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Jurisprudence of human rights and constitution of India, 1950

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Abstract
The Right to Life and Liberty has undergone tremendous expansion owing to the dynamism of agility of the Hon'ble Supreme Court over the past 70 years and the entire jurisprudence of human rights has been given great importance too. The concept of Human Rights can be more lived these days and the same has been made possibly due to the continuous involvement of the legislature as well as judicial activism. The author has tried to pen down the various steps taken in order to expand the scope of Article 21 of the Constitution of India.

Keywords: human rights, judicial activism, stare decisis, article 21, life & liberty, expansion, jurisprudence

Introduction

According to Greek and Roman philosophers, there is one common law of nature, based on reason, which is valid universally throughout the cosmos. Its postulates are binding upon all the races in every part of world. They developed a cosmopolitan philosophy, founded upon the guiding principle of equality of all men and the universal applicability of natural law. The ultimate rationale was a world-state where all men would live together harmoniously, for the benefit of each other and under the guidance of celestial with humane treatment, dignity and without any discrimination.

An imperative component in the notion of natural law philosophy was the principle of egalitarianism. The natural law philosophers were persuaded that all men were essentially equal and that discrimination between them on any front, including gender, sex, race, class or nationality was unjust and contrary to the laws of nature [1]. Though the above noted concept was more perceived in philosophy rather than reality and it continued to prevail in most part of the society, even the civilized one. The general belief is that the concept of human rights is western and that the origin of the concept of human rights in the world history found its first expression in Magna-Carta of 1215 and after this it becomes the milestones along the road in which the individual acquired protection against the capricious acts of the kings [2].

In Roman law, there was a distinction between national law or *Jus civile* and the law which is actually common to all nations or *Jus gentium*, while the former was exclusive law of city of Rome and it was peculiar to the state it belonged to, the latter was that law which was established by nature for all men and was considered law of all nations.

The concept and ideal of natural law being above any established man made law, was so profound and dominating that it continued to be followed in the middle ages as well. Natural law is based upon the innate moral feeling of mankind; instinctively felt to be right and fair, though not prescribed by any enactment or formal compact [3]. Most of the prominent philosophers have advocated in favor of the supremacy of law, for example, Aristotle propounded that the law is the rule of god and was based on reason not affected by the desires. The Indian Philosopher Kautilya also supported the assertions made by Aristotle and stated that "the reasons shall be held authoritative" [4]. The philosophical foundations of the rights of man are natural law and the history of the rights of man is bound up with the history of natural law [5].

During the middle age, catena of acts was brought into force to show the superiority of Natural law and Natural Rights. *Magna Carta* of 1215, Petition of Rights of 1628; Habeas corpus Act of 1679, Bill of Rights of 1689 are some of such steps taken in England for the empowerment, protection and evolution of the one of the most iconic and unblemished right of a human being [6].

Modern Era of Human Rights

In consequence and until this time, subject to permissible exceptions, the relation between a state and its subject, according to traditional prescriptions are a matter of domestic concern of law, not covered by rules of international law [7]. It would not be out of place to mention here that in spite of the inadequacies of traditional international law, an escalating number of treaties were executed for the purpose of protection of rights of certain classes of persons [8]. Then there was Dicey's concept of Rule of law as opposed to the influence and use of arbitrary power or wide discretionary powers which basically aimed to put an embargo to the unfettered usage of power [9]. The law which we see today was originated from the time of Second World War after the establishment of United Nations. Subsequently, volumes of documents appeared in the whole sphere of human rights in the international law. There are five foremost documents:

a. The United Nations Charter
b. The Universal Declaration of Human Rights
c. The International Covenant on Economic, Social and Cultural Rights
d. The International Covenant on Civil and Political Rights
e. The Optional protocol to the International Covenant on Civil and Political Rights.

