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FUNDAMENTAL RIGHTS

I

THIS is a subject with a long history going back to the Magna Carta and perhaps earlier, into the details of which it is unnecessary to enter here. It is sufficient for our present purpose to explain the nature of the problem and to indicate how it has been sought to be solved in other countries.

The constitutions of a great many countries contain an imposing array of such rights, sometimes described as "fundamental rights". Reference is invited in this connection (1) to amendments 1-10, 13-15 and 19 to the Constitution of the U.S.A., (2) to articles 4, 31, 44, 45, 49, 50, 55-58, 60 and 65 of the Swiss Constitution, (3) to articles 109-160 of the German Constitution of 1919, (4) to articles 118-128 of the Constitution of the U.S.S.R., and (5) to articles 40-44 of the Constitution of Ireland (printed in the Second Series of *Constitutional Precedents*). England has no written constitution, but the great charters, the Magna Carta, the Petition of Rights and the Bill of Rights form part of the constitution.

Broadly speaking, the rights declared in these constitutions relate to equality before the law, freedom of speech, freedom of the press, freedom of religion, freedom of assembly, freedom of association, security of person and security of property. Within limits these are all well-recognised rights and it may be useful to draw attention to them by embodying them in the constitutional charter. The difficulty is in defining the precise limits in each case and in devising effective protection

for the rights so limited. Some of the constitutions have attempted to define the limits of some of these rights and in doing so have gone far towards destroying them. As an example, we may take article 153 of the German Constitution of 1919, which runs:

> "Property is guaranteed by the constitution. Its extent and the restrictions placed upon it are defined by law.
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> "Expropriation may be effected only for the benefit of the general community and upon the basis of law. It shall be accompanied by due compensation save in so far as may be otherwise provided by a law of the Reich."

In other words, the rights of private property are said to be inviolable except where the law otherwise provides, which means that the rights are not inviolable. Similarly, article 115 provides, "the residence of every German is an inviolable sanctuary for him; exceptions are admissible only in virtue of laws". The fact of the matter is that while these rights can be enunciated in broad terms, it is not possible to enumerate in advance every possible exception; the framers of the constitution, therefore, leave the exception to be put in from time to time by the ordinary legislature. The result is that there is no constitutional guarantee against an oppressive legislature.

The other difficulty, namely, that of devising effective protection for the rights defined, really arises out of the difficulty of definition already pointed out. Where a right can only be indicated in broad terms, there is an obvious risk in allowing it to be enforced in the ordinary court, because there is no knowing how broadly they might interpret it. There are at least three alternatives possible in this connection:

(1) to take this risk and allow the rights, however imperfectly defined, to be enforced in the ordinary courts;

(2) to set out the rights merely as moral precepts for the authorities concerned and to bar the jurisdiction of the ordinary courts either expressly or by implication;

(3) to allow the more easily definable rights to be enforced in the ordinary courts and keep the rest out of their purview.

The difficulties of the problem are best elucidated by a few concrete cases. Let us take one of the most frequently enumerated of these rights, that of equality before the law; and let us take a country where the rights are enforceable by the courts: the United States of America. The fourteenth amendment to the Constitution of the U.S.A., which came into operation in 1868, puts it in the form that no State shall "deny to any person within its jurisdiction the equal protection of the laws". Obviously, these words are not to be taken too literally; otherwise, they would render invalid even a State law granting special protection to women or children, as distinguished from other inhabitants, *e.g.*, a law that exempted children under the age of seven from all criminal liability. And so it has been held by the Supreme Court that the mere fact that a law applies to a particular class of inhabitants and not to other classes is not sufficient to invalidate it. But even within the same main class, does the fourteenth amendment require absolute equality?

In *Radice v. New York*, a case decided in 1924 (264 U. S. 292) the Supreme Court was called upon to decide whether a New York law which prohibited the employment of certain classes of women in restaurants of certain classes of cities between 10 p.m. and 6 a.m. was valid or not. The law, it will be noticed, not only did not apply to male employees, but did not even apply equally to all classes of women employees; accordingly, it was attacked as a breach of the fourteenth amendment. Nevertheless, the court held that there was no breach. The legislature can select special classes or sub-classes for special treatment, provided that the classification is not arbitrary, oppressive, or capricious and, of course, the court is to decide whether it is so or not in any given case.

