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OUR FUNDAMENTAL RIGHTS.*

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A new Constitution demands a new philosophy of life. Yet it is doubtful whether many of us, lawyers, legislators or judges have fully wrenched ourselves from the fetters of the past and tuned ourselves to the freedom of the present. In an age of legislative supremacy, born of the doctrine of the omnipotence of Parliament, no citizen could claim any fundamental right. For the essence of a fundamental right lay in the paramountcy of the right over the Legislature of the land. Nevertheless though over a year has passed since the promulgation of the new Constitution, the civil servant, the administrator and the Government still function apparently oblivious of the deep changes wrought in the mechanism of Government. Legislative enactments are still passed, rules and orders made as if the old British regime still continued without the slightest effort to adjust themselves to the new order; and when such Acts or orders end up before the High Court with the issue of a Writ Rule Nisi and a Rule absolute, the offender throws up his hands in despair and blames fundamental rights as the source of all evils in the country.

Indeed it is an interesting paradox that those who were loudest in their insistence on the inclusion of fundamental rights in the Constitution are now among their most bitter opponents. Power corrupts but never so absolutely as to forswear the ideals of a lifetime.

The Constituent Assembly Debates enshrine some of the most passionate speeches in the cause of human right to life, liberty and property, to freedom of speech and of association. But it is not very surprising that those who fought against tyranny and despotism and the curtailment of human rights, should themselves, having been entrusted with the reins of power, find in the exigencies of the governance of the country, excuses for the abandonment of the ideals which they had cherished and fought for. It is a remarkable fact that before the Constitution is two year old, the provisional Parliament, which is but another name for the old Constituent Assembly, should have thought it necessary to introduce the first amendment to the Constitution striking at some of the basic fundamental rights enacted only a few months earlier. To those who are in the seat of power fundamental rights have become fundamental impediments to the governance of the country. If the Constituent Assembly had delayed the passage of the Constitution until 1951, it is indeed doubtful whether any fundamental rights Chapter would have stood in the Constitution at all. Perhaps there is little to choose between Government and Government. Whether the Government is by the many or by

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an individual, its commands must be obeyed. Its will must be the law of the land. If it is thwarted in its objectives, it liquidates the obstruction, with the means at its command.

The conflict between State control and individual freedom has been one of the perennial problems of political organisation. To the State self-preservation is the supreme social end. But a State is an abstraction. Its directive will is therefore the will of its controlling authority whether called a monarchical despot, a Fascist dictator or a democratic Cabinet. But such is the illusion of power that these enthroned in the seat of authority are apt to identify their own self-preservation as the preservation of the State, and therefore as the supreme social good. The old doctrine that the King is the State and the State is the King still persists with its modern substitutions. Opposition to authority therefore becomes opposition to the State. Where, however, the sovereign authority in a State, is supreme, paramount and uncontrolled, the will of the sovereign is the law of the land, whether sovereignty rests in a personal monarch or in impersonal Parliament. Power unrestricted is power absolute; and it does not affect the nature of the power in the least whether such power is exercised by one or by many. In such a system of Government a citizen has no rights but what the State may grant him. But since the State could always take away such rights at its will and pleasure, such rights become dependent on the bounty of the State and could enure only so long as the State permits. The State thus becomes the arbiter of both the existence and the extent of the citizen's rights. Against such a State a citizen can have no fundamental rights.

Of the three organs of the State, the most potent has been the Legislature. Where the Legislature is sovereign its enactments are unquestioned and unquestionable. But the concept of law has undergone a change. We no longer think of law along with Bacon and Bracton as of divine origin. Law in the modern State has no moral content. Its authority now rests neither on its divine origin nor in its moral appeal, but merely on the strength of the organised force of the State. Whether an Act keeps one to the right of the road or to its left, whether it enacts a rule of conduct with respect to transfer of property or murder, the Act is law, and its compulsion rests not in its inherent content, but in the competence of the legislative body from which it originates. But the technique of law-making has not stopped merely with the framing of rules of conduct. A Legislature may enact laws depriving a person of his life, liberty or property. When the British Parliament enacted in 1401, the Statute "De Heretico comburendo" confirming the right of the church to have heretics burnt by the common hangman, Parliament was enacting a law of the same efficacy as, say the Statute of Mortmain or any other enactment on the Statute Book. When again in 1530 Parliament passed an Act directing that the Bishop of Rochester's cook be boiled to death, it was placing on the Statute Book an enactment on the same par as any other statute that it passed. In 1641 the Earl of Stafford was beheaded by an Act of Parliament. The powers of a Legislature, which is uncontrolled, are therefore vast and unlimited. It holds in the hollow of its hands the life, liberty and property of the citizens. It matters little therefore whether such a law-making authority goes by the name of the Shah of Persia, or of Parliament.

All these might look irreconcilable with the elements of constitutional law that we have been familiar with. Most of us have learned that the leading characteristic of the British Constitution, as expounded by Dicey in his classical treatise, is the Rule of law. According to Dicey, "the Rule of law means in the first place absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power and excludes the existence of arbitrariness, or prerogative or even of wide discretionary authority on the part of the Government. Englishmen are governed by the law and by the law alone. A man may thus be punished for a breach of law, but he can be punished for nothing else."

