



## A study relating to the fundamental rights as the constitutional context of human rights

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**Abstract:** The premises of India's freedom struggle were very much in the context of an on-going struggle for human rights, particularly of valuing and upholding the Indian identity in terms of a people wanting essential human rights for all. Allan Octavian Hume, a British civilian, was convinced that unrest of the Indian people should be diverted into a safe and constitutional channel. It also mentions preservation of our rich heritage, of our composite culture and the environment, the protection of public property, avoidance of individual and collective activity. The paper try to analyze the fundamental rights as the constitutional context of human rights

**Key words:** fundamental rights, environment, *Freedom Movement*

### Introduction:

Human rights today have acquired legitimacy and significance in external relations of the world community but also in the domestic relations between the State and its citizens. They have moved centre-stage, stressing the need to encourage the effective exercise of fundamental rights as well as other freedoms that have been progressively built in, and imparting over these 66 years a momentum to human rights activism.

Prior to the American entry into World War II, Roosevelt identified and declared 'four freedoms' in his speech to Congress on 6<sup>th</sup> January, 1941, which later was consolidated in the Atlantic Charter. It was pledged that in the post-war world sovereign rights of people would be restored and that self-determination or self-government would be within the reach of people who had been forcibly deprived of these human rights. India was still a colony, and there seemed some optimism of will in the light of these declarations. In the context of famine, the Quit India Resolution of 1942, and growing and widespread

unrest, Britain found India difficult to hold on to, and India became an independent state by an Act of the British Parliament from 15<sup>th</sup> August, 1947.

The premises of India's freedom struggle were very much in the context of an on-going struggle for human rights, particularly of valuing and upholding the Indian identity in terms of a people wanting essential human rights for all. Allan Octavian Hume, a British civilian, was convinced that unrest of the Indian people should be diverted into a safe and constitutional channel. Neither Hume nor the seventy-two delegates of the First Congress had any idea what the Congress was being transferred into, a militant organisation that would launch civil disobedience movements and finally, in a world of consequences after 1945, terminate British rule. In the Dufferin papers cited by Tara Chand in his *History of the Freedom Movement*, the Congress was characterized as a 'babu parliament' making 'childish claims', and as a 'hysterical assembly' in which the 'more violent and silly of their members rule the roost'.<sup>1</sup>



By using petitions, presentation of memorials and a comparatively free press in a colonial set-up, Indians made the transition to agitations. Dufferin forbade 'mass meetings incendiary speechifying'.<sup>2</sup> In the absence of a constitutional opposition, these methods and the use of the press seemed to serve that purpose. In all this, the people learned to think in these matters during the spring time of our freedom movement. All those who had the benefit of English education had set before themselves the goal of representative institutions. The transplant took a long time, and the sharing of this English heritage was a long and winding road. It was vigorously argued that India was not ripe for this constitutionalism unless social reform was in place. In retrospect, Aurobindo Ghose, who had been a radical militant, recollected that 'political freedom is the life-breath of a nation; to attempt social reform, educational reform, industrial expansion, the moral improvement of the race without aiming first and foremost at political freedom, is the very height of ignorance and futility'.<sup>3</sup> In the intellectual evolution of India's founding fathers, this predilection for the political seems to have dominated, though the political experience of the first half of the twentieth century did articulate human rights concerns. The Nehru Committee Report of 1928, the Karachi Congress (1931) Resolution on Fundamental Rights and Economic Changes, the Government of India Act, 1935, and the Objectives Resolution of the Constituent Assembly 1946 indicated that human rights and the spirit of constitutionalism were very much on the agenda of a nation that was becoming a State.

The choice that our founding fathers exercised was between a government based on a network of panchayats, as Gandhi recommended, and the parliamentary model of Britain. The need for authority in society to run a government was paramount. Under the series of Acts introduced by the British, some kind of representative institutions were established. From Annie Besant's Commonwealth of India Bill in 1925, to the Sapru Report of 1945, parliamentary democracy was envisaged for India. The composition of the Constituent Assembly ranged from Marxists through Gandhian Socialists to conservative capitalists, each with his own definition of Socialism, nearly everyone in the Assembly was Fabian and Laski-ite enough to believe that Socialism is everyday politics for social regeneration' and that 'democratic constitutions are inseparably associated with a drive towards economic equality'.<sup>4</sup>

The Constituent Assembly made good decisions in times that tried the very soul of our people. The cross-fire and backlash of the great Calcutta killing of August, 1946, the Pakistan invasion of Kashmir in October, 1947 and the outbreak of the Telangana rebellion in 1948 led to the perception that a strong centre was needed to maintain internal security and implement planned growth. The granting of universal adult suffrage in establishing a government was more an act of faith. In spite of the Congress dominating the Constituent Assembly, decision-making was democratic, 'expressing the will of the many rather than the needs of the few'.<sup>5</sup>

The Constituent Assembly adopted the Constitution of India as the authority in all things that matter. The form of government was not a serious



issue: the parliamentary pattern had worked, though questions of an alternative presidential system did come up from time to time. The basic unit on which the Constitution was based was the individual and it therefore declared certain fundamental rights to individual citizens of India, which was equally applicable to non-citizens. The way in which these rights have been enforced by the courts of law has demonstrated that their enumeration in the Constitution has generated a real sense of security.

