part 4 of the Constitution dealing with the Directive Principles may be said to deal with property rights. Article 39(b) says: "The ownership and control of material resources of the community are so distributed as best to subserve the common interests". Article 39(c) says: "The operation of the economic system does not result in the accumulation of wealth and means of production to the common detriment". Granting, though not admitting, that the Article 31(2) dealing with property in the Fundamental Rights chapter stood in the way of the Directive Principles (b) and (c) of Article 39, it could have been made subject to amendment under Article 368 but the whole range of the Fundamental Rights of the citizen need not have been placed at the mercy of the Parliament, which in effect means at the mercy of the majority party in Parliament. This virtually means at the mercy of the Government of the day. Usually, all legislation in a democracy is passed, as sponsored by the Government (party in power) or supported by it. This is true specially of the Parliamentary system of Government.

It is argued that the 25th amendment to the Constitution was necessary because the ideas about property change. May be, though some private property, however small, as a necessary ingredient of personality, is allowed even in the Communist countries

like Russia, China, Yugoslavia, etc. To begin with, in Russia, all property belonged to the Communist State, but after years of experiment, the right to own some private property has been recognised in Communist Russia. After World War II, people there are allowed and even encouraged to deposit money on interest in State Bonds! In China too, after having tried the experiment that all property belonged to the State or the commune, the State has been allowing some private property to the citizen. In other communist countries, where communism has been imposed by Russia, some private property is allowed to be acquired.

We may not forget that majorities in legislatures may be formed on the basis of some false or fleeting sentiment or the passing passion of the day. These are not always formed on the basis of reason or scientific thought. Masses of men are often moved by demagogues; so moved, they are prone to advocate and adopt measures and policies which may cause injury to them, the people. It is dangerous to place the fundamental and basic rights of the citizens in such uncertain hands.

It is generally held that Parliament, as representing the people, is sovereign and supreme. It, therefore, can change even the Fundamental Rights of the citizen. This argument is fallacious. Put in syllogistical form, the argument runs thus:

People	=	Parliament
Parliament	=	Majority in Parliament
Majority	=	The Government of the day
Therefore, the Government of the day are the people.		
Q.E.D.		

The legislature is not the people. If that were so, there will be no need for any referendum or plebiscite. This device, to ascertain the will of the people on some important and basic issues, is adopted by many countries. Even England, where the Parliament is considered all-powerful, had recently to adopt this method of ascertaining the will of the people by referendum in the matter of joining or not joining the European Common Market. This is because the legislature, in practice, means the majority party. The government of the day is a Committee or a Cabinet of such a majority party. And, in a democracy the party in power and its Committee, the government, keep changing! The legislature, therefore, is not the people, much less is it the government of the day.

Fundamental rights which are mainly against the government cannot thus be put under the control of a changing government. It will be just like making the accused the judge in his own case!

Article 368

It is said that the 24th and 25th amendments to the Constitution were enacted under Article 368 of the Constitution. This Article, however, merely provides the procedure by which ordinary amendments of the Constitution can be enacted. But, when the Constitution has already provided Article 13(2) which lays down that "the State shall not make any law which takes away or abridges the rights conferred by this part (III) and any law made in contravention of this clause shall, to the extent of the contravention, be void." Article 368 does not and should not apply. But, is Article 368 all-pervasive and under it any and every amendment can be brought and passed provided the requisite majority in the legislature is available? If that were so, any legislature or rather the government of the day commanding the requisite majority may by an amendment under Article 368 change or modify the Preamble to the Constitution, declaring it as part of the Constitution! It may even alter or annihilate itself. All this would be absurd. This Article is not all-pervasive as revealed by its own proviso, that certain changes in the powers of the States cannot be made, without the agreement of half the number of states. There must, therefore, be a reasonable, inherent, and implied limitation to the application of Article 368, even if the requisite majority is available in the legislature.

After all, our Constitution is a consolidated, organic whole. I have given earlier the pre-independence history of the Fundamental Rights. It shows what the framers of the Constitution must have meant.

Further, an amendment is not a fundamental or basic alteration of the original statute, act or proposition. It is only, as the word indicates, an 'amendment'. It can only explain, enlarge or complete an idea stated in the original proposition. It cannot negate or take away the essential idea behind the original proposition. But, both the 24th and 25th amendments alter the basic nature and structure of not only Articles 13 and 31 but of some other articles of the Constitution itself.

Fundamental Rights have been provided in the Constitution because its framers were not quite confident that average human

nature will always follow the right and the reasonable course; less so will that nature follow the right course, when it enjoys power. As Lord Acton said, "power has the tendency to corrupt and absolute power corrupts absolutely". It was, therefore, felt necessary to keep the fundamental rights of the citizen outside the possible interference of average men and women who may act under intoxication of power, whether in the legislature or in the Government.

