JUDICIAL ACTIVISM AND PROTECTION OF HUMAN RIGHTS

ABSTRACT

SUBMITTED FOR THE AWARD OF THE DEGREE OF

Doctor of Philosophy

IN

POLITICAL SCIENCE

BY

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UNDER THE SUPERVISION OF

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ALIGARH (INDIA)

2014
ABSTRACT

Introduction

Know your human rights - This simple message from the United Nations is addressed to the citizens of all countries, because the human rights are the same for all, regardless of race, color, sex, language or religion. The message is important because people who are aware of their rights stand the best chance of realizing them. Knowledge of human rights, spread widely in the community, is the first and surest defiance against the danger that these rights will be trampled on. Learning about one's own rights builds respect for the rights of others, and points the way to more tolerant, peaceful societies. Vast number of people is today still unaware of their rights as human beings. Many suffer as a result of this lack of basic knowledge of human rights. The existing law and institutions - national and international - could in many cases defend them and counter abuses, but people must first know where they may turn for help.

The United Nations, for all these reasons, has launched a World Public Information Campaign for Human Rights. Knowledge and awareness of human rights is equally important in time of peace and war. Only those people who are educated about and aware of their human rights can demand that their governments observe those rights. Knowledge of human rights is essential as a tool for the observance and the promotion of human rights and for the creation of a climate of public opinion in which gross violations of human rights are unacceptable. In the past, massive violations of human rights brought about an atmosphere which was conducive to war. While education about and knowledge of human rights cannot totally prevent the occurrence of gross violation of human rights, it can create moral and mental inhibitions and a
sense of shame on the part of violators of human rights and thus contribute to protection of human rights. However, the most important question is - what are human rights and what is their source? The United Nations has described human rights as follows: “Human rights could be generally defined as those rights which are inherent in our nature and without which we cannot live as human beings”. Human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents and our conscience and to satisfy our spiritual and other needs. They are based on mankind’s increasing demand for a life in which the inherent dignity and worth of each human being will receive respect and protection.

It further states:

“The denial of human rights and fundamental freedoms not only is an individual and personal tragedy, but also creates conditions of social and political unrest, sowing the seeds of violence and conflict within and between societies and nations. As the first sentence of the Universal Declaration of Human Rights states, respect for human rights and human dignity is the foundation of freedom, justice and peace in the world”.

Thus, human rights are universal and apply to all persons without discrimination. Respect for individual rights needs to be upheld at all times, irrespective of circumstances or political systems. The rights of any particular individual or group can be restricted only if they threaten to curtail the human rights of others. To speak of human rights requires a conception of what rights one possesses by virtue of being human. Of course, we are not speaking here of human rights in the self-evident sense that those who have them are human but in the sense that in order to have them one need only be human. Human Rights have been identified as those rights which are “important, moral and Universal,
They may also be called as "rights" in some moral order or perhaps under some natural law. Human rights are sometimes called "fundamental rights" or "basic rights" or "natural rights". As fundamental or basic rights these are those rights which must not be taken away by any Act of legislature or government and which are often set out in the fundamental law of the land, i.e., Constitution. As natural rights these are seen as belonging to men and women by their very nature. Another way to describe them would be to call them as "common rights", for these are the rights which all men or women in the world should share, just as the Common Law in England, for example, was the body of rules and customs which unlike local customs governed the whole country.

Any civilized country or body like the United Nations must recognize them. The legal duty to protect human rights includes the legal duty to respect them. International concern for human rights as enshrined in the Charter of the United Nations is not a modern innovation. In fact, it is "heir to all the great historic movements for man's freedom to the enduring elements in the tradition of natural law and natural rights and in the most of the world's great religion and philosophies and the findings of contemporary science about inter-relations of simple respect for human dignity and other individual and community values.

The root of the concern for human rights may be traced to religion, humanitarian traditions and to the unceasing struggle for freedom and equality in all parts of the world. The term "human rights" as such is not found in traditional religions. Nevertheless, theology presents the basis for a human rights theory stemming from a law higher than the State and whose source is the Supreme Being. Since the rights stem from a divine source, they are inalienable by mortal authority. If one accepts the revealed truth of the fatherhood of God and the brotherhood of man, the problem remains as to
which human rights flow from there. Equality of all human beings in the eyes of God would seem a necessary development from the common creation by God, but freedom to live as one prefers is not. Indeed, religions generally impose severe limitations on individual freedoms. However, the concept of human beings created in the image of God certainly endows men and women with a worth and dignity from which there can logically flow the components of comprehensive human rights system.

The Greek thinkers developed the idea of “natural law” and laid down its essential features. According to Socrates, man possesses insight and this insight reveals to him the goodness and badness of things and makes him know the absolute and eternal moral rules. This human ‘insight’ is the basis to judge the law. Citizens of certain Greek city-states enjoyed such rights as isonomia (equality before the law), isotimia (equal respect for all) and isogoria (equal freedom of speech). These rights figure prominently in the modern human rights jurisprudence. Further, the ancient Greeks in all their city relations developed certain customary rules applicable throughout the ancient Greek world. Such customary rules referred to the inviolability of the person of envoys, the right of asylum of persons resorting to sacred places, the freedom of trading and sanctity of treaties especially those concluded after a religious ceremony.

