BASIC RIGHTS AND THEIR ENFORCEMENT. By T.B. Smith. 1979. B.N. Rau Memorial Lectures Series : Institute of Constitutional and Parliamentary Studies, New Delhi. Pp. xiii+64. Price Rs. 30.

THE INSTITUTE of Constitutional and Parliamentary Studies has rendered valuable service to the cause and promotion of juridical thoughts by instituting Sir B.N. Rau Memorial Lectures and thus enabling to perpetuate his contributions in the fields of constitutional law, international law and Hindu jurisprudence. B.N. Rau is regarded as one of the principal architects of the Indian Constitution. Hence befitting to his contribution, the first two lectures in the series were delivered by eminent personages, like the then Chief Justice of India, Justice M. Hidayatullah and Justice K.S. Hegde in the years 1969 and 1971 respectively. The book under review is the third lectures in sequence and have been delivered by an equally eminent jurist, T.B. Smith, who has chosen a basically important theme of basic rights and their enforcement. The contents of the book are (1) Foreword and exordial remarks by L. M. Singhvi, the chairman of the Institute. (2) Presidential remarks by K. S. Hegde, (3) Two lectures by T.B. Smith. (4) Concluding remarks by K. S. Hegde, and (5) A note on the union agreement of 1707 as an appendix.

Smith prefaced his first lectures with the following observation regarding the Indian Constitution and the concern that the foreign jurists have for the rule of law in India :

> Naturally we all hoped that the Constitution, to the framing of which such care was to be given, would prove flexible enough to respond to change, yet strong enough to secure basic rights and liberties under all strains and stresses.[1]

The question of the basic rights, their scope and their enforcement on one hand and procedure and power to amend these on the other had been a matter of deep and serious consideration for the founding fathers, Parliament and the judiciary. It may be noted that the inclusion of a set of basic rights in the form of the fundamental rights in the Indian Constitution had its genesis in the movement that operated in the national scene during the British *raj*. The movement was a struggle for political freedom against an alien rule and exploitation to secure political, social and economic justice. As a sequel to their nightmarish experience during the British rule the Indian people ensured that the basic rights were engraved in the charter with guaranteed enforcements.[2] These became an article of faith with the leaders of the freedom movement.

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1. T.B. Smith, *Basic Rights and their Enforcement* 3 (1979).
2. Arts. 32 and 226 of the Indian Constitution.

It is noteworthy that these lectures were delivered when the internal emergency was in force. Notwithstanding this fact, as well as Smith's imposing self-restraint that he "shall forebear from offering personal views on what may be sensitive political legal issues in India today"[3], he appreciated the speech of H. M. Seervai at the Fifth Commonwealth Conference and endorsed the views of eminent Indian jurists that repeated efforts in amending the Constitution to suit the power elite is an excuse in eroding the basic rights.

In lecture I, Smith discusses the British concept of supremacy of Parliament and its role to protect freedom of the individual. He also explains the English practice to combine the office of the Attorney-General with political and quasi-judicial functions did not find favour at the Commonwealth Conference.

The framers of the Indian Constitution did not consider it correct to make the offices of the Attorney-General and Advocate-General as political offices.[4] The proposal of Nehru to make the law minister as the Attorney-General on the impending retirement of the then Attorney-General in 1962 evoked protests and had to be abandoned.[5] However, a convention has developed in India that with the change of the government at the centre as well as in the state, the Attorney-General and the Advocate-General also resign to enable the new government to appoint persons of its own choice to the respective offices.

The author is of the view that the British Parliament is not sovereign in every respect of the term as propounded by Dicey.[6] According to him the Union Agreement of 1707 makes the British Parliament a creation of constitutent documents which limits the legislative powers of Parliament to a great extent.[7] However, it has not been tested in a court of law whether the limits imposed on the powers of Parliament by the document of the accession of the United Kingdom to the European Communities can be monitored by the courts.