But the court has not found this task easy. In 1902, in *Connoly v. Union Sewer Pipe Company* (184 U. S. 540), an anti-trust statute of Illinois of 1893 came under scrutiny. The statute made trusts or combinations for certain specified purposes a criminal offence, but added that its provisions did not apply to agricultural products or livestock in the hands of the producer or raiser. It was argued against this statute that the exemption of agriculturists and stockmen was repugnant to the "equal protection" clause and, therefore, that the entire statute was invalid. The Supreme Court, in accepting both these contentions, observed:

"If combinations of capital, skill, or acts, in respect of the sale or purchase of goods, merchandise, or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be suppressed, it is impossible to perceive why like-combinations in respect of agricultural products and livestock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meat, or fuel, or clothing, or medicines are, under the statute, criminals and subject to a fine, if they combine their capital, skill, or acts for the purpose of establishing, controlling, increasing, or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbours, who happen to be agriculturists and livestock raisers, may make combinations of that character in reference to their grain or livestock without incurring the prescribed penalty. Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws?

"We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the State for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill, or acts to destroy competition and to control prices for their special benefits, is so manifestly a denial of the equal protection of the laws that further or extended argument to

establish that position would seem to be unnecessary." (184 U.S. 564).

Nearly forty years later, in 1940, in *Tigner v. Texas* (310 U. S. 141), an anti-trust law of Texas of a similar character and containing a similar exemption in favour of agricultural products and livestock again came before the Supreme Court. This time the court upheld the law, observing:

> "The equality at which the 'equal protection' clause aims is not a disembodied equality. The fourteenth amendment enjoins 'the equal protection of the laws', and laws are not abstract propositions. They do not relate to abstract units A, B and C, but are expressions of policy arising out of specific difficulties, addressed to the attainment of specific ends by the use of specific remedies. The constitution does not require things which are different in fact or opinion to be treated in law as though they were the same. And so we conclude that to write into law the differences between agriculture and other economic pursuits was within the power of the Texas legislature. Connoly's case has been worn away by the erosion of time and we are of opinion that it is no longer controlling."

If the above qualification were incorporated in the fourteenth amendment, the "equal protection" clause would be diluted into the mild injunction that the State shall treat as equal in law only those persons within its jurisdiction who are equal in fact. It is, of course, for the courts to judge whether persons are equal in fact; but, we may add, the same classes of persons that appeared to the courts in 1902 to be manifestly equal in fact were found in 1940 to be in truth, unequal. The protection offered by the clause has thus worn very thin. Indeed, even a Nazi State might have accepted it on its present interpretation, for its courts could be trusted to rule "a Jew is not equal to an Aryan in fact and there is therefore no ground for treating him as equal in law".

Needless to say, the Supreme Court of the United States has a higher conception of the dignity of man and the constitutional protection, though "worn away by the erosion of

time" in certain other spheres, is still potent in the racial. In *Missouri v. Gaines*, a case decided in 1938 (305 U. S. 337), a Negro named Lloyd Gaines, who had been refused admission to the School of Law of the State University of Missouri, sought to compel the university authorities to admit him upon the strength of the "equal protection" clause in the constitution. The matter, after going through various courts in the States, ultimately came before the Supreme Court of the United States. The following extracts from the judgment give the full facts of the case and show the view taken by the majority:

"Petitioner is a citizen of Missouri. In August 1935, he was graduated with the degree of Bachelor of Arts at the Lincoln University, an institution maintained by the State of Missouri for the higher education of Negroes. That university has no law school. Upon the filling of his application for admission to the Law School of the University of Missouri, the Registrar advised him to communicate with the President of Lincoln University and the latter directed petitioner's attention to section 9622 of the Revised Statutes of Missouri (1929), Mo St. Ann *9622, *p.* 7328, providing as follows:

"*9622. *May arrange for attendance at university of any adjacent State —tuition fees*—Pending the full development of the Lincoln University, the Board of Curators shall have the authority to arrange for the attendance of Negro residents of the State of Missouri at the university of any adjacent State to take any course or to study at subjects provided for at the State University of Missouri and which are not taught at the Lincoln University and to pay the reasonable tuition fees for such attendance; provided that whenever the Board of Curators deem it advisable they shall have the power to open any necessary school or department. (Laws 1921, *p.* 86*7).