But the major premise that the Rule of law excludes the exercise of arbitrary power vanishes when the law itself is arbitrary in conception and discretionary in content. Dicey did not live to hear the pronouncement of the House of Lords in *Rex v. Halliday*¹ or *Liversidge v. Anderson*². If in England a person could be incarcerated on the mere satisfaction of a Secretary of State without any trial or remedy by judicial review, it is a travesty to extol the Rule of law in antithesis to arbitrary action. Between detention in a Concentration camp at Buescher wald on the orders of Hitler or his minions and detention at Wormwoods on the mandate of a Home Secretary, the difference is one of form and not of substance. And the law that sanctifies either detention, is not less arbitrary because one is the decree of a dictator and the other is a product of a Parliament passed after three solemn readings. But it is difficult to understand how the Rule of law can be the peculiarity only of the British Constitution. In every organised system of Government where the sovereign power rests in a monarchical despot or in a multitudinous Parliament, the will of the sovereign authority is the law of the land. What matters is not the form in which the sovereign will is expressed, whether it is expressed in the form of a statute entered on the rolls of the Statute Book, or in the form of an ukase oral or written. The laws or ordinances promulgated by a dictator or a monarch have the same legal efficacy and validity as the law enacted by a Parliament. The Rule of law therefore obtained both in Parliamentary Britain and also in Nazi Germany. It may be that a dictator or a monarch may change the laws at any time ; but so too, may a Parliament. If a parliamentary enactment later in time is inconsistent with an earlier Act, it is well-known that the later Act prevails. The doctrine of the Rule of law does not depend upon the elaborate way in which an enactment comes into being or the number of readings it is subjected to, but purely on the sovereign authority, the expression of whose will is binding on the land.

But what is more important to notice is that the Rule of law expresses only a half-truth. It is no doubt true that we are governed by the law. But the law is equally governed by us. Law in the modern State is what we make, and unmake. Therefore, we rule the law no less than we are ruled by the law. So long as a law is enforced, we are ruled by the law. But we have also the right to change, abridge or abrogate a law. Law is therefore neither immutable nor unchanging, neither fixed nor crystallised, neither absolute nor permanent. It owes its life and origin to the will of its maker and can exist only so long as it is permitted to continue. In this analysis, the doctrine of Rule of law does not operate against legislative oppression. Its only function and purpose is to safeguard the citizen against executive excesses. For so long as a law obtains, the executive in an organised State is bound by the law and the person and property of a subject may be interfered with only in accordance with law. To that extent the Rule of law has been one of the corner-stones of British Jurisprudence ; but not merely of British Jurisprudence, but of every organised society that is entitled to statehood in the modern community of nations. Without the Rule of law, there can be no organised community—in fact no organised institution of any type whatever. But if fundamental rights must be fundamental, they are rights against the State and all its organs and instrumentalities ; and no right is fundamental unless the Legislature of the State is bound thereby and may not transgress these rights except at its own peril.

Clearly then, what secures a citizen against the State is not the doctrine of the Rule of law, but the mechanism of the law-making authority, the method of its working and the restraints on its movements. Different countries have different political Constitutions and the process of history records the impact of individual liberty on the supreme authority of the State. In England the Magna Charta, the Petition of Rights and the Bill of Rights are landmarks in the struggle between the King personifying the supreme authority of the State and the people. To the

1. (1917) A.C. 260.

2. (1942) A.C. 206.

Magna Charta we owe the recognition that there is a law above all laws which no King may disrespect. When Article 39 of the Magna Charta proclaimed that "No free man shall be captured or imprisoned or disseized or outlawed or exiled or in any way destroyed ; nor will we go against him or send against him except by the lawful judgment of his peers and by the law of the land," it embodied the concept of the "law of the land" as something more than the edicts of the supreme authority promulgated from time to time, something permanent, something constant, something beyond the reach of Kings and Parliaments. When the great constitutional conflict between the King and Parliament finally ended in the triumph of the sovereignty of the Parliament over the sovereignty of the King, it became no longer necessary to secure the subject against the tyranny of the Crown. But as against Parliament, the subject had no fundamental rights. Whatever Parliament enacts, he is bound to obey. In England, Parliament is free ; the Courts are bound ; for no court may impugn an Act of Parliament as *ultra vires* or invalid, whether it conflicts with a previous Act of Parliament or the law of nature, or of reason, however arbitrary, tyrannical or discriminatory the Act may be. It would, however, be not in accord with truth to stop with the formal law of the British Constitution and disregard its working. Possibly no country in the world enjoys as great freedom as a British citizen, and that freedom, though subject entirely to the will of Parliament, has always been assured and continued by various statutory enactments which, though liable to alteration, are nevertheless enactments which, one may feel fairly certain, will never be abrogated except in times of grave danger. Take for instance, the Englishman's right to personal liberty. During the reign of Charles I, where a subject was imprisoned by order of the King, the return to a Habeas corpus writ used to be made that the person was held "*Per Speciale Mandatum Regis*", that is to say, by the special command of the King. Such a return was a perfectly valid answer to the Courts, just as at present in India if a return states that the prisoner is held as per satisfaction of the detaining authority under our Preventive Detention Acts, the Courts cannot question the legality of the satisfaction. Parliament therefore enacted the Habeas Corpus Act of 1679 by which such returns were held to be invalid and the King's Bench and every judge of His Majesty were laid under a legal duty to enquire into the legality of detention. If any judge refused to hear a Habeas corpus application, he was liable to a fine of £500, a provision which does not appear to have been copied by any other Legislature in the world. A second commitment on the same cause was punishable though, it is interesting to observe, that in India at present even a release by Court does not apparently afford sufficient immunity against a second re-arrest on the same cause. The Habeas Corpus Acts have been very zealously enforced by the Courts and it is indeed noteworthy, that if at the commencement of the day's work in court, counsel rises and states that he has an application concerning the liberty of a subject, a Judge in England immediately puts aside all the rest of his cases, however urgent and important they may be, and hears the Habeas corpus application forthwith. It serves little purpose to have a law on the Statute Book unless it is applied and enforced in the spirit in which it is made.

