FUNDAMENTAL RIGHTS UNDER THE CONSTITUTION OF INDIA

Rt. Hon. V. S. Srinivasa Sastri Lecture

BY

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INTRODUCTION

I deem it a great honour to be asked to deliver this year "the Right Honourable Srinivasa Sastri's memorial lectures" under the auspices of the University of Madras.

Sastriyar was one of those selfless workers who helped to place our country on the path of independence. He might not have been a spectacular fighter but his persuasive and mellowed eloquence paved the way for the others to follow. A fight for the independence of the country is really a fight for the rights of its people. Independence of a country would be an empty shell if its people were deprived of their rights. It would only be a change of a ruler - an indigenous one in the place of a foreigner. Sastriyar was an ardent believer in Human rights and that is the reason and the justification for the choice of my subject, namely, Fundamental Rights under our Constitution.

The concept of fundamental rights is rooted in the doctrine of natural law. They are the postulates of natural law. A brief history of natural law is not out of place as an introduction to these lectures. Natural law or the law of nature is the history of man's search for an ideal law. It is a law that transcends the arbitrary or ephemeral laws. It is a higher or supreme law, it is a universal order governing all men alike. Its origin is lost in antiquity. Its glimpses can be discovered in ancient

Greek philosophic thought. Demosthenes said "every law is a discovery, a gift of God". Coleridge said "men do not make laws ; they do but discover them". Aristotle advised the advocates in his "rhetoric" to appeal to the law of nature. After the breakdown of the Greek city states, the conception of natural law was upheld by the Romans, especially the Stoics. The *Jus naturale* of the Stoics was the way of happiness for all men. They equated nature, human nature and reason. Natural law became the expression of divine reason in man. Cicero resuscitated the doctrine of natural law in his De Republica. He observed "true law is right reason harmonious with nature".

The same idea was elaborated in the test of De Legibus. "We are born for justice and right is not the mere arbitrary construction of opinion but an institution of nature." The conception of higher law pervaded the middle ages. This was espoused by political philosophers, especially St. Thomas Aquinas who said that natural law was higher than all positive laws. There was a set back to the doctrine of natural law by the teaching of Machiavelli and the absolutism of the national states in the 16th century. The concept of natural law was also discernible in the works of John of Salisbury and the German historian Vongicelle. Through the middle ages the higher or natural law was said to test the validity of the claims of official authority. The English legal history records that Coke and Locke contributed to this doctrine of natural law. Edward S. Corwin summarised their contribution thus :—

"Coke's endeavour was to put forward the historical procedure of the common law as a permanent restraint on power and especially on the power

of the English crown. Locke in the limitation which he imposes on legislative power is looking rather to the security of the substantive rights of the individual—the rights which are implied in the basic arrangement of society at all times and in all places". But in England ultimately supremacy of Parliament was recognised and it implies that there is no law superior to the law of Parliament. This absolute doctrine was summed up by De Lolme a little later in the oft quoted aphorism "that parliament can do anything except make a man a woman or a woman a man". But though the Parliament in theory can trample on the liberties of the people, the English liberal tradition grounded in common law is a natural check on such a tendency. An eminent English Judge recently said that if any party in power dared to attempt to deprive the people of the liberties, its fate was doomed at the next general elections. The public opinion is so powerful in that country that no formal document preserving the rights of the people was found necessary. The doctrine so ably expounded by Coke and Locke in 17th and 18th centuries found response elsewhere and the constitution of America enshrined the bill of rights, the fundamental postulates of the natural law. America was under foreign domination for a long time. It knew that there was no inherent distinction between foreign or indigenous autocratic rule and that was only a transfer of masters. So the said country after throwing over the yoke of foreign rule, naturally preserved the people's rights against State's encroachment. The French Revolution which took place in the second half of the 18th century was built upon the declaration of natural rights of men, life and liberty and pursuit of happiness. Practically all the European countries included a long list of human rights in their Constitutions. In the 20th century, African countries, the Latin American

States and the countries which were parts of the British Empire accepted the natural or fundamental rights as the part of their constitution. When India became independent it was in the same position if not worse, as America was at the time it gained independence. The people of India never in the long history enjoyed real freedom, whether under Hindu rulers, Mohamedan conquerers or Western imperialists. It was all through under the yoke of some form of authoritarian or totalitarian rule. After sustained struggle for independence, it secured it in 1947 from the British rule. The Constitution makers comprised of eminent jurists, patriots, administrators who knew the history of our country rightly thought of providing a constitution for it which would maintain and preserve the freedom and liberties of the people and prevent autocracy raising its ugly head in the future. With that view the people on whose behalf the constitution was made while conferring specific powers on the institutions created by it, preserved the natural rights to them against State encroachment. In effect most of the modern States including India integrated the postulates of natural law in their constitutions. They have codified the natural rights and made them a part of their supreme law. Indeed the Charter of human liberties propounded by the United Nations placed the natural rights at an international level. But it would be an empty shell unless all the component parts of the world organisation recognise and respect those rights in their respective States.

What are the Fundamental Rights.

What are the rights of the people preserved by our Constitution? Human or fundamental rights is the modern name for what have been traditionally known as natural rights. As one author puts, they are moral rights which every human being every-

where at all times ought to have simply because of the fact that in contradistinction with other beings, he is rational and moral. They are the primordial rights necessary for the development of human personality. They are the rights which enable a man to ~~check~~ chalk out his own life in the manner he likes best. The earliest recorded history of these rights is found in that of Greek States. "Isogoria" or equal freedom of speech, "Isonomia" or equality before law and "Isothimia" or equal respect for all find their echo in the modern concepts of freedom of speech and equality before law. The fundamental rights as I said have been specified in various constitutions and also in our Indian constitution. Though, as I have pointed out, they can be traced to their source, the natural law, it is not now necessary to enter into any controversy on their origin, as they have been crystallised and given a place of pride in our constitution. It is therefore enough if I define the fundamental rights as the rights of the people recognised by our constitution and enforceable in the manner prescribed thereunder.

To appreciate the scope of the doctrine of fundamental rights it is necessary to notice briefly the scheme of our constitution. Our Constitution in my view is an excellent piece of work, though it is rather prolific and could have been more concise. Despite the enlightened criticism voiced against it, if it failed to any extent, the blame must fall on us who work it rather than on those who made it. However, perfect a scheme may be, its success depends on the way it is worked. The essential condition for its success is an implicit faith in it. The objective sought to be achieved by it is declared in sonorous terms in its preamble. "We the people of India have solemnly resolved to constitute India into a Sovereign Democratic Republic and to secure to all its citizens justice,

liberty, equality and fraternity". It contains in a nutshell, its ideals and its aspirations. India is a Sovereign Democratic Republic and not a totalitarian State. It is a place where justice, liberty, equality and fraternity are secured for every citizen. The preamble is not a platitude but the mode of its realisation is worked out in detail in the constitution lays down a pathway leading to the goal of a welfare State. It has not given a particular name to the pathway such as socialism, capitalism, communism or any mixedism. It leaves to the party in power to give any name it likes so long it does not overstep the constitutional limits laid down. It directs the State to bring out a social order in which justice, social, economic and political shall inform all the institutions of the national life. It enjoins on the State to bring out an egalatarian State where there is no concentration of wealth, where there is plenty, where there are equal opportunities to all, to education, to work, to livelihood and where there is social justice. Adequate powers are conferred on the appropriate legislatures to make laws to achieve the said results. But having regard to the tragic history of our country, it could not implicitly believe the representatives of the people, for an uncontrolled, and unrestricted power might lead to an authoritarian State. It therefore preserved the people's natural rights against the State encroachment and constituted the higher judiciary of the State as the sentinel of the said rights and a balancewheel between these rights and social control. Shortly stated, our constitution aimed at a welfare State. It does not define welfare state, but it has described its content. The constitutional conception of a welfare state is very comprehensive. One can know what is a welfare state better, if one knows what is not a welfare state. It is not a primitive state where the law of jungle prevails and where might is right. It is not a backward state

freedom thereunder if a legislature makes a law depriving him of his liberty. A citizen has no freedom to do business if a law is made conferring a monopoly on a State. The citizens' freedoms under Art. 19 can also be restricted by law in public interests. A person's right to equality is subject to the doctrine of classification. A person has practically no right to personal liberty against legislative action as he can be deprived of it by an enacted law. He has also practically no right to property against legislative action, as a law made can enable the State to acquire his property on payment of compensation, the adequacy thereof being not justiciable. He has no fundamental rights to his property, if it is an estate as defined in the constitution, for he can be deprived of it, by law, without payment of compensation. So too the rights of Managing agents and the rights under agreements for mining oils can be extinguished by law without compensation. But all the laws except those hit by Arts 31-A and 31-B shall stand the test of doctrine of equality. Furthermore, all the fundamental rights are bulwarks against executive action and they cannot be infringed except under authority of a valid law. This summary indicates that though fundamental rights as originally enshrined in our constitution were abridged to a considerable extent by amendments and judicial decision, there is still a large area where they have their full say. The short history of the fundamental rights under our constitution for the last 15 years shows that whatever might have been the intention of the constitution-makers, they can be abolished or modified or abridged at the pleasure of the Parliament, if only a party in power solely or in combination with another party has the requisite majority. Freedoms of the people therefore depend upon a slender thread. It depends upon the parliament's wisdom and the people's vigilance.

Some of the important fundamental rights and conflict of views thereon.

Now I shall proceed to place before you some of the important fundamental rights. I shall give the first place to the right of social and economic justice. The concept of social justice is a comparatively modern one, though some glimpses of it were found in ancient, and medieval legal history. The industrial Revolution, the two world wars, adult franchise, universal education, spread of humanitarian sentiments, shrinking of the world by reason of modern technological developments and such others contributed to the evolution of the said concept. This is accepted by countries adopting different political and social ideologies. Our Constitution has accepted it and made it an integral part of the scheme. A right to social justice is the right of the under privileged to the protection of the society. It is the right of the weak, aged, destitute, poor, women and children to the protection of the State against ruthless competition. It is a bundle of rights; in one sense, it is carved of other rights; in another sense, it is a preserver of other rights. It is a balancing wheel between 'haves and have-nots'. Paradoxically it helps the organic growth of freedom. It has both positive and negative aspects. It can be conveniently dealt with under different heads: caste, creed, sex, children, poor and under-privileged.

Caste: The Hindu Society which Constitutes the majority of the people of our country is divided into castes, sub-castes and untouchables. There is social and economic disparity between the said castes and sub-castes. The accident of birth determines a person's social status and in olden days his avocation for life. Untouchables at one time, were considered to be outside the pale of Hindu society, but were later on

recognised as part of it. The origin of caste system is lost in antiquity. There are conflicting views on the question whether caste was part of Hindu religion. The better opinion is that it is not. Though it was elastic in the beginning, over the centuries it has become crystallised into water tight compartments and rigid. One is born and dead in one's sub-caste. This led to the hierarchy of castes and concentration of intellectual power in the higher castes and degradation and dehumanisation of a large section of Hindu society. The higher castes formed an intellectual aristocracy during the British rule and captured the limited seats of power. During the last decades of British rule, owing to some political agitation, there was a diversification of power but it has not brought about any social revolution. Indeed the fight for power shifted to the areas of sub-castes. Sub-castes found pressure groups and the condition of the really backward classes remained as bad as ever. The constitution made a sincere attempt to bring about a change in the social structure of the country. Every person irrespective of the caste to which he belongs, if he satisfies the conditions laid down in the constitution is declared to be a citizen of India. Articles 15 and 16 of the constitution declare that there shall not be any discrimination against any caste and equal opportunities in the matter of employment should be given to every citizen. If they stood alone, all backward communities would go to the wall. The said rule of equality would remain only an Utopian conception unless a practical content was given to it. Its strict enforcement would bring about the very situation it seeks to avoid. To make my point clear, take the illustration of a horse race. The horses are set down to run a race. One is a first class race horse and the other an ordinary horse. Both

are made to run from the same starting point. Though theoretically they are given equal opportunity to run the race, in practice, the ordinary horse is not given an equal opportunity to compete with the race horse. Indeed that is denied to it. So a handicap is given either in the nature of extra weight or a start from a longer distance. By doing so what would otherwise have been a farce of competition would be made a real one. The same difficulty had confronted the makers of our Constitution. Centuries of calculated oppression and habitual submission reduced a considerable section of our community to a lifelong serfdom. It would be well nigh impossible to raise their standards if the doctrine of equal opportunity was strictly enforced in their case. They would not have any chance if they were made to enter the open field of competition without adventitious aids till such time when they could stand on their legs.

