

Fundamental Rights: The Indian Nature

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ABSTRACT

Fundamental right is the key factor of Indian constitution. Part III of the constitution deals with fundamental rights of the inhabitants and citizens of India. The part consists of 21 articles—article 12 to 32. A democracy aims at the maximum development of the individuals personality, and the personality of the individual is inescapably bound with the literacy—largely saying the fundamental rights. The common device that is adopted by most of them is to incorporate the list of fundamental rights in their constitutions and guarantees them from violation by the executive and legislature authorities.

KEYWORDS: constitution, fundamental rights, citizens, liberty, India

INTRODUCTION

Generally rights of citizens are guaranteed limited and at times withdrawn by the comprehensive body of laws in a state. It is relevant to look in reasons that lay behind the incorporations a full and separate chapter on fundamental rights by the members of the Indian constitution.[1]

The reason to incorporate fundamental rights is that:

1. Fact that the constitution was being framed not by the hereditary, traditional and rulers of the people who had risen amongst the common people of India.
2. The second reason was the urge and the long cherished desire, to eradicate the social evils which had led to social stratification and imbalances and rebelled against the cardinal principles of equality among citizens of the nation.
3. Evils like untouchability 2 inequality between the sexes had been a great hindrance in the way of security and dignity of individual do propounded by the preamble.
4. The third reason was the basic demands of democracy upon individual citizens. In a

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democracy, citizens are expected to participate in the process of expression and formation of public opinion or the general will which were impossible without freedom of thought and expression and the right to vote without fear and favour. The right was, therefore conferred upon the citizens of India.

5. The fourth reason, India is a vast land, for the first time in the recorded history of the country, it was emerging as a nation state. It was therefore necessary to grant uniform basic rights to all Indian citizens, and confer upon everyone of them the right to move freely throughout the country and to settle wherever one liked within the territory of India, and also the right to present one's language and culture.[2]
6. The last but not the least, the founding father's of the constitution were keen to safeguard the institution of democracy in India a goal that could only be seemed by making the people aware and proud of their rights and appointing the highest court of judiciary as their guardian and protector."In a politically underdeveloped country like India, which also lacked the required communication necessary to the formation and

expression of public opinion the written rights were nothing but a necessary –“ (granville Austin: the india is constitution: cornerstone of a nation p76). Here Austin is referring to India as it was in 1947.

Fundamental rights classification:

The first thing to understand about fundamental rights is that some of these rights are available only to the citizens of India and others to citizens and aliens alike that these rights are not absolute and that constitutional protection of these rights is available only against the state. The term state has been defined by article 12 of the constitution which we shall dwell upon later in this:

The fundamental rights can be classified upon the following categories:

1. Right to equality (article 14-18)
2. Right to freedom (article 19-22)
3. Right against exploitation (article 23-24)
4. Right to freedom of religion (article 25-28)
5. Cultural and educational rights (article 29-30)
6. Right to constitutional remedies (article 32-35)

The Indian demand for fundamental rights:[3]

The idea of incorporating a list of fundamental rights in a new constitution of India had excited the imagination of almost all political thinkers and constitutionalists in India from the time the idea of the transfer of power from Britain to Indian hands had taken shape. The American bill of rights had a tremendous impact on Indian thinking of this subject. The Indian national congress, the liberals, moderates of all shades and the religious minorities like the muslims , the Christians, and the Sikhs all considered it not only desirable but essential, both for the protection of rights of the minorities and for infusing confidence in the majority community. The british government however never agreed with this idea and therefore none of the constitution acts passed by the british parliament contained any fundamental rights.

General provisions

Article 12 defined the term states as it applies to the provision of this chapter. According to this state includes the government (executive) and parliament of India and government of legislature of each of the states and all local and other authorities within the territory of India or under the control of government of India. The definition is made so comprehensive that it includes every governmental authority, legislative or executive, central, state or local and the rights are guaranteed against violation by everyone of those authorities.[4]

Article 13 has two important aspects, on one hand it invalidates all laws which were in force at the

commencement of the constitution in so far as they were inconsistent with the fundamental rights and to the extent of their inconsistency with the fundamental rights and to the extent of their inconsistency with those rights. On the other it imposes a prohibition upon the state not to make any law which takes away abridges the rights conferred by this provision, such law would be invalid to the extent of its inconsistency with any of the rights guaranteed. The importance of this provision is that it makes express provision for judicial review of legislative enactments as to their conformity with their constitution.

In addition to articles 12 and 13, articles 33, 34 and 35 on fundamental rights also contain certain general provisions. Article 33 gives the power to parliament to suitably modify the fundamental rights so as to apply them to the armed forces with a view to ensuring the proper discharge of their duties and their maintenance of discipline among them. Article 34 deals with the restriction of fundamental rights while martial law is in force in any area.