The Habeas Corpus Acts may of course be suspended or repealed by Parliament ; for Parliament is supreme. But as against parliamentary excesses, there is a strong and virile public opinion which no party in power will dare disregard. Education and tradition have moulded the Englishman into both a law-abiding and also liberty-loving citizen. To whatever party he may belong, there are certain fundamentals on which every one is united. Generally speaking, those who hold the reins of the Government for the time being are not so blinded by power as to forget all restraints and toleration. For instance, the reform of the House of Lords has been a perennial issue for the last one century. Nevertheless, though for the last two decades there have been occasions when the party in power whether Conservative or Labour, had overwhelming majorities, no party would think of initiating legislation for its complete abolition or elevation of the House of Lords into a co-equal chamber. In England public opinion is the strongest bulwark

against parliamentary tyranny. The formal law of the Constitution recognises no fundamental rights. But nevertheless, the fundamental rights in England are as real and effective as in the United States.

In sharp contrast to the difference between the theory and practice in regard to fundamental rights in the British Constitution lies the treatment accorded to such rights in the continental Constitutions of France, Belgium and Switzerland. These Constitutions proclaim the freedom of conscience, the liberty of the person, the freedom of speech and of the press and indeed several other fundamental declarations. But while these solemn declarations are intended as injunctions to their Parliaments, the Constitutions themselves hold no safeguard against their infringement. If therefore the Legislatures of these countries exceed their competence or violate these constitutional provisions, the citizen has no remedy except to wait for the next elections and change the party in power and obtain their abrogation, though in Switzerland there is the revisionary process by referendum. The individual citizen has no right to go to a Court of law and no remedy by judicial redress. These continental declarations are no doubt part of the organic law, but they are what Salmond would call "imperfect rights". They are not justiciable in a Court of law, for the Courts have no jurisdiction to declare an Act invalid. As in England the Courts in these countries are bound though their Parliaments are not free in constitutional theory. In effect, therefore, these fundamental declarations are largely copy-book maxims in the organic law of the country. They have the same sanctity, as for instance, the solemn declarations in Part IV of our Constitution. A right is no right unless it is capable of enforcement. Nor is it fundamental if the Legislature may transgress the same with impunity.

While therefore fundamental rights in the continental constitutions are largely illusory in their import, it is in the American Constitution that they find concrete reality and acceptance. It would hardly be practicable in a short compass nor would it be necessary to state in detail the rights which have been enshrined in the text of the American Constitution. They have for their conscious aim and purpose the erection of guarantees of life, liberty and property against arbitrary deprivation by law. They are intended as a protection against tyranny by any of the organs of the State, the Legislature, the executive or the judiciary. Though in the formal law of the Constitution no provision is found that any law enacted by the Congress inconsistent with the fundamental rights would be void, judicial interpretation from very early times made it clear that any law in conflict with any of the clauses in the supreme law, would be a nullity and would have no legal validity. But in the working of the Constitution the most interesting feature has been the way in which the Courts have construed the phrase "due process of law". The 5th and 14th amendments commanded that no person shall be deprived of life, liberty or property without "due process of law". What did 'law' mean in the context? Did it mean an enacted law by the Congress or the State Legislature? Or did it mean law in the general sense? *Jus* as distinguished from *Lex*, the normal and the constant law, the natural law to which all laws, national and international, paid homage? If it meant an enacted law in the sense that no person shall be deprived of life, liberty or property except by a law enacted by the Congress or by the State Legislature, it followed that all that the Legislature had to do to transgress the provisions of the 5th and 14th amendments was to enact a law for the purpose. It could deprive a person of life, liberty and property, if it enacted a law for depriving him of life, liberty or property, however arbitrary the law may be in content or in operation. Such a construction would defeat the very basis of a fundamental right. For a fundamental right would necessarily involve the conception of an organic right, a right uncontrolled by the Legislature or by any other organs of the State. A right is fundamental because it is part of the fundamental law and liable to no infringement by the State. If therefore law in "due process of law" was intended to mean only an enacted law, the entire structure of the fundamental rights fell to the ground. The provisions became otiose. It was between

these competing claims that the Supreme Court of America in its early days evolved the great doctrine of "Due process of law" in American Constitutional jurisprudence. Was "Due process of law" equivalent to "the law of the land" as found in the 39th Chapter of Magna Charta? Had it any technical meaning? In *Hurtado's case*¹, Justice Mathews in delivering the opinion of the Court traced the history of the Magna Charta and stated :

"In this country written constitutions were deemed essential to protect the rights and liberties of the people against the encroachments of power delegated to their Governments, and the provisions of Magna Charta were incorporated into bills of rights. They were limitations upon all the powers of Government, legislative as well as executive and judicial.