In addition to the above and in order to strengthen the movement of recognizing the most emerging concept in the field of human rights, various international conferences were held to deal with the problems of women under the auspices of the United Nations [10]. In addition to the above, international conferences were also convened in order to discuss all the aspects relating to relating to the protection and promotion of human rights [11]. With these important developments taking place around the world, efforts have been exerted to change the long-established concept of human rights being majorly the subject matter of the domestic jurisdiction of state and not being subjected to any outside footing. As a result of unceasing efforts put in by the international, regional, governmental and non-governmental organizations around the world, human rights as on today transcends national boundaries and jurisdictions in order to protect the rights of the individuals.

Relativist thinkers believe that while human rights are necessary however they may vary according to culture. Usually, a standard of human rights can be adapted to fit into a given culture, at the same time, the basic principle of this paradigm is that all cultural practices have a purpose in the culture and therefore fulfil some purpose and should be accepted on face value. In the case of *Shirin Aumeeruddy-Cziffra et al. vs. Mauritius* [12], the Human Rights Committee interpreted the scope of the term "family" in Article 23 of the ICCPR from the perspective of cultural relativism. It stated that the long-time unmarried co-authors could enjoy the rights of family in Mauritius culture, undoubtedly changing the legal definition of the term "family." [13] This can be seen as a glaring example of legal interpretation in a relativistic way taking into account a particular culture open to acceptance of a custom which may not be accepted by other cultures.

On the other side, the *Universalist* thinkers maintained that an international paradigm on human rights requires uniform application across the globe and appreciated the pains which the UN took in developing international covenants and treaties which had dialogue and consensus, mutatis mutandis to each other. The ideal of universal human rights initially derived from the post-World War I period. After the war, the League of Nations was founded for the purpose of promoting world peace. Minority rights became one of the issues of greatest concern and were monitored by a special organ, the Mandate Commission. By mandate it was authorized to review reports related to minority affairs and deal with individual complaints [14]. These theories, *inter alia* made the individuals believe that the society consisting of individuals accept rules and regulations from legitimate and superior authority having power over him, in exchange for some sort of security, personal and economic advantage [15].

The main subject matter of disagreement was the concept of happiness, but a broad consensus could form around what they feared. Thus, the natural law suggested, "*how would a rational human being, who was seeking to justice & liberty survive and prosper, would proceed to live*". It is this prominent squabble which made natural law no longer dependent on mysticism [16].

Social Contract Theory, at its most basic level, states that human beings give up certain rights they have in a state of nature in order to obtain the securities and rights provided by civilization [17]. This theory of human rights suggests that while signing the social contract, a human being has to give up certain rights. The giving up of these rights by the individual leads to the formation of a sovereign state. For example, and for the sake of understanding, the criminal acts like murder and rape has to be given up by the individual as per the theory and after entering into a social contract he cannot commit these criminal acts and, in the case, otherwise, he would be subjected to punishment. Not only this, as per this theory, not all rights are forfeited and on the contrary, there are certain human rights which are modified to let the individual fit into the sew power structure.

Escalating a sarcastic assault upon the theory of natural rights, which is the ground norm of the liberal philosophy, Carl Marx understood it as and respected the idealistic approach but found it to be historical and nothing inalienable and immutable in such rights. He believed that in a society where means of production are in the hands of capitalists, the conception of human rights of an individual is nothing more than a bourgeois fantasy and far from the reality.

As Marx propounded that, "*Rights can never be higher than the economic structure of the society and its cultural development conditioned thereby"* [18]. Therefore, while criticizing the various ideologies behind the need of human rights, Marx stated that "*None of the supposed rights of man, therefore, go beyond the egoistic man, man as he is, as a member of civil society; that is, an individual separated from the community, withdrawn into himself, wholly preoccupied with his private interest and acting in accordance with his private caprice.*" [19]

The Golden Rule or the *ethic of reciprocity* argues that one must treat others in the same way as would want him to be regarded, the rationale being that reciprocal recognition ensures the protection of individual rights. This germane principle of reciprocity was profound in all the major religions in one form or the other, and was protected in the "*Declaration toward a Global Ethic*" by the Parliament of the World's Religions in 1993 [20].

