

## CHAPTER - 3

### I

The idea of defining and declaring the rights of man and of citizen is not a very recent contribution to political theory.

Origin & growth of fundamental human rights. Since the days of the French Revolution, the notion of defining Rights of Man and of Citizen has become an article of faith for

(1)  
liberalism .

Men normally value liberty only when it is denied to them. But its denial is a denial of all that makes life worth living, so that the spirit of the prisoner cries out for liberty and again for liberty, as the lungs of the man who is choking cry out for air. Liberty indeed is the air of the spirit . (2)

Fundamental Rights represent the modernised version of the traditional natural rights. They have been regarded as not only basic to the development of human personality, but also as an indispensable condition of the peaceful progress of the world and vitally essential for a stable international society. In a much narrower sense, the aim of having a declaration of fundamental rights is that certain elementary freedom of faith and so on, should be regarded as inviolable under all conditions and that the country should not be able to tamper with them . (3)

The modern conception of rights was unknown in ancient

Greece where society was divided into free citizens and slaves who had no rights. The Roman period was not conducive to the development of such a conception in a universal sense. The advent of christianity improved matters considerably from the stand point of human life and personality, but it was not until the late seventeenth and the eighteenth centuries that the necessity for a set of written guarantees of human freedoms was seriously felt, as the symbol of a new philosophy and new way of life, unthinkable, in the feudal, monarchical and absolutist society preceding it. Even the historically famous Magna Carta, which has been hailed in some quarters as the greatest charter of human liberty, should be considered as no more or no better than an attempt of the feudal Barons of the Middle Ages to secure their privilege and position against the monarch. It was not a declaration of the rights of all citizens, much less of all men<sup>(4)</sup>. It was Locke, Rousseau and Thomas Paine's sincere and zealous advocacy of the rights of man that initiated the process of constitutional incorporation and safeguard of rights of individuals living in a free democratic society-free from the arbitrary shackles of an authoritarian absolutist rule, not of laws but of man.

Locke was of the opinion that the original state of nature was one in which peace and reason prevailed. It was not lawless, since men lived under natural law. Under the law of nature all men were equal and possessed equal natural rights. Locke defined these as the rights to life, liberty and property. In his opinion, the powers of the legislatures were not to be absolute; behind it

stood the community, which retained its natural rights, and which might dissolve the government if it acted contrary to its trust.

"Men are born and remain free and equal in rights", and "the law is the expression of the general will", were the opinions of Rousseau, which influenced the governmental changes of the period. His doctrines of human equality, of popular sovereignty and many of his other principles had great impact on the political experiments of the French Revolution and were expressed in the Declaration of the Rights of Man in 1789<sup>(5)</sup> .

In America, the growth of democratic and republican sentiment was stimulated by the writings of Thomas Paine (1737-1809). Paine urged the Colonists to declare Independence. The later American attitude towards monarchy and the system of nobility, the emphasis on popular elections, and the idea of independence owed much to the influence of Paine<sup>(6)</sup> .

The French Revolution was supported in England by Paine. He held that a republican form of government and a written constitution were necessary for the proper organisation of the popular consent. Paine strongly upheld the natural law philosophy of the Declaration of the Rights of Man. He believed that men are free and equal, that they possess the natural rights of security, liberty, and property, and that all authority is derived from the people. He insisted that the state was made for man and that government should be his servant<sup>(7)</sup> .

The British Constitution, being unwritten, contains no formal declaration of rights; nevertheless, it can not be denied that the earliest charters of fundamental rights are to be found amongst the British Constitutional documents. Of these, the most ancient and important is the charter granted by King John, in 1215, generally known as Magna Carta <sup>(8)</sup>. The next constitutional charter was the Petition of Rights of 1628, the preamble of which expressly states that it concerns "Diverse rights and liberties of the subjects". The next was the Bill of Rights of 1689, which was expressly described as "an Act declaring the rights and liberties of the subject". These three declarations were the forerunners of modern Bill of Rights.

A direct descendant of these constitutional charters was the Virginia Declaration of 1776. As Professor Goodhart says, "Magna Carta crossed oceans in the 17th and 18th centuries because the colonists brought these documents with them" <sup>(9)</sup>. Originally, the British settlers in these colonies claimed the same rights as were enjoyed by their fellow citizens in Great Britain under the Common Law. Though there was no declaration of fundamental rights in the Constitution of the United States which came into force on the 25th September 1789, the gap was subsequently filled up by the first ten amendments which armed the people with all important rights.

On the 27th of August, 1789, the French Constituent

Assembly gave its final approval to a Declaration of Rights which, because of its historical importance, became the source of the charters of liberties not only on the continent of Europe, but also in other parts of the world.

Internationalisation of fundamental rights really began with the charter of the United Nations, which reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of the nations large and small" <sup>(10)</sup> . The second step in this direction was taken by the General Assembly on the 10th December, 1948, when it proclaimed the Universal Declaration of Human Rights.

With its long history of foreign rule and sensitive to its disabilities and discriminations, the Indian mind had come to regard a Bill of Rights as an essential part of their constitution.

Pandit Jawaharlal Nehru held that we did not have to go abroad for ideas of religious and cultural toleration; these were inherent in Indian life. In regard to individual and political rights and civil liberties, we were influenced by the ideas of the French and American revolutions, as also by the constitutional history of the British Parliament. Socialistic ideas, and the influence of the Soviet Revolution, came in later to give a powerful economic <sup>(11)</sup> turn to our thoughts.

In his Memorandum on Fundamental Rights, which was submitted to the Constituent Assembly, Sir B. N. Rau, the Constitu-

tional Adviser, refers to Magna Carta, the Petition of Rights, and the Bill of Rights - the triple pillars of the British Constitution, and also invites attention to the following declarations of rights: (1) Amendments to the Constitution of the United States, (2) Articles of the Swiss Constitution dealing with fundamental rights, (3) Articles 109-160 of the German (Weimar) Constitution of 1919, (4) Articles 113-128 of the 1936 Constitution of the USSR and (5) Articles 40-44 of the Constitution of the Republic of Ireland <sup>(12)</sup> .

But there is no denying the fact that the American Bill of Rights became the foundation of the declaration embodied in the Indian Constitution. The rights which the Indian Constitution recognises as "fundamental" are generally to be found in the American Bill of Rights.