"It necessarily happened, therefore, that as these broad and general maxims of liberty and justice held in our system a different place and performed a different function from their position and office in English constitutional history and law, they would receive and justify a corresponding and more comprehensive interpretation. Applied in England only as guards against executive usurpation and tyranny, here they have become bulwarks also against arbitrary legislation ; but, in that application, as it would be incongruous to measure and restrict them by the ancient customary English law, they must be held to guaranty not particular forms of procedure, but the very substance of individual rights to life, liberty and property But it is not to be supposed that these legislative powers are absolute and despotic, and that the Amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every Act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a special rule for a particular person or a particular case, but, in the language of Mr. Webster, in his familiar definition, 'the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial,' so 'that every citizen shall hold his life, liberty, property and immunities under the protection of the general rules which govern society,' and thus excluding, as not due process of law, Acts of attainder, Bills of pains and penalties, Acts of confiscation, Acts reversing judgments and Acts directly transferring one man's estate to another, legislative judgments and decrees, and other similar special, partial and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude. And the limitations imposed by our constitutional law upon the action of the Governments, both state and national, are essential to the preservation of public and private rights, notwithstanding the representative character of our political institutions. The enforcement of these limitations by judicial process is the device of self-governing communities to protect the rights of individuals and minorities, as well against the power of a numbers, as against the violence of public agents transcending the limits of lawful authority, even when acting in the name and wielding the force of the Government."

But it was not to be supposed that 'due process of law' conferred absolute liberty to the individual. That should have of course created chaos and anarchy. All these freedoms were subject to the limitations imposed in the interest of the welfare of the general public. The power to restrain individual liberty for the common social good was implicit in every organised Government and the Supreme Court soon evolved what is known in America as the doctrine of "police power", for the purpose of regulating the freedom of life, liberty and property. Whether any Act passed by the Congress or by a State infringed the constitutional guarantees was therefore liable to judicial review, the criterion being whether in its procedural

or substantive aspect it was reasonable in form and in substance, and not arbitrary in its application. Fundamental rights in American Constitution therefore were not imperfect but perfect rights justiciable in a Court of law. The Supreme Court reconciled the conflict between individual liberty and State control by making reasonableness of the law as the yardstick of its sustainability.

The Indian leaders who gathered at New Delhi in 1947 for the purpose of Constitution-making were familiar with the Constitutions of different countries and the attempts made to ensure individual liberty in the context of social needs. They had enjoyed neither free speech nor a free press, neither liberty of person nor of property. Most of them had been scarred and scorched in the bitter struggle for freedom. Many had undergone protracted imprisonments for long periods either by way of preventive or punitive detention for violation of what in the language of the Congress Resolutions used to be called lawless laws. They had various alternatives to choose from : parliamentary sovereignty of the Westminster model which recognised no fundamental rights, the continental types which made fundamental rights mere pious resolutions, and the American Constitution which made fundamental rights inviolable, with the Supreme Court as their ultimate arbiter. After considerable thought and anxious care they drafted the Constitution on the framework of the American model.

Systems and governments born of revolution, violent or non-violent, have always borne the indelible impress of the tyranny of the past in their efforts to secure the freedom of the future. In the first flush of freedom, the framers of the Indian Constitution drew their inspiration from the struggle of the American people and combined within its framework both justiciable rights of the American Constitution as also the fundamental declarations of the continental Constitutions. Part III, therefore incorporated the category of justiciable freedoms and Part IV, the non-justiciable declarations of the continental and Irish organic law. Part III opened in Article 12 with a definition of 'State' including therein not merely the executive, but also the Legislatures of both the State and of the Union. Article 13 rendered void all laws inconsistent with the fundamental rights guaranteed under Part III. Then followed the enunciation of substantive freedoms, the most important of which fall to be briefly considered.

Article 14 is partly an Irish and partly an American import. It postulates equality before the law and equal protection of the laws. Equal protection pledges the protection of equal laws. It prohibits arbitrary discrimination. But since all men, things, conditions and circumstances are not equal, equal protection does not forbid a reasonable classification having regard to the purpose the enactment has in view. If for instance compulsory acquisition of property is authorised under a Land Acquisition Act, the standard of compensation cannot vary with the caste of the property owner, or the colour of his complexion. Article 14 holds a major, all-pervasive fundamental right the potentialities of which are being slowly recognised. A law directed against even an individual or corporation may not offend the equal protection clause if the singling out is not based on arbitrary but reasonable grounds. But the power should not be capable of discriminatory application. The observations of Justice Mathews in the *Laundry case*, *Tick Wo v. Hopkins*¹, have become classic :

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play and action of purely personal and arbitrary power. Sovereignty itself is, of course, not subject to law, for it is the author and source

1. (1865) 118 U.S. 356 : 30 Law Ed. 220.

of law ; but in our system, while sovereign powers are delegated to the agencies of Government, sovereignty itself remains with the people, by whom and for whom all government exists and acts. And, the law is the definition and limitation of power. It is, indeed, quite true, that there must always be lodged somewhere, and in some person or body, the authority of final decision ; and, in many cases of mere administration the responsibility is purely political, no appeal lying except to the ultimate tribunal of the public judgment, exercised either in the pressure of opinion or by means of the suffrage. But the fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilisation under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the Government of the Commonwealth "may be a government of laws and not of men." For, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself. Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an equal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution." The *Pick Wo* judgment is of frequent application is cases arising under Article 14.