There is another aspect of the question, whether the saving clause compels a State to make provision of reservation on the basis of caste. The Supreme Court in **Balaji's case**[1] laid down two principles. (1) The caste of a group of citizens may be a relevant circumstance in ascertaining their social backwardness and (2) though it is a relevant factor to determine the social backwardness of a class of citizens, it cannot be the sole or dominant test in that behalf. This decision was explained by the Supreme Court in **Chitraleka's case.**[2]

The relevant provisions recognise the factual existence of backward classes in our country brought about by historical reasons and make a sincere attempt to promote the welfare of the weaker

(1) [1962] 2 S. C. R. 983
(2) Civil Appeals Nos. 1056 and 1057 of 1963 decided on 29-1-64.

sections thereof. They shall be so construed as to effectuate the said policy but not to give weightage to progressive sections of our community under the false colour of caste to which they happen to belong. The important factor to be noticed in Art. 15(4) is that it does not speak of 'caste' but only speaks of 'class'. If the makers of the constitution intended to take castes also as units of social and educational backwardness, they would have said so as they said in the case of scheduled castes, and scheduled tribes. Though it may be suggested that the wider expression "classes" is used in clause 4 of Art. 15 as, there are communities without castes, if the intention was to equate classes with castes nothing prevented the makers of the constitution to use the expression backward classes and castes. The juxtaposition of the expression backward classes and scheduled castes in Art. (15)(4) also leads to a reasonable inference that the expression "class" is not synonymous with "caste" It may be for ascertaining whether a particular citizen or group of citizens belong to a backward class or not: his or her caste may have some relevance but it cannot be either the sole or dominant criterion for ascertaining the class to which he or they belong. This interpretation will carry out the intention of the Constitution makers expressed in the relevant articles. It helps the really backward classes instead of promoting the interests of individuals or groups who though they belong to a particular caste, a majority whereof is socially and educationally backward, really belong to a class which is socially and educationally advanced. To illustrate take a caste in a State which is numerically the largest therein. It may be that though a majority of people in that caste are socially and educationally backward, an effective minority may be socially and educationally far more advanced than another small

sub-caste, the total number of which is far less than the said minority. If we interpret, the expression 'classes' as 'castes' the object of the Constitution will be frustrated and the people who do not deserve any help may get it to the exclusion of those who really deserve it, This anomoly will not arise if without equating caste with class, caste is taken as only one of the considerations to ascertain whether a person belongs to a backward class or not. On the other hand, if an entire sub-caste by and large is backward, it may be included in the "scheduled castes" by following the appropriate procedure laid down by the Constitution. This interpretation also prevents the perpetuation of castes on the basis of backwardness.

Two more provisions may be noticed at this stage. Article 15(2)(a) says that no citizen shall on the ground of caste be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels and places of public entertainment or (b) the use of wells, tanks, bathing ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public. It is well known that in our society many classes of people are not allowed to enter such public places. This provision removes the said social stigma and confers a right on the aggrieved party to take steps to prevent such exclusion. what is more, under Art. 17 untouchability is abolished and its enforcement is made an offence punishable in accordance with law.

The result of the discussion may be stated thus. The constitution does not recognise caste or untouchables, but a mere theoretical declaration or abolition will not yield any appreciable results but in practice may accentuate the distinctions based on

caste and untouchables. So it not only prohibits the age-long evil practices, but gives effective help to backward classes and scheduled castes so that they can march on as free citizens on the basis of equality along with advanced citizens.

Creed : Real religion is not a creed or code, but insight into the reality. But in the name of religion great atrocities have been committed throughout the history of mankind. In India there have been many creeds, Hindus, Mohamedans, Christians, Buddhists, Jains etc. Religion has been used by some as hand maid of politics and in the name of religion unpardonable sins have been committed. Religion has also formed the basis of social status. Protaganists of one creed are looked down upon by others and they have been excluded from social intercourse. Our Constitution recognised the real nature of religion and gave full play to all religious beliefs. While Arts - 15 and 16 prohibit discrimination on grounds of religion in the matter of entry into public places and employment, Art. 25 expressly declares the right to freedom of religion. All persons, the Article says, are equally entitled to freedom of conscience and the right freely to profess, practice and propagate religion. Article 26 confers a right on every religious denomination or any section thereto to establish and maintain institutions for religious and charitable purposes and manage its own affairs in matters of religion, and to acquire and administer property. In short, India is a State popularly described as a Secular State. A secular State is not a State where religion is banned or neglected, but a State where free play is given to all religions, where religion is the personal affair of every citizen and where religion cannot be a ground of exclusion or preference in the affairs of the State or in social intercourse. The Constitution places persons professing

different religions on the same social scale. But no religion sanctions misappropriation of property even in the name of God. Though every religious denomination or section thereof can establish religious institutions, acquire property and administer it in accordance with law, it cannot obviously be free from its fiduciary or social obligations or to perpetuate evil and deleterious practices in the name of religion. This constitutional declaration of religious tolerance is another milestone towards social justice.

Women: Through the ages, the status of women in India was of subservience. The historic existence of a few great women was an exception rather than a rule. As a maid she was dependent on father, as a wife on husdand and as a mother on son. Hindu legal concepts of sucession, adoption, marriage, etc hinged on the presumptive dependence and incompetence of women. The position of women in Mohamedan society was not better, though in the domain of law of property their position was comparatively better than their compeers in Hindu society. They also occupied an inferior and subordinate position to man. In Christian Society they were better socially but none the less occupied inferior status. Politically, economically, and socially women were backward. Their inferior position led to exploitation. Our Constitution declared their status equal to that of man. Art. 15 prohibits sex as a ground of discrimination. Art. 15 (3) enables the States to make any special provision for women. Art. 16 gives them equal opportunities in the matter of employment or office under the State. Art. 23 prohibits traffic in women and forced labour. Art. 39 enjoins State to direct its policy towards securing that all citizens, men and women equally, have the

right to adequate means of livelihood and that there shall be equal pay for equal work for both men and women, In short, women duly qualified to be citizens under the Constitution have equal rights and opportunities with men, and the badge of inferiority has been removed forever. Indeed having regard to the backwardness brought about by historical reasons, the State was authorised to give them preferential rights and aids to put them in equal position with men in the field of competition.

Children

Nor does our constitution ignore the coming generation. As caste, religion, social or economic status is neither the basis nor the qualification of citizenship, every child born in India and has domiciled there becomes a citizen of India and acquires all the rights under the constitution. He is born in free India and his rights are not conditioned by circumstances of his birth, such as caste, religion or status. Every child has equal opportunities to develop its full personality. Under Art. 39 the State is enjoined to direct its policy towards securing that the tender age of children is not abused and that the childhood and youth are protected against exploitation and against moral and material abandonment. Art. 45 directs the State to provide, within a period of 10 years from the commencement of the constitution, for free and compulsory education for all children until they complete the age of 14 years Art. 23 prohibits traffic in human beings including children. To help them survive ruthless competition of the free society in education or other fields, the State is permitted under Art. 15(3) to make provision for their advancement. The constitution therefore gives every scope for the institutions created by it to bring up a healthy and vital race.

Our Constitution promises an egalatarian society. It wants to reduce disparity of wealth. It is easy to destroy but difficult to build. It is easy to level down but difficult to level up. In order to build up prosperity of the country, it issued many injunctions to State to pursue definite ideals. They are embodied as directive principles of State policy in part IV of the constitution. They are (1) to strive to provide for the welfare of the people by securing a social order in which justice, social, economic and political, shall inform all the institutions of the national life, (2)to Improve the health and standard of living of the people, (3) to organise agriculture and animal husbandry, (4) to give a right to men and women for an adequate means of livelihood, and (5) to distribute the ownership and control of the material resources in such a way as best to subserve the common good. These will be empty platitudes unless conditions are created for human endeavour. So the Constitution says, the State shall within the limits of its economic capacity and development make effective provision for securing the right to work and that there is equal pay for equal work for both men and women. The right to work is not enforceable in a court of law, but there is the moral obligation on the State to give such a right. Though a right to work is not placed in part III of the constitution, it is a directive principle of State policy which is also fundamental to our constitution. A party in power can dare to disobey the said injunction only at its peril. The voting strength of the people, who seek livelihood through work, constitutes an effective political sanction for its enforcement. But all men cannot work. There may be people who can wish to work, but the State is not in a position to provide work for them. There are old, sick, disabled and other cases of undeserved want. The State is directed to make effective provision for securing them the right to public assistance. This is also a moral obli-

gation but as in the case of right to work so in the case of right to public assistance, their voting strength constitutes the political sanction. Whatever criticisms the principle of adult franchise has evoked, it operates as a real guarantee against infringement of the said moral obligation.

The right to social justice is therefore a composite one. Indeed, it is a bundle of fundamental and statutory rights. The welfare of an individual cannot be achieved in isolation, for his welfare is in relation to the society to which he belongs. The welfare of the society is achieved only by accepting the principle of social justice and the welfare of society automatically brings about the welfare of the individual; for the welfare of the society is in effect the welfare of the individuals forming the society.

In securing social justice to the under-privileged, the higher judiciary of our country has a considerable role to play. Any statutory law of social justice necessarily has to impinge, to some extent, on the 7 freedoms enshrined in Art. 19 of the constitution. Such a law would be valid only if it can be sustained as a reasonable restriction in the interests of the general public on the said freedoms. It should stand judicial scrutiny. The two expressions, "reasonable restriction" and "public interest" are so elastic that the High courts or the Supreme court, as the case may be can maintain a just balance between individual freedoms and social justice. In the ultimate analysis the right to social justice is enforced by courts. They enforce the relevant fundamental rights and permit encrochment on other fundamental rights by State action in the interests of social justice.

The work of two thousand years of human history has shown to us that the movement has definitely

been towards the emancipation of man as man and towards recognition of equality between men in society. The slogan that all men are equal expresses a protest against the privilege by birth. The doctrine of equality refuses to accept a State in which some men are more equal than others. This concept has been enshrined in Art. 14 of the constitution. It says "the State shall not deny any person equality before the law or equal protection of the laws within the territory of India". The doctrine of equality may be briefly stated as follows:

All persons are equal before law is fundamental of every civilised constitution. Equality before law is a negative concept, equal protection of laws is a positive one. The former declares that every one is equal before law, that no one can claim special privileges and that all classes are equally subjected to the ordinary law of the land, and the latter postulates an equal protection of all alike in the same situation and under like circumstances. No discrimination can be made either in the privileges conferred or in the liabilities imposed. But these propositions conceived in the interests of the public, if logically stretched too far, may not achieve the high purpose behind them. In a society of unequal basic structure it is well nigh impossible to make laws suitable in their application to all persons alike. So a reasonable classification is not only permitted but is necessary if the society should progress. But such a classification cannot be arbitrary but must be based upon differences pertinent to the subject in respect of and the purpose for which it is made. The Supreme court in **Ramakrishna Dalmia's** (3) case, after a review of all the relevant decisions of the Supreme court of America and that of India has restated the settled law on the subject in the form of the following propositions: —

(3) [1959] S. C. R. 279.

"(a) that a law may be constitutional even though it relates to a single individual if, on account of some special circumstances applicable to him and not applicable to others, that single individual may be treated as a class by himself;

(b) that there is always a presumption in favour of the constitutionality of an enactment and the burden is upon him who attacks it to show that there has been a clear transgression of the constitutional principles;

(c) that it must be presumed that the legislature understands and correctly appreciates the need of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based on adequate grounds;

(d) that the legislature is free to recognise degrees of harm and may confine its restrictions to those where the need is deemed to be the clearest.

(e) that in order to sustain the presumption of constitutionality the court may take into consideration matters of common knowledge, matters of report, the history of the times and may assume every state of facts which can be conceived existing at the time of legislation; and

(f) that while good faith and knowledge of the existing conditions on the part of a legislature are to be presumed, if there is

> nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the classification may reasonably be based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation".

In view of the clear statement of law, it will be redundent to cover the ground over again except to add the following caution administered by Brewer in Ellis (4) case :-

> "While good faith and a knowledge of existing condition on the part of a Legislature is to be presumed, yet to carry that presumption to the extent of always holding that there must be some undisclosed and unknown reason for subjecting certain individuals or corporations to hostile and discriminating legislation is to make the protecting clauses of the 14th Amendment a mere rope of sand, in no manner restraining state action."

Consistent with the doctrine, the Supreme Court justified classification on the basis of time, geography, nature of persons, trade, calling or occupation and even history.

But there is another aspect of the doctrine A statute may expressly make a discrimination between persons or it may confer a power on an authority who would be in a position to do so. An

(4) (1897) 165 U. S. 150,

official arbitrariness is more subversive of the doctrine than statutory discrimination. In respect of a statute one knows where he is, but the wand of Official arbitrariness can be waved in all directions indiscriminately. Such a discretionary power is sanctioned by courts, if the policy regulating it is disclosed by the Statute. Statutory policy, it is argued, is a clear channel through which the discretion flows. Such a discretion regulated by the statutory policy, it is presumed, cannot be arbitrary.

There is another aspect of the doctrine. Is it possible to have an absolute equality before law? Men are different physically, intellectually and spiritually. Though two men start their life with equal opportunities, one of them with better qualities and better luck is bound to steal a march over the other. The levelling of humanity is an impossible task. It is against nature. So the doctrine in practice can only be worked out by accepting two principles:-

(1) to give equal opportunity to every citizen of India to develop his own personality in the way he seeks to do.

(2) to give adventitious aids to the under-privileged to face boldly the competition of life. Though the two principles appear to be conflicting as I have illustrated earlier, the harmonious blending of both gives equal opportunities to all citizens to work out their way of life. Doctrinaire insistence of an abstract equality of opportunity leads in practice to inequality which the doctrine seeks to abolish.

Before I leave this topic, I would like to administer a caution. The doctrine may lose its efficacy in its application if tendencies in three directions are left unchecked.

(1) I have indicated earlier that there is a presumption in favour of the constitutionality of an enactment and a heavy burden is thrown upon a person to establish that the discrimination is not on permissible grounds. Over emphasis on the wisdom of the legislature and over drawing of presumptions in its favour may throw an impossible burden on a citizen The rules intended to elucidate the doctrine of equality may tend to exhaust the right itself. While the court may be justified to assume certain facts to sustain the constitutionality of a statute, it is not permissible to rest its decision on some undisclosed or unknown reasons, in that event, a court would not be enforcing a fundamental right but would be finding out some excuse to support the infringement of that right.