In spite of the long association of the Indian statesmen and politicians with the British political system, the Constituent Assembly deliberately departed from the British conception and adopted a formal declaration of fundamental rights in the Constitution in accordance with the American practice. Historically speaking the persistent refusal on the part of the British rulers to grant even a semblance of human freedom to the oppressed Indians, and the ardent conviction of the Indian leaders that an unwritten assurance was no effective guarantee or remedy against a possible interference by the state, perhaps accounted for this departure. The history of this country, the composition of its population, ideological differences

amongst the different sections of the population, India's social traditions, and the requirements of true democracy, were determining factors with the members of the Constituent Assembly in their task of enunciating a set of justiciable rights for the newly independent people of India .<sup>(13)</sup> Apart from this "the notion for many years had great appeal not only as representing advanced democratic thought but more particularly as a convenient way of setting at rest the fears of minorities"<sup>(14)</sup> . Moreover, that a declaration of rights had assumed such importance was not surprising. India was a land of communities, of minorities, social, religious, linguistic and caste. For India to become a state, these minorities had to agree to be governed both at the centre and in the provinces by fellow Indian members, perhaps, of another minority - and not by a mediatory third power, the British. On both psychological and political grounds, therefore, the demand for written rights proved overwhelming<sup>(15)</sup> .

The rights embodied in the Indian Constitution are not absolute. The notion of qualified or restricted rights is of recent origin. Modern states are welfare states. The existence of the welfare state is conditioned by a right balance between individual liberty and social welfare. This balance between individual liberty and social control implies qualified rights.

Mill championed an individualistic and negative approach to liberty. In his opinion, the only part of the conduct of any one, for which he is amenable to society, is that which

concerns others. In the part which merely concerns himself, his independence is, of right, absolute. "Over himself, over his own body and mind, the individual is sovereign" (16). The central idea of Mill's 'Liberty' is the immense importance to mankind of encouraging and promoting a large variety of character and modes of thinking, thus giving full freedom to human nature to expand and improve in all directions.

Modern political scientists like Harold Laski and Ernest Barker put emphasis on positive content of liberty and its qualified character. Laski means by liberty "the absence of restraint upon the existence of those special conditions which, in modern civilisation, are the necessary guarantees of individual happiness" (17). For something like a century and a half, says Laski, it has been the central purpose of western civilisation to find the secret of combining individual freedom with social order. The fulfilment of that purpose has been achieved in different ways, and in different degrees; there has been one method in France and another in Great Britain. But it is an aim, the fulfilment of which has been generally and increasingly desired wherever there has been respect for human personality (18).

Barker holds the view that Liberty within the state is a relative and regulated liberty: it is the greatest common measure of liberty which is possible for all, as determined and defined (1) by the need of each to enjoy similar and equal liberty with others, and (2) by the need of all to enjoy the specific

liberty of realising specific capacities .... "A relative and regulated liberty, actually operative and enjoyed, is a liberty greater in amount than absolute liberty could ever be" <sup>(19)</sup> . In the twentieth century, especially after the First World War, fundamental rights and human freedoms have acquired altogether new dimensions. While in the 18th century, people talked of inalienable and unchangeable natural rights basic to human development, in the second half of the nineteenth century, they talked more and more of civil liberties, especially those concerned with political participation. A new dimension was added in the twentieth century when, thanks to President Roosevelt's famous declaration of "four freedoms" namely, freedom of expression, freedom of participation, freedom from want and freedom from fear, liberties were transformed into freedoms. This new dimension of freedom calls for social security, for right to work, education and leisure, and requires a rich cultural life and internal order. This was partly epitomised in the Bill of Rights of the Soviet Constitution of 1936, and received complete fruition and fulfilment in the Universal Declaration of Human Rights of the U. N. when fundamental rights were, for the first time, internationalised. This, indeed, has been a revolution in itself. One other development requires attention. While there has been significant and substantial addition to the quantum and content of the freedoms, the corresponding restrictions and limitations on such freedoms have also increased, due partly to the growth in the activities and functions of the state, and partly to the growing need for discipline, order, security and stability

of the state society. This has resulted in a new equilibrium between freedom and authority. The Constitution of India, in a large measure, seeks to recognize these changing dimensions and patterns in the field of human freedoms, not in Part III in isolation, but in Parts III & IV taken together as an integrated scheme of freedom. Part IV, in a large measure, seeks to symbolize, albeit partially and superficially, the new shift in the evolution of rights and freedoms.

The difference between the Indian Constitution and the Constitution of the U. S. A., so far as fundamental rights are concerned, is really, as Dr. Ambedkar rightly pointed out in the Constituent Assembly on November 4, 1948, "one of form and not of substance" <sup>(20)</sup>. The fundamental rights of the American citizen as judicially interpreted, are not absolute rights. There is really no difference in the result. What one does directly, the other does indirectly. In both cases the fundamental rights are not absolute.

The urge for liberty in India was the product of a mixture of events. Mill's essay "On Liberty" in 1859 was a source of inspiration to the educated Indians. The foundation of High Courts in Calcutta, Bombay and Madras in 1862 was an important landmark in the history of civil liberties in India. The immortal documents like Magna Carta, Petition of Rights and the Bill of Rights inspired the students of constitutional history and the

lawyers. Indians, educated in the western line, inspired by the teachings of Locke, Hume, Paine and Bentham, were suffering from a sense of frustration seeing the glaring contrast between the ideal of civil liberty which the Indians got from the study of English history and literature and its virtual denial in their everyday life under the British rule. American Bill of Rights and the French Declaration of the Rights of Man and Citizen had immense effect in this direction.

The Indian National Congress which led the national movement of the country, was the most important political organisation in British India. From 1885, the year of its inception, upto 1905, it was dominated by leaders, who were known as the Moderates. Demands like (1) Indianisation of the Services, (2) expansion of the Legislative Councils, (3) removal of the restrictions on the Press, (4) the extension of the rule of law by taking such steps as the separation of the judiciary from the executive, were articulated by such stalwarts as Ranade, Surendranath Banerjee, Pherozeshah Mehta and G.K. Gokhale; and the line of activity the Congress pursued, was to apply constitutional pressure both in India and in England through the normal channels of political communication.