"Petitioner was advised to apply to the State Superintendent of Schools for aid under that statute. It was admitted at the trial that petitioner's 'work and credits at the Lincoln University would qualify him for admission to the School of Law of the University of Missouri if he were found otherwise eligible'. He was refused admission upon the ground that it was 'contrary to

the constitution, laws and public policy of the State to admit a Negro as a student in the University of Missouri '. It appears that there are schools of law in connection with the State universities, of four adjacent States, Kansas, Nebraska, Iowa and Illinois where non-resident Negroes are admitted.

" In answering petitioner's contention that this discrimination constituted a denial of his constitutional right, the State Court has fully recognised the obligation of the State to provide Negroes with advantages for higher education substantially equal to the advantages afforded to white students. The State has sought to fulfil that obligation by furnishing equal facilities in separate schools, a method the validity of which has been sustained by our decisions.

" But the fact remains that instruction in law for Negroes is not now afforded by the State, either at Lincoln University or elsewhere within the State, and that the State excludes Negroes from the advantages of the Law School it has established at the University of Missouri.

" The State Court stresses the advantages that are afforded by the law schools of the adjacent States, Kansas, Nebraska, Iowa, and Illinois, which admit non-resident Negroes. The court considered that these were schools of high standing where one desiring to practise law in Missouri can get ' as sound, comprehensive, valuable legal education ' as in the University of Missouri; that the system of education in the former is the same as that in the latter and is designed to give the students a basis for the practice of law in any State where the Anglo-American system of law obtains; that the Law School of the University of Missouri does not specialise in Missouri law and that the course of study and the case books used in the five schools are substantially identical. Petitioner insists that for one intending to practise in Missouri there are special advantages in attending a law school there, both in relation to the opportunities for the particular study of Missouri law and for the observation of the local courts, and also in view of the prestige of the Missouri Law School among the citizens of the State, his prospective clients. Proceeding with its examination of relative advantages, the State Court found that the difference in distances to be travelled afforded no substantial ground of complaint and that there was an adequate appropriation to meet the full tuition fees which petitioner would have to pay.

" We think that these matters are beside the point. The basic consideration is not as to what sort of opportunities other States provide, or whether they are as good as those in Missouri, but as to what opportunities Missouri itself furnishes to white students and denies to Negroes solely upon the ground of colour. The admissibility of laws separating the races in the enjoyment of privileges afforded by the State rests wholly upon the equality of the privileges which the laws give to the separated groups within the State. The question here is not of a duty of the State to supply legal training, or of the quality of the training which it does supply, but of its duty when it provides such training to furnish it to the residents of the State upon the basis of an equality of right. By the operation of the laws of Missouri a privilege has been created for white law students which is denied to Negroes by reason of their race. The white resident is afforded legal education within the State: the Negro resident having the same qualifications is refused it there and must go outside the State to obtain it. That is a denial of the equality of legal right to the enjoyment of the privilege which the State has set up, and the provision for the payment of tuition fees in another State does not remove the discrimination.

" Nor can we regard the fact that there is but a limited demand in Missouri for the legal education of Negroes as excusing the discrimination in favour of whites. We had occasion to consider a cognate question in the case of *McCabe v. Atchison, Topeka and Santa Fe Railway Co., Supra.* There the argument was advanced, in relation to the provision by a carrier of sleeping cars, dining and chair cars, that the limited demand by Negroes justified the State in permitting the furnishing of such accommodation exclusively for white persons. We found that argument to be without merit. It made, we said, the constitutional right ' depend upon the number of persons who may be discriminated against, whereas the essence of the constitutional right is that it is a personal one. Whether or not particular facilities shall be provided may doubtless be conditioned upon there being a reasonable demand therefor; but, if facilities are provided, substantial equality of treatment of persons travelling under like conditions cannot be refused. It is the individual who is entitled to the equal protection of the laws, and if he is denied by a common carrier, acting in the matter under the authority of a State law, a facility or convenience in the course of his journey

which, under substantially the same circumstances, is furnished to another traveller, he may properly complain that his constitutional privilege has been invaded.' Id., 235 U.S., *pp.* 161, 162, 35 S.Ct., *p.* 71.

" Here, petitioner's right was a personal one. It was as an individual that he was entitled to the equal protection of the laws, and the State was bound to furnish him within its borders facilities for legal education substantially equal to those which the State there afforded for persons of the white race, whether or not other Negroes sought the same opportunity.