A fundamental right as defined in the Constitution, differs from a non-fundamental right in one vital respect: a fundamental right (subject to the qualifications defined in the Constitution itself) is inevitable in the sense that no law, ordinance, custom, usage or administrative order can abridge or take away a fundamental right. A law which violates any of the fundamental rights is void. They are binding on the Legislature as well as the Executive. A fundamental right cannot be taken away even by a constitutional amendment if it forms the basic structure of the Constitution.<sup>6</sup>

Along with the list of fundamental rights, the Directive Principles of State Policy are the conscience of the Constitution.<sup>7</sup> Clauses 1, 5 and 6 of the Objectives Resolution make up the Preamble. The goals of human rights can be read from this Preamble as a political, social, economic and cultural revolution that the people of India have committed themselves to. By the 42<sup>nd</sup> Amendment, the words 'Socialist' and 'Secular' were added to the Preamble. Anomalous though they seem in practice, they are connected with the vision of Article. 18 of the Universal Declaration of Human Rights 1948, and

consistent in objectives with Article. 18 of the International Covenant on Civil and Political Rights, 1966. The test of the use of the word 'democratic' is the way in which the Constitution is being used to uphold democratic rights and dignity of individuals, spelt out in words as 'justice', 'liberty', 'equality' and 'fraternity'. The preamble is considered a part of the basic structure of the Indian Constitution, particularly its identification of democracy, secularism, liberty, equality and dignity of the individual, which even by constitutional amendment cannot be taken away.<sup>8</sup>

It is in the logic of history and the Constitution that fundamental rights reflecting the dignity of the individual are the basic human rights against the State. The State includes government and the Parliament of India, as well as the legislature and government of each of the states, and local and 'other authorities', within the territorial jurisdiction of the Government of India as stated under Article. 12. The 'State' may even be a private body as defined in *Mahabir Auto Stores v. Indian Oil Corporation*.<sup>9</sup> The State cannot, as Justice P.N. Bhagwati said, encroach on individual liberty in the various dimensions, as these fundamental rights reflect the basic values of the people of our country, and this 'pattern of guarantees' on the basic structure of human rights, subject to 'reasonable restrictions' in the interest of society or the nation.<sup>10</sup> Article. 13(2) affirms that the State shall not make any law abridging fundamental rights, and any such law to the degree of inconsistency will be void. The courts still have the reviewing power to declare it unconstitutional on grounds of infringement of fundamental rights.<sup>11</sup> In all this, the Supreme Court laid down



objective criteria for determining reasonableness of restrictions,<sup>12</sup> which shall not be greater than required by the circumstances,<sup>13</sup> or there should be a balance between the restriction and the objective to be realized.<sup>14</sup>

The fundamental rights that are guaranteed under the Constitution have a close similarity with those in the UN Declaration of Human Rights in form and content in Articles. 14, 15, 16, 19, 20, 21, 23, 25, 29, 31 and 32.<sup>15</sup> The Constitution provides six basic as the right to equality under Articles. 14 to 18. The right to freedom is described in Articles. 19 to 22. The right against exploitation is found in Articles. 23 to 28. Cultural and educational rights are provided in Articles. 29 and 30 and the important right to constitutional remedies in Article. 32. The Directive Principles of State Policy under Part. IV of the Constitution incorporate the right to work and fair wages; to equal pay for equal work; to improved living conditions; to education; to participate in cultural life; and to the highest attainable standard of physical and mental health. All these rights are not enforceable by a court, though judicial activism has made them more real for the people.

It was resolved in the International Law Association on 02<sup>nd</sup> September, 1978, that violation of human rights within a country is a matter of domestic concern and may not therefore be subject to International Law.<sup>16</sup> In ratifying the International Covenant on Civil and Political Rights on 27<sup>th</sup> March, 1979, the Government of India specified certain provisions in case of compensation for human rights violations. Indian human rights standards have not changed much, since

no right or freedom has been added to Part. III of the Constitution since 1950. On the contrary, the scope of rights already provided has been restricted by the addition of new conditions as well as by the deletion of the right to property. Although the concept and catalogue of human rights have progressively changed during the last five decades, the Constitution has maintained its basic structure.