(2) Courts evolved the principle of classification to give a practical content to the doctrine of equality. It shall be remembered that a citizen is entitled to the fundamental right of equality before the law and that the doctrine of classification is only a subsidiary rule evolved by the courts to give practical content to the said doctrine. Undue emphasis on the doctrine of classification or anxious or sustained attempts to discover some basis for classification may gradually and imperceptibly deprive the Article of its glorious content. The process would inevitably end in substituting the doctrine of classification for the doctrine of equality, and the fundamental right to equality before the law and equal protection of the laws may be replaced by the doctrine of classfication.

(3) Thirdly the discretionary power conferred by the Statute on the authority is sustained on the ground of a regulated policy discovered thereunder. Decided cases ascertained such a policy from the expressed provisions of a Statute, a fair reading of the relevant provisions of the act, the preamble read in the light of the circumstances in which it was passed, the examination of the Act as a whole and even the rules made under the Act. An attempt to discover the policy of the legislature in the crevices of an Act or even outside its provisions in order to sustain an otherwise arbitrary power, is real threat to the doctrine of equality. Because of the legislative reluctance or inadvertence to express itself clearly its policy, a heavy and difficult burden is often placed on courts to discover the policy if possible, on a fair reading of the provisions of an Act. Some Acts expressly lay down the policy to guide the exercise of the discretion of an authority on whom a power to classify is conferred. Some Acts though they do not expressly say so, through their provisions may indicate clearly, on by necessary implication, their policy affording a real guidance for the exercise of discretion conferred on an authority thereunder. But it is neither possible nor advisable to lay down precisely how a court should cull out its policy from an Act in the absence of expréss statutory declaration of policy. But what can be postulated is that the policy must appear clearly either expressly or by necessary implication from the provisions of the Statute itself. Judicial insistance on a strict compliance of this injunction would, to a large extent, eliminate arbitrariness and violation of the principle of equality by authorities concerned but would also persuade the legislatures to declare their policy clearly and succinctly in every Act conferring such discretionary power.

Some extreme illustrations that came up for decision before the courts show the overlapping of the two doctrines of equality and of classification and pointedly bring about the danger of the extinction of the main doctrine. A killed B with a dagger when he was in police custody. He made a statement to the police officer that he had hid a dagger in a bush. On his information the blood stained dagger was discovered. The facts of another case were similar except that A when he made the statement was not in the custody of the police. A in the first illustration was held to have committed the murder; but A in the second illustration was held not guilty of murder. The first was sentenced to death and the second was acquitted. The ground of the decision was that the legislature need not cover the entire common ground. It can occupy a part of it and leave the rest. Under similar circumstances one was convicted for murder and the other acquitted, yet the court held that equality clause was not infringed. Now coming to the Civil case a native State merged in a part A State. Before merger if a person borrowed from the State Bank, the Director of the Co. only could decide what was due from the customer and realise the same as if it were arrears of rent. But after merger, the State Bank authorities followed the same procedure. But in the case of other banks in the said A State they had to file suits in the civil courts and realise the amount due from the customers in execution of the decrees obtained against them. The court sustained the State Banks action on historic grounds. History may explain the difference but cannot sustain a classification that depends upon the circumstances obtaining at the time the said doctrine is invoked. In the same State two creditors under the same circumstances could resort to two different and conflicting procedures. Such decisions not only illustrate a tendency of courts to weaken the doctrine of equality but they afford a warning for a cautious approach in future.

Art. 15, 16, 17 and 18 are some of the illustrations of the doctrine of equality. I have referred to the first three Articles in another context. Article 18 says that no title not being a military or academic distinction shall be conferred by State. The underlying principle is that the State shall not distinguish one person, however, eminent he may be and the other, however small, by award of a title to the former thereby distinguishing him from the latter. This illustrates the basic principle of the republic that all men are equal. It prohibits the making of such invidious distinction between man and man. This Article reflects the emotional attachment of the makers of the Constitution to the concept of equality.

The doctrine of equality is a glorious concept and is the cornerstone of the rule of law as evolved in modern times. We cannot afford to whittle it down. We shall not forget that the main principle is equality and the subsidiary doctrine of classification is intended only to safeguard it by giving it a practical content. The right is the important one and the devices adopted to implement it, shall not be allowed in effect to deny the same. If the right correlation between the two is borne in mind, I have no doubt that the process will be reversed and just balance will be maintained between the two.

Liberty: No freedom is more important to man than that of life and personal liberty. There has been perpetual historic conflict between authority and liberty. There were periods in history sometimes long and very often short when personal liberties were suppressed by autocrats. But liberty being an inalienable and resilient quality of life itself, it ultimately triumphed over autocracy. Our constitution made it a fundamental right and sought to

protect it against State action. How far it was able to do is the subject of the present topic. Articles 19, 20, 21 deal with that subject. The said articles may be summarised thus ,—

(1) Under Art. 19 all citizens shall have the freedom to move freely throughout the territory of India and reside and settle in any part of India subject to the power of the State to impose reasonable restrictions in public interest on the exercise of those rights.

(2) No person shall be deprived of his life or personal liberty except according to procedure established by law.

(3) A person arrested shall not be detained in custody without being informed of the grounds for such arrest.

(4) He shall not be denied the right to consult and be defended by legal practitioners of his choice.

(5) Every person arrested shall be produced before a Magistrate within a period of 24 hours of such arrest.

(6) Law providing for preventive detention shall not authorise the detention of a person for a longer period than three months unless an Advisory Board comes to the opinion before such period that there is sufficient cause for detention.

(7) The Parliament may by law prescribe the maximum period for which any person may in any class or classes of cases be detained and also the circumstances under which the class or classes of cases in which a person may be detained for a period longer

than three months without obtaining the opinion of the advisory board. The authority may refuse to disclose the facts to the detenue if such authority considers them to be against public interest to be disclosed.

In **Gopalan's case** (5) the Supreme Court of India held that the expression procedure established by law in Art. 21 means the procedure prescribed by law of the State. It refused to accept the contention that the expression means due process of law as understood in the American constitution. The Supreme Court further held that Articles 21 and 22 constitute a distinct code and therefore if once a person is deprived of his personal liberty in accordance with the procedure established by law, no further question of freedom under Art. 19 would arise. That is to say if a man is deprived of his liberty by law he no longer enjoys the freedoms under Art. 19.

It will be seen from the above summary that the parliament can make a law for arresting and detaining a person belonging to any particular class indefinitely by way of punitive or preventive detention without trial subject to some minor safeguards. That is to say there is practically no fundamental right against legislative action.

In practice the fundamental right of personal liberty may not be effective even against executive action. It may turn out to be illusory as in a modern democracy the executive has virtual control over the majority party in the legislature and can put through legislation conferring arbitrary powers on itself.

This legal position has only a mixed reception amongst the jurists. The importance of the conflict will be apparent if the concept of personal liberty is analysed.

(5) [1950] S.C.R. 88

The expression "life and personal liberty" in Art. 12 is a comprehensive one. The word 'life' cannot be confined only to the taking away of life, that is, causing death. Field J. defined life in the following words: "Something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provisions equally prohibit the mutilation of the body by an amputation of an arm or leg, or putting out of an eye or destuction of any other organ of the body through which the soul communicates with the outer world". The expression liberty has also a wide meaning in America. It takes in all the freedoms. The expression is not confined to mere freedom from bodily restraint. It extends to the full range of conduct which an individual is free to pursue. But the absolute right to liberty is regulated to protect other social interests by the State exercising its powers, such as police power, the power of Eminent domain, the power of taxation etc. In India the word liberty has been qualified by the word "personal" indicating thereby that it is confined only to the liberty of the person. The other aspects of the liberty have been provided for in other provisions of the constitution. The concept of personal liberty has been succintly explained by Dicey in his Book on Constitutional Law (ninth edition). The learned author described the ambit of the right thus: "The right not to be subjected to imprisonment, arrest or physical coercion in any manner that does not admit of legal justification". Blackstone in his "Commentaries on the laws of England" says "personal liberty includes the power to locomotion, of changing situation or moving one's person to whatsoever place one's own inclination may direct without imprisonment or restraint unless by due course of law". Our Supreme Court in Gopalan's

case described it to mean liberty relating to or concerning the person or body of the individual. Personal liberty in this sense is an antithesis of physical restraint or coercion. The expression is wide enough to take in a right to be free from restrictions placed on his movements. The expression 'coercion' in the modern age cannot be construed in a narrow sense. In an uncivilised society where there are no inhibitions, only physical restraints may detract from personal liberty. But as civilisation advances, the psychological restraints are more effective than physical ones. Scientific methods used to condition a man's mind are in a real sense physical restraints, for they engender physical fear channeling one's actions through anticipated and expected grooves. So also creation of conditions which necessarily develop inhibitions and fear-complexes can be described as physical restraints. Further the right to personal liberty takes in not only a right to be free from restrictions placed on one's movements but also a right to be free from encroachment on his private life. I would therefore define the right of personal liberty in Art. 21 as a right of an individual to be free from restrictions or encroachments on his person whether these restrictions or encroachments are directly imposed or indirectly brought about by calculated measures.

Such is the wide scope of the expression "life and liberty" which Art. 21 protects. Art. 19 protects some of the attributes of life and personal liberty. Thereunder all citizens shall have the right to the freedom of speech, to assemble peacefully without arms, to form associations or unions, to move freely throughout the territory of India and to reside and settle in any part of the territory of India, to practice any profession or

to carry on any occupation, trade or business. These are some of the attributes of the personal liberty defined by me earlier. The said rights declared by Art. 19 are not absolute, for a State can make a law imposing reasonable restrictions thereon in the interests of the general public. So, both Arts. 19 and 21 confer on the citizens of India fundamental rights in respect of liberty; the former is more comprehensive than the latter and indeed the latter comprises some of the important attributes of the former.

The provisions of these two articles overlap to some extent. It is therefore necessary to reconcile them and there is a difference of view in the matter of resolving the apparent conflict. One method suggested was that Art. 19 dealt with abstract rights of liberty whereas Art. 21, with concrete rights. There is no justification for this distinction. Phraseology used in Art. 19 is wide and it primafacie takes in its sweep both abstract and concrete rights. If the said mode of reconciliation was accepted, it would mean that legislature could not make a law declaring that citizens could not be prevented from assembling peacefully or forming associations and moving freely throughout the territory of India etc., but could make a law curbing their activities when they were assembling, when they were forming associations and when they were moving freely in the country. It would mean that the constitution-makers declared platitudes in the constitution while they gave unrestricted power to the Legislatures to interfere with the liberties of the people. The Supreme court held that Art. 19 covered both abstract and concrete rights in the case of **Swami Motor Transport Ltd.** (6)

The second way suggested is that Arts. 19 and 21 deal with separate topics. Art. 21 deals with the

(6) (1963) Supp. 1 S.C.R. 282

deprivation of personal liberty of a person and Art 19 with liberties of a free man. If the liberty of a person has been taken away under a valid law of the punitive and preventive detention, he ceases to have any rights under Art. 19. This interpretation was accepted by the Supreme court in **Gopalan's case.**(5)

The third way is to confine Art. 21 to the law of procedure as it expressly says that no person shall be deprived of his life or personal liberty except according to procedure established by law and Art. 19 to substantive rights of liberty; that is to say the State can make a law prescribing a particular procedure, say a mode of trial before depriving a person of his liberty. The validity of that may not be justiceable, but the question whether the said law amounts to reasonable restriction in the interests of the public on the fundamental rights of a citizen under Art. 19 still remains justiceable.

The fourth way is that fundamental rights under Arts. 19 and 21 are independent, though there is overlapping. The fundamental right of life and liberty has many attributes and some of them are found in Art. 19 If a person's fundamental right under Art. 21 is infringed, the State can rely upon a law to sustain the action; but that cannot be a complete answer, unless the said law satisfies the tests laid down in Art 19-(2) so far as the attributes covered by Art. 19-(1) are concerned. In other words the State must satisfy that both the fundamental rights under Art. 21 and Art. 19 are not infringed by establishing that there is a law and the said law only imposes reasonable restrictions in public interests on the fundamental rights of a citizen under Art. 19.

It is said that "procedure established by law" is the same as "due process of law", the expression found in the fifth and 14th amendments of the constitution of United States of America. Due process is a concept of widest amplitude. It is an elastic one. It has both substantive and procedural meaning. It hits at arbitrary and unreasonable exercise of legislative powers. In the words of Mr. Justice Frankfurter, "It is the compendious expression for all those rights which the courts must enforce because they are basis to our free society—it is of the very nature of a free society to advance in its standards of what is deemed reasonable and right,—it is for the court to draw it by the gradual and empiric process of inclusion and exclusion". This wide doctrine was in practice regulated by the doctrine of police power. The equation between the doctrine of "due process" and that of "procedure established by law" is brought out thus: The key word is law. Law must necessarily mean valid law. A law under constitution can be valid only if it has passed two tests: (1) legislative competency and (2) non-infringement of fundamental rights. The law made by a competent legislature to be valid shall not therefore infringe article 14, 19 or any other article in Part III. If article 21 is read with the said articles the provisions analogous to due process and police power are attracted; that is to say a law depriving a citizen of his life and personal liberty cannot be valid unless it amounts to a reasonable restriction imposed in public interests on the attributes of liberty embodied in Art. 19

On the view expressed by the Supreme court in Gopalan's case, there is no fundamental right of personal liberty against legislative action. The other views discussed above keep a balance between the fundamental right of liberty and social control. The reason-

ing of the Supreme court in the **Kochunni's case**(7) accepted in the context of Art.31(1)read with Art.19 throws a considerable doubt on the correctness of Gopalan's decision. For obvious reasons, I will not express my preference to any particular view I have briefly touched upon conflicting and possible views on the construction of Art. 21 and it is for the Jurists to examine the question from all aspects and give a lead in that regard.