The next article of importance is Article 19 which combines in its fold the seven freedoms, of speech and expression, of assembly and association of movement and residence, of property and of occupation. Save in regard to freedom of speech and expression wherein legislation respecting libel, contempt of Court, or any matter offending decency and morality was authorised, all the rest of the freedoms were subject to laws imposing reasonable restrictions thereon in the interests of public order or of the general public. The framers of the Constitution have thus integrated the police power of America into the absolute freedoms which they would otherwise have become. Whether a particular restriction is reasonable or not is entirely for the Courts to decide, the Supreme Court having unambiguously laid down this principle, right from the time its jurisdiction was invoked in the first case involving constitutional construction. Secondly, the reasonableness of the restriction has to be judged both from the substantive and procedural part of the law, as stated by Chief Justice Kania in *Dr. Khare's case*¹ so that if the reasonableness of the law cannot be sustained from either angle the law cannot be upheld.

The provision regarding freedom of speech stood in a different category altogether, the Constitution originally embodying the traditional concept of the liberty of the press free from all pre-restraints and adopting the law as it stood in America. But the recent amendment to the Constitution has made a tremendous change with retrospective effect. The freedom of speech and expression is "made subject to reasonable restrictions that may be imposed by law in the interests of the security of the State, friendly relations with foreign states, public order, decency, or morality or in relation to contempt of Court, defamation or incitement to an offence." The indefiniteness of this vague verbiage would no doubt give legal validity to the re-enactment of the lawless laws of the old regime ; but in sad contrast one turns to the concept of free speech in America as expounded by American Judges. Here is what Justice Brandeis states in *Whitney v. California*² :

"Those who won our independence believed that the final end of the State was to make men free to develop their faculties ; and that in its government the

1. (1950) S.C.J. 328.

2. 274 U.S. 357, 375.

deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to be the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrines; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognised the risks to which all human institutions are subject. But they knew that order cannot be secured merely through fear of punishment for its infraction; that it is hazardous to discourage thought, hope and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law—the argument of force in its worst form. Recognizing the occasional tyrannies of governing majorities, they amended the Constitution so that free speech and assembly should be guaranteed.” These are immortal words that deserve to be inscribed in letters of gold on the walls of our Parliament. Only they who are animated by such sentiments can realize the great imponderables of free speech and of a free Constitution.

Freedom of conscience and of religion is secured by Article 25, and freedom to manage religious affairs by Article 26. In a country like India where religious observances govern life from birth to death, from the cradle to the grave, freedom of religious practices unfettered would cover far too large an area than in any other country. Secular activities are therefore dissociated by the Constitution from religious freedom, and the practice and profession of religion is made expressly subject to public order, morality and health. While the bounds of this freedom may be fairly susceptible of easy delimitation, controversy is likely to rage over the freedom of management of religious affairs and of the administration of religious institutions and endowments in accordance with law. Independent India has proclaimed in the great Preamble to the Constitution that India is constituted into a Sovereign Democratic Republic to secure among other things liberty of thought, expression, belief, faith and worship. India is now a secular State and recognizes no State religion. Nor may any taxes be levied for the promotion or maintenance of any particular religion. The civil jurisprudence of every civilised State contains principles of legal control over breach of trust or other kindred matters with regard to every kind of trust, public or private, religious or charitable. But when something more is attempted or a particular religion is singled out for governmental control, questions are likely to arise as to the ambit of the rights secured by the Constitution. It is well-known that Regulation VII of 1817 authorised governmental superintendence over all religious endowments, Hindu and Mohammedan, and that as a result of agitation, Act XXIII of 1863 was passed withdrawing such control altogether. It was only after the introduction of diarchy that religious neutrality was departed from and the Hindu Religious Endowments Act of 1925 was enacted. From that time right up-to-date one Act after another has been passed throwing a net-work of State control over Hindu Religious institutions, slowly dragging all the temples and mutts into the fold of governmental management. The high water mark of State control has been reached under the latest Act, Madras Act XIX of 1951 which formally subjects the administration of all Hindu Religious Endowments to the superintendence and control of a Commissioner appointed by the Government, but concentrates all authority in the hands of the party in power by empowering the Government to call for and examine the records of any Commissioner or any of his subordinates, or of any Area Committee or even of any trustee in respect of any proceeding other than those in respect of which a suit or appeal to a Court is provided by the Act and cancel or modify such orders. It is rather difficult to reconcile the provisions of the new Act with the theory of

a secular State. But it is interesting to notice that a novel provision has been introduced in the Act that nothing contained therein shall affect any right under Article 26, clauses (a) to (c) of the Constitution. If therefore immunity is sought from Judicial invalidation, all that the framers of future enactments in India have to do is to insert a provision stating that nothing in this Act shall be deemed to contravene any section of the Constitution.