National consciousness began to grow fast. The development of transport and communications through the railways, posts and telegraphs and press, helped the growth of such consciousness. The first popular movement began under the leadership of B.G. Tilak

in Maharashtra in the year 1890, and the Partition of Bengal (1905) gave a great fillip and a radical turn to the nationalist movement. It is significant that in 1906 Dadabhai Naoroji, in his Presidential address to the annual session of the Indian National Congress, placed before the people 'swaraj' or 'self-government' as the goal to be attained (21) .

The Fundamental Rights and the Directive Principles had their roots deep in the struggle for Independence; they were included in the Constitution in the hope and expectation that one day the tree of liberty would be securely planted in India. The Rights and Principles thus connect India's future, present and past, adding greatly to the significance of their inclusion in the constitution and giving strength to the pursuit of the social revolution in India (22) .

The majority provisions of the Constitution are either directly aimed at furthering the goals of the social revolution or attempt to foster this revolution by establishing the conditions necessary for its achievement. Though the entire Constitution is directed towards this end, the core of the commitment to the social revolution lies in Parts III and IV, in the Fundamental Rights and in the Directive Principles of State Policy. These, according to Granville Austin, are the 'Conscience' of the Constitution (23) .

In the Directive Principles, however, one finds a

more concrete statement of social revolution, and the institution-  
alization of such goals. These principles aim at making the  
Indian masses free from the passivity engendered by centuries of  
social-political constraints, free from the abject physical condi-  
tions that had prevented them from fulfilling their best selves .  
(24)

The preamble to the Constitution of India lays down  
"justice, social, economic and political", and "equality of status  
and of opportunity", as objects to be secured to all its citizens.  
Part IV explains more precisely what it means by the objective of  
the Preamble. Article 33, the essence of the Directives, echoing  
the Preamble, states that "the state shall strive to promote the  
welfare of the people by securing and protecting as effectively as  
it may a social order in which justice, social, economic and poli-  
tical, shall inform all the institutions of the national life."

The formulation of social and economic objectives in  
national constitutions owes its origin essentially to the realisa-  
tion that the content of political freedom is impaired by the  
absence of social justice and that without adequate protection  
for social and economic rights constitutional guarantees of what  
are known as "classical individual liberties" such as the right to  
equality, liberty of person and freedom of speech and association  
may lose much of their significance. This close association be-  
tween political freedom and social justice has become a common  
concept since the French Revolution .  
(25)

In India, it was hoped that the Constitution would be framed in such a way that a true socio-economic revolution could be heralded and through this revolution the basic needs of the common man could be fulfilled. The Assembly members were also conscious of the need for a fundamental change in the structure of Indian society and of a powerful infusion of energy and rationalism. And as a result the theme of social revolution runs throughout the proceedings and documents of the Assembly .  
(26)

Jawaharlal Nehru was of the opinion that "the service of India meant the service of the millions who suffer. It meant the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation" he said "has been to wipe every tear from every eye" . Nehru believed that two revolutions, the national and the social, had been running parallel in India since the end of the First World War. With Independence, the national revolution would be completed, but the social revolution must go on. Freedom was not an end in itself, only a means to an end, that end being the raising of the people to higher levels and the general advancement of humanity .  
(27)  
(28)

The choice for India, wrote Santhanam, was between rapid evolution and violent revolution because the Indian masses could not and would not wait for a long time to obtain the satisfaction of their minimum needs .  
(29)

And it may be said that the Directive Principles serve

this purpose, representing the minimum of the ambitions and aspirations cherished by the people of India. They are the ideals of a welfare state, and represent a dynamic move towards a certain objective.

Gandhi was a firm believer in 'liberty', 'equality' and 'fraternity' as being the essence of democracy. Consistently with his own social philosophy, Gandhi tried to pour a new content of ideas into 'liberty', 'equality' and 'fraternity'. These ideas were characteristically egalitarian and socialistic, and were rooted in his conception of non-violence as the very essence of democracy.

Gandhi said in 1942 that the liberty of the people should not depend upon the will of the individual, however noble and ancient may be his descent. Nor can, any person, whether prince or princely zamindar or merchant, be the sole owner and disposer of the possessions, hereditary or self-acquired. Every individual must have the fullest liberty to use his talents consistently with equal use by his neighbours. Referring to the French ideal of 'liberty', 'equality' and 'fraternity', Gandhi said, "it is a heritage not for the French only but for all mankind, what the French never realised, it is open to us to do" <sup>(30)</sup>.

An attempt to outline the rights desired by Gandhi for the citizens of free India is largely frustrated in the absence of specific political or constitutional ideas of Gandhi. In the early years of his political career, he was

preoccupied with his Constructive Programme. Throughout his life, he showed the least interest in participating in the governmental affairs. He neither participated in the debates of the Constituent Assembly nor allowed himself to express anything he deemed proper during the long debates in the Assembly. His role in the later years was one of disinterestedness, except under special circumstances when he made some casual expressions. Therefore, the task to ascertain his views on the rights of the people is to depend on his sporadic remarks or statements lying scattered here and there, which he made either in personal capacity or as the leader of the Congress.

The book 'Hind Swaraj' or 'Indian Home Rule' written by Gandhi in 1909 contained his basic ideals on which the future Constitution of India should be based (31)

Again, on the eve of his departure for London to attend the Round Table Conference in 1931, being asked by a correspondent what type of constitution he would like to bring home, if he was allowed to, Gandhi asserted that he would strive for a constitution, which would release India from all thralldom and patronage, and give her if need be, the right to sin. He reiterated his vow to work for an India in which the poorest should feel that it was their country - in whose making they had an effective voice; an India in which there would be no high class and low class of people; an India in which all communities would live in perfect harmony. There could be no room in such an

India for the curse of untouchability or the curse of intoxicating drinks and drugs. Women would enjoy the same rights as men..... This was the India of his dreams. He would be satisfied with nothing less <sup>(32)</sup>. We find an echo of his ideas in some of the Directive Principles of State Policy, which were later adopted.

With reasonable caution and reservations we can accept Shriman Narayan Agarwal's book 'Gandhian Constitution for Free India' as Gandhi's own conception or idea about India's constitution; because Gandhi himself approved this book, and in foreword he wrote that the merit of Shriman Narayan Agarwal's attempt consisted in the fact that he had done what for want of time Gandhi himself had failed to do. In this brochure, Shriman Narayan Agarwal intended to draw the attention of the future rulers of the people to what Gandhi had contemplated. Therefore, the fifth chapter of this brochure, which contains the 'fundamental rights and duties' may accordingly be expected to be Gandhi's prescriptions for the people of free India.

