

Evolution of Human Rights - Changing Phases and Parameters

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The notion of Human Rights as it is in existence today though is very nebulous however, it has been in practice since the ages right from the oldest civilization. There is a close knit bond between Human Rights and Civilization, at every point of time across the world. Though the concept of Human Rights is new to the modern developed world, however, it's context and content are not novice to the legal systems. Even in absence of politically organized legal orders the concept of rights or be it called as Human Rights was very much there throughout all the time.

Jurisprudentially speaking Rights are not any more gifts given by the legal system nor they are the gifts given by God. Instead they are so natural that every human being becomes entitle to them, as a human being not only after the birth but even very much prior to it. For instance even foetus has certain rights, like not to be terminated and that life contained in it which is the product of nature ought to come into existence. Rights have been described by various political thinkers and jurists in various ways and manners.

Thomas Paine, John Locke and several other jurists have elaborated the concept of rights as necessary conditions which are required for each human being to live as a human being in Human society. Natural rights are "life, liberty, and property."ⁱ With the emergence of the State as an institution the concept of rights has acquired totally new different dimensions.ⁱⁱ

Historically speaking the concept of rights was in existence even there in ancient India. Vedas, Smrutis, Shrutis, and other Hindu literatures are the testimony that even during ancient period the notion of rights was very much accepted and recognized by the then kingdoms. The concept of Dharma which was the basic foundation of all earthly matters and the center point of the Hindu philosophy was nothing but the instance or extension of the notion of human rights. Loosely, organized States (Kingdoms) did follow certain procedural rules which were based upon certain customs, usages, mores and traditions were the instances of certain inherent rules which were to be followed by the sovereign authority for recognition, protection and determination in case of conflict of some or the other rights of individuals.

There was no much distinctions or difference amongst ruler and ruled in relation to the rights which were required for them barring some privileges made available to or acquired by the sovereign authority (not in strict sense). The principle of dharma had its roots in the vedantic vintage of Hindu philosophy did riot mean either religion nor it has its source in any positive legal order but it was somewhat higher moral in the form of bounden duty casted upon sovereign as well as the citizens. It was an ample testimony of nothing but the modern concept of rule of law as propounded by Dicey.

HUMAN RIGHTS - JURISPRUDENTIAL CONNOTATIONS:

The concept of rule of law and equality are inherently interlinked with each other, which are the basic foundations of notion of rights as well as human rights. Theory of Natural law which was evolved in the early centuries and underwent a change with changing circumstances till today, however two of its core principles remain immutable, unchangeable which are inalienable rights of individual and universal order governing all men.

Theory of rights and theory of Natural law was juxtaposed and had mutual influence over each other. With the progress of time, in fact they had become inseparable and instead were incorporated in each other. Almost all Natural law jurists barring few like Duguit, have talked about notion of rights in their respective theories. Indeed it was altogether a different matter that each one of them albeit had given and acknowledged different sets of right due to the reasons which were rather the product of the then circumstances existing in the society. The State has played a very vital role when it was emerged in shaping and restructuring as well as recognizing various rights. The politico, socio-economic circumstances have played very influential role to acknowledge and accept variety of rights across the world or across the globe. As Prof. Joseph Raz says “Rights not only to be enjoyed but could flourish in a society which is a tolerant one, educated one and wherein there is sense of respect for the rights of others.”

The institution of State which was transformed from police State to laissez faire and laissez faire to social welfare ‘was primarily responsible for transformation of rights also. In these three phases at one point of time State had nothing to do much with the rights of individual rather its prime duty was only, to maintain law and order, in the second phase it was entirely left to the choice or discretion of the individuals with complete non-interventionist role of the State. This was resulted in wide disparity between or amongst individuals and gave a set back to the notion of rule of law and equality. Due to this reason the third phase had arrived in the form of social welfare wherein collective interest or rights was to be a concern for the State subordinating sometime an individual right or individual interest for the sake of better or larger benefit.

Human Rights and Modern Age:

The modern developed legal systems in their supreme documents do contain certain basic or Fundamental Rights for their citizens. The concept of Fundamental Rights emerged in the 19th century and became integral part of American Constitution denotes that, the rights are fundamental, basic or natural. Alteration of title or rubric does not alter their value, content and context including Human Rights. Human Rights are meant for human beings which are the necessary or essential conditions to provide or if they are in existence not to be tampered with by legal system or legal order. It means rights are either fundamental or human, are not only the conditions essential for living but are also the conditions which are essential to be followed by sovereign authority in governance and administration in respective countries. Therefore, rights Human or Fundamental are the stipulations, limitations or restrictions imposed legally, morally or philosophically upon the exercise of sovereign constituent, legislative or executive powers by the State. This depicts the importance, significance and value of the notion of Human Rights which have gained or acquired in recent times by the States.