" It is urged, however, that the provision for tuition outside the State is a temporary one—that it is intended to operate merely pending the establishment of a law department for Negroes at Lincoln University. While in that sense the discrimination may be termed temporary, it may nevertheless continue for an indefinite period by reason of the discretion given to the curators of Lincoln University and the alternative of arranging for tuition in other States, as permitted by the State law as construed by the State Court, so long as the curators find it unnecessary and impracticable to provide facilities for the legal instruction of Negroes within the State. In that view we cannot regard the discrimination as excused by what is called its temporary character.

" The judgment of the Supreme Court of Missouri is reversed and the case is remanded for further proceedings not inconsistent with the opinion."

The importance of this judgment is enhanced by the fact that apart from the clause about equal protection of the laws in the fourteenth amendment, the U.S.A. Constitution does not expressly provide for equality of educational opportunities for all citizens, irrespective of race. The express provision contained in the fifteenth amendment is limited to the franchise: " the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, colour, or previous condition of servitude ". In this respect, the Constitution of the U.S.S.R. is more liberal, because under article 123, " equality of rights of citizens of the U.S.S.R., irrespective

of their nationality or race, in all spheres of economic state, cultural, social and political life, is an indefeasible law. Any direct or indirect restriction of the rights of, or, conversely, any establishment of direct or indirect privileges for, citizens on account of their race or nationality, as well as any advocacy of racial or national exclusiveness or hatred and contempt, is punishable by law". But the Supreme Court of the U.S.S.R. has no power to disallow laws and acts which contravene the rights declared. The Presidium of the Supreme Soviet—which is a sort of joint standing committee of the Chambers of the Supreme Soviet (the Union Parliament)—interprets the laws of the U.S.S.R. and annuls decisions and orders of the governments of the Union and the constituent republics in case they do not conform to law (article 49 of the Constitution of the U.S.S.R.).

The following account, taken from the *New York Times*, of an American case is of interest in this connection:

> "The U.S. Supreme Court held on June 3rd (1946) by a six-to-one decision announced by Justice Stanley F. Reed that racial segregation of bus passengers, as authorised by law in 10 States (called 'Jim Crowism, after a Negro character in an old Negro folk song), was unconstitutional on buses crossing State borders. The court dealt with the case of Irene Morgan, a Negro girl who, when travelling in a bus going from Virginia to Maryland, had been arrested and fined 10 dollars for refusing to change her seat and sit in the rear marked 'for coloured patrons' (as is general in trolley cars, buses and trains in the South), thus violating the Virginia 'Jim Crowism' statute. The Virginia Supreme Court of Appeal upheld the conviction and in the hearing before the Supreme Court the State of Virginia defended the segregation law as 'recognition of human nature' arguing that it prevented racial clashes that might endanger public safety. The Supreme Court decided, however, that there being no Federal Act dealing with the separation of races in inter-State transportation, the Virginian statute interfered with the freedom of inter-State commerce which required 'uniformity' in the seating arrangements for the different races in inter-State travel, and for this reason was unconstitutional."

It has already been pointed out that the "equal protection" clause, as interpreted by the Supreme Court, does not prevent special legislation for special classes provided the classification is not arbitrary. It has also been pointed out that the task of deciding whether the clause, in a given case, is arbitrary or not, is not easy. An illustration of this difficulty has already been given in the matter of anti-trust laws; a few others in the sphere of taxation may now be mentioned. In 1935, in the case *Stewart Dry Goods Co. v. Lewis* (294 U.S. 550), the Supreme Court held invalid a Kentucky law imposing a graduated tax upon annual gross sales of retail merchants ranging from 1/20 per cent upon the first 400,000 dollars of gross sales to 1 per cent on sales over 1,000,000 dollars. In the language of the court, "the law arbitrarily classified these vendors for the imposition of a varying rate of taxation, solely by reference to the volume of their transactions, disregarding the absence of any reasonable relation between the chosen criterion of classification and the privilege the enjoyment of which is said to be the subject taxed".

