

**HOW FUNDAMENTAL ARE 'FUNDAMENTAL RIGHTS' ?***By***—PURVA AGARWAL,**

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Beyond and superior to laws made by man are certain immutable and higher principles. Any manmade law in derogation of the said principles lacks validity and acceptance. Fundamental rights are the recognition and tribute to those principles, not a gift by State to its citizens. The Ten Commandments are a set of ten basic rules of behavior, mostly negative in construction, that appear in the ancient Hebrew Scriptures and are directed at the Hebrews as God's chosen people. It is believed that these rules were delivered to them by God *via* Moses, who climbed to the top of Mount Sinai during the Hebrews' journey through the desert from Egypt to Canaan. They are God's requirements for how the Hebrews are supposed to behave.

"Part-III of the Constitution does not confer fundamental rights. It confirms their existence and gives them protection. Its purpose is to withdraw certain subjects from the area of political controversy to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by Courts."—*Golak Nath v. State of Punjab*, AIR 1967 SC 1643 (1656 Paragraph 16). Fundamental rights are natural rights in the sense that, they are inherent in men, found in the most primitive societies and stand above the law of the land. Part-III of the Constitution is most explicitly set forth than in any other constitutional document of the world. The reason for this scale is not far to seek, the religious, cultural, social and political diversity of the huge population and the sheer size of the country made it unavoidable.

The responsibility of drafting the Fundamental Rights was on an Advisory committee to the Constituent Assembly, comprising of members like *B.R. Ambedkar*, *Diwan Bahadur*, *Acharya J. B. Kripalani*, *Rajkumari Amrit Kaur*, *K.M. Panikkar*, *Dr. S.P. Mookerjee* and *V.B. Patel*.

***Definition of State***

Article 12 defines State to include the Government and Parliament and all local or other authorities within or under the Territory of India. The definition is only for the purpose of application of the provisions of Part-III. The significance of the definition is, whenever a complaint of violation of fundamental rights included in Part-III of our Constitution is made, the person aggrieved can have no remedy unless the respondent can be brought within the definition of 'State' given in Article 12. As far as opening word of Article 14 is concerned, it is the responsibility of State to ensure equity before law.

"In spite of unambiguous definition of the word 'controversy' has still arisen as to the meaning of the residuary words 'other authorities'. The opening words 'Government and Parliament of India and the Government and the Legislature of each of the States' give colour to the rest of the Article. These opening words indicate that in order to be included within the definition, the authority must exercise either Governmental (or executive) powers or legislative powers. So far as the Union and a State Government is concerned, it includes its executive and legislative organs and Departments. The

expression 'local authorities' also partakes of the features which characterize the Government and Legislature of the Union and a State, though in a limited way, inasmuch as a local authority, such as a Municipality, exercises Governmental powers within a local area and also legislative powers, though of a subordinate nature, within the limits imposed by the statute which creates the Municipality."—*Kartick Chandra Nandi v. West Bengal Small Industries*, Equivalent citations: AIR 1967 Cal. 231.

### ***Supremacy of Fundamental Rights***

By virtue of provisions in Article 13, any law existing immediately before the commencement of Constitution and any law enacted subsequent to commencement of Constitution that is inconsistent with Part-III is to the extent of inconsistency is declared void.

In *I.C. Golaknath and others v. State of Punjab and another*, 1967 AIR 1643, power of Parliament to abridge or take away fundamental rights through carrying out amendment under Article 368 was curtailed. Clause (4) has been inserted by Constitution (24th Amendment) Act, 1971 to nullify the effect of this judgment. Though the validity of this amendment is upheld by Full Bench judgment in *Keshavananda v. State of Kerala*, it was with a rider that, "basic feature" of the Constitution cannot be changed.

### ***Right to Equality***

Article 14 declares that, the State shall not deny to any person equality before the law or the equal protection of laws. Right to equality is declared to be basic feature of Constitution beyond the pale of amendment.

"Cursed is anyone who withholds justice from the foreigner, the fatherless or the widow." Deuteronomy 27:19

To stress on importance on each and every word of the constitution, the word

'citizen' was changed to 'person' with respect to equality of law. Equality before law is guaranteed to all, citizens and aliens.

### ***Prohibition of Discrimination***

Clause (1) of Article 15 in general terms prohibits discrimination by State against any person on grounds only of religion, race, caste, sex, place of birth or any of them. As enumeration of grounds of discrimination is explicit, no further ground of discrimination can be added by interpretation.