There is a close nexus between human rights and Rule of Law supported by positive documents in every legal system. Rule of law which is rather a bedrock of the governance of every civilized society has been ingrained in Municipal and International legal orders respectively. As it was pointed out earlier that the emergence of the State had played a pivotal role in shaping and restructuring the notion of human rights but at the same time it is to be stated that with the passage of time and the transformation of Institute of State based on modern scientific, technological socio-economic, political circumstances, the generational change has occurred in the concept of human rights as well. The progress of human civilization and its march towards more freedom and liberty with economic security has also resulted in reorganizing or reformulating the concept of human rights. The first phase of human rights formally demonstrates rights in relation to the basic living conditions of human being like food, shelter, clothing. The second phase connotes some socio cultural and civil rights whereas the third phase is known as the third generation rights indicates individual autonomy, freedom of choice, freedom from torture, abuse, privacy, right to clean environment etc. together constitute the gamut of third generation of human rights including rights of woman, children, prisoners etc.

Looking at the jurisprudential foundation of human rights as it is said in the first part of this paper that a close nexus between rights and Natural law theory provided a basis of their evolution and utility. Prof. Finnis a renowned Natural law Jurist of 21st century has labeled rights as human rights.ⁱⁱⁱ The coinage of human rights which is used, was with the intention to send the message that they constitute together as a check or limitations upon the exercise of sovereign power by the respective authority.

In the field of Natural law theory itself apart from Prof. Finnis various other jurists like John Locke, Stammler etc. have passionately and vehemently advocated the cause of rights or human rights. Its not only Municipal legal order which were to contain and based but at the same time even international legal order was to be effected on the basis of certain basic Human Rights. The principle of Pacta Sunt Servanda advocated by Hugo Grotious is nothing but the extension or the instance of Human Rights on the basis of which the International legal order is to be operated. This justifies the value and significance of Human Rights by Natural law theory.

The theory of positivism which was developed as a reaction against Natural law theory intended to positivise (to be recognized positively through legal instrument by the sovereign legislative power or executive authority), these rights recognizing them as a part of respective legal order without which those rights where not to be a part of the legal system.

The emergence of a State as an institution and its sovereign legislative power to be exercised by the authorities was used for recognition, protection as well as enforcement of rights. The earlier phase was a phase of the Police State wherein the prime task or prime duty of the State was to maintain the law and order in the society. In this era State had nothing to do with either any rights of an individual or welfare of the society in general. Due to the inadequacy of that stage the then society did come across with several difficulties or problems. It was due to the same reason the Institution of State was transformed into laissez faire State where market economy was available and an individual had become a center point of a legal system guaranteeing him maximum degree of freedom and liberty without any much interference on the part of the State that was resulted in very wide disparity amongst people which gave rise to poverty, illiteracy and under development. This brand of institution of State was thought as most unsuitable to the

notion of Fundamental or Human Rights, where there was on a large scale discrimination and inequality among people which were not possible to be remedied by the State through an instrument of law by the exercise of sovereign power.

With the modern scientific, technological development which has occurred across the world, the institution of the State itself was required to respond to the changing needs of changing society and its demands. In that zeal it has assumed the role of a welfare State committing itself to the welfare of people at large in the society. The State was obligated to discharge not its orthodox powers like maintenance of law order etc. but at the same time it became a bounden duty of the State to provide an adequate means of livelihood to the each member of the society along with all other conditions which are necessary for a human being to live as an human being in a society. Concept of social welfare and social justice along with equality gave rise to the notion of human rights which meant for providing human conditions to all members without any or much of discrimination on the part of the State.

The emergence of social welfare State with a clear hut bondage of Human Rights provided or empowered the State to positive them as a part of the charter of Human Rights by their legislative or executive mechanisms. The theory of positivism which was emerged as a reaction to the Natural law theory came to the rescue of the State while recognizing or acknowledging (positivi sing) the notion of rights either fundamental or human. No doubt, few of the positivists had denied rights (like Austin) however, positivism as a whole did accept notion of rights or human rights e.g. Bentham. The Jurisprudential basis or foundation of Human Rights are reflected more further in the theory of social engineering advocated by Prof. Pound and his followers. According to him and his theory "Rights are nothing but the defect to claims which exists independently in the legal system which are to be merely recognized, protected and enforced by law. It justifies the promise, that rights are not the gifts or the creation of the State or the legal system but they are inherent in every society which have to be made as au de jure". Balancing of competing, conflicting rights on the basis of a social interest (collective rights) demonstrates that the concept of Human rights is a product of social welfare State which is committed to social justice.

Rule of Law and Human Rights:

The State or an institution which is the creation of will, wishes and aspirations of the people were to be carried out on the basic principles of "Rule of Law". The doctrine of Rule of Law founded upon equality also had become a cornerstone of notion of Human Rights. The Constitution of every State which is a supremalex of that State contains the charter of human rights in the form of Fundamental rights. It not only provided some basic rights but also equally provided the mechanism or the machinery for their enforcement. The State derives its power legislative, executive or judicial from the Constitution itself wherein these powers were to be exercised in accordance with provision and principles of Constitution as well as in accordance with the rights guaranteed by it. In distribution of these rights the State had to adhere to the principle of neutrality without discriminating any of its citizen or depriving any of its citizen while conferring or awarding any of the rights. Nondiscrimination and neutrality in a way, equality and rule of law were to be standard parameters or determinative factors for enforcement of rights upon individuals. Rights being inherent, contain and connote certain intrinsic value and thereby they operate as stipulation upon the powers to be exercised by the respective sovereign authority.