But in the previous year (1934), in *Fox v. Standard Oil Co.*, of New Jersey (294 U.S. 87), the court had, by a majority of five to four, upheld a West Virginia graduated tax running from two dollars for one store to 250 dollars for each store in excess of 75, saying that a series of gasoline stations maintained in a single ownership has the benefit of chain organisation and that, therefore, the graduation of the tax according to the number of stores owned was not arbitrary. Again, in 1940, in *Madden V. Kentucky* (309 U.S. 83) the court, with two dissentient judges, upheld a Kentucky statute imposing on its citizens an annual *ad valorem* tax on their deposits in banks outside the State at the rate of 50 cents per 100 dollars and on their deposits in banks within the State at the rate of 10 cents per 100 dollars. This had been attacked on the ground, among others, that it discriminated between those who deposited their money in Kentucky banks and those who

deposited their money in banks outside Kentucky and thus offended against the "equal protection" clause. The court observed (1) that in taxation, even more than in other fields, the legislature possesses the greatest freedom in classification, (2) that the presumption of validity attaching to legislation can be overcome only by the most explicit proof that the classification adopted by the legislature was "a hostile and oppressive discrimination against particular persons and classes," and (3) that in this case the treatment accorded to the two kinds of deposits may have resulted from the differences in the difficulties and expenses of tax collection.

We may now turn to another clause in the fundamental rights enunciated in the Constitution of the U.S.A. In the fifth amendment, which applies to the Centre, it is declared that no persons shall be deprived of life, liberty or property, without due process of law; and in the fourteenth amendment, there is a similar declaration applying to the States: "Nor shall any State deprive any person of life, liberty or property without due process of law". A vast volume of case law has gathered round this "due process" clause, of which it has been said that it is "the most important single basis of judicial review today". At first it was regarded only as a limitation on procedure and not on the substance of legislation; but it has now been settled that it applies to matters of substantive law as well. In fact, the phrase "without due process of law" appears to have become synonymous with "without just cause", the court being the judge of what is "just cause"; and since the object of most legislation is to promote the public welfare by restraining and regulating individual rights of liberty and property, the court can be invited, under this clause, to review almost any law. The court has upheld laws providing for compulsory vaccination (1905); for compulsory sterilisation of mental defectives (1927); for commitment of persons with a "psychopathic personality" (1940); but not a law forbidding the use of

shoddy in the manufacture of mattresses (1926), nor one requiring every pharmacy to be owned by a licensed pharmacist (1928). The usual issue in such cases is whether what is called the "police power" of the State—in other words, the inherent power of every State "to prescribe regulations to promote the health, peace, morals, education and good order of the people" justifies the particular law under consideration. Since there is no certain criterion in these matters, the court's verdict may vary from time to time. Thus in *Lochner v. New York* (1905, 198 U. S. 45), a New York law forbidding more than 60 hours' work in any week, or an average of more than 10 hours per day in bakeries or confectioneries, was held unconstitutional as infringing the liberty of the individual without due process of law. The judgment of the majority of the court (5 to 4) observed:

> "The question whether this act is valid as a labour law, pure and simple, may be dismissed in a few words. There is no reasonable ground for interfering with the liberty of person or the right of free contract, by determining the hours of labour in the occupation of a baker. There is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the State, interfering with their independence of judgment and of action. They are in no sense wards of the State. Viewed in the light of a purely labour law, with no reference whatever to the question of health, we think that a law like the one before us involved neither the safety, the morals, nor the welfare of the public and that the interest of the public is not in the slightest degree affected by such an act. The law must be upheld, if at all, as a law pertaining to the health of the individual engaged in the occupation of a baker. It does not affect any other portion of the public than those who are engaged in that occupation. Clean and wholesome bread does not depend upon whether the baker works but ten hours per day or only sixty hours a week. The limitation of the hours of labour does not come within the police power on that ground."

But twelve years later, in *Bunting v. Oregon* (243 U. S. 426), the court, without mentioning the Lochner case, upheld a ten-hour law for factories. Again, in 1923, *Adkins v. Children's Hospital* (261 U. S. 525), the court by a narrow majority overthrew an Act of Congress prescribing a minimum wage for women and children in the district of Columbia. But in 1937, in *West Coast Hotel Co. v. Parrish*, the court, by a bare majority (5 to 4), overruled the Adkins case and upheld a Washington Act authorising the fixing of minimum wages for women and minors. There has been similar oscillation in regard to laws providing for price-control; and Dodd's comment on this line of cases is: "The question is one as to the efficient action of the government, while at the same time protecting the essential rights of the individual. The cases printed below will indicate that the court has wavered from one position to another and may now be wavering back to its earlier position." (Dodd's *Cases and Materials on Constitutional Law*, Third Edition, *p.* 649).