Discussion on the topic of personal liberty will not be complete without a reference to the question of the legislature's privilege to deprive a citizen of his liberty for contempt of legislature.

The question raised can be focussed by an illustration arising from the facts of a recent case. A citizen applied to the High Court of Allahabad complaining that the legislature of U. P. malafide and illegally issued a warrant against him and sent him to jail. The advocate representing the said citizen and two of the Judges of the said High court, who entertained the said petition, against whom unspeaking warrants of arrest were issued by the legislature for discharging their duties as advocate and Judges, filed petitions before the said High Court for protection against the said warrants. The citizen, the Advocate and Judges in their petitions alleged that their fundamental right under Art. 21 was infringed by the legislature and therefore they sought the help of the High Court to enforce their said right against the legislature. Under Art. 21, no person shall be deprived of his life or his personal liberty except according to procedure established by law. If the allegations made in the petition were true, there was no doubt that the liberty of the said persons was

(7) [1960] 3 S.C.R 887

sought to be deprived of by the legislature contrary to law. If so, under Art. 226 of the Constitution, the High court had undoubtedly the power to issue to the legislature a direction, order or a writ for the enforcement of the fundamental rights of the said petitioners.

But the legislature's contention was that the jurisdiction of the High Court under Art. 226 was curtailed by Art. 194(3) thereof. Under Art 194(3), powers, privileges and immunities of a House of Legislature of a State, and of the members and the committees of a House of such Legislature, shall be such as may from time to time be defined by the legislature by law, and until so defined, shall be those of the House of Commons of the Parliament of the United Kingdom, and of its members and committees at the commencement of this constitution. The argument was that it was one of the privileges of the House of Commons of the Parliament at the commencement of the constitution that it could issue an unspeaking warrant of arrest against a citizen of England for contempt of legislature and as a part of that privilege the Superior courts in England had no jurisdiction to question the correctness of the said warrant. In other words, the curtailment of the jurisdiction of the High Court under Art. 226 of the constitution of India was sought to be spelled out from a reference made to the privileges of the House of Commons in clause (3) of Art. 194 of the constitution. It was said that the ouster of jurisdiction in that regard was introduced in a "tabloid" form in the said clause.

The wide jurisdiction of the High Court in enforcing the fundamental rights of a citizen, clearly expressed in Art. 226 of the Constitution, can no doubt be restricted expressly or by necessary implication by

another provision of the Constitution. But, is there any such restriction expressly or by necessary implication in clause (3) of article 194.?

Before any such conflict between two Articles is envisaged, the principle of harmonious construction shall be invoked to reconcile the said two Articles.

Cl. 3 is in two parts. The first part is in clear and unambiguous terms and it says that the powers, privileges and immunities of a House of the legislature of a State shall be such as may from time to time be defined by the legislature by law. If the legislature made a law, it is manifest that it shall be a valid law. That is to say that it shall be within the competence of the legislature and it shall not infringe the fundamental right embodied in part III, for if it does not satisfy either of the two conditions, it is a void law and therefore not a law. This provision gives the clue that the Constitution never intended that the privileges of the House shall be outside the purview of the fundamental rights. The constitutional command is clear. The dominant intention of the Constitution is that the law of the country shall define the privileges, but as there will be an interregnum before the said law is made, it says that untill it is so defined, the previleges shall be those of the House of Commons of the Parliament of the United Kingdom.

The provision was intended to serve during a short interregnum. It is impossible to conceive that people of India solemnly declared that the privileges of the legislature should be permanently those of a foreign country, particularly when the said country happened to be its erstwhile ruler, though, the said circum-

stance might have been the reason for adopting the privileges of its parliament for a short period for a smooth transition. If the second limb of the clause was intended or even expected to become a permanent feature in our constitution, the clause would not have limited the operation of the privileges of the House of Commons to those existing as on 26—1—50. The constitution would not have fixed a date and ignored the progressive development of the law of privileges in England. The expression "at the commencement of this constitution" emphasises the transitory nature of the second part of cl. (3) and indicates that it was intended only to govern the situation for a short period till a comprehensive law of privileges was made by the legislature. Therefore, a comparative study of the two parts of cl. (3) shows beyond any doubt that the said clause is subject to the fundamental rights.

There is another way of looking at the problem. Cl. (3), in substance, says that the law of privileges in England at the commencement of the constitution shall be the law of privileges in India till the appropriate legislature in India makes a law defining them. The expression "at the commencement" introduces an idea that the law of privileges that existed in England immediately before the commencement of the Constitution shall govern the situation' They are not the privileges declared by the constitutional provisions but are those existing under the English law called common law or Lex Parliamentia. By a constitutional fiction they are treated for a transitory period as the law of privileges, governing those of the Indian legislatures. In that view, there cannot be any essential distinction between a law made

by a legislature of a State and a law treated as such by fiction in the matter of application of fundamental rights. If in the case of former, it is subject to fundamental rights, it shall equally be so in the case of the latter. A transitory provision cannot have higher sanctity than a permanent provision. It may also be noticed that the Constitution makers did not use any of the accepted legislative phraseology to free the said clause from the operation of Part III of the constitution.

The next question is whether the House of Commons of British Parliament has the power or privilege to punish a person for its contempt and if so, what is the content of that power and privilege. It has been recognised and recorded in every text book on the subject that the House of Commons has the power to punish for contempt and in that regard has jurisdiction over persons outside Parliament. May, in his book on "parliamentary practice" after considering the relevant decisions on the subject observed:—

"There is one respect in which the courts recognise existence in either house of a jurisdiction over persons outside parliament and that is in its power to punish for contempt. This recognition is subject to the qualification that, if the causes of commitment are "stated on the warrant, and appear to be in respect of no established privilege", the courts have claimed the right to examine their sufficiency. In taking this view the courts have in effect treated the power of a House to commit for contempt as in all respect analogous to the power of committal enjoyed by all superior courts".

The same view has been expressed in all the other Text Books on the subject. It is unnecessary to refer to them.

But the question is whether exclusion of a court's jurisdiction to scrutinise an unspeaking warrant is an integral part of the privilege. We have to gather the contents of the said privilege only from the rulings of courts, the proceedings of parliament and the text books on the subject. The decisions on the subject establish that the Judges consider it their duty to question any privilege arising directly or indirectly in a case which falls within their jurisdiction, and decide it according to their own interpretation of law. Dicey on "Constitution" also says that no single branch of the legislature can by any assertion of its alleged privileges alter, suspend and supersede any known law of the land or bar the resort of any Englishman to any remedy or his exercise or enjoyment of any right. It is true that this view was not accepted as binding by the House of Commons. It is therefore clear that while the House of Commons has power to punish a person for contempt, courts have the jurisdiction to ascertain the existence and the extent of the privilege. Decided cases also recognise that even in the case of power to commit for contempt, the courts, if the warrant is a speaking one, always claim the right to examine its sufficiency. After so much is conceded, what is the legal basis for holding that courts cannot go behind an unspeaking warrant? Is it because the said exclusion is a part of the previlege of contempt or because of any other reason? Decided cases give the clue for the said exclusion. The reason for the rule is, that in the case of a warrant issued by a superior court, it is presumed that it acted with jurisdiction unless want of jurisdiction appears on the face of it. Arrest under such a warrant affords a good return in an application for the issue of a writ of Habeas corpus. The same rule has been applied to the House of Commons which has been equated to a superior court. If in the case of a superior court

other than the House of Commons, such a presumption or practice is not a part of its privilege, it cannot equally be so in the case of House of Commons. The reason of the rule must be the same in both cases.

Therefore, the exclusion of the courts' jurisdiction is not a part of the privilege but it is referable to the practice regulating relationship between superior courts. The practice might have had its origin in the principle of comity or that of a presumption of infallibility attributable to superior courts. Our Constitution could not have intended to bring in by reference not only the powers, privileges and immunities of the House of Commons but also its procedural and evidentiary trappings. The constitution confers a power on the appropriate legislature to prescribe the procedure in the matter of privileges, which indicates that the procedural aspects of the privileges were not intended to be imported into India. That apart, the Indian law does not recognise the doctrine of 'unspeaking warrant'. If a court has jurisdiction to ascertain the validity of the warrant its jurisdiction is not circumscribed by any such limitation. But, if the jurisdiction is only discretionary, it is left to the court to exercise or to refuse to exercise it having regard to the circumstances of each case. The doctrine of unspeaking warrant may have some relevance in the manner of exercising jurisdiction and none in the context of the existence of jurisdiction. If so, it follows, that though the power or privilege of the House of commons to commit a citizen for its contempt, may be by reference imported into Art. 194 (3) of the constitution, it does not take in any ouster of court's jurisdiction in the case of unspeaking warrants.

That apart, Art. 194(3) does not by reference import all the privileges of the House of Commons into the Indian constitution. It only says, that the powers, privileges and immunities of the legislature shall be those of the House of Commons, committees and members of the committees. The makers of the constitution designedly used the word 'those' for the simple reason that some of the admitted privileges of the House of Commons would not fit in the scheme of our constitution and are indeed foreign to it. The privileges of the House of Commons vis-a-vis the Crown in respect of elections and similar others are not germane to our constitution. So too, the ouster of jurisdiction of Court, if it is an integral part of the privilege to commit for contempt, does not fit into the scheme of our constitution. If it is invoked in full, it cuts across the fundamental rights of the constitution and the jurisdiction of the High Court to keep the other institutions within their bounds have to be infringed. The resolutions of the legislatures will have to be given higher sanctity than the Acts passed by it. The privileges which are only accessory for carrying out the functions of the legislature can be used to enlarge the legislature's powers. In the constitutional set up, in which Art. 194(3) finds a place, even on the assumption that the said clause is not subject to article 19 (1), it is reasonable to draw at the most an inference that the privilege of House of Commons brought in by reference is only a basic privilege to commit for contempt. So understood Art. 194(3) at best takes in only the power to commit for contempt possessed by the House of Commons and not its procedural cobwebs.

Indeed, if the relevant provision is reasonably construed having regard to the clear intention underlying the provision, it may even be held that the

expression 'until so defined' may by construction be qualified by the words "within a reasonable period." That is to say, the law shall be made within a reasonable period from the date the constitution came into force. It is not possible to hold that 15 years could be such a period and, if that be so, it may legitimately be held that the transitory provision has lapsed.

There is some confusion in the public mind in respect of the privileges of the legislature. It is often said that there is conflict between the High Courts and legislature in this regard. This is entirely a misconception of the situation. The people of India through their representatives in the Constituent Assembly made constitution for the governance of the country. It introduced a federal structure, and created institutions for the administration of the country, namely, legislature, executive and judiciary. The Legislature was asked to make laws, the executive to administer the State and the judiciary to decide disputes. At the same time, though the people entrusted the Legislature with great powers, they did not part with their fundamental rights and issued an injunction to legislature not to interfere with those rights. It was not enough to issue a mere injunction but it was necessary to provide a mechinery to enforce those rights, if infringed by the State. So construed, the higher judiciary of the country was constituted in order to protect the people's rights and to enforce them against the State. In this context the constitution is supreme and all institutions whether legislature, executive or judiciary shall function under it in strict compliance with its provisions. If so looked at it is obvious that the conflict is really between the legislature, one of the institutions created by the constitution, and the people who created the cons-

titution. When the legislature seeks to interfere with the fundamental rights of the people contrary to the provisions of the Constitution, a citizen whose rights are so infringed can complain of such infringement to the only institution which has the power to decide the disputes thereunder. In that context the High Court only discharges its duties under the Constitution, namely, decides the disputes between the legislature and a citizen of the country, whose rights are violated.

It is said that if a law is made defining the privileges of a Legislature, no sound conventions can be established. Apart from the fact that the Legislature cannot ignore constitutional provisions, it is impossible to appreciate how conventions can be developed if the privileges of the Legislature were crystallized and equated to those of the House of commons in existence at the time the Constitution came into force. Any convention which is in conflict with the privileges so crystallized would be illegal with the result that our Legislature's privileges would not keep pace with the progress of our institutions.

If the contention of the U. P. Legislature was accepted, it would lead to irreconcilable conflicts between various legislatures and the members belonging to different parties in the same legislature. Lok Sabha may charge a member of Rajya Sabha for contempt and vice-versa. The Legislature of a State may commit a member of Parliament or a member of the other legislature for contempt. Then who has got to resolve the conflict between the different legislatures if not the body which is entrusted by the Constitution to decide disputes? If every institution created by the Constitution exercises its powers con-

ferred on it and discharges the duties allotted to it thereunder, there is no scope for any conflict. I hope and trust that in the good name of our country this kind of conflict will never arise in future and the citizens of our country continue to have the guarantee that their fundamental rights will not be infringed by any authority.

Property : Security is the hall mark of ownership of property. Stability is its concomitant; trusteeship, its moral attribute. Harmonious combination of these concepts leads to development of human personality and to happiness. Nationalisation of property for the good of society is being experimented upon in some countries but their results have not yet been demonstrated to be better than the individual ownership of property. I am not competent to express my views on this question, it is for the politicians and economists to do so. Be that as it may, our constitution, as it originally stood, did not accept the doctrine of nationalisation of property. On the contrary it provided for the individual ownership thereof.