Context of Human Rights–Issues and Concerns

As an elusive conception, the scheme of human rights mainly focuses on the minimum respect and dignity the human deserves and defies the possibility of a unanimous core and content. The definitional difficulty of the concept arises mainly because of the various honorable justifications advanced by various philosophical and

their viewpoints on the concept. Not only this while explaining the concept, once had to confront the conflicts between utilitarian and anti-utilitarian philosophy, values of equality and liberty, absolute and relativist conceptions of rights, all issues of moral justification.

This would ultimately mean that a particular idea or notion could not be imposed upon the people residing in different and brought up with a different set of cultural attributes and any effort at the imposition of such an idea on would tantamount to disabling the very concept of right of the human. Thus, the charge of universality of the human rights remained a challenge on the developing countries of the world to counter in the post second world war times [21]. As Jack Donnelly has observed that "*Political histories, cultural legacies, economic conditions, and human rights problems do differ not only among the first, second, and third worlds, but within each world as well*". Internationally recognized human rights provide general direction. They do not provide a plan of implementation that can be applied mechanically, irrespective of political, economic, and cultural diversity." [22]

In addition to the aforementioned, the dogma of universal application of human rights unfortunately has not been collectively accepted as an infallible underwriter of human decorum even by few of the originators itself. The basic disagreement encompassed not only regarding the different opinion on the meaning of the terms like 'democracy' and 'freedom' but also what is to constitute the core of human rights. Finally, the advent at a universally acceptable connotation of human rights is cluttered by the etymological pedigree of the notion comprising of the two terms, namely '*human' and 'rights'*- which are required to be read and understood together. The answers which individuals and states provide to this question have great bearing on their attitudes on their vigor with respect to protecting human rights [23].

Understanding Human Rights

Having analyzed the issues and concerns which facilitate the rebelliousness of a universally accepted understanding of human rights, it now becomes to easier to have a broader understanding of the concept, if not definition of human rights. While attempting an understanding of the concept, it needs to be kept in mind that the authors have tried to delineate the broad contours of the concept based on the emphasis they would like to merge to the concept. Thus, at the very rudimentary level, the concept has been defined by *Mr. Subhash Kashyap* as such, '*human rights are those fundamental rights to which every man and woman inhabiting any part of the world should be deemed entitled by virtue of having born as human beings* [24]' Every country desires to achieve the contours of life, liberty, dignity, education, work and pollution free environment while keeping the standards of discrimination as minimum as possible for its citizens. Likewise, values constituting human rights should not be negotiable at any cost, not even at the interest of a political community or agenda.

Dignity of human beings is the source from which the validity and universal authority of human rights is derived, and at the same time dignity functions as a critical yardstick to answer the question of which historically conditioned claims shall be recognized as human rights." [25]. The concept of human rights is closely connected with the protection of individuals from the exercise of state, government or authority in certain areas of their lives. It is also directed towards the creation of social conditions by the state in which individuals are to develop their fullest potential. Similarly, another exponent of the developmental notion of human rights asserts that human rights are those rights which are considered to be absolutely essential for the survival, existence and personality development of a human being [26].

In final analysis, the concept of human rights has been subject to varied definitions and is supposed to be made up of two inseparable categories of rights – rights that are essential for the dignified human existence, and rights which are essential for the adequate development of human personality [27]. The United Declaration of Human Rights has gone a long way in securing a graceful place to the human rights in the legal system of several, if not all, countries of the world. Consequently, catena of countries is in a situation to elevate the status of certain human rights to the level of legal rights in their constitutional systems guaranteeing a common standard of behavior by the government towards both its own citizens and foreigners alike.

Human Rights and the Constitution of India, 1950

The Constitution of India is regarded as one of the most rigid though right-based constitutions across the boundaries. Interestingly, it was shaped more or less during the same time when the Universal Declaration of Human Rights came into force and had thus assisted the law makers in providing the spirit of human rights in its preamble as well as various other provisions which regards the protection of imperative Human Rights.