In the Hellenistic period, the Stoic philosophers formulated the doctrine of natural rights as something which belonged to all men at all times. The rights were not particular privileges of citizens of particular cities, but something to which every human being everywhere was entitled by virtue of being human and rational. They believed in the universal brotherhood of man and they related what they considered to be the “innate reason” of man to cosmic order. In this respect Cicero remarked: “Universal consent is the voice of nature. In
Ancient India too, the human rights were not unknown. For example, in 1367 B.C., Bahmani and Vijaynagar kings entered into an agreement for the humane treatment of prisoners of war and the sparing of lives of the enemy's unarmed subjects.

Roman lawyers followed the Stoics closely in stressing the fundamental resemblance and equality of men stemming from their common possession of reason and from their capacity to develop and to attain virtue notwithstanding differences in learning and ability. The influence of "natural law" was also found in the *Institutes* where justice was defined as "the constant perpetual desire of giving to every man what is due to him." In the middle ages, great philosopher Thomas Aquinas reaffirmed that the "natural law" is higher than the positive laws and it should be obeyed by all. According to him, any order or authority which contravened the natural law could be disobeyed, for "unjust law has no moral validity."

Notwithstanding all the polemics of philosophers, the condition of man remained unchanged. Though he knew about "natural rights" yet he was still in shakles, however, the situation changed materially with Renaissance, it opened new vistas. The most important event of this period was the signing of *Magna Carta* by the King which is said to be the first mile-stone on the road to the liberties of the people of England in 1215 AD. The *Magna Carta*, which is also known as "the great charter of liberty" provided that "no person shall be captured or imprisoned or diseased or outlawed or exiled or in any way destroyed, nor will we go against him or send against him, except by the lawful judgment of his peers only under the law of the land. To no one will we sell, to no one will we deny or delay right of justice". The later development led to the presenting of Petition of Rights, 1628 which was enacted as a statute by Parliament and it became a part of the positive law of England.
Almost at the same time, Hugo Grotius in Holland and Thomas Hobbes and John Locke of England provided the necessary wings to the movement of freedom and liberty.

Grotius was categorical that positive law was subordinate to "natural law". On the other hand, Hobbs was basically a staunch supporter and believer of individual freedom and equality of man. According to him, while living in the state of nature, men were absolutely free and equal to each other. According to Locke, the rulers must respect the standards evolved by a political community. His views were based on the theory of natural law which accepted that there are inherent in each individual, certain rights which are innate and therefore, indefeasible. Hugo Grotius and other lawyers also expounded the doctrine of "humanitarian intervention" in the seventeenth century. They recognized the use of force by one or more states as lawful if it was used to stop the maltreatment by a state of its own national when that conduct was so brutal and large scale as to shock the conscience of the community of nations. The Bill of Rights, 1689 was another great Charter of liberty.

It was the statement of basic rights which the Englishmen secured in their long struggle against the autocratic rule of some of British Kings. The Bill of 1689 consolidated the important rights and liberties of the people. It recognized the right to trial by jury and prescribed that in law courts law of excessive bail should not be required, nor excessive fine imposed, nor cruel or unusual punishment inflicted. The theory of the "social contract" remained predominant up to the beginning of eighteenth century. According to Rousseau, by the "social contract" men united for the preservation of their rights of freedom and equality. The very notion of the "social contract" implies the existence of rights which individual possessed before entering organized society. Rousseau wanted the people to enjoy their liberty, equality and fraternity within a
political set up. It was the political theory of Locke which affected the nations at large most deeply. It not only affected England but it also penetrated into North American Colonies and passed through Samuel Adams and Thomas Jefferson into American Declaration of Independence in 1776. It penetrated into France and passed through Rousseau into French Revolution of 1789.

The American Declaration of Independence was adopted on 4 July 1776 by the Constitutional Congress and it was declared that we hold these truths to be self-evident that all men are created equal, that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and pursuit of happiness, that to secure these rights government are instituted among men deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or abolish it, and to institute a new government laying its foundation on such principles and organizing its power in such form, as to them, shall seem most likely affect their safety and happiness. The first ten Amendments known as the "Bill of Rights" became part of the American Constitution on 15 December 1791 and the rights of the people were defined in more detail. Thus, the Americans were first to give the "Bill of Rights" a constitutional status. In 1789, the French Declaration of the Right of Man and of the Citizens, Issued by the Constituent Assembly asserted: "Men are born and remain free and equal in respect of rights", and it further stated that "the purpose of all political association is the preservation of the natural and inalienable rights of man. These rights are liberty, property, security and resistance to oppression."

Thus, we find that the early developments in the field of human rights were the result of historic pronouncements of statesmen, philosophers, political leaders and unceasing struggle for freedom and equality in all parts of the
world. However, the real development of contemporary human rights jurisprudence started only during the nineteenth century which continued in the twentieth century. The factors which were responsible for this development are related to, inter-alia, abolition of slavery and slave trade, which was vigorously pursued; positive action taken to promote the economic and social progress and development through labour legislations and measures designed to ensure healthy living conditions; humanitarian laws of warfare; and the protection of minorities.