The relevant Articles dealing with 'property' are Art. 19 (1) (f), 31; 31A and 31B. Art. 19 (1) (f) in clear terms says that all citizens shall have the right to acquire, hold and dispose of property. Cl. (5) thereof, enables a State to make any law imposing reasonable restrictions on the exercise of the said right in the interest of general public or for the protection of the interests of any scheduled tribe. Art. 19 uses the expression 'property' in a general sense. It has three attributes mentioned therein, namely, that which could be acquired, held or disposed of. It includes, subject to the said qualification, private property of all descriptions, both movable and immovable, corporal or incorporal, whether permanent or tempo-

rary, stable or precarious. There is a conflict of view on the question whether a contractual right could be regarded as property. Whether such a right is property or not may depend upon the question whether the benefits under the contract can be acquired, held or disposed of. A distinction may reasonably be made between an interest under a contract which is transferable and an interest which is only personal. The former is property and the latter is not. So too, a distinction can be sustained between an interest in an immovable property and an agreement of sale or purchase which does not create any interest in the said property. Though there are some decisions of the supreme court on this matter disclosing its line of thought, a clear pronouncement on the subject is yet awaited.

I have indicated earlier in the context of 'liberty' that there was a controversy at one time whether Art. 19 (1) applied only to abstract right, or to both abstract and concrete rights. That controversy is now set at rest by the Supreme court. The court held that Art. 19 (1) takes in both abstract and concrete rights. That is to say, the State cannot interfere with the actual exercise of the rights declared thereunder.

The next question is what is the scope of Art. 31. Art. 31 has six clauses. For the present purpose, it will be enough if I consider clauses (1), (2) and (2A) thereof. Cl. (2) has been amended and Cl. (2A) has been inserted in Art. 31 by the Constitution (4th amendment) Act, 1955. The unamended clause was subject to the judicial scrutiny. In **Subodh Gopal Bose's** (8) case, the court by a majority held that Art. 31 (1) and (2) provide for the doctrine of "eminent domain" and that under cl. (2) a person must be deemed to have been deprived of his property, if

(8) [1954] 2 S. C. R. 587

he is "substantially dispossessed" or if his right use and enjoy his property has been "seriously impaired" or the value of the property is "materially reduced" by the impugned law. That was followed in later decisions. The amendment made it clear that cl. (2) applies only to acquisition and requisition and cl. (2A) says that unless the law provides for the transfer of the ownership or right to possession of any property to the State or to a corporation owned or controlled by the State, it shall not be deemed to provide for the compulsory acquisition or requisitioning of property, notwithstanding that it deprives any person of his property. The effect of the amendment is that cl. (2) deals with acquisition or requisition as defined in cl. 2 (A) and cl. (1) covers cases of deprivation of property by the State otherwise than by acquisition or requisition. But the amendment does not give any indication in regard to the interpretation of cl. (1) of Art. 31. That shall be interpreted on its own terms. The said clause says in a negative form that no person shall be deprived of his property save by authority of law. In effect, it declares a fundamental right against the deprivation of property by Executive action, but it does not expressly or by necessary implication take the law of deprivation out of the limitations laid down in Art. 19 (1) (f) and (2) of the constitution. The law in Art. 31 (1) must be a valid law and to be a valid law, apart from the constitutional competence of the legislature that made it, it must stand the test of other fundamental rights and therefore of Art. 19 (1) (f) and (2) of the constitution If an analogy could be drawn from the American Constitutional law, Art. 31 (1) read with Art. 19 (1) (f) and (2) may be approximated to the doctrine of "police power" and Art. 31 (2) to that of "eminent domain", but it is better not to do so but base our conclusion on a reasonable

construction of the provisions of the Constitution itself. But it is said that the deprivation of property could never be a reasonable restriction in the interests of general public on a citizen's right to acquire, hold and dispose of property and therefore Art. 31 (1) would become nugatory. There are three answers to this criticism. (1) Art. 31 (1) gives protection against Executive action; (2) Art 31 (1) applies to all the people of India whereas Art. 19 (1) (f) applies only to the citizens of India; and (3) that in view of **Narendra Kumar's case** (9), deprivation of property under exceptional circumstances may amount to be a reasonable restriction within the meaning of Art. 19 (2) of the Constitution. The contrary view makes a mockery of the fundamental right to acquire, hold and dispose of property. While with one hand the constitution confers such a fundamental right on a citizen, with the other it enables the legislature to take it away by making a law infringing the same. Such a construction cannot be accepted unless the Constitution in clear terms says so, which it does not. The view I have expressed was accepted by the Supreme court in the second **Kochuni's case** (7) and later followed in other decisions.

This takes us to the construction of Art. 31 (2) and (2A) as they now exist after the constitution (4th amendment) Act, 1955. Cl. (2) and (2A) are now confined to compulsory acquisition and requisition of property as defined in cl. (2A). Four conditions will have to be complied with before the said Art. could be invoked: (1) there shall be a valid law; (2) the law shall provide for compensation or principles for ascertaining compensation; (3) there shall be a public purpose and (4) the law shall provide for the transfer of the ownership or right to compensation of any property acquired or requisitioned to the State or

(9) [1960] 2 S. C. R. 375.

a Corporation owned by the State. It is said that on the parity of reasoning adopted in constructing Cl. (1), the law of acquisition or requisition of property shall also stand the test of Art. 19. As such acquisition is made only by law, the said expression in cl. (2) and (2A), it is suggested, shall be given the same meaning as in Cl. (1).

This suggestion appears to be plausible but deserves to be rejected on two grounds. (1) Cls. (2) and (2A) in effect embody the doctrine of "eminent domain", which is a well established soverign power of a State to acquire land for public purpose on payment of compensation; and (2) such an acquisition or requisition for a public purpose will invariably be a reasonable restriction on a citizen's fundamental rights to hold property and therefore no express limitations of that power is called for. The supreme court in a recent decision held that the validity of the law of acquisition and requisition need not be tested on the touch-stone of Art. 19 (1) (f) of the constitution.

There is one clause in Cl. (2) which requires serious consideration, that is, 'no such law shall be called in question in any court on the ground that the compensation provided by that law is not adequate'. That was introduced by the Constitution (4th Amendment) Act, 1955. The Supreme court explained the scope and content of the said clause in **Vajravelu Mudaliar's** (10) case. It will be noticed that the law of acquisition and requisition is not wholly immune from scrutiny by the court but what is excluded from the court's jurisdiction is that the said law cannot be questioned on the ground that compensation provided by law is not adequate. It will

(10) A.I.R. 1965 S.C. 1017

further be noticed that the clause excluding the jurisdiction of the court also contains the word "compensation", which earlier received judicial interpretation to mean "just equivalent". The argument that the word "compensation" means "just equivalent" for the property acquired and therefore, the court can ascertain whether it is 'just equivalent' or not, makes the amendment of the constitution nugatory. The reasonable interpretation is that neither the principles prescribing 'just equivalent' nor the 'just equivalent' can be questioned by the court on the ground of inadequacy of the compensation fixed or arrived at by the working out of the said principles. The application of different principles may lead to different results. The adoption of one principle may give a higher value and the adoption of another principle may give a lesser value, but none the less they are principles according to which compensation is determined. The court cannot obviously state that the law should have adopted one of many relevant principles, for all relate only to the question of adequacy. On the other hand, if a law lays down principles which are not relevant to the property acquired or to the value of the property at or about the time it was acquired it may be said that they are not 'principles' contemplated by Art. 31 (2) of the constitution. If a law says that though a house is acquired it shall be valued as land or that though a house site is acquired it shall be valued as an agricultural land or that though it is acquired in 1950 its value in 1930 shall be given or though 100 acres are acquired, compensation shall be given only for 50 acres, the principles are unconnected to the value of the property acquired. In such cases, the validity of the principles can be scrutinised. The law may also prescribe a compensation which is illusory; it may provide for the acquisition of a property worth

lakhs of rupees for a paltry sum of Rs. 100/-. The question in that case does not relate to the adequacy of the compensation, for it is no compensation at all. Illustrations given are not exhaustive. There may be many others falling on either side of the line, but this much is clear. If the compensation is illusory or if the principles prescribed are irrelevant to the value of the property at or about the time of its acquisition, it can be said that the legislature committed a fraud on power and therefore the law is bad. It is a use of the protection of Art. 31 in a manner which the Article hardly intended. The result of this discussion may be stated thus: The property of a person can be acquired or requisitioned under Cl.2 (A) subject to two conditions: (i) it shall be for a public purpose; and (ii) the law shall provide either for fixing the amount or specifying the principles for determining the amount of compensation. Whether the acquisition is for public purpose or not is a justiciable issue but the said law cannot be questioned in any court of law on the ground that the compensation provided is not adequate, but the validity of the law can be questioned on the ground that the legislature has committed fraud on power as explained by me earlier.

The next Art. to be considered is Art. 31-A. Under Art. 31A, the fundamental rights under Arts. 19 and 31 are further weakened and to a large extent restricted. The Article was originally inserted by section 4 of the Constitution (first amendment) Act 1951, and later amended by the Constitution (fourth Amendment) Act, 1955. By reason of the said Article the State is now free to make a law providing for acquisition of an estate or any rights therein or extinguishment or modification of any such rights. Such a law would be good notwithstanding the fact

that it offends Arts. 14, 19 and 31. The object of the amendment was to bring about an agrarian reform by abolishing intermediaries. The definition of the word "estate" in the Articles as originally stood clearly brought out the intention that it was aimed at the well known intermediaries like a proprietor, sub-proprietor, under-proprietor, tenure-holder or other intermediaries. But in **Shri Ram Ram Narain Medhi's** case (11), the Supreme court has interpreted the definition of the word 'estate' liberally and held that every piece of land in a part of the Bombay State was an 'estate' as under the existing law relating to land tenures in that part of Bombay, the definition of 'estate' included "land". This solitary instance of a wide definition of 'estate' in that part of the country gave scope for the enlargement of the operation of Art. 31A beyond its original intendment. Though the land was held directly under the State, just like in the case of ryotwari pattadars in the Madras State and though the owner thereof, was in no sense an intermediary, the aggrieved party was deprived of his fundamental right under Arts. 14, 19 and 31. The result of that decision was that in that part of the Bombay State, wherein every category of land, according to the law of land tenures of that State was included in the definition of 'estate', the State can deprive a person of his land without paying any compensation. Presumbly influenced by this decision, the State of Kerala made an Act affecting the rights in any land held by ryotwari pattadars and relied upon Art. 31A to ward off an attack on the ground that it infringed the fundamental rights of the pattadars. The Supreme Court in **Karimbil's** (12)case rejected the plea of the State on the ground that the lands of ryotwari pattadars were not

(11) [1959] Supp 1. S.C.R. 489

(12) [1962] Supp. 1 S. C. R. 829.

included in the definition of 'estate' in the law relating to the land tenures in force in Kerala area.

It will be seen that both the decisions were based upon a liberal interpretation of the definition of 'estate' in the Constitution, with the result in regard to similar lands, that is, lands directly held under the Govt. without any intermediaries, the Supreme court came to two different conclusions based upon the difinition of an 'estate' in the law of tenures obtaining in those two States. This anomoly could have been avoided if Art. 31A was by construction confined to the well-known tenure known as 'estate' where the land was held under intermediaries Whatever might have been the original intention of Art. 31A the Constitution (17th Amendment) Act. 1964, enlarged the definition of 'estate' so as to take in land held under ryotwari system and land held for purposes of agriculture or for purposes ancillary thereto, including waste land, forest land, wooded waste or sites of buildings and other structures occupied by cultivators. This amendment deprived the people of this country of their fundamental rights under Arts. 14, 19 and 31 in respect of agricultural lands and lands used for ancillary purposes. The result is that in respect of such lands, which form a major part of the lands in villages, the State now can make a law depriving the owners of their land without its being for public purpose or without paying any compensation therefor.

The Supreme Court's construction has imposed a limitation on Art. 31A. In **Kochunni's case** (7), the Court held that though the impugned Act dealt with 'estate' it was not covered by Art. 31A of the Constitution as the impugned Act had nothing to do with

(7) [1960] 3 S. C. R. 887.

the agrarian reform, but simply conferred on the junior members of the tarwads joint rights in the Sthanam property which they had not got before. In **Ranjit Singh's case** (13), the Court applied Art. 31A to cases where the general scheme of legislation was definitely an agrarian reform and under its provision something ancillary thereto in the interests of rural economy had to be undertaken to give full effect to the said reform. The judgment accepted the view that Art 31A was enacted only to implement agrarian reform but has given a comprehensive meaning to the expression 'agrarian reform' so as to include a scheme for the development of rural economy. In a recent judgment in **Vajravelu Mudaliar's** (10) case, the Supreme Court did not accept the contention that acquiring of lands for slum clearance in the Madras City related to agrarian reform in the enlarged sense.

Under Art. 31 (2) and 31 (2A) of the Constitution, the State is prohibited from making a law for acquiring land except for a public purpose and unless it fixes the amount of compensation. But, Art. 31A lifts the ban to enable the State to implement pressing agrarian reforms. The said object of the Constitution is implicit in Art. 31A and is also discernible from a fair reading of that provision. If this limitation was not read into the Article, it would enable the State to acquire the land of a citizen without reference to any agrarian reform in derogation of his fundamental rights, and without payment of compensation and thus deprive Art. 31(2) practically of its content. If the intention of Parliament was to make Art. 31 (2) a dead letter, it should have expressed its intention in clearer terms.

Art. 31B and Schedule 9 are extraordinary provisions introduced by the Amendment into the Consti-

(13) [1965] 1 S. C. R. 82.

tution. It is a constitutional device to place certain specified statutes beyond attack on the ground that they infringe the rights in Part III of the Constitution. The Ninth schedule includes many Acts which do not relate to 'estates' as defined in Art. 31A(2).