The following are the rights enumerated in the book:

(1) All citizens shall be equal before the law, irrespective of caste, colour, creed, sex, religion or material wealth.

(2) No citizen shall suffer from any disability on account of his or her religion, caste or creed in regard to

public employment, public honour, trade and commerce.

(3) Subject to the principles of non-violence and public morality, every citizen shall enjoy freedom of person; freedom of speech; freedom of assembly, combination and discussion.

(4) Every citizen shall enjoy freedom of conscience and the right to follow personal and social customs, subject to public order and morality.

(5) All citizens shall be free to preserve and develop their script, language and culture.

(6) All citizens shall have an equal right to the use of wells, tanks, roads, schools and places of public resort, maintained out of state or local funds, or dedicated by private persons for the use of the general public.

(7) Every citizen shall be entitled to free basic education, otherwise known as 'Nai Talim'.

(8) Every citizen shall have the right to obtain legal and public protection from violence, compulsion or intimidation in regard to his or her persons and personal property.

(9) Every citizen shall have the right to obtain a minimum living wage through honest work or employment.

(10) Every citizen shall have the right to rest, by not being compelled to work for more than eight hours a day.

(11) Every citizen shall have the right to medical freedom.

(12) Every citizen shall have the right to take part

in Public Administration through his or her vote on the basis of adult franchise.

(13) Every citizen shall have the right to keep and bear arms in accordance with rules and regulations made in this behalf.

Duties:-

(1) All citizens shall be faithful to the state specially in times of national emergencies and foreign aggression.

(2) Every citizen shall promote public welfare by contributing to state funds in cash, kind or labour as required by law.

(3) Every citizen shall avoid, check and, if necessary, resist exploitation of man by man (33)

## II

The inclusion of a set of Fundamental Rights in the Indian Constitution had its genesis in the forces that operated in the national struggle during the British rule. With the British authorities resorting to all sorts of arbitrary acts to curb the liberty of the people in the early decades of this century, this became an article of faith with the leaders of the freedom movement. Of course, the Indian desire for civil rights had its roots deep in the nineteenth century. It was implicit in the formation of the Indian National Congress in 1885. Indians wanted the same rights and privileges that their British masters enjoyed in India.

Sir B. N. Rau, in his report on Human Rights (December 1947), says that at the end of the First World War, when the League of Nations and the International Labour Organisation came into being, India's membership of these bodies and her participation in their periodical conferences had an immense educative effect on the Indian public. So too had Mahatma Gandhi's powerful and persistent efforts to ameliorate the position of Harijans. Almost simultaneously came the introduction of responsible government in the Provinces, at first, partially, under the Government of India Act 1919 and later, more completely, under the Act of 1935. The legislatures became more and more responsible to public opinion and this had the effect of facilitating, if not compelling, the transition of the new ideals into law. The process was further accelerated by the Second World War and the establishment, upon its end, of the United Nations (34)

The first explicit demand for fundamental rights appeared in the Constitution of India Bill, 1895. This Bill guaranteed to everyone of her citizens freedom of expression, inviolability of one's house, right to property, equality before the law and in regard to admission to public offices, right to present claims, petitions and complaints and right to personal liberty. (Clauses 16-21 and 23, 24 of the Bill, select Documents 1,2,p.7) (35) . This was the starting point and subsequent resolutions of the Indian National Congress sought to lay emphasis on the securing of fundamental rights, in any future consti-

tution in India, as an article of faith. The Calcutta Congress in 1906 resolved that in the opinion of this Congress, "the time has arrived for the people all over the country earnestly to take up the question of National Education for both boys and girls and organise a system of education - literary, scientific and technical, suited to the requirements of the country on national lines and under national control."<sup>(36)</sup>

The Calcutta Congress of 1907 demanded equality of women and men in regard to the franchise and education. On the allied question of the Depressed Classes, the Congress urged upon the people of India the necessity, justice and righteousness of removing all disabilities imposed by custom upon the Depressed Classes, the disabilities being of a most oppressive character, subjecting those classes to considerable hardship and inconvenience.<sup>(37)</sup>

By the mid-twenties, Congress and Indian leaders had generally achieved a new forcefulness and a consciousness of their Indianness and of the needs of the people, thanks largely to the experience of the First World War, to the disappointment of the Montagu-Chelmsford Reforms, to Woodrow Wilson's support for self-determination, and to Gandhi's arrival on the scene. These influences were reflected in the tone and form of demands for civil rights<sup>(38)</sup>.

Ever since his advent into Indian politics,

Gandhi exercised tremendous influence in moulding public opinion and guiding Indian leaders. He held the field for about three decades at one time as the active head of the Congress, at another as the sole inspirer. It is immaterial whether he was or was not all along a formal member of the Congress organisation. Upto the last day of his life he had been the consultant, whose experiments in satyagraha and other non-violent techniques placed him in the position of a guide to the Congress. Under his leadership, the aim of the Congress was to win India's freedom and to secure rights and liberty for the people. Therefore, it would not be unfair or irrelevant to assume that the Congress, its struggle for individual rights, its reports and resolutions during that (Gandhi's) period, were to a great extent influenced by Gandhi. Hence, it will be illuminating and most interesting to have here a brief survey of the evolution of Fundamental Rights, through different stages, side by side with Gandhi's attempts in this direction.

Following the publication, in 1918, of the Montagu Chelmsford Report, the Indian National Congress at its special session, held in Bombay in August, 1918, demanded that the new Government of India Act should include a Declaration of the Rights of the People of India as British citizens. The proposed declaration was to include, inter alia, guarantees in regard to equality before the law, protection in respect of liberty, life and property, freedom of speech and press, and right of association. In the same year, at its Delhi session in December, the Congress

passed another resolution demanding the immediate repeal of all laws, regulations and ordinances, restricting the free discussions of political questions and conferring on the executive the power to arrest, detain, intern, extern or imprison any British subject in India outside the process of ordinary civil or criminal law (39) .

The war ended in a victory for the British, the feeling grew that the attitude of the British would turn for the worse. The Government of India announced in January 1919, its intention to make new laws with a view to restrict freedom of expression and movement and to arrest a person without showing cause. In February 1919 the Rowlatt Bills made their appearance. Gandhi characterised these as "unjust, subversive of the principles of liberty and justice and destructive of the elementary rights of an individual" (40) . Government turned a deaf year and passed the Rowlatt Bill, Gandhi threatened Satyagraha, if the Bill which was subversive of the principles of liberty and justice and destructive of the elementary rights of an individual was passed.