The Constitution of India, 1950 is predominantly structured upon the hypothesis that guided India's struggle to outclass the British dominance which had all the varieties of rampant violation of civil, economic, cultural, political and human rights of the people which had guided the framers of the constitution to accord highest respect to the rights of the human to the citizens and are thus enshrined in the PART III of the Constitution of India, 1950. However, with the Constitution of India with its coming into force, marked a win but is still to mark its win on the real independence of India. The battle would be won on the realisation of the objectives set out in PART IV of the Constitution of India, 1950 enforceable by the state and not through court. The rights have their origins in many sources including England's Bill of Rights, the United States Bill of Rights and France's declaration of the Rights of Man [28].

The Indian Courts while interpreting the tools of rights as mentioned in the Constitution of India has shown a clear approach of widening the contours of dignity, life and liberty. While the first two categories of human rights lie in PART III & IV of the constitution, the third category of rights are spread over in various chapters related to individual and national development as mentioned in PART IX AND IX A of the Constitution of

India. As introduced by the 73rd and 74th Amendment Act, these parts talk about the decentralization of power and addressing the local issues of the individual by creating institutions of local self-government.

India's Independence Movements, Human Rights and the Constituent Assembly

The year of 1857 brought with it the significance development in India in claiming its right towards the basic human rights for its citizens. With India losing its first battle of independence in the year 1857, the citizens also lost their primitive human rights of self-determination and autonomy. Although, Indians getting the most basics of their human rights during the reign of colonialism stands on a highly arguable and ironic footing as Britishers thought that Indians lacked the conditions of equality and individual freedom, which indeed was provided to them by the Britishers, during their rule in India.

However, the mutiny of 1857 brought with it various rights that Indians raised including the security of land to the farmers thereby demanding an end to the long laid feudal system, the inclusion of Indians to appear in the civil services, rights of working class et cetera. The Rowlatt Act of 1919 provided extensive powers to the British government which resulted into the gross violation of the core rights of human. Owing to the above, public opposition grew and there was a widespread demand of guaranteed civil liberties and limitations on the supremacy of government.

Prior to this Act, there were Vernacular Press Act, 1878, Indian Council Act, 1892, Indian Council Act 1909 etc., which faced political and opposition by the general public as regards their unfair and arbitrary provisions. Adding to it, the Non-Cooperation Movements in 1920 and the Civil Disobedient Movement of 1930 led by M.K. Gandhi as its leader, raised the issues of rights of Indians to rule their *swarajya*. Thus, it can be said that the fight of the leaders of freedom movement was not only limited to securing independence and it also included in its ambit, the basic rudiments of human rights of the citizens.

Another chief progress took place during that period was the Nehru Commission Report of 1928 headed by *Shri Motilal Nehru* which encompassed various constitutional reforms for India. It apart from demanding a dominion status for India and elections under universal suffrage, laid crucial reliance on the deemed rights of the individuals and also suggested to put an embargo on the unfettered power of government in order to curb the possible arbitrariness and perversity which might be used by the officials. It also proposed to protect the fundamental rights of the people, which were denied most frequently by the colonial administration and as such exposed the possible misuse of the unfettered rights to the government and its impact which might be detrimental to the citizens [29].

The Constitution of the Republic of India which came into force on 26th January, 1950 comprised of 395 Articles and 8 Schedules and is one of the most elaborated legal documents often called as *Magna Carta* of a democracy where protection of fundamental rights is a must. The Preamble declares India to be a Sovereign, Socialist, Secular and Democratic Republic which is for the people, by the people and of the people. The term 'democratic' primarily recognizes that the Government gets its authority rather derive its power to act from the people, for the people and amongst the people.