The effect of the said provision on the fundamental rights of property may be briefly stated thus: Every citizen of India has a fundamental right to acquire, hold and dispose of his property whether moveable or immovable, corporal or incorporal. That right is subject to the law of social control. The State can acquire or requisition a land for a public purpose after paying compensation the adequacy wherof is not justiciable. It can also deprive him of his property, if the law authorising it to do so amounts to be a reasonable restriction in public interest on his right to hold the property. But, in the case of 'estate' as defined in Art. 31A, which includes also that of a ryotwari pattadar and any land held or let for agricultural or any purpose ancillary thereto, the State by law can deprive any person of that estate ; and the only limitation on the said law is that it shall be in regard to agrarian reform in the comprehensive sense indicated above. It is therefore, clear that though originally under our constitution every citizen had fundamental right to acquire, hold and dispose of property, subject to the law of social control, later amendments weakned the right to a considerable extent though Art. 19 (1) (f) still continues to protect the fundamental right to property other than ' estate ' as explained earlier.

Freedom of Speech and Expression

Democracy does not thrive on illiteracy; illiteracy breeds heroworship or despotism; paradoxically both lead to the same result, namely,

destruction of democracy and the rule of law. Public education sustains both. Public education in its turn depends on freedom of speech and expression. Freedom of speech is therefore of absolute importance in a democratic Constitution which envisages changes in the position of legislatures and Governments. Justice **Holmes** in his inimitable way said "the best test of truth is the power, of the thought to get itself accepted in the competition in the market". Justice **Jackson** put the same idea thus: "Compulsory education of opinion achieves only the unanimity of the grave-yard—authority is to be controlled by public opinion, not the public opinion by authority". Its importance is all pervasive. Without it there will be no real progress in any field of human activity. Conflict of ideas leads to progress. Autocratic suppression of speech leads to stagnation. Our Supreme court in **Romesh Thappar's** (14) case developed the same idea thus: "Freedom of speech and the Press lay at the foundation of all democratic organisations, for, without free political dicussion no public education, so essential for the proper functioning of the processes of popular Government is possible. A freedom of such amplitude might involve risks of abuse. But the framers of the Constitution may well have reflected with Madison who was the leading spirit in the preparation of the First Amendment of the Federal Constitution that "it is better to leave a few of its noxious branches to their luxuriant growth, than by pruning them away, to injure the vigour of those yielding the proper fruits". But absolute freedom of speech may lead to anarchy but in recognition of its predominant position in the scale of freedoms, Cl. (2) of Art. 19 unlike other clauses of that Article, confines the scope of permissible restrictions on the said freedom within

(14) [1950] S C.R. 594

comparitively narrowed field. The legislature's control is confined only to the following specified grounds:

i Sovereignty and integrity of India ;
ii Security of the State ;
iii Friendly relations with foreign States
iv Public order ;
v Decency or morality ;
vi Contempt of court ;
vii Defamation ; and
viii Incitement to an offence.

The words "freedom of speech and expressions' have a wide and comprehensive meaning. They mean, a right to express one's convictions and thoughts freely through any media, a right to express and propagate not only one's view but also the views of others, a right to publish and circulate the said ideas and a right to discuss and disseminate knowledge. This right extends to every field of human activity such as religious, political, economic, social and international. The said right necessarily comprehends the freedom of press, which is undoubtedly one of the essential bulwarks of human liberty.

The Supreme Court in **Romesh Tahappar's** (14) case defined the "freedom" thus : "There can be no doubt that freedom of speech and expression include freedom of propagation of ideas, and that freedom is ensured by freedom of circulation". Indeed without circulation publication is of little value. In the era of scientific mass media there is no freedom more potent than the freedom of speech. In a country like India where the majority of the population is illiterate, its importance cannot be exaggerated. It

(14) [1950] S.C.R. 594.

educates public in current problems; it puts before them pros and cons of the proposed governmental actions, it unveils falacies of State policies; it supports its right policies; it enables every individual to lead free life. Free movement without free speech is a mirage

The scope and ambit of this right can best be illustrated from some of the decisions of the Supreme Court. As I have noticed earlier, the expression has been defined with clarity in Romesh Thappar's case **Sakal paper's** (15) case highlights the importance of the freedom of speech in a democratic set up. Newspaper (Prize and Page) Act (XLV of 1956) was passed with the object of enabling some newspapers to secure large circulation by provisions which without disguise were aimed at restricting the circulation of what were termed the larger paper with better financial strength. The effect of the Act and the order passed thereunder was to regulate the number of pages according to the price charged, to prescribe the number of supplements to be published and to prohibit the publication and sale of newspapers in contravention of any order made under Sec. 3 of that Act. The Act also provided for regulation by an Order under Section 3, the size and area of advertising matter in relation to other matters contained in newspapers. Penalties were prescribed for contravening the provisions of the Act or orders. The total number of pages which Sakal gave to its reading public on six days in a week was 34 and as a result of the impugned order, it would either have to raise its price from 7 nP. to 8 nP. per day or to reduce the total number of pages to 24. Further it could not issue supplements without the permission

(15) [1962] 3 S.C.R. 842

of the Govt. The Supreme Court struck down as bad both section 3 (1) of the Act and also the order made thereunder for the following reasons :

1. The right to freedom of speech and expression carries with it the right to publish and circulate one's ideas, opinions, and views with complete freedom and by resorting to any available means of publication, subject again to such restriction as could be legitimately imposed under cl. (2) of Art. 19.

2. The fixation of minimum price for the number of pages which a newspaper is entitled to publish is obviously not for ensuring a reasonable price to the buyers of newspaper, but for expressly cutting down the volume of circulation of some newspaper by making the price so unattractively high for a class of readers as to deter it from purchasing such newspapers.

3. The impugned Act was thus directly intended to affect the circulation and therefore the freedom of speech.

4. If a law directly affecting the freedom of speech is challenged, it is no answer that the restrictions enacted by it are justifiable under Cl. (3) to (6).

5. Carrying on unfair practice or acquiring of monopolies may be a matter for condemnation, but that would be no ground for placing restrictions on the right of circulation.

This decision is a leading one on the subject of freedom of speech. It recognises that no restrictions can be placed directly on any of the incidents of the freedom of speech except those sanctioned under Cl. (2) Art. 19. There are two earlier decisions of the Supreme Court, which may be noticed at this stage.

In **Express Newspapers'** (16) case, the question was whether the Wage Board specifying the wages (Conditions of Service) of the working Journalists and thus imposing certain financial burden on the Press was an interference with the right of freedom of press. The Court held, that it was not and the reason for the decision was stated thus:" Unless there was direct or the inevitable consequences of the measures enacted in the impugned Act, it would not be possible to strike down the legislation has having that effect of operation". This principle of direct effect was also accepted and followed in the later decision of the Supreme Court, in **Hamdard Dawakhana's case** (17). There the constitutionality of the Drugs and Magic Remedies (Objectionable advertisements) Act, was questioned on the ground that it infringed Art. 19(1). The Court held that the main purpose and the true intention, object and scope of the Act was to prevent self medication or self treatment, that advertisment was a part of the business and that it had no direct impact on freedom of speech. The three decisions accepted the principle that a provision would be bad, though it was introduced as a restriction on a freedom other than a freedom of speech, if it had a direct restrictive impact on the

(16) [1959] S. C. R. 12.
(17) [1960] 2. S.C.R. 671

said freedom of speech. Any direct encroachment therefore on any of the incidents of freedom of speech otherwise than by way of permissible restrictions will be constitutionally void.

At this stage, the impact of the freedom of press on the privileges of legislatures may conveniently be noticed.

The conflict between the freedom of press and the Legislature arose when **"Searchlight"**, an English daily newspaper of Patna, published the proceedings of the Legislature dated May 30, 1957 in its issue dated May 31, 1957. In the said issue, an accurate and faithful account of the proceedings of the assembly of May 30, 1957, was published under the caption "bitterest attack on Chief Minister", including a portion alleged to have been expunged by the speaker. A privilege motion was moved in the House and it was carried out, presumbly no one opposed it. On the same day, the House referred the matter to the Committee of Privileges which met under the Presidentship of the Chief Minister. It found that a prima facie case of breach of the privileges was made out against the Editor. Thereafter notice was issued to him informing him that the Committee had found that a prima facie case of breach of privileges was made out against him, and asked him to show cause if any, before a particular date why appropriate action should not be taken against him. The charge against the Editor was that he committed the breach of privilege of the Legislature by publishing a perverted and unfaithfull report of the proceedings of the assembly. The Editor filed a petition (18) under Art. 32 of the

(18) Pt.M.S.M. Sharma vs. Shri Sri Krishna Sinha
[1959] Supp. (1) S. C. R. 806.

Constitution for enforcing his fundamental right of speech. The supreme Court held that the House of Commons had, at the commencement of the, Indian Constitution, the power or privilege of prohibiting publication of even a true and faithful report of the debates or proceedings that took place within the House, that *a fortiori* the House had at the relevant time the power or privilege of prohibiting the publication of an inaccurate or garbled version of such debates and proceedings that the said power was conferred on the State Legislature in India under Art. 194 (3) of the Constitution and that therefore to that extent of the privilege, the freedom of the press conferred under Art. 19 (1) was restricted. This is a decision with far reaching effects on the freedom of press.

I have dealt at some length at an earlier stage the conflict between the fundamental right of life and liberty of a citizen and the the power of the legislature to deprive his liberty on the ground that he committed contempt of the legislature The Supreme Court held in the context of that conflict that Art. 194 (3) did not over-ride the fundamental right of liberty and the High Court had ample power to enforce that right in a case where it was infringed by an unspeaking warrant issued by a Legislature. In that case, the correctness of the decision of the Supreme Court in **Sharma's** (18) case was not gone into, for the reason that the correctness of the said decision was not relevant for decision in that case. So long as the decision of the Supreme Court in Sharma's case stands, the Indian Press will find itself in a difficult position to report the proceedings of the Legislatures.

Privilege is a part of the law of custom of the Parliament. Its scope could be found in the journals of the House compiled in the office from the manuscripts, minutes and notes of proceedings made by the clerks at the table during the sittings of the House. It could also be gathered from decided cases, precedents and continued experience and authorised text book. It has now become the unenviable duty of an Editor of newspaper to acquaint himself with the said mass of scattered material to keep himself abreast of law of the privilege and even so he will be taking a hidden risk every time he publishes the proceedings of a Legislature Precision and certainty in law is a desideratum in this field. The sooner the law of privileges is codified, the better it will be for all concerned. To keep this branch of law in a nebulous state is to impose a restraint on the freedom of press, for one can only publish the proceedings of a Legislature at the risk of his being called before its bar. I go further and state that it will not be in consonance with the dignity of the Parliament and legislatures of an independant country like ours to rely upon the privileges of the parliament of a foreign country, particularly those obtaining in that country fifteen years ago. A progressive country like India shall have a forward look and it shall therefore make its own law of privileges suitable to the circumstances obtaining in our country. If necessary "Contempt of Legislatures" may be added to the objects of cl. (2) of Art. 19. The apprehension that the validity of the law so made will have to stand judicial scrutiny cannot be a ground for not making a law.

Under our constitution, no person or citizen or an institution is above law, and the same is the

case in regard to an institution which makes the laws. This does not involve any complex or prestige. Certainty and definiteness in the law of privileges of legislatures will enhance the Legislature's dignity, as it enables the people to respect them; fluidity and uncertainty of law breeds disrespect for law and induces people to break it and plead ignorance. I hope and trust that our legislatures will make appropriate laws defining their privileges so that people in India will know what they are and will gladly respect them.

As I have said earlier, freedom of speech and expression is not an absolute one. Obviously, it cannot be, for in a society of freemen, freedom of speech of one necessarily comes into conflict with that of another and with that of the society. So Cl. (2) of Art. 19 permits the State to make laws infringing the said freedom in respect of specified matters, which I have given earlier. But a wide interpretation of Art. 19 (2) may completely destroy the freedom itself. Two expressions in that clause, namely (i) "reasonable restrictions", and (ii) "in the interests of" demarcate the ambit of the protection. A very wide interpretation was sought to be placed on the second expression so as to bring within its scope any remote connection with the objects enumerated therein. But this interpretation was rejected by the Supreme Court in **Dr. Ram Manohar Lohia's** case. It was held that there shall be an intimate connection between the impugned Act and one or the other of the matters mentioned in Cl. (2) in respect whereof the legislature can make laws. This conclusion was drawn from the expression 'reasonable

(19) [1960] S. C. R 821

restrictions' and it was held that in order to be reasonable, restrictions must have reasonable relation to the object which the legislature seeks to achieve and must not go in excess of that object. A reasonable restriction should therefore be one which has a proximate connection or nexus with one or the other of the objects mentioned in Cl. (2) but not one which is farfetched or too remote in the chain of its relation with the said object or objects.

Our constitutional right to 'freedom of speech and expression' as defined and interpreted by the Supreme Court has a real content. It is given a comprehensive meaning so as to include freedom of speech, expression, circulation and dissemination of ideas, through different media available in the modern world. Law of permissible restrictions on the said freedom is strictly confined to that which has a proximate and resonable relation to the objects enumerated in clause 2. That is as it should be, for the said freedom is the bulwark of democracy.