Clause (2) specifically states, no citizen shall on grounds only of religion, race, caste, sex, place of birth or any of them, be subject to any disability, liability, restriction or condition with regard to access to shops, public restaurants, hotels and places of public entertainment; or the use of wells, tanks, bathing ghats, roads and place of public resort maintained wholly or partly out to State funds or dedicated to the use of general public. By specific incorporation of noun 'citizen', non-citizens are excluded from the protection of right against discrimination. By clause (3) power is conferred on State to make any special provision for women and children. Clause (4) inserted by the Constitution (First Amendment) Act, 1951 empowers the State to enact any special provision for the advancement of any socially and educationally backward classes of citizens or for the Schedule Castes and Schedule Tribes. Clause (5) inserted by Constitution (Ninety Third Amendment) Act, 2005, authorizes the State in spite of sub-clause (g) of Clause (1) or Article 19 to make any special provision for the advancement of any socially and educationally backward classes of citizens or for the Schedule Castes or Schedule Tribes for their admissions to educational institutions including private educational institutions added or unaided except minority educational institutions.

### ***Equality of Opportunity in Public Employment***

Clauses (1) and (2) of Article 16 assure equality of opportunity for all citizens in employment or appointment to any office under the State. Clause (3) restricts the application of clause (2) providing exceptions in matter of employment under a State or Union Territory or under any authority of them. By clause (4) power of State to make any provision for reservation of appointments or posts in favour of any backward class of citizens is excepted. The Supreme Court in *Indra Sawhney v. Union of India* held that, no reservation in promotion could be made under Clause (4). To invalidate this decision clause (4-A) is inserted by Constitution (Seventy Seventh Amendment) Act, 1995. Now the rule of reservation also applies to promotions. Constitution (Eighty First Amendment) Act, 2000 by inserting clause (4-B) provided that, the unfilled reserved vacancies in a year to be carried forward to subsequent year and that these vacancies are to be treated as distinct and separate from the current vacancies during any year. Clause (5) provides that, in making laws for the administration of the property of religious denomination, the State shall be competent to reserve such appointments to members of the particular community.

### ***Abolition of Untouchability***

By Article 17 the practice of untouchability is abolished. By Article 18, title except of military or academic distinction is abolished.

Another heated discussion centered on untouchability Constituent Assembly. Mentioning in the Fundamental Right that untouchability is abolished wouldn't make it so. Mr. *Rajan Thakur* said that untouchability was a direct consequence of the repulsive caste system and cannot be dealt with unless the caste system is done away with. It was like treating one symptom of a disease and

for complete cure the disease must be dealt as a whole.

### ***Abolition of Titles***

Article 18 abolished titles except of military and academic distinction.

### ***Right to Freedom***

Article 19 embodies the "basic freedoms". It provides that all citizens shall have the right—

- (a) to freedom of speech and expression;
- (b) to assemble peaceably and without arms;
- (c) to form associations or unions;
- (d) to move freely throughout the Territory of India;
- (e) to reside and settle in any part of the Territory of India;
- (f) to acquire, hold and dispose of property is omitted by (44th Amendment) Act, 1978;
- (g) to practice any profession, or to carry on any occupation, trade or business.

Right to freedom of speech and expression is not absolute. There are 8 restrictions on the freedom of speech and expression in the interest of—

- i. Security of the State
- ii. Friendly relations with foreign States.
- iii. Public Order.
- iv. Decency or morality
- v. Contempt of Court
- vi. Defamation
- vii. Incitement to offense
- viii. Sovereignty and integrity of India.

These 8 restrictions were substituted by Constitution (First Amendment) Act, 1951 to nullify the effect of decision in *Romesh Thapar v. State of Madras* (1950).

The intent of the Advisory committee was to provide as much freedom to individuals as it was possible in the light of circumstance of the country. In doing so, they limited a few rights to a certain extent. For instance right of freedom of expression, given its wide ambit, was one of the most controversial rights. To ensure its applicability in positive direction, Dr. *Ambedkar* explicitly stated that any publication or utterance of slanderous, seditious, obscene or defamatory matter shall be against the law and the Right shall issue no defense.

Though Freedom of movement was granted as a fundamental right, a clause that allowed reasonable restrictions of movement in the interest of general public was inserted.

### ***Protection in Respect of Conviction of Offenses***

Certain constitutional restrictions are imposed on the power to State in respect of enforcement of criminal laws by provisions of Article 20.