Let us again examine whether the fundamental rights stand in the way of the Directive Principles of State Policy. Does it mean that only through curtailing the liberty of the individual citizen can the Directive Principles be fulfilled? Slaves cannot fulfil the requirements of the Directive Principles. Further, it will be seen that the Directive Principles have not been made justiciable like Fundamental Rights. This was necessary because it was felt that it was not possible to fulfil the requirements of the Directive Principles in their entirety in any specified time. They would be fulfilled in progressive stages, with the advancement of the social consciousness. For instance, one Directive Principle even put a time limit for its performance. It states that: "The State shall endeavour to provide, within a period of ten years from the commencement of this Constitution, for free and compulsory education for all children until they complete the age of fourteen years". In the last 30 years, this Directive principle has not been fulfilled. It is not known when it will be! Another Directive Principle contemplates the progressive diminution of disparity in income and wealth, between the rich and the poor. In the last 30 years, these disparities have rather increased than diminished! Is the individual citizen to be deprived of his basic rights and liberties till the Directive Principles are fulfilled? If that were so, the Directive Principles, Part IV in our Constitution, would have been put before Part III, that of Fundamental Rights. Moreover, Fundamental Rights would lack meaning and significance if they had to await the fulfilment of the Directive Principles. It is, after all, the free citizens in a democracy who have to work for the fulfilment of the Directive Principles, whatever the Government may do in the matter.

After independence, our Constituent Assembly functioned also as the Parliament of India till the first general elections in 1952. Why did the Founding Fathers then pass as it were a self-denying ordinance against themselves and keep the fundamental rights of the

citizen outside their own jurisdiction? They did this because they realised the dangers to which even democratic legislatures and governments are prone.

It must also be realised that our Fundamental Rights follow the same pattern as the "Charter of Freedom" of the United Nations. To this Charter, India is a signatory. It is for this freedom that our pre-independence patriots fought and made great sacrifice. Some of them had to pay with their lives for securing freedom. It was not only for national liberty that they fought but also for the liberty of the individual. In tampering with our fundamental rights we seem to have lost our historical perspective. We seem also to have forgotten the debt of gratitude we owe to the martyrs of our freedom fight. We have thus proved ourselves unworthy of the heritage they left for us.

Evolution in Law

It is true that law is as much subject to evolutionary change as any other human activity or institution. With the change in the ideas of the people about property, the laws governing it may also change. But, there can be no doubt that, if human nature does not fundamentally change, at no time will man forego his right to freedom of speech and expression, freedom of conscience, faith and religion. This is because these are basic rights and they belong to the category of 'eternal verities' of human life. As such, they are imbedded in human nature. Their abrogation would mean that human beings have ceased to be human and humane. The moral justification for the existence of a Government can be based only on the ground that the rights which go deep in human nature, are protected.

Committed Judiciary

In 1973, three judges of the Supreme Court were superseded, to make room for a junior as the Chief Justice. At first, the reason given was that seniority was not the sole criterion for the promotion of the judges. What then it was, was not quite clear. But, soon after, in the Parliament, a minister, not the Law Minister, frankly admitted that the reason behind the action taken was that it would be helpful to the authorities in pursuing their political philosophy! Was it the philosophy of the Government or that of Mrs. Gandhi? As subsequent events proved the then Prime Minister, Mrs. Gandhi

had no political philosophy of her own, except to retain power and to bequeath it to her younger son.

The question is, was this test of conformity with the political philosophy of the government to be applied to the Chief Justice only or to the other judges also? If it was to apply to all the Supreme Court judges, they too should have been replaced by those who believed in the official philosophy. Or else, they must have been required to perjure themselves and declare that they believed in the official philosophy. What justice could one expect from judges with such easy conscience!

This official philosophy was called 'forward looking'. In politics, every party and political leader consider their political philosophy as forward looking! The dictatorial policy of the communists or the Fascists is considered by them as forward-looking. Every dictator claims his policies to be forward-looking!

From this forward-looking political philosophy follows the idea of a 'committed judiciary'. This has nothing to do with the primary functions of a judge, who is to see that justice is done, keeping in view the law of the land and the principles of natural justice. Even if one thinks in terms of a philosophy for the judges, that has already been settled for them by the Constitution that they will uphold it. The President too takes the oath that he will maintain the Constitution. All the ministers and the legislators have to take the oath that they will abide by and uphold the Constitution.

It is absurd to say that the judge's legal philosophy must be in conformity with that of the government and not that of the Constitution and the legal duties he has fearlessly to perform under it.

In this connection, the Law Commission appointed by our Government quoted with approval what was said by Winston Churchill:

"The principle of complete independence of the judiciary from the executive is the foundation of many things in our island life. . . . The judge has not only to do justice between man and man. He also—and this is one of the most important functions considered incomprehensible in some large parts of the world—has to do justice between the citizens and the State. He has to ensure that the administration conforms with the law, and

to adjudicate upon the legality of the exercise by the executive of its powers”.