Dangers lurking at the corner

The first is the doctrine of "waiver" of a fundamental right. Could that right be waived? This question was considered by the Supreme Court in **Basheshar Nath's case** (20) where the court held by a majority that the fundamental right flowing from Art. 14 could not be waived by a citizen or any other person who is benefited by reason of the said provi-

(20) [1959] Supp. 1 S.C.R. 528

sion. As regards the rest of the fundamental rights there is some conflict of opinion and no final decision has yet been reached thereon. This conflict arose because under the American Law some of the Rights could be waived and others could not be. In America the doctrine of 'waiver' can be invoked when the constitutional or statutory guarantee of a right is not conceived in public interests, and when it does not affect the jurisdiction of the authority infringing the said right; but if the privilege conferred or the right created by the statute is solely for the benefit of the individual, it could be waived. But even in those cases, the Courts invariably administered a caution that having regard to the nature of the right some precautionary and stringent conditions should be applied before the doctrine is invoked. While it is true that the judgements of the Supreme court of the United States are of great assistance to us in elucidating and solving the difficult problems that arise from time to time, it is equally necessary to keep in mind the fact that the decisions of that Court are given in the context of a different social, economic and political set up and therefore great care should be bestowed in applying those decisions to the corresponding situations that arise in India. Fundamental rights are enshrined in Part III of our Constitution. The Constitution does not grade them on the basis of their comparative importance, but all are placed on the same footing. Art.13, in clear and unambiguous terms, not only declares that all laws in force before the commencement of the Constitution and made thereafter taking away or abridging the said rights would be void to the extent of the contravention, but also prohibits the state from making any law taking away or abridging the said rights. Part III is therefore enacted for the benefit of the

people of India, in an attempt to preserve to them their fundamental rights against infringement by the institutions created by the Constitution, for without that safeguard, the objects adumberated in the Constitution could not be achieved. With the same purpose the said chapter imposes a limitation on the power of the State to make laws in violation of those rights. The entire part, in my view, has been introduced in public interests and it is not proper that the fundamental rights created under the various Articles should be dissected to ascertain whether any or which part of them is conceived for individual benefit. Part 111 reflects the attempt of the constitution-makers to reconcile individual freedom with State control. While in America, this process of reconciliation was allowed to be evolved by the course of judicial decisions, in India, the fundamental rights and their limitations are crystallized and embodied in the constitution itself. The Constitution does not therefore permit importation of any further limitations on the fundamental rights other than those contained in Part 111 by any extraneous doctrine. Further, under the present circumstances obtaining in our country, acceptance of the doctrine of 'waiver will affect the rights of the people. A large majority of the people are economically poor, educationally backward and politically not yet conscious of their rights, individually or even collectively they cannot be pitted against the State organisations or institutions; nor can they meet them on equal terms; they must be protected against themselves. All the fundamental rights created by constitution are transcendental in nature, conceived and enacted in national and public interests, and therefore they cannot be waived. In this view, there is no scope for distinguishing one funda-

mental right from the other in the matter of application of the doctrine of 'waiver'.

While the doctrine of 'waiver' tends to undermine the fundamental rights by self abrogation, the right to amend the Constitution contains the seeds of its destruction by legislative action. The question is whether Parliament can by amending the constitution take away or abridge the rights conferred by Part III of the constitution. There are two conflicting views on this question—one that it cannot and the other it can. The Supreme Court in **Sankari Prasad Singh Deo's case** (21) held that it could. As some of the jurists questioned the correctness of this decision, I shall briefly give the reasons for the conflicting views and leave it there.

The Supreme Court's decision is based upon the following reasons: Under Art. 12 (2), the State shall not make any law which takes away or abridges the rights conferred by Part III, and any law made in contravention of the said clause shall, to the extent of the contravention, be void. If the amendment of the constitution under Art. 368 was not law, Art. 13 would not be attracted. The Supreme Court in the said decision made a distinction between a constituent power and the legislative power of Parliament and that the amendment of the Constitution was made not in exercise of the legislative power but in exercise of the constituent power and that therefore the amendment of the constitution was not a law within the meaning of Art. 13 (2) there of. The result of the decision was

(21) [1952] S.C.R. 89

that Parliament by a majority of total membership of the House and by a majority of not less than 2/3rd of the members in that House present, abridge or take away the fundamental right as enshrined in Part III of the Constitution. On that view fundamental rights could be abrogated if a party in power could secure the requisite majority in parliament without even consulting the States.

The contrary view suggests that an amendment of the constitution is 'law' within the inclusive definition of 'law' under Art. 13 (3) (a) of the Constitution and that as the entire scheme of the constitution postulates the inviolability of Part III thereof, Article 368 shall not be so construed as to destroy the structure of our Constitution. The formulation of fundamental rights as a check on Parliament is a necessary curb on its power and if it can remove it in the manner suggested, the object of the Constitution itself will be defeated. This view is voiced by two of the learned Judges of the Supreme Court in **Sajjan Singh's case (22)**

I will not express my preference to one or the other of the two views. I leave that for the jurists to do. But the decision of the Supreme court is now the law. On that basis we must evolve some procedure by amendment of the Constitution, or otherwise to make Part III of the Constitution less vulnerable than it is now. I would make two suggestions in this regard: (1) Any party which seeks to amend the constitution shall at the general elections place before the electorate as a part of its electoral manifesto, the precise amendment or amendments which it seeks to make if it comes into

(22) A.I.R. 1965 S.C. 845

power; and (2) by making consent of all the States or at any rate majority of the States, as a condition for the validity of the amendment.

It must be realised that a reverential attachment to the constitution in the public mind is the only effective guarantee against the infringment of fundamental rights preserved for the people thereunder.

The next possible attack against the fundamental rights may come from Articles 358 and 359 of the Constitution. They are special provisions intended to meet a great emergency. While a proclamation of Emergency is in force, under Art. 358, the operation of Art. 19 is suspended during the said Emergency. Under Art. 359 during the operation of the Emergency the enforcement of such other rights conferred by part 111 as may be mentioned in the Order made by the President is suspended for the period during which the proclamation is in force or for such shorter period as may be specified in the Order. The principle underlying these provisions is that, during the period of Emergency, the fundamental rights of the people are restricted in the manner prescribed in the said two Articles in order to preserve their rights. A comparative study of these two Articles indicates that Art. 358 suspends the right, whereas Art. 359 suspends the remedy. Suspension of the remedy cannot confer a power on Parliment to make illegal laws. It is one thing to suggest that in view of the amplitude of the phraseology used in Art. 359 " the right to move any court for the enforcement " of fundamental rights infringed by a void law, even deliberately made by Parliament, is suspended, but it is a different thing to suggest that

the Constitution permitted Parliament under the shelter of executive fiat to make void laws. I cannot visualise the Parliament making intentionally such void laws. The President only suspends the remedy otherwise open to an aggrieved party to impugne laws made by Parliament during the operation of the Emergency. The phraseology in the Article is wide enough to cover a remedy not only under Art. 359 but also under Art. 226. Three expressions stand out in bold relief: (i) " right to move, " (ii) " any court". and (iii) " for the enforcement of such of the rights conferred in Part III". " Any court" implies more than one court. But it cannot obviously be any court in India, for it must be a court where a person has a right to move for the enforcement of the fundamental rights. It can therefore be only the Supreme Court, High Court or the court or courts constituted by Parliament under Art. 32 (3).

The next question is, what do the words "right to move " mean ? The right to move is qualified by the expression " for the enforcement of such of the rights conferred by Part III". Therefore, the right to move must be a right to move the Supreme court or the High court in the manner prescribed by Art. 32 (2) or Art. 226 (1) of the Constitution for the enforcement of the fundamental rights. The words in the second limb of the Article that " all proceedings pending in any court for the enforcement of the rights so mentioned shall remain suspended" only relate to the proceedings instituted in exercise of the said right. This construction gives full meaning to every expression used in the Article. If so construed, it can only mean that the temporary bar that can be imposed by an order of the President is not confined only to the guaranteed right of a person to move the Supreme

Court for the enforcement of his fundamental rights, but also extends to the right of a person to move the High Court or the court or courts constituted by parliament for the enforcement of such of the fundamental rights as mentioned in the Order.

The Supreme Court in **Makhan Singh's case** (23) went further and held that a Presidential Order suspending the rights not to move any court for the enforcement of the fundamental rights would cover not only the right to approach the Supreme Court or the High Court under Art. 32 or 226, as the case may be, but also the proceedings in any court if the relief claimed couldnot be granted to a citizen without determining the question of alleged infringement of his fundamental rights. In that view, the court held that the bar could apply also to proceedings under Sec 491 Cr.P.C.

As I have said earlier, these Articles were intended as a transitory measure to meet a grave Emergency. Whether there was such an emergancy or not at a particular point of time was certainly for the executive to decide. The only safeguard against abuse of Art. 359 is a strong opposition and equally strong public opinion. Our country has attained sufficient maturity in the field of democracy that it can reasonably be expected that the Constitution will not be abused to perpetuate arbitrary power beyond the period actually necessary to meet a grave situation.

At this stage some of the decisions of the Supreme Court which restricted the scope of the enforcement of fundamental rights may appropriately be noticed

(23) Crl. Appeal No. 80 of 1963 decided on 2-9-1963

In **Khajoor Singh's case** (24) the Supreme Court held that the High court could not issue a writ or an order under Art. 226, unless the person, the authority or the Govt. against whom a writ was sought was physically resident or located within the territorial jurisdiction of the High court. It also held that it was the residence or the permanent location of the respondent and not the operation of the impugned order or accrual of the cause of action which was material for determining jurisdiction of the High Court. This decision was mainly based upon the procedural restrictions obtaining in England. England is comparately a small country and it has only one Govt. functioning throughout the State. The problems that arose in that case could not have arisen in England for the territorial jurisdiction of the Queen's Bench Division extends throughout the Britain. In England the manner of exercise of jurisdiction is also regulated by the conventional technical procedures grown over the years though later on to some extent simplified by Statute. The framers of our Constitution designedly used the words "in the nature of" indicating that they were not incorporating in the Constitution the entire procedure followed in England, for the procedure in India will have to be evolved having regard to the federal structure of our constitution and the vast expanse of the country. How can the procedural law of England in the matter of writs be bodily lifted and implanted in India ? The result of the decision was that whenever the Union Govt. infringed the right of a person in any remote part of the country, he must come all the way to New Delhi to enforce his right by filing a writ petition in the Circuit Bench of the Punjab High Court. If a common man residing in Kanyakumari, the southernmost part of India was

(24) [1961] 2 S. G. R. 828

illegally detained in prison or deprived of his property otherwise than by law, by an order of the Union Govt. it would be a travesty of fundamental rights to expect him to come to New Delhi to seek the protection of the High Court of Punjab.

This defect was noticed by Parliament and Art 226 was suitably amended by the Constitution (15th Amendment) Act, 1963, whereunder, the following clause was inserted under Art. 226(1A):

> "The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat, of such Govt. authority or the residence of such person is not within those territories".

By reason of this amendment it is now open to any citizen in any part of the country to approch the High Court wherein the cause of action accrues for enforcing his fundamental rights against Union Govt. or authority or person though the said Governmental authority's residence is not within the territorial jurisdiction of the said High Court.

The next decision that is said to have restricted the amplitude of the jurisdiction of the Supreme Court is that in **Daryao's case** (25). The court applied the doctrine of res judicata and held that the petitioner who filed a writ under Art. 32 to the Supreme Court had no fundamental

(25) [1962] 1 S.C.R. 574

right as the writ on merits was denied by the High Court in the petition under Art. 266 of the Constitution and that as no appeal was filed thereunder it had become final. This decision was criticised on the ground that as the right to approach the Supreme court by original petition under Art. 32 was guaranteed by the Constitution it was not apparent how the Supreme Court could refuse to hear the application under Art. 32 on the ground that the petitioner had not appealed to it from the judgement of the High Court under Art. 226. A perusal of the judgement discloses that the Court made it clear that the principle of res judicata could be invoked only when there was an express decision by the High Court under Art. 226 on merits. The doctrine of res judicata applied by the Court does not detract from the amplitude of the rights. but only negatives the right of the petitioner on the ground that a competent court had given a final decision against him in respect of the right claimed. As the petitioner had no right, for there was a binding decision against him denying his right, he had no longer the fundamental right to approach the Supreme Court under Art. 32 of the Constitution. That apart, in practice, that decision does not cause prejudice to an aggrieved party, for he can file an appeal against the order of the High Court to the Supreme Court and where the order of the High Court is not on merits, he can also directly file an application under Art. 32 before the Supreme court.

But, there appears to be some justification for the comment that the amplitude of the Supreme Court's jurisdiction under Art. 32 is restricted by the decision of the said Court in **Ujjam Bai's case**(27).

(26) [1963] 1 S.C.R. 778.

The facts of that case may be stated by way of an illustration. A citizen of India was doing business in bidis. He had the fundamental right to carry on that business. The State Legislature enacted the sales tax act imposing a tax on the turnover and on the sales of various goods, but gave certain exemptions. It expressly declared that no tax should be levied on the exempted goods. The said law was a reasonable restriction on the petitioner's fundamental right to carry on the business in bidis On a true construction of the relevant provisions of the Act, no tax was leviable on bidis. But on a wrong construction of the relevant provisions of the Act, the sales tax officer imposed a tax on the turnover of the petitioner relating to the said bidis. He filed successive statutory appeals before the hierarchy of Tribunals but without success. The result was that he was asked to pay tax in respect of the business of bidis exempted under the Act. The imposition of the said illegal tax on the turnover of bidis was certainly an infringement of his fundamental right. He came to Supreme court and prayed that his fundamental right might be enforced against the Sales Tax Officer. The Officer said: "It may be true that my order is wrong; it may also be that the Supreme Court may hold that my construction of the section as accepted by the highest tribunal is perverse; still as under the Act I have got the power to decide rightly or wrongly, my order, though illegal, operates as a reasonable restriction on the petitioner's fundamental right to carry on the business". That argument was accepted by the Supreme Court by a majority and the petition was dismissed. The result of the decision was that the fundamental right could be defeated by a wrong order of an Executive Officer. While the

Constitution says in effect that neither the Parliament nor the Executive could infringe the fundamental rights of the citizen and if they do, the person affected has a guranteed right to approach the Supreme Court and the court has a duty to enforce it, the said decision holds that Executive Authority by a wrong construction of the Act could infringe the fundamental right of a citizen, and in that event the said court could not enforce his fundamental right under Art. 32 of the Constitution. The reason of the decision was that the Sales Tax Authority had jurisdiction to construe the provisions of the Act and the Notification issued thereunder and therefore the Supreme Court could not question its correctness under Art. 32 unless there was an error of law apparent on the face of the record. This decision places the Executive Authorities functioning under a Statute in the same position as Courts. In effect it applies the doctrine of res judicata to a decision of an Executive Authority. This decision was subjected to much criticism but so long as this decision holds the field, that is the law of this country and to that extent the jurisdiction of Article 32 is wittled down.