Under the inspiring leadership of Gandhi the Amritsar Congress in 1919 passed a resolution supporting vigorously the civil liberty and denouncing the excesses committed by the Government. The whole Congress was a triumph for Gandhi. He had impressed the Congress with his principles and philosophy, his code of ethics, his cult of truth and non-violence (41) .

After a long and earnest consideration the resolution of Gandhi for non-co-operation (due to Khilaphat and Punjab excesses) was passed in the Calcutta Congress in September 1920.

Many important changes took place at Nagpur, in the same year. The creed of the Congress was changed, the object of the Indian National Congress was declared to be the attainment of swaraj by the people of India by peaceful and legitimate means. Previously, the Congress creed was the attainment of a form of administration within the British empire on the lines of those in the colonies. Swarajya, in the creed adopted at Nagpur, meant, according to Gandhi, "within the British Empire if possible, outside the Empire if necessary"<sup>(42)</sup>. This session was a personal victory of Gandhi. The drastic changes made in the Congress organisation by Gandhi made it a real, solid organisation. At Nagpur, Gandhi became the undisputed leader of India.

Resolution No. 8 of this session proclaimed that "the Congress is of opinion that Indian labour should be organised with a view to improve and promote their well being and secure to them their just rights and also to prevent the exploitation (1) of the Indian labour (2) of Indian resources by foreign agencies, and that the All India Congress Committee should appoint a committee<sup>(43)</sup> to take effective steps in that behalf".

Resolution No. 14 read: ---- "as free elementary education is the primary and urgent need of the masses of India, this Congress urges on all Congress organisations to introduce and

enforce the same in their respective areas on national lines" (44) .

The Congress, as early as 1920, began to implement the ideals of the 'Constructive Programme' of Gandhi, consisting of untouchability, Hindu-Muslim unity, Khadi, prohibition, etc. The Ahmedabad Congress of 1921, in its resolution No. 2, put an appeal to the Congress workers and the nation "to help the cause of prohibition and removal of untouchability and to help the condition of the submerged classes" (45) .

At the Gaya session of the Congress in 1922, there appeared a fight between those that raised politics to a spiritual level, and those that worked politics on the intellectual and material plans. That the leader of the former group was not present in flesh and blood made no difference. The issue was Council entry. To Gandhi it was opposed to non-co-operation. The spirit of Gandhi was all pervading. Everyone took it to be an act of disloyalty to the master to turn his back on him, the moment he was found to be absent from the Congress (46) . A handsome tribute was paid to Gandhi and his principles: "This Congress places on record its grateful appreciation of the services of Mahatma Gandhi to the cause of India and humanity by his messages of peace and truth and reiterates its faith in the principle of non-violent, non-co-operation inaugurated by him for the enforcement of the rights of the people of India" (47) .

The Gaya Congress also reiterated its previous stand taken in the Nagpur Congress, 1920, (resolution no. 8) on

the rights of the labourers.

The Indian National Congress, in its Belgaum session in December 1924, took resolutions on removal of untouchability, prohibition of intoxicating drinks, abolition of race distinction in services and religious freedom to various denominations. Among these the first two items found prominence. (Items 7 & 13 of the resolution) <sup>(48)</sup>. Gandhi, in his presidential address at this Congress, said that "untouchability is another hindrance to swaraj. Its removal is just as essential for swaraj, as the attainment of Hindu Muslim unity. This is an essentially Hindu question and Hindus cannot claim or take swaraj till they have restored the liberty of the suppressed classes. They have sunk with the latter's suppression..... The sooner we remove the blot, the better it is for us Hindus" <sup>(49)</sup>.

Gandhi placed his 'twelve points' Swaraj scheme. The fourth point of the scheme demanded that the revenues from intoxicating liquors and drugs should be abolished, and the eleventh point demanded recognition of complete religious freedom to various denominations, subject to mutual forbearance.

The 40th session of the Congress at Kanpur, in December 1925, adopted the following programme of political work-

(1) The work in the country shall be directed to the education of the people in their political rights, and training them to acquire the necessary strength and power of resistance to win those rights by carrying out the constructive programme of the

Congress with special reference to popularising the spinning wheel and khaddar, promoting inter-communal unity, the removal of untouchability, ameliorating the condition of the suppressed classes and the removal of the drink and drug evil, the organisation of labour, both industrial and agricultural, the adjustment of relations between employees and workmen and between landlords and tenants and the general advancement of the national, economic and industrial and commercial interests of the country (50) . It requires no mention that almost all the rights of the above programme were the manifestations of Gandhi's ideas and wishes.

In the same year Mrs. Annie Besant's Commonwealth of India Bill appeared with seven fundamental rights. The rights were: - individual liberty, freedom of conscience, free expression of opinion, free assembly, equality before the law, free elementary education, equal right to the use of roads, courts of justice and all other places of business or resort dedicated to the public. Thus the Bill may be said to have been the precursor of several provisions of Fundamental Rights and the Directive Principles. By now, Indian opinion, including that of the minorities, had become attuned to the necessity for such a list of fundamental rights. The minorities regarded these rights as the sheet anchor of their political existence, and even the Muslims found in such declarations a solution to all their problems (51) .

Again, in the Gauhati Congress in 1926, Gandhi took a very active role in the deliberations. Special attention

was given to untouchability and prohibition, freedom of person, speech, association and of the press. Improvement of agriculture and protection of the rights of labour, agricultural and industrial, were taken to be the aim (52) .

Within two years of the appearance of the Annie Besant Bill came the announcement that the Simon Commission would undertake a study of possible constitutional reforms in India. In response, the annual session of the Congress at Madras in 1927 resolved that the Working Committee should draft a 'swaraj' constitution for India on the basis of a declaration of rights. Since the problem of minorities in India further strengthened the general argument in favour of the inclusion of fundamental rights in the Indian Constitution, this Congress passed a resolution which categorically laid down that the basis of the future constitution of India must be a declaration of fundamental rights.

The session of the Indian National Congress held in Calcutta in the month of December 1928, demanded total prohibition of intoxicating drugs and drinks (resolution no. 1), removal of the disability of the women (resolution no. 2), and removal of untouchability (resolution No. 3) (53) .