If the right to life and personnel liberty cannot be violated except according to procedure established by law the application of martial law might become impossible in the country and it would be impossible for the states to restore order quickly in an area which has become rebellious riotous or in any other way violently disorderly. Therefore it was thought necessary to make special provision to permit any act proclaimed by the commander in chief of the area where martial law prevails as an offence to be reckoned as an offence under established law. Further parliament is empowered to indemnify any person, in respect of any act done by him in connection, with the restoration and maintenance of order in any area where martial law was in force. Thus article 34 makes the operation of martial law and the consequent restoration of peace possible.[5]

Article 35 of Indian constitution

Legislation to give effect to the provisions of this Part Notwithstanding anything in this Constitution,

- A. Parliament shall have, and the Legislature of a State shall not have, power to make laws
 1. with respect to any of the matters which under clause (3) of Article 16, clause (3) of Article 32, Article 33 and Article 34 may be provided for by law made by Parliament; and
 2. for prescribing punishment for those acts which are declared to be offences under this Part; and Parliament shall, as soon as may be after the commencement of this Constitution, make laws for prescribing punishment for the acts referred to in sub clause (ii);

B. any law in force immediately before the commencement of this Constitution in the territory of India with respect to any of the matters referred to in sub clause (i) of clause (a) or providing for punishment for any act referred to in sub clause (ii) of that clause shall, subject to the terms there of and to any adaptations and modifications that may be made therein under Article 372, continue in force until altered or repealed or amended by Parliament Explanation In this article, the expression law in force has the same meaning as in **Article 372 PART IV DIRECTIVE PRINCIPLES OF STATE POLICY**[6]

Suspension of fundamental rights during emergency

A state of emergency in India refers to a period of governance that can be proclaimed by the **President of India** during certain crisis situations. Under the advice of the cabinet of ministers, the President can overrule many provisions of the Constitution, which guarantees **Fundamental Rights** to the citizens of India.

- The emergency provisions are contained in **Part XVIII** of the Constitution of India, from **Article 352 to 360**. These provisions enable the Central government to meet any abnormal situation effectively.
- The rationality behind the incorporation is to safeguard the sovereignty, unity, integrity and security of the country, the democratic political system and the Constitution.[7]
- **The Constitution stipulates three types of emergencies-**
 1. National Emergency
 2. Constitutional Emergency
 3. Financial Emergency

NATIONAL EMERGENCY

National emergency can be declared on the basis of war, external aggression or armed rebellion. The Constitution employs the expression 'proclamation of emergency' to denote an emergency of this type.

Grounds of declaration:

Under Article 352, the president can declare a national emergency when the security of India or a part of it is threatened by war or external aggression or armed rebellion.

The President can declare a national emergency even before the actual occurrence of war or armed rebellion or external aggression

When a national emergency is declared on the grounds of 'war' or 'external aggression', it is known

as 'External Emergency'. On the other hand, when it is declared on the grounds of 'armed rebellion', it is known as 'Internal Emergency'. [8]

This term 'armed rebellion' is inserted from the 44th amendment. Before this term it was known as internal disturbance.

Parliamentary approval and duration

The proclamation of emergency must be approved by both the houses of parliament within one month from the date of its issue.

However, if the proclamation of emergency is issued at a time when the Lok Sabha has been dissolved or the dissolution takes place during the period of one month without approving the proclamation, then the proclamation survives until 30 days from the first sitting of Lok Sabha after its reconstitution, provided the Rajya Sabha has in the meantime approved it.

If approved by both the houses, the Emergency continues for 6 months and can be extended to an indefinite period with an approval of the Parliament for every six months.

Every resolution approving the proclamation of emergency or its continuance must be passed by either House of Parliament by a special majority.[9]

Revocation of proclamation

A proclamation of Emergency may be revoked by the President at any time by a subsequent proclamation. Such proclamation does not require parliamentary approval.

The emergency must be revoked if the Lok Sabha passes a resolution by a simple majority disapproving its continuation.

Effects of national emergency

A proclamation of Emergency has drastic and wide-ranging effects on the political system. These consequences can be grouped into 3 categories:

Effects on the centre-state relations: While a proclamation of Emergency is in force, the normal fabric of the Centre-State relations undergoes a basic change. this can be studied under three heads:

Executive: Centre becomes entitled to give executive directions to a state on 'any' matter

Legislative: The parliament becomes empowered to make laws on any subject mentioned in the state list, the president can issue ordinances on State subjects also, if the parliament is not in session. The laws made on state subjects by the parliament become inoperative six months after the emergency has ceased to be in operation.