By far the more important rights relating to deprivation of life, liberty and property are dealt with by Article 21 and Article 31 (1). Article 21 in its original draft embodied the American "due process of law" with regard to the deprivation of life and liberty, while by a separate Article, Article 31 (1), no person could be deprived of property save by authority of law. There were no provisions at all with regard to preventive detention. It may be said without exaggeration that had the Indian Constitution stood so drafted, it would have incorporated probably the best features of the leading Constitutions in the world. There may have been imperfections in its phrasing here and there, but there can be very little doubt that in three of its notable provisions, it excelled every other Constitutions in the world: Firstly, in erecting the fundamental rights against exercise of arbitrary power by both the executive and the Legislature, secondly, in expressly invalidating laws infringing those fundamental rights, and thirdly, in guaranteeing the enforcement of these rights directly by the Supreme Court at the instance of any aggrieved person.

But as months passed and the process of constitution-making lengthened, changes developed. The "due process of law" in the draft of Article 21 was converted into "procedure established by law". What exactly were the implications of the change that the framers had in view, were not very clear, except that "due process of law" was not wanted, in the Indian Constitution. But neither Article 12 defining the State nor Article 13 which rendered laws infringing the fundamental rights void, were interfered with. In course of time, new provisions were added to Part III which are now numbered as Article 22 (4) to 22 (7), introducing preventive detention in the chapter of Fundamental Rights. That again was unique in the organic law of any country in the world. Preventive detention *eo nomine* came within the category of fundamental rights of the Indian citizen.

It was obvious that the shades of the past were growing dim. What exactly was the distinction sought to be made in eliminating "due process of law" and substituting in its stead "procedure established by law" in relation to deprivation of life and personal liberty? Did the word 'law' in the context connote law in the due process clause, law in the abstract or law in the concrete, *jus* or *lex*, the general law or the enacted law, the natural law or the statute law? If law therein meant enacted law, what was the scope of the fundamental right guaranteed under Article 21 or under Article 31 (1)? British jurisprudence had introduced the Rule of law in India as a safeguard against executive interference with the liberty of person or of property. There was not the slightest doubt that declaration of a fundamental right against executive excesses was therefore absolutely superfluous, for it was part of the jurisprudence of India that no Government or official could take away the life, liberty or property of a person unless he could rely on statutory sanction. If Article 21 bore only this limited construction what was its import as a guarantee against legislative arbitrariness. The State as defined in Article 12 included the Legislature as well.

Nor was it easy to correlate Article 13 with the content of Article 21. If a law abridging or abrogating the right under Article 21 was void, that is to say, if the Constitution postulated in terms that an enacted law infringing procedure established by law may be void, then surely the law under Article 21 could not mean the changing enacted law, but the constant and the normal law.

The first impact of these alternatives on the Constitution came within a few weeks of its promulgation before a Division Bench of the High Court of Madras, consisting of Govinda Menon and Krishnaswami Naidu, JJ., in a *habeas corpus* application in *Re. Venkataraman*. Mr. Justice Govinda Menon after examining the provisions of the Magna Charta, the 5th and 14th amendments to the American Constitution and American precedents, adopted the view that any legislative enactment that is utterly repugnant to one's sense of natural justice would be an Act that would infringe the provisions of Article 21. It followed that by implication the word 'law in procedure established by law' did not mean enacted law, but the general law, within the meaning of "due process of law." Unfortunately that judgment has not yet been reported. But very soon the matter came up for consideration before the Supreme Court in *A. K. Gopalan's case*¹. The competing interpretations were exhaustively analysed. In construing the expression "procedure established by law," four out of the six learned Judges who constituted the Bench held that 'procedure established by law' meant 'procedure prescribed by the law of a State,' that is to say, a law which had a statutory origin. They repelled the view that the word 'law' in Article 21 had been used in the sense of general law connoting the principles of natural justice outside the realm of positive law. Law in that Article was equivalent to State-made law. Mr. Justice Patanjali Sastri while adopting this conclusion, struck entirely a new note of his own. In the view of the learned Judge the interpretation suggested by the State that the expression "procedure established by law" meant nothing more than law prescribed by any law made by a competent Legislature, was hardly acceptable, for to accept that construction would be to stultify Article 13 (2) and indeed, the very conception of the fundamental right." What then was the solution? Mr. Justice Patanjali Sastri found a *via media* between the two extreme positions contended for on either side, by stressing the word "established." According to the learned Judge "Certain basic principles emerge as the constant factors common to all those procedures, and they form the core of the procedure established by law. I realise that even on this view, the life and liberty of the individual will not be immune from legislative interference, for a competent Legislature may change the procedure so as to whittle down the protection if so minded. But, in the view I have indicated, it must not be a change *ad hoc* for any special purpose or occasion, but a change in the general law of procedure embodied in the Code. So long as such a change is not effected, the protection under Article 21 would be available." Mr. Justice Mukherjea recognised that "if law is taken to mean a State-made law, then Article 21 would not be a restriction on legislation at all. No question of passing any law abridging the right conferred by this Article could possibly arise and Article 13 (2) of the Constitution would have no operation so far as this provision is concerned." Nevertheless the learned Judge came to the conclusion that the word "law" in Article 21 has been used in the sense of State-made law and that Article 21 is apparently a check on the exercise of executive power. Article 31 (1) was also referred to incidentally for the purpose of clarification of the word "law", and the same conclusion arrived at. Therefore, in regard to deprivation of life, liberty and property, the fundamental right granted by the Constitution, according to the learned Judges who formed the majority, was the right which extended only to the requirement of an enacted law. If therefore Parliament or a State Legislature passed an Act depriving a person of his life, liberty or property, no citizen could impugn its validity, however arbitrary or unjust the Act might be.