It's not only Municipal legal orders which were to adhere to the doctrine of Human Rights but without an international support in the form of international document it would not have been possible for the sovereign State to commit themselves to the cause of basic Human Rights of an individual. The International Movement of Human Rights was culminated by adopting Universal Declaration of Human Rights by the United Nations General Assembly in the year 1948.

The peculiarity of Universal Declaration of Human Rights is that it is not addressed to the sovereign States but instead addressed to individual members of the sovereign State. It proclaims that all individuals are born free and equal as human beings. As Rousseau says that all individuals are born free but every where they are in chains that is what is reflected in solemn international document. Apart from this, United Nations Charter and several such covenants or conventions like covenant on civil and political rights, covenant on Economic Social and Cultural rights and convention on all forms of discrimination against women etc. These are the bare testimonies of the international consent and an attempt to the cause of Human Rights across the world.

The global or the International Movements of Human Rights had its impact on Municipal legal system including India. The Indian Constitution in its part III does contain the chapter of Fundamental Rights incorporating various freedom and liberties guaranteed to citizens and non-citizens along with the protective gear or enforcing machinery. India being a welfare, democratic country has committed itself to the cause of welfare which has been ingrained in the preamble of the Constitution along with Directive Principles of State policy contained in part IV, It is a myth that rights are provided only in part III of the Constitution but the reality is that rights are also contained in part IV. Rights under part III or rights provided under part III are the negative obligations imposed upon the State that it shall not deprive people from those rights. However, rights contained in part IV are kind of positive obligation casted upon the State enabling it to provide for those rights positively. Its not a matter of debate now, particularly after the various decisions of the Supreme Court of India that rights under part IV are unenforceable or non-enforceable. Art.37 of the Constitution has been vetoed^{iv} by the judicial decisions and now these rights under part IV are part of part III.

The trinity of preamble, part III and part IV together constitute the notion of Human Rights in India. Since the question was that there was no such law in the Indian legal system which would enforce or implement some international document in relation to Human Rights and there by Indian legal system is inhuman to human rights was met, with or responded with protection of Human Rights Act 1993 enacted by Indian Parliament. The Act in question deals not only with the notion of Human Rights but also composition and establishment of Human Rights Commission at National and State level for the protection or enforcement of Human Rights. Apart from this Art. 32 and 226 of the Constitution empower the Supreme Court and High Courts respectively about the same. The only question remains here is that, is there any difference between Fundamental Rights and Human Rights or as it is said are Fundamental Rights are also Human Rights? The matter of fact that Fundamental Rights are Human Rights but all Human Rights may not be Fundamental Rights. Since in a traditional manner Fundamental Rights are guaranteed to the individual against the State whereas Human Rights are available not only against the State but against the other individuals as well. This thinner distinction line between Fundamental and Human Rights appears to be disappearing in the recent past and even Fundamental Rights have been made available against individual.^v Hence though

theoretically there is a difference between two rights as it appears realistically or practically there is no much difference remained between the two notions or two concept of rights. And perhaps, the possible cause or possible reason for such elimination of distinction is that both are meant for human beings as Human beings.

CONCLUSION:

The institution of human rights is a complex and its pilgrimage is otherwise. a difficult task. The world which is riddled with dissensions, discriminations, devastations, destructions and aggressive attitudes either on the part of the State or the society negate an intrinsic value of human rights. The twilight of human rights dimensions which are being evolved from the inception of civilization have been transformed or advanced with multicultural, multi-lingual and multi-religious societies throughout the globe.

Tolerance or power of tolerance is a key to nourish and to flourish human rights in almost all human societies. This core of tolerance has become appreciative and demanding commodity particularly in last few decades. Advancement of science and technology has greatly transformed firstly the society second, the State and thirdly notion of human rights. Development has its advantages as well as drawbacks too, and therefore is a kind of double edged weapon. However, if an ultimate goal of any State is to transform the society into peaceful progressive one it has to have an instrument of human rights to achieve the same. Any progress sans by human rights will have its own hazards and may acquire a demonic colour. Hence, when there is a threat or a great danger posed not only to human rights but to the earth itself, it is an indeed a nobles oblige for all human beings to think whether human sapines shall be extinguished or to be retained and if it is to be retained it is only by way of human rights protection and promotion. Nothing else!

ENDNOTES:

- ⁱ John Lock
- ⁱⁱⁱ Finnis John, 'Natural law and Natural Rights, (1980)
- ^{iv} People's Union for Democratic rights v. Union of India, AIR 1982 SC 1473. Mohin' Jam v. State of Kama taka, AIR 1992 SC 1858 Unnikrishnan v. State of A.P. AIR 1993 sc 2178.
- ^v Bodhisatva Gautam v. Subhra Chakravarti AIR 1996 SC 922