This assumes the independence of the judiciary from the executive and from the legislature. In a democracy, the judges are rather expected to shed any political philosophy they might have before their appointment. But, the minister who defended the supersession of the three judges, thought otherwise. However, that is not the legal philosophy of democracy but of totalitarian regimes which believe that every organ and every department of government must carry out the policy of the party or the dictator. This policy was followed in England by the Stuart Kings in the 17th century with disastrous results to themselves.

The judges can only uphold the underlying principles or philosophy of the Constitution, which is democratic and which preserves the independence of the judiciary.

Our Constitution is democratic. If a party which does not believe in democracy comes to power, what have the judges to do—remain loyal to the Constitution or to the party in power? Can the President who himself is pledged to ‘preserve, protect and defend’ the Constitution, appoint a judge whose loyalty is not pledged to the Constitution but to the ruling party? Both the President and the judges have to uphold the basic principles of the Constitution, which provide for the fundamental rights of the citizen, civil liberties, the ‘rule of law’ and the right of peaceful dissent.

Today, as we have said before, the majority of members of Parliament are Hindus. Supposing a wave of Hindu fanaticism sweeps the country, will the judges be obliged to uphold the unconstitutional position taken by the majority party? If they do, they will violate the oath of their office!

Further, a ‘committed judge’ like ‘hot ice’ is a contradiction in terms. What justice can be expected from a judge who is ‘committed’ even before a case comes to his court?

The minister in question relied on the assumption that Parliament in India is sovereign. This has been repudiated by the Supreme Court’s judgement in the case of the ‘Fundamental Rights’. The Constitution is supreme. All the main departments of the government, the legislature, the executive and the judiciary are created by the Constitution. The powers of each of these departments are laid down by the Constitution. In short, the government

is created by the Constitution and not the Constitution by the government. In this connection, Rajendra Babu, the Chairman of the Constituent Assembly said, as quoted above, "We (the Constituent Assembly) are sovereign and not the *future Parliaments*". (Italics mine). The Constitution being supreme, no amendment can be entertained which destroys its basic framework. That framework is indicated in its Preamble quoted earlier.

Fundamental Rights in Brief

To conclude, what are the fundamental rights of the citizen which need to be protected and guaranteed against the executive and the legislature? In brief, they are freedom of expression, assembly press and religion, the right against illegal arrest and unreasonable search and seizure of property without 'due process of law'. They are natural rights, basic to social life. They guarantee the dignity of man, against the crushing weight of the authority of the State or of the legislature. They are not rights which can be conferred by the government or taken away by it. It is, therefore, that these rights are considered basic and made 'inalienable'. If any form of Government becomes destructive of these rights, it is the right, nay, the duty of a free people to alter or to abolish it.

Contd. from cover ii]

brief period, May-December 1950, and Minister for Home Affairs from January to November 1951.

The difficult political situation in Madras in 1952 called him from his retirement and he became Chief Minister of Madras, from 1952-54. He was given the highest award of 'Bharat Ratna' in 1954. From then onwards, he was chiefly concerned with guiding the nation's affairs through numerous articles in newspapers, which paved the way, particularly after the Avadi Congress, for the founding of the Swatantra Party as an All-India Party by him. Interested in world peace, he led the three-men Indian delegation on behalf of the Gandhi Peace Foundation to America, England and Italy in October 1962 to canvass support for the banning of nuclear tests. He passed away on 25-12-1972.

His publications, which are a perennial source of thought, wisdom and enlightenment, are both in Tamil and English. Important among his Tamil books are: Socrates, Kutti Kadhaigal, Kannan Kattiya Vazhi, Aureliussin—Atmachintanai, Upanishada-Palagani, Abheda Vadam, Vyasara Virundu, Chakravarthy Thirumagan, Valluvar Vachagam and others, some of which have been translated into other Indian languages. His English books include Jail Diary, Ramayana, Mahabharata, Kamba Ramayana—Ayodhya Kanda, Cripps Mission, Satyam Eva Jayate—Vols. I, II and III, Voice of the Uninvolved, Hinduism—Doctrine and Way of Life, and others.

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Born in 1888 in Hyderabad (Sind). Professor of History at Muzaffarpur college in Bihar. Met Mahatma Gandhi in 1914 at Santiniketan. The first Satyagrahi to be arrested at the Champaran Satyagraha in 1917. Professor at the Banaras Hindu University. Founded the Gandhi Ashram at Banaras for Khadi and Village work, which was later shifted to Meerut. In 1923 at Gandhiji's request took charges as Principal & Acharya of Gujarat Vidya Peeta at Ahmedabad. In 1935 helped Dr. Rajendra Prasad in the Bihar Earthquake Relief work and later appointed as General Secretary to the congress. Unanimously elected. President of the congress in 1946. Members of the constituent Assembly from 1945 to 1951. Resigned from the congress in 1951 and founded the Kisan Mazdoor Praja Party in 1951 which merged with the Socialist Party in the same year. He was chairman of the Praja Socialist Party till 1954. He was elected to the Lok Sabha in elections of 1952 1957, 1963 and 1967.