Clause (1) provides, a person can be convicted only for violation of law in force and be subjected only upto the penalty provided for in that offence. In clause (2), the principle of 'double jeopardy' is embodied. Clause (3) provides that no person accused of any offence shall be compelled to be a witness against himself.

### ***Right to Life***

Article 21 of the Constitution of India gives a valuable Fundamental Right: "No person shall be deprived of his life or personal liberty except according to procedure established by law"

The apex Court has applied this Article interpreting it in various ways in *Menaka Gandhi v. Union of India*, AIR 1978 SC 597; *Gopalanachari v. State of Kerala*, AIR 1981 SC 674; *Francis v. Union of Territory of Delhi*, 1981 Cr. LJ 306; *Olga Tellis*, AIR 1986 SC 108; *M.C. Mehta v. Union of India*, AIR 1986 SC 1986.

### ***Protection against Arrest and Detention in Certain Cases***

Article 22(1) and (2) confers four following fundamental rights upon a person who has been arrested:

- (i) Right to be informed, as soon as may be, of the grounds for such arrest.
- (ii) Right to consult and to be defended by a legal practitioner of his choice.
- (iii) Right to be produced before the nearest Magistrate within twenty-four hours of his arrest excluding the time necessary for the journey from the place of arrest to the Court of Magistrate.
- (iv) Right not to be detained in custody beyond the period of twenty-four hours without the authority of the Magistrate.

### ***Abolition of Trafficking in Human Beings***

Under the provisions of Article 23, traffic in human beings and begar and other similar forms of forced are prohibited.

### ***Prohibition of Employment of Children in Factories, etc.***

Article 24 ensures freedom of children below fourteen years from employment to work in any factory or mine or engaged in any other hazardous employment.

Articles 25 to 28 of the Constitution of India guarantees the right of Freedom of religion.

***Freedom of Conscience etc.***

Article 25 guarantees, subject to public order, morality and health and to other provisions of Part-III, to persons freedom from conscience and the right freely to profess, practice and propagate religion.

***Freedom to Manage Religious Affairs***

26. Freedom to manage religious affairs subject to public order, morality and health, every religious denomination or any section thereof shall have the right

- (a) to establish and maintain institutions for religious and charitable purposes;
- (b) to manage its own affairs in matters of religion;
- (c) to own and acquire movable and immovable property; and
- (d) to administer such property in accordance with law.

Articles 25 and 26 are not absolute. No person can do such religious things, which affect the public order, morality, and health. As has been pointed by Supreme Court in *Acharaya Maharajshri v. The State of Gujarat and others*, AIR 1974 SC 2098, "A particular fundamental right cannot exist in isolation in a watertight compartment. One fundamental right of a person may have to co-exist in harmony with the exercise of another fundamental right by others and also with reasonable and valid exercise of power by the State in the light of the Directive Principles in the interests of social welfare as a whole."

***Freedom from Payment of Taxes for Promotion of Religion***

Article 27 mandates that no citizen would be compelled by the State to pay any taxes for promotion or maintenance of particular religion or religious institutions.

***Freedom from Attendance at Religious Instructions***

Article 28: This Article mandates that no religious instruction would be imparted in the State Funded Educational Institutions.

To ensure that minority is properly looked upon, the rights against discrimination were adopted. The Minorities' Rights were absolute in nature, these included religion, education and special grants.

***Protection of Interest of Minorities***

Article 29 protects the interests of the minorities by providing that any citizen/section of citizens having a distinct language, script or culture have the right to conserve the same. Article 29 mandates that no discrimination would be done on the ground of religion, race, caste, language or any of them.

***Right of Minorities in Respect of Educational Institutions***

Article 30 provides that all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice. Article 30 provides an absolute right to the minorities that they can establish their own linguistic and religious institutions and at the same time can also claim for grant-in-aid without any discrimination. Article 30 is rightly called a Charter of Education Rights.

***Right to Constitutional Remedies***

A declaration of fundamental rights is worthless in the absence of effective judicial remedy for their enforcement.

(1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed

(2) The Supreme Court shall have power to issue directions or orders or writs,

including writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any other Court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2)

(4) The right guaranteed by this Article shall not be suspended except as otherwise provided for by this Constitution

Article 32 was called the “soul of the Constitution and very heart of it” by Dr. *Ambedkar*. Supreme Court has included it in basic structure doctrine. Further, it is made clear that right to move to Supreme Court cannot be suspended except as provided by the Constitution. This implies that this right suspended during a national emergency under Article 359.