Financial: the president can modify the constitutional distribution of revenues between the centre and the states.

Effect on the life of the Lok Sabha and State Assembly:

While a proclamation of National Emergency is in operation, the life of the Lok Sabha may be extended beyond the normal term for one year at a time. However, this extension cannot continue beyond a period of six months after the emergency has ceased to operate.

Similarly, the Parliament may extend the normal tenure of a state Legislative Assembly by one year each time during a national emergency, subject to a maximum period of six months after the emergency has ceased to operate.

Effect on fundamental rights: Articles 358 and 359 describes the effect of a National Emergency on the Fundamental Rights. These two provisions are explained below:

Suspension of Fundamental rights under Article 19:

According to Article 358, when a proclamation of National Emergency is made, the six fundamental rights under article 19 are automatically suspended. Article 19 is automatically revived after the expiry of the emergency. The 44th Amendment Act laid out that Article 19 can only be suspended when the National Emergency is laid on the grounds of war or external aggression and not in the case of armed rebellion.

Suspension of other Fundamental Rights: Under Article 359, the President is authorised to suspend, by order, the right to move any court for the enforcement of Fundamental Rights during a National Emergency. Thus, **remedial measures are suspended and not the Fundamental Rights.** The suspension of enforcement relates to only those Fundamental Rights that are specified in the Presidential Order. The suspension could be for the period during the operation of emergency or for a shorter period. The Order should be laid before each House of Parliament for approval. The 44 Amendment Act mandates that the President cannot suspend the right to move the court for the enforcement of Fundamental Rights guaranteed by Article 20 and 21.

Declarations made so far: This type of emergency has been proclaimed three times so far- in 1962, 1971 and 1975

The first proclamation of National Emergency was issued in October 1962 on account of Chinese aggression in the NEFA and was in force till January 1968.

The second proclamation of National Emergency was made in December 1971 in the wake of the attack by Pakistan.

Even when the emergency was in operation, the third proclamation of National Emergency was made in June 1975. Both the second and the third proclamations were revoked in March 1977

President's Rule

- Article 355 imposes a duty on the centre to ensure that the government of every state is carried on in accordance with the provisions of the constitution.
- It is this duty in the performance of which the centre takes over the government of a state under Article 356 in case of failure of constitutional machinery in a state.
- This is popularly known as 'President's Rule'. [10]
- **Grounds of imposition:** the president's ruler can be proclaimed under Article 356 on two grounds:
 1. Article 356 empowers the President to issue a proclamation if he is satisfied that a situation has arisen in which the government of a state cannot be carried on in accordance with the provisions of the constitution.
 2. Article 365 says that whenever a state fails to comply with or to give effect to any direction from the centre, it will be lawful for the President to hold that a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of the constitution.
- **Parliamentary approval and duration:** A proclamation imposing president's rule must be approved by both the houses of parliament within two months from the date of its issue.
 1. However, if the proclamation of President's rule is issued at a time when the Lok Sabha has been dissolved or the dissolution of the Lok Sabha takes place during the period of two months without approving the proclamation, then the proclamation survives until 30 days from the first sitting of the Lok Sabha after its reconstitution, provided that the Rajya Sabha approves it in the meantime [9]
- **Consequences of the President's rule:** The President acquires the following extraordinary powers when the President's rule is imposed in a state:

1. He can take up the functions of the state government and powers vested in the governor or any other executive authority in the state.
 2. He can declare that the powers of the state legislature are to be exercised by the parliament.
 3. He can take all other necessary steps including the suspension of the constitutional provisions relating to any body or authority in the state.
- **Scope of judicial review:** The 38th Amendment act of 1975 made the satisfaction of the President in invoking Article 356 final and conclusive which would not be challenged in any court on any ground.
1. But, this provision was subsequently deleted by the 44th Amendment Act of 1978 implying that the satisfaction of the President is not beyond judicial review.

Financial Emergency

- **Grounds of declaration: Article 360** empowers the president to proclaim a Financial Emergency if he is satisfied that a situation has arisen due to which the financial stability or credit of India or any part of its territory is threatened.
- **Parliamentary approval and duration:** A proclamation declaring financial emergency must be approved by both the Houses of Parliament within two months from the date of its issue.
- However, if the proclamation of Financial Emergency is issued at a time when the Lok Sabha has been dissolved or the dissolution of the Lok Sabha takes place during the period of two months without approving the proclamation, then the proclamation survives until 30 days from the first sitting of the Lok Sabha after its reconstitution, provided the Rajya Sabha has in the meantime approved it.[10]
 - Once approved by both the houses of Parliament, the Financial Emergency continues indefinitely till it is revoked.