We are now in a position to realise some of the difficulties of the problem of fundamental rights. To enunciate them in general terms and to leave it to the courts to enforce them will have the following consequences:

(1) The legislature not being in a position to know what view the courts will take of a particular enactment, the process of legislation will become difficult.

(2) There will be a vast mass of litigation about the validity of laws and the same law that was held valid at one time may be held invalid at another or *vice versa*: the law will therefore become uncertain.

(3) The courts, manned by an irremovable judiciary not so sensitive to public needs in the social or economic sphere as the representatives of the periodically-elected legislative body, will, in effect, have a veto on legislation exercisable at any time and at the instance of any litigant.

As against these disadvantages and compensating for them, there will undoubtedly be the advantage that racial and religious minorities will feel some security. Many European constitutions contain a declaration of fundamental rights, but there is often no court with power to pronounce an offending law unconstitutional. Even in Switzerland, where the Federal Court is competent to entertain complaints of violation of the constitutional rights of citizens, the constitution requires the court to apply the laws passed by the Federal Assembly. (See article 113 of the Swiss Constitution.)

The difference between the Supreme Court of the United States and the Swiss Federal Court in this respect is explained thus by Adams and Cunningham:

> "Every judge of the Supreme Court of the United States is bound to treat as void all legislative acts, whether proceeding from Congress or from the State legislatures, which are inconsistent with the Federal constitution, or are in excess of the legislative powers which that constitution confers. The Supreme Court only inquires into the validity of Acts of Congress for the purpose of determining a question brought before it in a legal proceeding.
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> "The Federal Tribunal, on the contrary, cannot inquire into the constitutional character of a law or a resolution of a general nature which has been adopted by the Federal Assembly, any more than of a treaty ratified by that body. It is bound by the constitution to accept those laws and resolutions and to apply them to the cases submitted to its judgment.
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> "The reason is clear. The measures which, after being framed by the Federal Council and adopted by the Federal Assembly, are accepted by the people, either tacitly or through the referendum, thus obtain the sanction of the Swiss people. Hence the Federal Tribunal must bow to the decision of the people and regard all such measures as constitutional and inviolable." (*The Swiss Confederation* by Adams and Cunningham, 1889, *pp.* 267, 268.)

The Swiss Federal Court can, however, examine the constitutionality of cantonal laws.

The Irish Constitution of 1937 has followed the plan of separating "fundamental rights" from "directive principles of social policy"; the former are, to some extent, enforceable by the court, but the latter not at all. The former are set out in articles 40-44 of the constitution and the latter in article 45, which begins thus: "The principles of social policy set forth in this article are intended for the general guidance of the Oireachtas (the Irish Parliament). The application of those principles in the making of laws shall be the care of the Oireachtas exclusively and shall not be cognisable by any court under any of the provisions of this constitution." There is no similar provision in articles 40-44 expressly excluding the jurisdiction of the courts. Some of the fundamental rights appear to be couched in terms which could be enforced by the courts: *e.g.*, section 40 (6). 2° provides that laws regulating the manner in which the right of forming associations and unions and the right of free assembly may be exercised shall contain no political, religious, or class discrimination; section 44 (2) 4° prescribes that legislation providing State aid for schools shall not discriminate between schools under the management of different religious denominations; and so forth. Laws contravening these guarantees will doubtless be pronounced *ultra vires*.

But a provision such as "no citizen shall be deprived of his personal liberty save in accordance with law" occurring in section 40 (4) 1° cannot invalidate any law and is really meaningless as a guarantee against oppressive laws after enactment. Possibly it has a moral value and may afford ground for a referendum before the Bill becomes law, for under article 27, Bills may be referred to the people, if they involve proposals of national importance. There is also a provision in article 26 (1) 1° enabling the President, after consulting the Council of State (which is a sort of Privy Council), to refer any Bill to which the article applies to the Supreme Court for a decision whether the Bill or any specified provision thereof is unconstitutional.