Thus, quintessence of right of a human that signifies the aspiration of the people, who have established the Constitution, are in the preamble concisely set out. The preamble being the grundnorm to the Constitution is of paramount importance and is its soul. Thus, certain rights were extended to every Indian and while making special provisions to the weaker strata of the society, religious minorities were also given due consideration. The Constitution of India binds the states to protect the life and liberty to its citizens. *Per contra*, Article 21 of the Constitution of India, 1950 is also extended to the non-citizens of India and is duly applicable to the foreigners also [30]. Hence, the Preamble of the Constitution, Part III and Part IV together have been described as forming the fundamental nucleus of the Constitution, which *per se* directly connotes to the basic rudiments of the Universal Declaration of Human Rights, International Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights and other world treaties on Human Rights. The Hon'ble Supreme Court had on many occasions while interpreting and underlining the pertinence of directive principles and fundamental rights distinguished that fundamental rights outweighed the directive principles in as much as the former are not enforceable. In *Champakam Dorairajan vs. the State of Madras* [31] the Hon'ble Supreme Court held that DPSP cannot override the provisions of Part III of Constitution of India, 1950 i.e. the Fundamental Rights.

In *State of Kerala vs. N. M. Thomas* [32], the Hon'ble Supreme Court held that Fundamental rights and DPSP should be built in such a way to be with each other every effort should be taken by the court to resolve the dispute between them. In *Ashok Kumar Thakur vs. Union of India* [33], the Hon'ble Supreme Court said that no difference can be made between the 2 sets of rights. Fundamental rights deal with Civil and political rights whereas Directive Principles of State Policy deals with social and economic rights. Although, Directive Principles of State Policy are not enforceable in a court of law but that doesn't mean in any way that it is subordinate to Fundamental Rights.

The Indian Judiciary has also promoted the formulation of various institutions such as the National Human Rights Commission, National Commission for Women, National Minorities Commission and SC/ST Commission in order to protect any violation of rights of the diversity in its population that India holds and to further extend the right to live with dignity to everyone forming the part of India.

The judicial elucidation of Article 21 of the Constitution of India and the activism at the behest of the Supreme Court of India transpires the role played by the Supreme Court of the India in ensuring protection of the fundamental rights of the citizens even in the situations wherein the legislative and executive have failed in performing their duties. To some extent, judicial activism on the part of judiciary is the result of lackadaisical attitude and underlying flaws and malfunctioning of the state instrumentalities in performance of their duties. The Right guaranteed under Article 21 is the most magical, celebrated and pivotal fundamental and assumes

great significance. In *Vikram Vir Vohra vs. Shalini Bhalla* [34], the Hon'ble Supreme Court held that a mother cannot be compelled to choose between her child and career and held it to be violative of Article 19 (1) (a), and 21 of the Constitution of India, 1950. The Hon'ble Supreme Court comprising of charismatic personalities with dynamic approach has led to catena of judgments which lead to expansion of the Article 21 since independence coupled with the power contained in Article 141. The unvarying modification of the basic rudiments of right to life has resulted into phenomenal expansion of the ideology as to what includes in the right to life with dignity. The court in this context has observed that:

"*The meaning and content of fundamental right guaranteed in the constitution of India are of sufficient amplitude to encompass all facets of gender equality including prevention of sexual harassment or abuse."*