Article 32 of the Indian Constitution provides for constitutional remedies against the violation of fundamental rights. The fundamental rights are of highest importance to the individuals. Hence it is called “the very soul of the constitution” by Dr. *Ambedkar*. Clause 2 provides that, “*The Supreme Court shall have the power to issue directions or order or writs including the writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and criterion, whichever may be appropriate for the enforcement of any of the rights conferred by*” fundamental rights. The citizens are given the right to move—the Supreme Court in case of violation of fundamental rights. The Supreme Court thus is the protector and guarantor fundamental rights. The right to constitutional remedy is itself a fundamental right. The High Courts are also repository of fundamental rights. Under Article 226 of the Constitution, High Courts also can issue

writs for the enforcement of fundamental rights.

The Supreme Court can issue writs only in case of infringement of a fundamental right in Part-III of the Constitution. The High Courts on the other can issue writs against infringement of fundamental rights, as well as against contravention of ordinary law of redress grievances arising therefrom.

The five kinds of writs that may be issued by Supreme Court or High Court are *habeas corpus*, *mandamus*, *prohibition*, *criterion*, and *quo warranto*.

*Habeas Corpus*—*Habeas Corpus* literally means—that human person is sacred. Hence no man may be detained illegally. Whenever a man is detained, he must be produced before a Court.

*Mandamus*—meaning ‘command’. *Mandamus* is issued against dereliction of duty.

*Prohibition*—this writ is issued by the Supreme Court or the High Courts, to prohibit inferior Courts under them to overstep their jurisdiction.

*Criterion*—it enables a superior Court of compels inferior Courts to submit records of proceedings to the higher Court.

*Quo warranto*—This writ is issued to determine the legality of a person’s claim to public office. The purpose of this writ is to prevent usurpation of a public office by an undesirable or, unqualified person.

*Limitations*—Like fundamental rights themselves, the right to constitutional remedies under Article 32 are not without limits. The Constitution visualizes there situations when fundamental rights may be denied but constitutional remedies will not be available *i.e.*, Article 32 will not be applicable.

1. Article 33 empower the Parliament to modify application of fundamental

- rights to armed forces and the Police to ensure proper discharge of their duties.
2. Under Article 34, during the operation of Martial law in any area, the Parliament may indemnify any person in the service of the Central or a State Government for acts for the maintenance or restoration of law and order.
  3. During emergency proclaimed under Article 352 of the Constitution, the fundamental rights guaranteed to the citizens, will remain suspended. Article 358 authorize the Parliament to restrict fundamental rights guaranteed by Article 19 during the pendency of an emergency under Article 352.
- Article 359 empower the President to suspend the right to move the Courts for the restoration of fundamental rights. In other words, Article 359 empowers the President to suspend Article 32 of the Constitution. Such an order however is to be submitted to the Parliament, and the Parliament has the right to disapprove the Presidential order.

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### NEED OF THE HOUR TO ENACT STRINGENT ANTI-TERROR LAW

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The primary justifications for the existence of the State and the Civil Government as envisaged under the Social Contract theory were the protection of the property and person of the individual. This view of the State coincides with the police functions traditionally associated with it. Conceptualized in this manner, the State necessarily retains monopoly over the use of legitimate force within its territory and over its residents. This exclusive right which the State obtains through a process of legitimation is exercised by it unparalleled. However, when such a context of a modern sovereign nation State with its centralized Government is imported into the milieu of the contemporary democratic welfare State, it gives rise to problems of great irreconcilability due to the radically different roles that the institution of the State adopts in two contexts. The existing State of the anti-terror legislation in India is a reflection of this problematic

situation. This article proposes to analyze the major anti-terrorism enactments in India in the context of the bitter criticism and controversy surrounding them, thereby emphasizing the need for a reform within the framework of these legislations.

Terrorism may be conceptualized as inclusive of those acts of unjustified violence and war, imbued with a strong sense of a historical social or political wrong, often aimed against the State or the establishment. Violence is treated as a weapon generating fear and forcing an immediate, large scale political transformation. Historically terrorism was often employed as an extremist strategy or policy to overthrow the colonial Government during the British rule. However, in contemporary times, terrorism has altered greatly in terms of its manifestation and characteristics. The violence perpetrated in pursuance of terrorist activities