In the Austrian Constitution of 1920, certain fundamental rights were declared (*e.g.*, article 7 declared: "All citizens of the Federation shall be equal before the law. Privileges of birth, sex, position, class and religion are abolished.") and there was also provision for a constitutional court in addition to an administrative court and the ordinary courts of law. The ordinary courts were not to inquire into the validity of any duly promulgated law [article 89 (1)], but the constitutional court was competent in certain circumstances to decide all such questions and to annul any laws, which it adjudged unconstitutional (article 140); in addition, the constitutional court was expressly given power to entertain complaints of violation by any administrative authority, of rights guaranteed under the constitution after the matter had been taken through all the stages of administrative appeal (article 144). The net result of these provisions appears to have been that the constitutional court could annul a law as unconstitutional at the instance of the Federal Government or a provincial government (as the case might be) and to annul any administrative decision as unconstitutional at the instance of any aggrieved individual. The constitutional court consisted of a President, a Vice-President and a number of other members; the President, the Vice-President and one half of the other members were elected by the Lower House and the other half of the other members by the Upper House of the Federal legislature. They were to hold office for life. Further provisions as to the organisation and procedure of the constitutional court were to be prescribed by Federal legislation.

II

We may now proceed to analyse the fundamental rights embodied in the constitutions of some of the more important countries of the world and to frame the draft of a Bill of

Rights for incorporation in the Indian Constitution. For this purpose, it is useful to recognise a distinction between two broad classes of rights: there are certain rights which require positive action by the State and which can be guaranteed only so far as such action is practicable, while others merely require that the State shall abstain from prejudicial action. Typical of the former is the right to work, which cannot be guaranteed further than by requiring the State, in the language of the Irish Constitution, "to direct its policy towards securing that the citizens may, through their occupations, find the means of making reasonable provision for their domestic needs"; typical of the latter is the right which requires, in the language of the American Constitution, that "the State shall not deprive any citizen of his liberty without due process of law". It is obvious that rights of the first type are not normally either capable of, or suitable for, enforcement by legal action, while those of the second type may be so enforced. Both classes of rights are mentioned together under the head of "fundamental rights" in certain constitutions, *e.g.*, in the Constitution of the U. S. S. R. and in the Weimar Constitution of the German Reich, possibly because neither was intended to be enforced by legal action. But the distinction is clearly recognised (though not uniformly pursued) in the Irish Constitution, which deals first with "fundamental rights" strictly so called, and then with "directive principles of social policy", the latter being expressly excluded from the purview of the courts. A similar distinction is recognised in Dr. Lauterpacht's *International Bill of Rights of Man* (1945). The substantive provisions of the Bill are in two parts, Part I dealing with rights meant to be enforced by the ordinary courts and Part II dealing with rights incapable of or unsuitable for such enforcement.

We may usefully follow this plan and separate the two classes of rights: Part A may deal with fundamental principles of State policy and Part B with fundamental rights strictly

so called.* The following draft is suggested for Part A (it is meant to be illustrative rather than exhaustive):

PART A

"The principles set forth in this Part are intended for the general guidance of the appropriate legislatures and governments in India (hereinafter referred to collectively as 'the State'). The application of these principles in legislation and administration shall be the care of the State and shall not be cognisable by any court.

"1. The State shall promote international peace and security by the elimination of war as an instrument of national policy, by the prescription of open, just and honourable relations between nations, by the firm establishment of the understandings of international law as the actual rule of conduct among governments and by the maintenance of justice and the scrupulous respect for treaty obligations in the dealings of organised people with one another.

"2. The State shall promote internal peace and security by the elimination of every cause of communal discord.

"3. The State shall, as far as possible, secure to each citizen:

(1) the right to work,
(2) the right to education,
(3) the right to maintenance in old age and during sickness or loss of capacity to work,
(4) the right to rest and leisure;

in particular, the State shall make provision for free and compulsory primary education.

"4. The State shall promote with special care the educational and economic interests of the weaker sections of the people and, in particular, of the scheduled castes and the aboriginal tribes, and shall protect them from social injustice and all forms of exploitation.

"5. The State shall protect the culture, language and script of the various communities and linguistic areas in India.

"6. The State shall regard the raising of the level of nutrition and the standard of living of its people and the improvement of public health as among its primary duties.

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* Cf. Parts IV and III of the Indian Constitution.

" 7. The State shall ensure that the strength and health of workers, men and women, and the tender age of children shall not be abused and that they shall not be forced by economic necessity to take up occupations unsuited to their sex, age or strength."