This Congress also urged the Ruling Princes of the Indian States to introduce responsible government based on representative institutions in the States, and to issue immediately proclamations or enact laws guaranteeing elementary fundamental rights of association, free speech, free press and

security of person and property (54) .

The Nehru Committee appointed by the All Parties Conference in its Report in 1923, incorporated a provision for the enumeration of rights. The rights of this Report ultimately formed the basis of the fundamental rights in the constitution of India - "ten of the nineteen sub-clauses re-appear, materially unchanged, and three of the Nehru Rights are included in the Directive Principles ..... In this report the desire to afford protection to minorities was specially prominent .!" (55)

Some of the more important rights recommended by the Nehru Committee may be summed up as follows:

- (1) personal liberty and inviolability of dwelling place and property,
- (2) freedom of conscience and of profession and practice of religion,
- (3) right to free expression of opinion and to assemble peaceably, to form associations or unions;
- (4) right to free elementary education without distinction of caste or creed in the matter of admission into any educational institutions maintained or aided by the state;
- (5) equality for all citizens before the law and in civic rights;
- (6) non-discrimination against any person on grounds of religion, caste or creed in the matter of public employment;
- (7) equality of the right to all citizens in the matter of access to, and use of public roads, public wells and all other places of public resort;
- (8) freedom of combination and association for the maintenance and improvement of labour and economic conditions;
- (9) equality of

(56)  
rights to men and women as citizens .

The Lahore session in 1929 was altogether a strenuous session as it was critical. The alternative proposals put forward against Gandhi were either academic or destructive. Gandhi was all too powerful here. The session ended amidst cries of 'Mahatma Gandhi Ki Jai'. "After Lahore, Gandhi again became the undisputed leader of the Congress. After experimenting on swarajist modification for about six years the country again found that circumstanced as India was, salvation of India lay through Gandhi's programme of undiluted non-violent, non-co-operation" . (57)

The resolution which was issued on behalf of the Working Committee for adoption by public meetings all over the country on Purna Swarajya day, January 26th, 1930, proclaimed: "We believe that it is an inalienable right of the Indian people to have freedom and to enjoy the fruits of their toil and have the necessities of life, so that they may have full opportunities of growth" (58) . In the same month Gandhi offered an 'eleven point' Swaraj Scheme to Lord Irwin, which contained vital needs of India (59) .

The Simon Commission which was appointed by the British Government in 1926, published its Report in 1930, totally rejecting the demands voiced by the Nehru Committee Report. However, this could not dampen the Indians' enthusiasm; in 1931, a new dimension was added to the demand for constitutional rights. The Congress session held at Karachi in March 1931, adopted the

resolutions on fundamental rights and economic and social change, which was both a declaration of rights and a humanitarian socialist manifesto. The provisions did, in fact, become in some cases the direct antecedents of the Directive Principles. There were, in all, 17 articles in this resolution, divided under 4 heads as (1) fundamental rights and duties (article 1 with 14 sub-clauses), (2) labour (articles 2 to 6), (3) taxation and expenditure (articles 7 to 11) and (4) economic and social programme (articles 12 to 17) <sup>(60)</sup> .

The Karachi resolution stated that, 'in order to end the exploitation of the masses, political freedom must include the real economic freedom of the starving millions'. The state was to safeguard 'the interests of industrial workers', ensuring that 'suitable legislation' should secure them a living wage, healthy conditions, limited hours of labour, and protection from the economic consequences of old age, sickness and unemployment, women and children were also to be protected in various ways and accorded special benefits. The state was to own and control key industries and services, mineral resources, railways, waterways, shipping and other means of public transport. Another item called for the reform of the systems of land tenure, revenue and rent.

"Several clauses reflected the Gandhian side of the Congress: for example, the demand for greatly reduced military expenditure, the ceiling of five hundred rupees per month

for civil servants' salaries, no salt duty, prohibition and the demand for protection against foreign cloth. The provisions concerning the salt-tax, prohibition, and protection for domestic textiles had the ring of a tactical programme for the Independence Movement - these subjects had indeed, been at the centre of the civil disobedience campaign of the previous year ..."<sup>(61)</sup>

The question of a Bill of Rights for the Indian people came up before the Round Table Conference. The subject of fundamental rights designed to secure either to the community in general or to specified sections of the people of India rights and immunities, was discussed at length and memoranda were also submitted by individuals and groups for the inclusion of a chapter on Fundamental Rights in the proposed Constitution of India. This demand was vigorously championed by Dr. B. R. Ambedkar. And a strong case for social and economic rights was made out by prominent Labour members like N. M. Joshi, B. Shiva Rau and V.V. Giri .<sup>(62)</sup>

A memorandum circulated by Gandhi at the second session of the conference, demanded, inter alia, that the new constitution should include a guarantee to the communities concerned of the protection of their cultures, languages, scripts, education, profession and practice of religion and religious endowments, and protect personal laws, and that the protection of political and other rights of minority communities should be the concern of the Federal Government .<sup>(63)</sup>

At the third session of the Conference, the

subject of fundamental rights was discussed on the 17th and 19th December 1932, and although the British Government realised the importance attached to them, it expressed the practical difficulties which might result from including many, indeed most of them as conditions which might be complied with as universal rules by executive or by legislative authority <sup>(64)</sup> .

In 1932 a spate of correspondence between Gandhi and the Viceroy proved futile. Gandhi was arrested, along with other leaders including Jawaharlal Nehru and Sardar Patel. Amongst the leaders, only Pandit Malavya remained free. Terrible repression took place everywhere. Two Congress sessions, apparently insignificant, were held in April, 1932 in Delhi and in 1933 in Calcutta. The Delhi session (1) reiterated complete independence as the goal of the Congress, (2) endorsed Civil Disobedience, (3) congratulated the nation on its splendid response to Mahatma Gandhi's call and expressing complete faith in his leadership, <sup>(65)</sup> (4) reaffirmed deep faith in non-violence .

The Calcutta Congress, (1) regarded Civil Disobedience to be a perfectly legitimate means for the protection of the rights of the people, (2) asked the people to boycott foreign clothes, (3) held that "no constitution framed by the British Government, while it is engaged in conducting a campaign of ruthless repression - involving the imprisonment and internment of the most trusted leaders of the nation and thousands of their followers, suppression of the fundamental rights of free speech

and association, stringent restraint on the liberty of the press and replacement of the normal civil law by virtual Martial law, deliberately initiated by it on the eve of Mahatma Gandhi's return from England with a view to crush the national spirit, could be worthy of consideration by or acceptable to the people of India" <sup>(66)</sup> . (4) The Congress offered its congratulations to the country on the successful termination of Mahatma Gandhi's fast of September, 1932, and hoped that untouchability would before long become a thing of the past. (5) It reiterated the resolution <sup>(67)</sup> on fundamental rights of the Karachi Congress .