The question, however, had been raised in the course of the arguments as to whether an Act in terms of 22 Henry VIII, Chapter 9, ordering that the Bishop of Rochester's cook be boiled to death, would be valid under the Indian Constitution. Such an Act certainly amounted to deprivation of the life of the unfortu-

1. (1950) 2 M.L.J. 42 : 1950 S.C.R. 48 : 1950 S.C.J. 174 (S.C.).

nate cook and the procedure established by law was the procedure of boiling to death. Mr. Justice Das, one of the majority Judges, answered the question in these words: "Our Constitution is a compromise between Parliamentary supremacy of England and the supremacy of the Supreme Court of the United States. Subject to the limitations I have mentioned which are certainly justiciable, our Constitution has accepted the supremacy of the legislative authority and, that being so we must be prepared to face occasional vagaries of that body and to put up with enactments of the nature of the atrocious English statute to which learned counsel for the petitioner has repeatedly referred, namely, that the bishop of Rochester's cook be boiled to death. If Parliament may take away life by providing for hanging by the neck, logically there can be no objection if it provides a sentence of death by shooting by a firing squad or by guillotine or in the electric chair or even by boiling in oil. A procedure laid down by the Legislature may offend against the Court's sense of justice and fair play and a sentence provided by the Legislature may outrage the Court's notions of penology, but that is a wholly irrelevant consideration. The Court may construe and interpret the Constitution and ascertain its true meaning but once that is done the Court cannot question its wisdom or policy. The Constitution is supreme. The Court must take the Constitution as it finds it even if it does not accord with its preconceived notions of what an ideal Constitution should be. Our protection against legislative tyranny, if any, lies in ultimate analysis in a free and intelligent public opinion which must eventually assert itself." If the word "Law" in Article 21 meant a State-made law, the thesis of Mr. Justice Das that any enactment in the nature of Henry VIII Act just mentioned would be valid under the Indian Constitution necessarily followed. But in such a view the Constitution stands self-condemned. With regard to the major rights against arbitrary deprivation of life, liberty and property, our Constitution holds no protection against legislative tyranny. All that is required is to procure the passing of an Act, and the basest wrong may be perpetrated.

But then as pointed out by Justice Bronson in *Taylor v. Porter*¹, the words "by the law of the land," (which is the same as 'due process of law') as used in the Constitution, do not mean a statute passed for the purpose of working the wrong. That construction would render the restriction absolutely nugatory and turn this part of the Constitution into mere non-sense. People would be made to say to the two Houses: "You shall be vested with the legislative power of the State, but no one shall be disfranchised or deprived of any of the rights or privileges of a citizen unless you pass a statute for that purpose. In other words, you shall not do the wrong, unless you choose to do it." And this is exactly the position now under the Indian Constitution.

Nor does the doctrine of the supremacy of the Indian Parliament rest on unassailable grounds. A federation in the well-known language of Dicey is "an indestructible Union of indestructible States"; and the federal compact embodies the division of powers between the units and the union. The Legislative organs of the State must therefore necessarily be bound by the instrument of the Union. The supremacy of the Constitution follows. So too the subordination of the Legislatures to the Constitution. The ambit of the legislative authority may vary in different Constitutions; but the status of the Legislature in every federal Constitution must be identical. Within the bounds of its freedom it is no doubt free from a doctrine that has been applied to all subordinate Legislatures. But the core of the problem lies in its powers of amendment as pointed out by Lord Birkenhead in *McCowley v. King*². Can the Legislature amend the Constitution in the same mode and by the same process as it can enact an ordinary piece of legislation? In that case the Legislature is uncontrolled. Or does the Constitution

1. 4 Hill 140, 145.

2. 1920 A.C. 691.

prescribe a particular procedure for the purpose of amending the Constitution? In that case the Legislature is controlled and not uncontrolled. In the former case the doctrine of *ultra vires* would have no application at all; for, every enactment inconsistent with the organic law would *pro tanto* amount to an amendment to the Constitution and would be valid. In the latter case, the doctrine of *ultra vires* would necessarily apply; for every Act in conflict with the Constitution transgresses the bounds of its authority and is void. If the Legislature is uncontrolled, the Legislature is supreme. If the Legislature is controlled, the Legislature is the slave of the Constitution, and can never be supreme. Article 368 prescribes a special procedure for constitutional amendments in India; and the terms of the federal compact cannot be altered or nullified by the unilateral Act of the Legislative organ. The observations of the learned Judge in regard to the supremacy of the Indian Parliament with great respect call for re-consideration.