An interesting aspect of administrative law discussed by Smith is that the House of Lords in *Gouriet* v. *Union af Post Office Workers*[8] held that the English law provides that the public right could only be asserted by the Attorney-General of England as an officer of the Crown representing the public. Therefore, a member of public who had no specific personal interest in the matter is not entitled to bring an action in his own name for the purpose of preventing public wrong. The individual in such a case

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3. *Supra* note 1 at 2.
4. VII *C.A D.* 1348.
5. H.M. Seervai, II *Constitutional Law of India : A Critical Commentry* 1093 (1976).
6. A V. Dicey, *Introduction to the Study of the Law of the Constitution* 64-65 (1964).
7. *Supra* note 1 at 13.
8. [1978] A.C. 435: (1977) 2 All E.R. 70.

is without remedy as the House of Lords decision in *Gouriet* upholds "the traditional doctrine as to the Attorney-General's inscrutable discretion to refuse consent to a relator action"[9]. This is a serious weakness of the English law.

The decisions of the Indian Supreme Court in the *Kesavananda Bharati* case,[10] the *Indira Gandhi* case[11] and the *Minerva Mills* case[12] support the view that power of the Indian Parliament to amend the Constitution is uot unlimited. The amending power of the Indian Parliament is subject to the basic structure concept laid down by the Supreme Court in the *Kesavananda Bharati* case. One may find it apposite to go alongwith the view of Smith that the basic rights cannot be placed at the mercy of parliamentary majority—even if it be the two third. The observations of Justice H.R. Khanna are also apt in this connection:

> [T]he elimination of the bill of rights and the curtailment of civil liberties have always paved the way to authoritarianism and dictatorship. It has also resulted in undermining the rule of law and thus created a climate of abitrariness.[13]

Smith has rightly observed that notwithstanding the deep concern of Britishers for the human rights, these do not find a place in form of written guarantees in that country. Any enactment made by Parliament can be modified or repealed by a subsequent legislation even without special procedure or majority: He is a votary of the constitutionally guaranteed basic rights. Smith strongly advocates that the United Kingdom should also have a written Constitution with the bill of rights incorporated as the basic rights. The enforcement of such rights should be in the hands of judges. The experience has shown that the judges, notwithstanding their social and political background, in India as well as in the United Kingdom are the safest custodians of the Constitution as a last resort. This may also prevent elective dictatorship to a great extent.

Lecture II starts with a note of caution that unless the basic rights can be enforced effectively, they do create frustration and cruel mockery. Smith has cited the example of the Universal Declaration of Human Rights which are invariably violated due to the lack of effective sanction.

The framers of the Indian Constitution did not take any chances and included articles 12, 13, 32 and 226 in the Constitution to make the

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9. *Supra* note 1 at 39.
10. *Kesavanada Bharati* v. *State of Kerala*, A.I.R. 1973 S.C. 1461.
11. *Indira Nehru Gandhi* v. *Raj Narain*, A.I.R. 1975 S.C. 2299.
12. *Minerva Mills Ltd.* v. *Union of India*, (1980) 3 S.C.C. 625.
13. H.R. Khanna, *Liberty, Democray and Ethics* 67 (1979).

fundamental rights a reality. However, the author has explained that in Scotish law, the emphasis is on ordinary remedies. Similarly, Scotish law does not recognise a general right of private individual to prosecute any person for any offence which could be injurious to the public.[14]

Smith has noted that in politico-economic matters, the approach of the U.S. Supreme Court is phenomenal. It is gratifying for him to find that traditionally in Britain as well as in India, the judges maintain a low profile on political issues and deal judiciously and judicially, when such matters are placed before them. Smith is of the view that the office of the Attorney-General or the Advocate-General in India should not be a political office as such a convention will create confidence in masses.[15]

It may be pointed out here that as a matter of fact the real defence against any inroads on precious liberties of the individual is a strong public opinion besides independent judiciary. Such public opinion is a strong defence against any tyranny. Justice Khanna has rightly observed:

> The ramparts of defence against tyranny—are ultimately in the hearts of the people. The Constitution, the courts and the laws can only as aids to strengthen those ramparts; they do not and cannot furnish substitutes for those ramparts. If the ramparts are secure anyone who dares tamper with the liberties of the citizens would do so at his own peril. If, however, the ramparts crack, no constitution, no law, no court would be able to do much in the matter.[16]

The book though brief is thought provoking, and is an important addition to the existing literature on comparative constitutional systems. It has been written in a lucid style with a useful appendix.

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14. *Supra* note 1 at 34, 36.
15. *Id.* at 48.
16. *Supra* note 13 at 26.

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