Another decision of the Supreme Court in the State Trading Corporation case ruled that the rights conferred by Art. 19 are confined to natural persons who are citizens and that a Corporation, not being a citizen cannot claim any of the rights included in Art. 19, even though its shareholders are citizens. Till that decision was given, the Supreme Court assumed that a corporation was a citizen within the meaning of that Article. Two learned Judges who formed the Bench recorded powerfull dissents But the majority view represents the law of the country. India is moving fast in the industrial

and co-operative fields. In future, it may reasonably be expected that the country will be covered by a network of companies and co-operatives functioning in both the fields. The result of the decision is that while a Citizen has a fundamental right to carry on business, if he forms a Corporation or floats a company, he along with others loses his right. An association of persons will have fundamental rights, but if they form a Corporation they loose them. This position will discourage persons from forming Corporations and co-operatives as, if formed it enables the State to infringe their rights. A constitutional amendment enlarging the definition of a citizen so as to take in a Corporation is in my view a reform in the right direction.

JUDICIAL REVIEW

The declaration of fundamental rights is only a pious wish, unless a suitable and effectivite machinery is evolved to enforce them. The Constitution, in the felicitous language of Patanjali Sastri, Chief Justice, assigned to the Supreme Court the role of "sentinel of the Qui Vive". The same metaphor equally applies to the High Courts within their territoral jurisdictions. The jurisdiction of the Supreme Court and the High Courts in that regard is defined in Arts. 32 and 226 respectively of the Constitution. Art. 32 confers a guaranteed right on a person to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution. Cl. (2) thereof confers the power on the Supreme Court to issue directions or orders or writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, whichever may be

appropriate, for the enforcement of the right conferred by the said Part. This provision deals with procedure. Art. 226 confers a similar power on the High Court to issue similar directions, orders or writs for enforcing any of the rights conferred by Part III. The only difference between Art. 32 and Art. 226, in the context of fundamental rights, rests on the fact that the former is a guaranteed right, while the latter is not expressly made so. The distinction between substantive and procedural rights is important. Mixing of the two concepts leads to confusion. When a person, whose fundamental right is infringed, has the right to move the Supreme Court, his application cannot be dismissed if he establishes his right and infringement of that right by the State or any other authority. If so much is conceded, as cl. (2) of Art. 32 confers a power upon Supreme Court to issue an appropriate direction, order or writ, it has the duty to enforce the right by issuing appropriate direction, order or writ. Cl. (2) is couched in the widest term so as to enable the Supreme Court to mould its relief to meet the requirements of different situations. This clause is designedly made wide to avoid technical difficulties that confronted English Judges in enforing the rights of citizens. In England substantive and procedural rights are so mixed up, that established rights floundered on technical grounds. In India if the substantive right is established, procedural obstacles are not permitted to deny it. Indeed, the Supreme Court has ample discretion to select appropriate procedural steps to implement its decisions. It can issue directions or orders ; it can issue writs in the nature of prerogative writs so familar to English courts; it can also issue any other writ appropriate for the enforcement of any of the rights. The scope of the power of the Court under Art. 32 of the Constitution has been expounded by the Supreme Court on many occasions. The decisions not only laid

down the amplitude of the power but also the mode of exercising that power to meet different situations that might present themselves to the Court. In **Romesh Thappar's** (14) case, the Court declared that under the Constitution, the Supreme Court is constituted as the protector and guarantor of fundamental rights, and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking protection against the infringement of such rights, although such applications are made to the court in the first instance without resort to a High Court having concurrent jurisdiction in the mater. The Court again in **Rashid Ahmad's case**, (27) pointed out that the powers given to the court under Art. 32 of the Contitution are much wider and are not confined to issuing prerogative writs only. The Court further elucidated the scope of the jurisdiction in the following terms "In view of the express provisions in our constitution we need not look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges." The Court again elaborated the scope of its power under the said Art. in **Kochunni's case** (28) and stated thus :

> " Further, even if the existence of other adequate legal remedy may be taken into consideration by the High court in deciding whether it should issue any of its prerogative writs on an application under Art. 226 of the Constitution, as to which we may say nothing now, this court cannot on a similar ground decline to entertain a petition under

(14) [1950] S.G.R. 594
(27) [1959] Supp. (2) S.G.R. 316, 325.
(28) [1950] S.G.R. 566

> Art. 32, for the right to move this court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution is itself a guaranteed right"

It further held that it would fail in its duty as the custodian and protector of fundamental rights if it was to decline to entertain a petition under Art, 32 simply because it involved the determination of disputed questions of fact. Finally the court held that in appropriate cases it had the power in its discretion to frame writs or orders suitable to the exigencies created by enactments and that where the occasion so required, to make even a declaratory order with consequential reliefs. In short, this decision recognised the comprehensive jurisdiction of the Supreme Court under Art. 32 of the Constitution and gave it full effect without putting any artificial limitations thereon. Even in regard to the scope of an enquiry and the nature of the relief that could be given thereunder, the Supreme Court adopted a latitudinarian attitude. Relief was given not only when there was an actual infringement of a right but even when there was a serious threat to it; relief was also given even when there was an alternative remedy; declaratory reliefs, with or without consequential reliefs, were also issued; if necessary the Court before giving a relief called for a finding from an appropriate Tribunal or Authority. In short the guaranteed fundamental right to move the Supreme Court for the enforcement of other fundamental rights was held to carry with it all the procedural steps necessary to ascertain the existence of the right alleged to have been infringed and the factum of its infringement and to mould the relief to enforce the same

within the frame work of the said Article. **Kochuni case** (28) was a land-mark in the development of the law of fundamental rights as it has clearly defined the scope of judicial review in the context of the enforcement of said rights.

Another milestone in the path of fundamental rights was the decision of the Supreme Court holding that no security for costs need be given in a petition to enforce the fundamental rights. The object of Art. 32 is to provide for cheap and expeditious remedy to enforce a person's fundamental rights. Insistence of payment of heavy security obviously worked against a poor party and to the advantage of a richer one. This decision, by holding that no security is to be given on such a petition, has given equal opportunity to the poor and the rich alike to approach the court to enforce their fundamental rights.

The Supreme Court in **Himmatalal (29) and Ram Prasad (30)** cases held that the High Court exercising its jurisdiction under Art. 226 has also the duty to enforce fundamental right if it was infringed, and the fact that a party had an alternative remedy was not a ground for refusing to give the relief.

Our Constitution in effect promises to usher in a welfare State for our country and in such a State the legislature has necessarily to create innumerable administrative Tribunals, and entrust them with multifarious functions. They would have powers to interfere with every aspect of human activity. If their existence is necessary for the progress of our

(28) [1959] Supp. (2) S.C.R. 316.
(29) [1954] S.C.R. 1122.
(30) [1953] S.C.R. 1129.

country, the abuse of power by them may bring about an authoritarian or totalitarian State. The existence of the said power of the Supreme court and the High Courts to enforce the fundamental rights and the exercise of the same effectively when the occasion arises is a necessary safeguard against the abuse of the power by the administrative Tribunals The Supreme Court and the High Courts have no more important function than to preserve the inviolable fundamental rights of the people, for the fathers of constitution in their fullest confidence have entrusted them to the care of the said courts and gave them all the institutional conditions necessary to exercise their jurisdiction in that regard without fear or favour. The task is delicate and sometimes a difficult one, but the courts have to discharge it to the best of their ability and not to abdicate it on the fallacious ground of difficulty or inconvenience.

Arbitrariness of the Tribunals and the Authorities can be checked in three ways; (1) by rigid supervision (English and American system), (ii) by an administrative Tribunal (French and other continental systems) and (3) or by complete merger of laws in the administration (totalitarian system): The third method is contrary to our democratic way of life and the rule of law. The first has taken its root in our system of law for over a century. The Madras, the Bombay and the Calcutta High Courts have all along been exercising the said jurisdiction. As indicated earlier Arts. 226 and 32 confer extensive jurisdiction on the High Courts and the Supreme Court to enforce the fundamental rights. If the Courts instead of limiting their scope by construction exercise the jurisdiction in appropriate cases, I have no doubt that the arbitrariness of the authorities can be minimised. If the authorities entrusted

with the discretionary power knew that their illegal orders, infringing the rights of the people would be quashed by the appropriate High Court, they would rarely pass orders in excess of their powers. If they knew that not only the form but the substance of the orders would be scrutinised in open court, they would try to keep within their bounds. The fear of ventilation of grievance in public has always been an effective deterrent The apprehension that the High Courts would be swamped with writs has no basis. On the other hand, the heavy pendency of writs in the High Courts is due to a vicious circle. People who are aggrieved by the illegal or arbitrary orders or acts of the officers and who have faith in Courts rush to the High Court to get their grievances redressed. But the High Court dismisses most of them on one technical ground or other, and even if it allows some of them more often than not it only quashes the orders but leaves the matters to be decided over again by the same officers with the result the said officers without redressing the grievances clothe their orders in more acceptable forms. Further emboldened by this process they adopt in future more technical than equitable postures and conform more to the form than to the substance with the result the aggrieved parties, not having any other recourse, rush to the High Court with more writs. This vicious circle must be broken. In this context it is only the liberal construction of Arts. 226 and 32 given by the Supreme court earlier that must be pursued to the logical conclusion so that the High Court or the Supreme court, as the case may be, can reach injustice wherever it is found. The technicalities of the English law, as stated earlier, need not be permitted to obstruct the course of justice. Instead of on procedural technicalities, the Courts may concen-

trate their attention on problems having significance viz., whether, when and how much to review. The procedure if properly evolved would enable the courts to control the arbitrary actions of the authorities. Various suggestions are thrown out to import foreign systems to control administrative agencies. While the said suggestions rightly accept the necessity for such a control, the remedy of a global search for a panacea does not appeal to me.

Personally speaking, I do not know whether the French or any other foreign system was perfected in the countries of their origin and whether the people of those countries are satisfied with its working. Even if such systems were perfect, they have been evolved over the years in a different social and political set up and it is problematical whether it shall yield the same results in our country I believe that it is easier to perfect the existing system than to import a foreign one, which at its best may take a long time to take root in India. It is anybody's guess whether it would take root at all.

Before I end, I would like to impress on the audience that the independence of a country without the fundamental rights will be a mirage Independence of a country means independence to the people of the country. It is not a mere change of Ruler. Such an independence can be acquired and preserved not merely by declaration of a Bill of Rights in the constitution, but by a consistent and sustained effort of the people to maintain them and protect them against attack from any quarter.

Fundamental rights can in the ultimate analysis be preserved only by strong public opinion and by a conscious effort to cultivate reverence to our constitution, which declares them. We shall nct allow the humanitarian path laid down by the Constitution leading to welfare State to be diverted on the pretext of a shortcut through an authoritarian path. Such a pathway which avoids fundamental rights cannot possibly reach the welfare state of our constitutional conception, but can only lead to a totsalitarian State.

I have no doubt that the present and futurgenerations will treasure their fundamental rights and preserve them at any cost.

ERRATA

(1) *Page No.*	(2) *Para*	(3) *Line*	(4) *As it is printed*	(5) *To be read as*
2	2	8	set back	setback
4	1	13	comprised	comprising
		14	patriots, administrators	patriots and administrators
5	2	8	However,	However
6	1	7	constitution	constitution. It
	1	20	work, to livelihood	work and to livelihood
7	1	10	activity,	activity ;
8	1	5	abridge	abridged
10	1	23	carved of	carved out of
13	1	12	as-there	as there
		20	" caste "	" caste ".
		25	they belong	she belongs
		33	illustrate	illustrate,
14	1	6	anomoly	anomaly
15	2	10	down upon	down
22	last line		who	which
25	1	14	express itself clearly	express clearly
		22	on	or
37	3	9	right	rights
40	1	18	by	on
42	1	19	have	has
		23	can	cannot
43	2	7	made constitution	made the constitution
49	2	9	rights	right
52	1	17-18	just like	just as

(1) *Page No.*	(2) *Para*	(3) *Line*	(4) *As it is printed*	(5) *To be read as*
53	2	3	withthe result	with the result that
53	2	26	being for public purpose	being acquired for a public purpose
54	2	1	Art	Arts
56	1	19	and the	and of the
		24	possible.	possible."
57	1	1	narrowes	narrower
58	1	5	free life	a free life
59	1	2	both	(delete)
62	1	3	of the, Indian	of the Indian
		7	a fortiori	*afortiori*
63	1	7	precedent	precedents
64	2	18	Dr. Ram Manohar Lohia's case	Dr. Ram Manohar Lohia's case (19)
		Foot note	(19) [1960] S.C.R. 821	(19) [1960] (2) S.C.R. 821
65		Heading	Dangers lurking at the corner	Dangers lurking round the corner
68	3	102	Parliameut and	Parliament and held
70	3	2	395	359
80	1	17	terms	terms;
85	2	8	country	country
86	2	1	future –	future