In the year 1934, the Working Committee met at Wardha on June 12 and 13, and in Bombay on June 17 and 18, and laid down for the newly organised Congress Committees a Constructive programme which contained: removal of untouchability, the promotion of inter-communal unity, the promotion of total abstinence from intoxicating drinks and drugs and advocacy of prohibition, promotion of education on national lines, promotion and development of useful small industries, organisation and reconstruction of village life in its economic, educational, social and hygienic aspects, spread of useful knowledge amongst the adult population in the villages, or organisation of industrial <sup>(68)</sup> labour .

The Government of India Act, 1935, was passed without any Bill of Rights, much to the disappointment of the Indian leaders. Based as it was on the recommendations of the Joint Select Committee of the British Parliament, it provided

for only a few rights and privileges under sections 275, 297, 298, 299 and 300. Under section 298, the Act aimed at preventing discrimination against citizens in matters relating to holding of office under the Crown, holding, acquiring and disposing of property, and carrying on any trade in British India, on grounds of race, religion or place of birth or any of them, Section 299 provided that no person shall be deprived of his property in British India save by authority of law. Over and above these constitutional provisions, there were ordinary provisions of statutory enactments turning on individual rights, privileges and immunities.

On the whole, however, the position was not very satisfying; rather, it failed to come upto the Indian expectations and was bitterly resented by those sections of Indian leaders who wanted nothing short of complete independence and a full scale Bill of Rights for the subjugated Indian people, long denied the basic human freedom as members of a civilised society. By and large the Act was ineffective in safeguarding the people against executive despotism.

The session of the Indian National Congress at Lucknow in the month of April 1936 resolved that "the Congress draws public attention again to the widespread and intensive suppression of civil and in many instances personal liberties in India by the British Government: crushing labour and peasant movements, banning of books and periodicals, restriction of the

free movement of persons within the country, prevention from carrying on their usual occupations and business". The demand for a Constituent Assembly, elected by the people, to frame a constitution for India and to determine India's political destiny, which was first seriously made in 1934 by the Indian National Congress, was reiterated in the Lucknow session, and in this session an exhaustive agrarian programme was also taken (69) .

The Draft Election Manifesto prepared in connection with the election to the provincial legislatures in February 1937, which was approved at a meeting of the All India Congress Committee, held in Bombay on 22nd and 23rd of August 1936, was to a great extent manifestations of Gandhi's wishes. The manifesto stated that "it stands by the Karachi resolution relating to fundamental rights and duties and will give its first attention to prohibition". Various agrarian reforms were also suggested. It was further stated that "in the domain of industrial labour, settlement of disputes and relief against old age, sickness and unemployment and the right to form unions and to declare strikes, will be the reforms aimed at removal of sickness, disability, maternity benefits and protection of women workers, equality with men in regard to privileges and obligations of citizenship and the removal of untouchability and uplift of the Harijans and backward classes, encouragement of Khadi and village industries, will largely constitute the programme of the Congress in the legislatures" (70) .

A convention of newly elected members of legislatures and others met in Delhi in March 19 and 20. This convention was preceded by a sitting of the All India Congress Committee on the 17th March. The members pledged to be governed by certain principles, and put emphasis on the promotion of Khadi, prohibition of intoxicating liquor or drugs, unemployment relief, reduction of high salaries, allowances, and cost of administration of government, substantial reduction of military expenditure, freedom of speech, press and association etc. (71)

The Faizpur Congress was from all accounts a great success. The power behind the Congress was Gandhi, and Gandhi in the penumbras of retirement was no less a force than Gandhi in the limelight. India claimed for herself the right to frame her own Constitution, and if a genuine democratic state, with its political power transferred to the people as a whole, should come into existence, it could only come through a Constituent Assembly elected by adult suffrage and invested with the power to determine finally the Constitution of the country (72). Nehru, in his presidential address, said that the Congress today stands for full democracy in India and fights for a democratic state (73). Gandhi added his voice and by political independence he interpreted (74) 'Ramarajya'.

The Indian National Congress, after assuming office in some of the provinces under the scheme of Provincial Autonomy, once again voiced its demand for Fundamental Rights at its

Calcutta session in October 1937.

The Labour Commission formulated a comprehensive programme of reform which was accepted by the All India Congress Committee in October 1937 in a resolution. The Congress included in its resolution on fundamental rights that (1) "every citizen of India has the right of free expression of opinion, the right of free association and combination and the right to assemble peaceably and without arms. (2) freedom of conscience and the right freely to profess and practise his religion. (3) The culture, language and script of the minorities and of the different linguistic areas shall be protected.

(4) All citizens are equal before the law irrespective of religion, caste, creed or sex.

(5) No disability attaches to any citizen by reason of his or her religion, caste, creed or sex in regard to public employment, office of power or honour or in the exercise of any trade or calling.

(6) All citizens have equal rights and duties in regard to wells, tanks, roads, schools and places of public resort maintained out of state or local funds or dedicated by private person for the use of the general public.

(7) The state shall observe neutrality in regard to all religions.

(8) The franchise shall be on the basis of universal adult suffrage.

(9) Every citizen is free to move throughout India and to stay

and settle in any part thereof, to acquire property and to follow any trade or calling and to be treated equally with regard to legal prosecution or protection in all parts of India" (75) .

The 51st session of the Indian National Congress at Haripura in 1938 was another triumph for Gandhi. He was successful in evolving a national education principle in the line of his concept of basic education. An All India Education Board was formed under the advice of Gandhi.

The Congress also approved of the resolution of the Working Committee on Minority Rights, passed in Calcutta in October 1937, and declared afresh that it regarded its primary duty and fundamental policy to protect the religious, linguistic, cultural and other rights of the minorities in India so as to ensure and safeguard them in any scheme of government to which the Congress would be a party (76) .