Effects of Financial Emergency

- Extension of the executive authority of the Union over the financial matters of the States.
- Reduction of salaries and allowances of all or any class of persons serving in the State.
- Reservation of all money bills or other financial bills for the consideration of the President after they are passed by the legislature of the State.
- Direction from the President for the reduction of salaries and allowances of all or any class of

persons serving the Union; and the judges of the Supreme Court and the High Courts.

Criticism of the Emergency Provision

- Some members of the Constituent Assembly criticised the incorporation of emergency provisions in the constitution on the following grounds:
- The federal character of the constitution will be destroyed and the union will become all-powerful
 - The powers of the State- both the Union and the Units- will entirely be concentrated in the hands of the union executive.
 - The president will become a dictator
 - The financial autonomy of the state will be nullified
 - Fundamental rights will become meaningless and, as a result, the democratic foundation of the constitution will be destroyed.'
- While defending the emergency provisions in the Constituent Assembly, Dr Ambedkar accepted the possibility of their misuse. He observed, 'I do not altogether deny that there is a possibility of the Articles being abused or employed for political purposes.' [8]

Fundamental rights are the cornerstone of the way of life

Justice P.N. Bhagwati served on the Supreme Court of India during an extraordinary period that saw a series of landmark rulings supporting human rights and expanding access to justice for all Indians. Justice Bhagwati described the evolution of India's human rights law in a talk at Columbia Law School on March 31.

Justice PN Bhagwati, who passed away on 15 June, has been described as "a pioneer of judicial activism", credited for introducing public interest litigation (PIL) in India, among other things. Justice Bhagwati, who served first as a Supreme Court judge and then as Chief Justice of India, passed away on Thursday at the age of 95.

As a judge with one of the longest tenures on the bench, his impact on jurisprudence in India is undeniable. His judgment in Maneka Gandhi v Union of India changed the way Indian courts approached questions of fundamental rights, expanding their scope more than ever before.

In this era of Globalization, Free Market and World Economy, a move has been initiated to encourage privatization in performing several welfare, commercial and other such activities which were

traditionally considered to be the functions of the State as welfare State; But this has raised several questions of constitutional importance generally and exercise of Fundamental Rights, their violations and the claim relating infringement of Fundamental Rights. Some illustrations for showing the shift of the performance of several welfare, commercial and other such activities from the State in the hands of free market and private world can be given reference as follows:

* Though there are around 27 nationalized banks in India like Punjab National Banks, State Bank of India etc. Still number of privatized banks like HDFC, ICICI are growing rapidly in Indian economy.* Indian market is got captured by numerous Multi National Companies like Sony in the name of Sony India Pvt. Ltd., Honda, Quark, H.P. and so on. Apart from it there are several other fields also like insurance business etc. where the private companies are settling their feets effectively and efficiently. Now the concern of my study begins that what is the position of Fundamental Rights in the present era of globalization, free market and world economy.[7]

Basically our Constitution provides Fundamental Rights to the people:

Firstly, to save them against the undesirable action of the state and any of the agency of the state encroaching upon their of Fundamental Rights; and

Secondly to give them a right to get their of Fundamental Rights to be enforced by the court of law against the state in case any infringement.

Where we are discussing the eroding scenario of state and the claim of Fundamental Rights it would not be out of context to discuss about the meaning of the Constitution because both the State and The Fundamental Rights are the part of the Constitution itself.

According to dictionary meaning “the constitution of a country is that body of rules, written or unwritten which:-

- A. establishes institution of government for a particular country, and
- B. Which specifies the ways by which the political process has to function.

But while we interpreting the Indian constitution we come to know that our Constitution put the people of somewhere at a very high place.

Under Indian Constitution the people of India has been given sovereignty as Preamble of the Constitution itself states “WE THE PEOPLE OF INDIA – HEREBY ADOPT, ENACT AND GIVE

TO OURSELVES THIS CONSTITUTION OF INDIA”.

That shows that government of India and its all the organs has to perform their duties and work for the people of India under the purview of general principles and provisions of Constitution of India.

Purpose of the Study:-

The purpose of my study is as follows:-

- A. What amounts to within the ambit and scope of Article 12.
- B. What expensive interpretation has been made by the Indian judiciary and what is its present status.
- C. To study the Objective Resolution of the Constitution and the Preamble of the Constitution stated for.
- D. How and why rights of the people are divided in two categories that is:[6]
 - Fundamental Rights
 - Directive Principle of State Policy.
- E. Who are the actual consumers of fundamentals rights.
- F. Against whom fundamental rights are enforceable.
- G. Present position of Fundamental Rights and protection given to the Fundamental Rights.
- H. Concept of welfare state and so on.
- I. How far Fundamental Rights are enforceable in the world of Globalization, Liberalization and Industrialization.