To a large extent the interpretation of the majority view of the Supreme Court on Article 21 was influenced by the deletion of 'due process of law' in the original draft and the substitution of 'procedure established by law.' While it is clear that the framers of the Constitution did not wish to import the entire due process of law of the American make, what exactly did they intend to connote by "procedure established by law"? A reference to the Constituent Assembly Debates does not elucidate either the content of the fundamental right secured by the new formula, nor even the scope of the alteration effected in Article 21. Dr. Ambedkar understood the substitution one way; Sir Alladi Krishnaswami Iyer a different way; and the speeches of others indicate that they took it only as a verbal change restricting the due process to its procedural content. If the amendment was intended to abrogate the fundamental right of due process altogether and reduce it to an eyewash as it is now found to be, it should have been more intelligible and less farcical to delete Article 21 and Article 31 (1) altogether rather than retain them in a form which renders them impotent.

It is not without significance that the change came towards the end of the Constituent Assembly, when the party in power had gathered a little more experience of both governmental difficulties and governmental authority. But not less sinister was the accompanying amendments introduced as clauses of Preventive Detention in the chapter on Fundamental Rights.

Detention without trial has been an unavoidable necessity in the stress of war. But detention without trial in times of peace is reminiscent of the Spanish Inquisition and Louis XIV, the Bastille, and the Concentration Camp, Buchenwald and Siberia. In no civilized country in the world does arbitrary detention obtain as the normal feature of every day life. And the history of Fascism, Nazism and Communism has necessitated the setting up of a Committee of the U. N. O. to frame a World Charter of Human Rights binding on every State. No amount of fine phrasing can disguise the fact that preventive detention without trial is utterly repugnant to the universal conscience of civilized mankind. And Article 22 has enshrined in the Indian Constitution preventive detention as a fundamental right of a citizen, a normal and constant right above other rights. Till a few months back it was thought that Article 22 provided safeguards against indefinite detention. But the recent amendment to the Preventive Detention Act, the validity of which has been upheld by the Supreme Court has dispelled such illusions. If Parliament enacts suitable amendments to the existing Preventive Detention law, detention can be legally extended to any length of time.

It has already been mentioned that Article 32 grants a guaranteed right of petitioning the Supreme Court for speedy redress by *certiorari*, *mandamus* and by other orders. The technicalities of the ancient writs obtaining in England have been swept away by widening the ambit of such jurisdiction by authorising the Supreme Court to issue any appropriate orders or directions. But while access to Supreme Court is likely to prove difficult and expensive, the framers of the

Constitution have rendered these remedies far more practicable by empowering every High Court to issue such writs both for the enforcement of fundamental rights and also for other purposes. But the corner-stone of fundamental rights rests on the independence of judgment of those who are entrusted with their enforcement. While there are provisions in the Constitution to secure the independence of both the Judges of the Supreme Court and of the High Court, akin to those in the Act of Settlement in England, there is one clause in the Indian Constitution that gives grave room for disquiet, and that is the power vested in the Union Government to transfer any of the High Court Judges to any State. While in a vast country like India, the barriers of provincialism should no doubt be destroyed, and the best legal talent should be made available to any part of India, it has also to be borne in mind that the power of transfer may be capable of exercise "with an evil eye and an unequal hand." In a stage of transition, some judgments are likely to prove unpalatable to the Executive; and transfer then should not prove an insidious instrument for harrassing an inconvenient Judge, or conditioning him into the proper frame of mind. One should never forget that the real bulwark of our fundamental rights is a strong and independent judiciary, which should discharge its duties without fear or favour. What is our freedom worth if our Judges are not free?

Such in brief are the main contours of the fundamental rights incorporated in the Constitution of India. That these rights have not grown quite popular with the executive admits of no dispute. Whether their existence would be permitted to be continued in the Constitution has become a matter of grave concern. It is noteworthy that the first Amendment to the Constitution had for its conscious aim and purpose the devitalisation of some of the fundamental rights even before the ink in which the Constitution was inscribed was hardly dry. By forcing the first amendment through, precedent has been laid for further amendments. Future governments confronted with the obstacle of fundamental rights may not hesitate very much to adopt the same device found by the first free Government in India. It is true that there are countries like Great Britain where there are no fundamental rights. But conditions in England are different from those in India. In England centuries of tradition and history have thrown a halo round individual liberty creating thereby a guarantee against its infringement far stronger than the fundamental rights of the written constitutions of the Continent. India has just emerged from slavery. Nor have we developed a virile and intelligent public opinion to deter executive inroads into the area of our freedom. After all let it be remembered that fundamental freedoms are intended to secure nothing more than equality, impartiality and fair play. They are shields against governmental tyranny not swords against the just exercise of governmental authority.

A Constitution is not an end in itself. It is only a means to an end. It is, what it is intended to be, a mechanism of Government designed to secure national prosperity and national greatness. We live in an inter-dependent age of highly competing forces; and no country can withstand the impact of world events without the corporate efforts of its citizens. Whether in peace or in war the greatest asset of a nation is the loyalty and the character of its people. The striking force of a State is assessed not merely by its armaments and equipments but in terms of initiative, integrity, fearlessness, and readiness of self-sacrifice of its nationals. If Independent India must survive, India must nurture a strong and virile race having minds without fear and heads held high. It is only in the penumbra of fundamental freedoms that a people can grow free.