Apart from this, the pledge for the Independence Day on January 26, 1930 declared that "it is the inalienable right of the Indian people, as of any other people, to have freedom and to enjoy the fruits of their toil and have the necessities of life, so that they may have full opportunities of growth, and that the Congress believes that if any government deprives a people of these rights and oppresses them, the people have a further right to alter it or to abolish it" (77) .

The Congress pledged anew to the independence of

India and solemnly resolved to carry on non-violently the struggle for freedom till Purna Swaraj was attained. (78)

The 52nd session of the Indian National Congress, held at Tripuri in March 1939, demanded full freedom and a constitution through a Constituent Assembly, and declared its firm adherence to the fundamental policies which have governed its programme in the past years under the guidance of Gandhi, and opined that there should be no break in these policies, and that they should continue to govern the Congress Programme in future. In view of the critical situation that might develop during the coming year, and in view of the fact that Gandhi alone could lead the Congress and the country to victory during such crisis, the Congress regarded it as imperative that its executive should command his implicit confidence and requested the President to appoint the Working Committee in accordance with the wishes of Gandhi. (79)

In 1940, Gandhi's influence in the Congress was immense. On some issues based on ideology and programme, he had some differences with many of the Congress leaders, but later he was unanimously declared as the 'General'. Gandhi's impact was visible quite abundantly in the Independence pledge as well as in the resolution of the Congress session of the year.

Independence Day pledge for January 26, 1940 said that "non-violent action in general and preparation for non-violent direct action in particular, require successful working of the Constructive Programme of khadi, communal harmony and removal of untouchability". Distinction on the basis of caste and creed and Harijans was denounced. (80)

The 53rd session of the Indian National Congress held at Ramgarh in March 1940 resolved that "the Congress has always aimed at a constitution where the fullest freedom and opportunities of development are guaranteed to the group and the individual, and social injustice yields place to a juster social order".<sup>(81)</sup>

Then, in the holocaust of the war, sank all clamour for rights and liberties. The end of the war saw the revival of this demand, and the major contribution in this direction was made by the Sapru Committee (appointed by the All Parties Conference, 1944-45) Report of 1945. The Report pointed out that the fundamental rights will be a 'standing warning' to all "that what the constitution demands and expects is perfect equality between one section of the community and another in the matter of political and civic rights, and equality of liberty and security in the enjoyment of the freedom of religion, worship, and the pursuit of the ordinary applications of life"<sup>(82)</sup>. For the first time, the Report distinguished between "justiciable" and "non-justiciable" rights, i.e., "breaches of some may form the subject of judicial pronouncement, and the breaches of others may be remedied without resort to courts of law"<sup>(83)</sup>. This distinction exercised tremendous influence later in the framing of the fundamental rights for the new Constitution of India.

During these years, Gandhi was the key figure. The nation experienced his leadership including the 'Quit India' movement, during this great crisis. A meeting of the Working Committee of the Congress was convened in Poona and later in Bombay in September 1945. Azad presided and Gandhi, who was present in most of the sittings, declared that "fundamental rights as laid down by the Karachi Congress and subsequently added to, must form an integral part of this constitution"<sup>(84)</sup>. In October the

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Congress Working Committee issued a 12-point election manifesto which was a combination of socio-economic and constitutional right for the people. This manifesto also contained many of Gandhi's wishes. A good number of these rights were later incorporated in the present Constitution of India.

The British Cabinet Mission in 1945 recognised the need for a written guarantee of fundamental rights in the Constitution of India. In paragraphs 19 and 20 of its statement of May 16, 1946, envisaging a Constituent Assembly for framing the Constitution of India, it recommended the setting up of an advisory committee for reporting inter alia, on fundamental rights. (86)

By the Objectives Resolution adopted on January 22, 1947, the Constituent Assembly solemnly pledged itself to draw up for India's future governance a constitution where in "shall be guaranteed and secured to all the people of India justice, social, economic and political, equality of status and of opportunity and before the law; freedom of thought, expression, belief, faith, worship, vocation, association and action, subject to law and public morality" and wherein adequate safeguards would be provided for minorities, backward and tribal areas and depressed and other classes. (87)

Two days after the adoption of the Resolution the Assembly elected an Advisory Committee for reporting on minorities, fundamental rights and on the tribal and excluded areas. (88) The Advisory Committee in its turn constituted on February 27, 1947, five Sub-Committees, one of which was to deal with fundamental rights.

The members of the Constituent Assembly sought to reconcile two guiding principles which motivated and inspired them: the desire for

incorporating guaranteed rights for the individuals, including the minorities, and the ushering in of a welfare state which would bring maximum good to the maximum people. (89)

A thorny problem that faced the Constituent Assembly at the outset was what to leave out and what to include as rights. Some 'leftish' (sic) pressure to make fundamental rights all inclusive was resisted on the common sense ground that, it was pointless to give men guaranteed rights to things that no one would have the capacity, for at least some time, to provide. The Irish Constitution came to the rescue. (90) The Fundamental Rights Sub-Committee recommended, in line with the Irish model, division of rights into two parts -- one part consisting of justiciable rights, i.e., rights enforceable by appropriate legal process, and the other part consisting of non-justiciable rights in the same way as directive principles of social policy of the Irish Constitution, which, though not cognisable in any court of law, should be regarded as fundamental in the governance of the country. (91)

The Sub-Committee had before it draft list of rights by Sir B. N. Rau, K. T. Shah, K. M. Munshi, Dr. B.R. Ambedkar, Harnam Singh and other Congress experts. On these the Sub-Committee drafted the rights in its ten meetings during March and April 1947 and then submitted the Report to the Advisory Committee on 16th April. Sardar Patel then presented the Interim Report of the Advisory Committee on Fundamental Rights to the Constituent Assembly on 29th April, 1947. (92) Sardar Patel disclosed that there were two schools of thought in the Committee-one school in favour of inclusion of as many rights as possible easily and straightaway enforceable in a court of law, and the other school in favour of restriction of fundamental rights to a few very essential things, and that,

the final report represented a compromise. The recommendations of the Committee were accepted by the Constituent Assembly in the third session of the preliminary meeting. The decisions of the Assembly were incorporated by the Drafting Committee in Part III, of the Draft Constitutions<sup>(93)</sup>. The Drafting Committee under the Chairmanship of Dr. B.R. Ambedkar, prepared a Draft of the Constitution and presented it to the Constituent Assembly, on November 4, 1948. Except for several controversial provisions, the drafting of the rights was completed in mid-December, 1948.

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