1. The principle and enshrined in the Preamble of the Constitution:-

Objective Resolution of the Constitution as well as the Preamble of the Constitution shows the intention of the Constitution makers that how much they were concern for not only providing Fundamental Rights to the people but also to provide effective measures for enforcement of those Fundamental Rights easily in the hands of court of law.

A glance at clauses (4), (5), and (6) of Objective Resolution shows the concern of people of India even to the extent that the whole Government process is actually placed in the hands of people of India. As clause (4) of Objective Resolution significant in regard which reads as follows that “all the powers and authority of the sovereign independent India, and of its constituent parts and of organs of government, are derived from the people”

Clause (5) of Objective Resolution says that “it shall be guaranteed and secured to all of the people of India – justice: social and political, Equality of status and of

opportunity and before the law: freedom of thought, expression, belief, faith, worship, vocation, association and action but subject to law and positive morality.”

Apart from this Preamble of the Constitution of India also begins with the word “we the people of India”

Thus all these above statements made it very-very clear that Constitution of India wants to put the people of India somewhere at higher level and to the state in the capacity of serving authority which basically have to work and functions for the betterment, development and welfare of the people of India. And to serve this purpose part III of the constitution only talks of Fundamental Rights, which itself contain Article 32, itself a Fundamental Rights for the proper enforcement of Fundamental Rights.[6]

2. Against whom fundamental rights are enforced :A critique

The existence of Article 12 in part III of Indian Constitution itself says that Fundamental Rights are enforceable only against the State. Thus Fundamental Rights can be enforced in their nature and power as of Fundamental Rights only when their violated by the state and when their not violated by the state they have not to be enforced as Fundamental Rights but to be enforced as general rights under general laws. Thus it very rudely struck down the fundamental rights basically to be enforced in the capacity of fundamental rights.

Conclusion:-

Now to conclude I would like to say that we are living in the era of welfare state in which all the powers, functions and duties of the state and of the organs of the state is to be performed under the purpose of welfare state. Thus while enforcing the fundamental rights of the people state should set aside the complexity of Article 12 in defining the term state but it aimed to get the justice done by opting for the liberal interpretation to the constitutional provisions. Apart from it the Court in several cases given the relief to the petitioner without going into the question whether the violator of the fundamental rights was a state. Thus in the era of globalization, liberalization and industrialization the court of law should first consider the welfare of the people of India and courts has to kept in mind justice should not only be done but it seems to be done. And this is the reason that’s why I am supporting that court has to interpret the

Fundamental Rights in the direction of justice without going into the concept and concern of the term “State” as given under Article 12.[10]

References

- [1] The Constitution of India (PDF). pp. 6–20.
- [2] Tayal, B.B. & Jacob, A. (2005), Indian , World Developments and Civics, pg. A-23
- [3] Gandhi, Rajmohan. Patel: A Life. p. 206.
- [4] UNI. "Sardar Patel was the real architect of the Constitution". Rediff.com. Archived from the original on 5 May 2006. Retrieved 15 May 2006. Unknown parameter `|link=` ignored (help)
- [5] The state, Ishani. "The state". Legal Thirst. Archived from the original on 8 May 2020. Retrieved 3 April 2020.
- [6] The term "State" includes all authorities within the territory of India. It includes the Government of India, the Parliament of India, the governments and legislatures of the states of India. It also includes all local or other authorities such as Municipal Corporations, Municipal Boards, District Boards, Panchayats etc. To avoid confusion with the term states and territories of India, State (encompassing all the authorities in India) has been capitalised and the term state (referring to the state governments) is in lowercase.
- [7] Laski, Harold Joseph (1930). Liberty in the Modern State. New York and London: Harpers and Brothers.
- [8] "Bodhisattwa Gautam vs. Subhra Chakraborty; 1995 ICHRL 69". www.worldlii.org, World Legal Information Institute. Archived from the original on 22 November 2005. Retrieved 25 May 2006. This was the case where Public interest litigation was introduced (date of ruling 15 December 1995).
- [9] Tayal, B.B. & Jacob, A. (2005), Indian History, World Developments and Civics, pg. A-25
- [10] "Citizenship (Amendment) Bill, 2003" (PDF). rajyasabha.nic.in/, Rajya Sabha. p. 5. Archived from the original (PDF) on 25 April 2006. Retrieved 25 May 2006.