Sexual Harassment of women at workplace and even otherwise has been time and again held to be violative of the most cherished fundamental rights, namely, the Right to Life contained in Article 21 of the Constitution of India, 1950. In *Vishakha vs. State of Rajasthan* [35], the Hon'ble Supreme Court has declared a clear violation of right to equality and rights to life and liberty under Articles 14, 15 and 21. It amounts to sexual harassment at work and unsafe workplace environment of a working woman at her work. The court also laid down the guidelines without any discrimination of ranks or positions or place or occupation to be applicable to all employers or persons in charge of workplace in all sectors whether public or private sector. The Hon'ble Supreme Court in *Shivaji Shankar vs. State of Maharashtra* [36] has held that "undue sympathy to impose inadequate punishment would do more harm to the justice system that undermines the public confidence in the efficacy of the law". Not only this, in *State of Punjab vs. Rakesh Kumar*, it also held that "*Sentencing process should be stern where it should be, and tempered with mercy where it warrants to be, otherwise departure from Just desert principle results into injustice*" [37]. Although, rape has been held to a violation of a person's fundamental life guaranteed under Article 21 as it makes life conceptually hollow, deficient and not worth living. In, *Chameli Singh v. State of Uttar Pradesh* [38], the Hon'ble Supreme Court, while refereeing the '*doctrine of eminent domain*' that when the land is acquired by the state for purposed set out in the law of acquisition and in consonance with the procedure established, it shall not be held to violative of right to livelihood, even though such acquisition would render the landowner, homeless. The court distinguished the ruling in *Olga Tellis vs. Bombay Municipal Corporation* [39] and held that in that case the petitioners were very poor persons who had made pavements their homes existing in the midst of filth and squalor and that they had to stay on the pavements from the business of selling on the footpaths. Not only this, while keeping the concept of preservation of right to fair and healthy life, the Hon'ble Court in *Secretary, State of Karnataka vs. Uma Devi* [40], rejected that right to employment which was claimed as a fundamental right under Article 21 of the Constitution of India, 1950. In *Regional Director, ESI Corporation vs. Francis De Costa* [41], the Hon'ble Supreme held that security against sickness and disablement was a fundamental right under Article 21 read with Sec. 39(e) of the Constitution of India, 1950 which casts an obligation of the state to frame policies in the interest of its citizens. In *L.I.C. of India vs. Consumer Education and Research Centre* [42], it was further held that right to life and livelihood included right to life insurance policies of Life Insurance Corporation of India, but that it must be within the paying capacity and means of the insured and at no point of time it would mean that the securing life by a policy would fall within their right and as a duty of the state.

In *Common Cause (A Regd. Society) vs. Union of India* [43] adverting the concept of euthanasia, the court remarked that right to life includes right to live with human dignity and this extents to one's natural right. The constitutional bench also held that when the right extents to death and a person is allowed to live with dignity why not his death, person have the right to die with dignity and procedure which is dignified. In other words, it includes right of dying man to die with dignity when life is ebbing out.

The final case that makes up the 'privacy quintet' in India was the case of *PUCL vs. Union of India* [44], the Hon'ble Supreme Court observed that:

"We have; therefore, no hesitation in holding that right to privacy is a part of the right to life and personal liberty enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy; Article 21 is attracted. The said right cannot be curtailed except according to procedure established by law."

The universal *ratio* and *obiter* which could be found in all these pronouncements which also led to the expansion of scope of Article 21 of the Constitution of India, 1950 is the thought and belief which led to the emancipation of personal freedom and enjoyment of life by all citizens of this country with utmost dignity and has marked a new era of ideological development of the human rights. Thus, the emphasis is on the development of an individual in all respects."

Opening a Pandora of box and giving a new life to the transgenders, *in Navtej Singh Johar & Ors. vs. Union of India through Secretary Ministry of Law and Justice,* the Hon'ble Supreme Court scrapped the controversial Section 377 of the Indian Penal Code, 1859, a 158-year-old colonial law on consensual gay sex. The Hon'ble Supreme Court reversed its own decision and said Section 377 is irrational and arbitrary and held:

"*LGBT Community has same rights as of any ordinary citizen. Respect for individual choice is the essence of liberty; LGBT community possesses equal rights under the constitution. Criminalizing gay sex is irrational and indefensible," said Chief Justice Dipak Misra, who headed the five judge bench hearing the case. The five-judge bench read out four judgments, all of which held that the law, which criminalizes 'unnatural sex' between consenting adults, and has been used to target the LGBTQ community in India, has been struck down in so far as it criminalizes same sex intercourse, LGBT rights*.

A bare perusal of the above referred judgments delivered by the Hon'ble Supreme Court over the past 70 years depicts the growing pertinence of the need of protection of fundamental rights, specially the right to life as

envisaged under Article 21 of the Constitution of India, 1950. *It is very evident that the judiciary has evolved from a positivist institution to an activist on in the 20th century. However, when it comes to Article 21 of the Constitution of India, the judiciary has not only been involved in judicial activism, but also judicial creativity and the credit of the same shall be given firstly to those who had wisdom struck their mind, secondly to the ones who raised and satisfied the courts and last but not the least, the Hon'ble Judges of the Supreme Court for their courageous and pragmatic approach in expanding the horizons of Article 21 of the Constitution of India, 1950.*

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