On 27<sup>th</sup> March 1991, the UN Human Rights Committee observed that: "the Covenant had not been fully incorporated in the Constitution of India, and that several provisions of the Armed Forces (Special Power) Act, the National Security (Amendment) Act and the Terrorist and Disruptive Activities (Prevention) Act seemed to be incompatible with Articles. 6, 9 and 14 of the Covenant".

Acting on the recommendation of the National Human Rights Commission, operations under TADA were brought to an end. An issue of continuing concern is the linkage between Indian law and international law. The Government of India had only ratified two conventions on the rights of the child, and the Convention against Torture. It is yet to ratify the conventions on the rights of migrant workers, on marriage, on the reduction of statelessness, the convention and protocol relating to the status of refugees, the optional protocol to the International Covenant on Civil and Political Rights, and the second optional protocol to the International Covenant on Civil and Political Rights aimed at the abolition of death penalty. The 44<sup>th</sup> Amendment in 1978 deleted the right to property from the Fundamental Rights Chapter and made it a constitutional



right under Part. XXII. Article. 300A laid down that 'No person shall be deprived of his property, save by authority of law'.

The Constitution, however, does provide for the property of having a district language, script or culture of one's own as a right that can be conserved under Article. 29(1). Article. 29(2) provides that no citizen shall be denied admission into any educational institution maintained by the State or aid out of State funds on grounds of religion, race, caste or language. The State can provide for reservation in certain categories, such as children of ex-servicemen,<sup>17</sup> even if they are not one of the categories specifically mentioned under Article. 15(4). However, Article. 45, which provides for free and compulsory education for all children below the age of 14, has not been fully implemented, as education is not always available for that age group and in all states. The Supreme Court in *Unnikrishnan v. State of A.P.* in 1993<sup>18</sup> reaffirmed that provision for that age group; thereafter, the provision was subject to the economic constraints of the State and its development, which may particularly be overcome in making provision for physically handicapped children.<sup>19</sup>

Human rights under Part. III of the Constitution have to be respected regardless of budgetary provision.<sup>20</sup> The Court further interpreted that 'decency and dignity are non-negotiable facets of human rights and are a first charge on local self-governing bodies'<sup>21</sup> The right to live in a pollution-free environment was recognized under Article. 21.<sup>22</sup>

It is the responsibility of the State to disseminate relevant information through the media to raise public

consciousness and enable people's participation to make laws real in their lives. Access to information is a right equally granted to all; in actual practice it includes the freedom of the press, which is not specifically listed. The right to privacy and its implications were upheld by the Supreme Court.<sup>23</sup>

Under Article. 19(1)(b), the right to assemble freely, unarmed, is guaranteed to all citizens. Under Article. 19(1)(c), the right to form associations or unions is guaranteed, and under Article. 19(1)(d), the right to reside and settle in any part of the territory of India, thus giving the citizens the right to move freely all over India. The right to practice any profession or carry on any business, trade or occupation is granted under Article. 19(1)(g), subject to the following limitations specified under Articles. 19(2) to 19(6); it must not conflict with the security of the State, friendly relations with a foreign country (which is peculiar to the Indian Constitution), public order that goes beyond mere law and order situations, morality and decency, and the integrity and sovereignty of India, and it must not involve contempt of court, defamation, or incitement to offence and violence. Conflict of interests between an individual and the claims of the common good are balanced as per the identified criteria of Article. 19.

Article. 20 provides protection in respect of conviction for offences relevant to the law in force at that time, and from a penalty greater than is legally permissible. No individual can be tried and punished for the same offence twice, and no person can be compelled by any means to be a witness against himself. This is particularly relevant in the use of torture by the police or other



investigative agencies to gain 'confessions'. Article. 20(1) also prohibits the legislature from making retrospective criminal law, and it protects the person against any such law *ex post facto*. However, any benefit under an *ex post facto* law can be applied, as in the reduction of a term of imprisonment.<sup>24</sup> Provision must be made for a speedy trial.<sup>25</sup> Under Articles. 22(1) and 22(2), when a person is detained under law other than a preventive detention law, the grounds of arrest should be communicated.<sup>26</sup> In a public interest litigation concerning children of prostitutes, the Supreme Court citing Articles. 23(1) and 39(1) issued instructions that such children should not be exploited<sup>27</sup> even if it is under the cover of religious traditions, such as *devadasis*.