It is obvious that none of the above provisions is suitable for enforcement by the courts. They are really in the nature of moral precepts for the authorities of the State. Although it may be contended that the constitution is not the proper place for moral precepts, nevertheless, constitutional declarations of policy of this kind are now becoming increasingly frequent.* They have at least an educative value. The first clause is taken from the Declaration of Havana made in 1939 by the representatives of the governments, employers and work-people in the American Continent. The second, fourth and fifth clauses are peculiarly needed in India. The third clause embodies certain objectives of social and economic policy which are now widely recognised; see, for example, articles 118-121 of the Constitution of the U. S. S. R. and articles 42 and 45 of the Irish Constitution. The sixth clause relating to nutritional and other standards is taken from the recommendations of the United Nations Conference on Food and Agriculture, 1943, and is of special importance to India. The seventh clause is taken from article 45 (4) 2° of the Irish Constitution, 1937.

PART B

We now come to the other Part, part B, relating to fundamental rights strictly so called, that is to say, rights which are meant to be enforced by legal action. Here we enter upon controversial ground.

" There are very few countries which have fully adopted the system of judicial review enabling courts to act in that capacity

* (See the Introduction to the I. L. O. publication *Constitutional Provisions Concerning Social and Economic Policy*, Montreal, 1944).

in the matter of the fundamental rights of the individual guaranteed by the constitution. In the United States, by long-established practice—though not in pursuance of any express provision of the constitution—the Supreme Court has exercised that power since its decision in the historic case of *Marbury v. Madison*. This is also the position, by virtue of an express constitutional provision, in Brazil, Venezuela and some other Latin-American countries, in Czechoslovakia, Rumania and the Irish Free State. In a number of countries—such as Australia, Canada and Germany (in the constitution of 1919)—judicial review is limited largely to questions relating to the respective legislative competence of the Federation and of the member States.

"On the other hand, in many States the constitution specifically excludes the interpretation of laws—and *a fortiori* any declaration of their invalidity—from the purview of the judiciary. Judicial review of legislation is contrary to the constitutional doctrine of France and, above all, of Great Britain, where the supremacy of Parliament is absolute. Although the Constitution of Soviet Russia of 1923 gave (in article 7, sec. 43) the Supreme Court of the Union the power to render decisions, at the request of the Central Executive Committee of the Union, on the constitutionality of any regulations made by the republics of the Union, no such powers have been conferred upon it by the constitution of 1936. . . .

"The doctrine of judicial review has been defended with fervent approval by great lawyers in the United States and elsewhere. Daniel Webster and Francis Lieber praised it as a bulwark of liberty. Lord Bryce was of the view that 'there is no part of the American system which reflects more credit on its authors or has worked better in practice.' Dicey was a strong believer in the doctrine of the supremacy of Parliament in England. But he was emphatic that it was 'the glory of the founders of the United States'—in fact the doctrine of judicial review was adopted a quarter of a century after the foundation of the republic—to have established a system of protection of the constitution essential to a federal system (actually, the exercise of the power of judicial review by the Supreme Court has borne little relation to the fact of the federal structure of the United States). Tocqueville praised it as most favourable to liberty and to public order. After one hundred and forty years of operation it has the unqualified support of a large—perhaps

predominant—section of American legal opinion as a bulwark of liberty of the people against the rashness and the tyranny of short-lived legislative majorities.

" On the other hand, the doctrine of judicial review has found from its very inception violent opponents and detractors in the country of its origin. Jefferson and Madison denounced it. Great teachers of constitutional law, such as J. B. Thayer, have drawn attention to the dangers of attempting to find in the Supreme Court—instead of in the lessons of experience—a safeguard against the mistakes of the representatives of the people. That criticism has grown in the last fifty years to the point of bitter denunciation as the result of the exercise of the power of judicial review in a manner which, in the view of many, has made the Supreme Court a defender of vested rights and social statics. Some French jurists, who were attempting to find a remedy for the absence of an effective guarantee of fundamental rights in their own constitution, have come to regard the experience of judicial review in the United States as a sufficient deterrent against introducing judicial review in France. In countries other than the United States, in which judicial review of legislation is recognised, it has been experienced only in rare cases for the protection of the rights of the individual." (*pp.* 186-190, *An International Bill of the Rights of Man*, 1945, by Lauterpacht).