The Constitution under Article. 25 provides the right to freedom of religion, which entitles all persons to profess, practice and propagate religion, but it does not include a right to make 'forcible' conversions.<sup>28</sup> Belief in God is not essential in the practice of a religion, which by Article. 26 can establish and maintain institutions for religious affairs, acquire moveable and immoveable property, and by law administer such property. A cornerstone of secularism is Article. 28, which states under clause 1 that no religious instruction shall be provided in any educational institution wholly maintained out of State funds. Article. 29 protects the interests of linguistic and cultural minorities.

Article. 30 gives linguistic and religious minorities the right to establish and administer educational institutions. "The minority under Article. 30 must necessarily mean those who form a distinct and identifiable group of citizens of India".<sup>29</sup> Such a minority community

may reserve up to 50 per cent of the seats in its educational institutions for members of its community.<sup>30</sup> In *Frank Anthony Public School Employees' Association V. Union of India*,<sup>31</sup> and in the *C.M.C. hospital Employees' Union v. C.M.C. Vellore Association*,<sup>32</sup> it was held that general laws of administration such as the Delhi School Education Act, 1973 and the Industrial Disputes Act, 1947 are applicable to minority institutions, although they were not specifically directed at educational institutions of minorities or others.

Article. 32 gave the right to move the Supreme Court by 'appropriate proceedings for the enforcement of rights guaranteed under the Constitution, which shall not be suspended except as otherwise provided for by the Constitution.

The greatest incidence of human rights violations occurred during the Emergency. Many went unreported, and remedies for enforcement of rights were suspended during the period. The suspension of the writ of *habeas corpus* under Article. 352, which was legitimized in terms of the greater claim of national security, came up before the Supreme Court in *A.D.M. Jabalpur v. Shivakant Shukla*<sup>33</sup> Chief Justice Ray stated 'that Liberty is not an abstract or absolute freedom but a regulated freedom, and if extraordinary powers are given to the Government, it is so because the emergency is extraordinary'. The court had to give effect to the Presidential Order in force under Article. 359. The Emergency provisions were part of the law of the Constitution for such situations.

The 44<sup>th</sup> Amendment and subsequent judicial interpretation have restored Articles. 20 and 21 as being capable of enforcement, and provided





that they cannot be suspended under any situation. The executive can never deprive a person of his life or liberty without the authority of law. But some habits die hard, and deaths in custody still happen, as do 'disappearances'. The Government of India acknowledged that, between 1988 and 1992, armed separatists killed 4,602 persons including 500 members of the security forces, in Jammu and Kashmir, and more than 10,000 persons, including 1,400 policemen in Punjab.<sup>34</sup> A popular trade union leader of the Chattisgarh region in the state of Madhya Pradesh was assassinated at his residence and little was done about it.<sup>35</sup> In the by-election to the Vidhan Sabha of Haryana, there was widespread mass violence at Meham, which was compounded by alleged police involvement. The right to participate in political work had become hazardous and a casualty.<sup>36</sup>

Important developments took place in the 1980s and 1990s in the area of the Supreme Court having the power to award monetary compensation where a citizen's constitutional rights had been violated. For wrongful detention after he was acquitted by the court, Rudal Shah was granted compensation.<sup>37</sup> Bhim Singh, a member of the legislature, was wrongfully arrested and prevented from attending the legislature.<sup>38</sup> For the death of a child who fell into an uncovered sewer opening, compensation was awarded against the State.<sup>39</sup> The principle of sovereign immunity does not apply to public law remedies under Articles 32 and 226 for the enforcement of fundamental rights. However, a petitioner was awarded compensation for the death of her son in police custody.<sup>40</sup>

#### **Conclusion:**

In all this, the nature of our State is partly determined by its authority, its

capacity to maintain law and order, its administration of justice and its effectiveness. The emergence of extra-constitutional entities that seemingly challenge the authority and power of the State is what makes governance ineffective. Gender discrimination and sexual violence are so common that even education, values and the cumulative impact of so many judgments has not altered realities on the ground. The number of violations has been increasing. Greater specialization in human rights legislation is essential, so that violators can be quickly charged and prosecuted. Until the conviction rate rises, human rights protection will remain illusory. The use of legalism in our politicized environment permits 'emergencies' in non-political areas and in the private sector as well. It also mentions preservation of our rich heritage, of our composite culture and the environment, the protection of public property, avoidance of individual and collective activity. The pursuit of human rights legitimizes the constitutional order providing it a fair amount of decency and pre-empting economic and military sanction against a country for its record in the defence of human rights. It consequently sets limits to unrestrained activism. However, judicial review, which opens the door to judicial rule, puts life into the Constitution through an apparatus of interpretation and enforcement. In all this is an experience of learning how to learn, in surviving and growing constitutionally.

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