The problem of slavery and slave trade was a notorious practice which had flourished till the beginning of the nineteenth century in almost all parts of the world. It was in the year 1807 when Great Britain abolished slave traffic throughout her colonies. In 1814, by the Treaty of Paris between British and French governments, it was further agreed to co-operate in the abolition of slave trade. Subsequently, this practice was condemned by several other countries such as Australia, Portugal, Spain, Sweden and Russia at the Congress of Vienna in 1815. Further development in this regard took place at the Brussels Conference of 1890 when Anti-slavery Act was signed which was ratified by eighteen states. Thus, the abolition of the slave trade and slavery led to the recognition of the basic human rights to dignity and right to equality of all human beings at the international level.

At the close of the First World War, "The Treaty of Peace" of 28 June 1919 between the Allied and Associated Power and Germany was the most significant and enduring instrument which dealt with a number of political, legal, humanitarian and economic issues. The international concern for human dignity and rights found expression in the Covenant of the League of Nations. Article 22 of the Covenant of League of Nation established the "Mandates System" which proclaimed the principle that "the well-being and development
of the peoples in mandated territories formed a sacred trust of civilization" and that mandatory power should administer these territories under the conditions which will guarantee freedom of conscience and religion and the prohibition of abuses such as slave trade. The Mandatory Powers also undertook to provide the League of Nations annual reports regarding the discharge of their responsibilities in this regard. These reports were reviewed by the "Mandates Commission" of the League. Subsequently, the Mandates System also acquired the supervisory powers, over the Mandates regarding the manner in which the native population was treated. Thus, we notice that along with the development of human rights, a implementation mechanism was also developed. With the dissolution of the League of Nations, this development ended. However, under the United Nations Organization, the United Nations established the U.N. Trusteeship System which was entrusted with the supervisory functions over the remaining Mandates.

Article 23 of the Covenant of the League of Nations was also concerning human rights. It related to the fair and humane condition of labour of men, women and children. It also envisaged the establishment of international organization to achieve the said objective. This function was taken over by the International Labour Organization which was established in 1919 in the realization that universal peace could be achieved only if it were based on social justice. The organization was established with its guiding principle that all human beings, irrespective of race, creed, or sex, have the right to pursue both their material well-being and spiritual development in conditions of freedom and dignity, of economic security and equal opportunity". Thus, the International Labour Organization is required to direct its activities towards the protection of welfare of human beings and thus promoting the human rights.
The International Labour Organization is now one of the specialized agencies of the United Nations.

Another important question regarding which the League of National played an important role was relating to the protection of Minorities from discrimination and unequal treatment. It may be noted here that the question of "protection of minorities" as such was not regulated by the Covenant of League of Nations. Infact the League of Nations derived this power from series of treaties relating to protection of minorities concluded after the First World War. The first treaty regarding the protection of minorities was between Principal allied and Associated Power and Poland which was signed at Versailles on 29 June, 1919. In this treaty, as also under other realities which followed in this regard, the States to which minority system applied, undertook not to discriminate against the members of the protected minorities' and, to grant them special rights necessary for their ethnic religious and linguistic integrity. The League of Nations agreed to serve as "guarantor" of the undertakings that the parties assumed in these treaties. The most important steps taken by the League of Nation ensure that the functions assigned to it by the minorities treaties should be carried out in most effective possible way were: (i) the establishment of the right of petition in favors of minorities and (ii) the creation of Minorities Committees of the Council of League of Nations. Another important development which contributed for the evolution of human rights was the humanitarian laws of warfare. In early days the human rights of the civilians or prisoners in warfare unknown. From time to time various attempts were made to limit the horrors of war and to "humanize" it. In this direction, the first attempt was made by Louis XV after the Battle of Fontenoy in 1745. He ordered that the enemy wounded were to be treated in the same way as his own soldiers because once they are wounded they are no longer our enemies.
However, the modern developments in this regard can be traced to the efforts of Henry Dunant who after witnessing the horrors of Salferino Battle organized a Conference in 1863 regarding the sufferings of the wounded which ultimately culminated into Geneva Convention of 1864. In this Convention it was provided that "wounded or sick combatants, to whatever nation they may belong, shall be collected and cared for". This convention was followed by Hague Convention of 1899 which also established humanitarian rules of warfare. These rules of humanitarian welfare were further revised and improved by the Geneva Convention of 1927 in the light of the experience of First World War. Now most of the laws dealing with almost all aspects of modern armed conflicts are codified in the four Geneva Conventions of 1949 and the two Additional Protocols to these conventions. Thus, all these developments contributed to the evolution of the concept of human rights in the modern scenes. The specific inclusion among the purposes of the United Nations of promotion and encouragement of respect for human rights and fundamental freedoms for all was primarily due to the events which occurred immediately before and during the Second World War. The human rights provisions of the U.N. Charter reflect the reaction of the international community to the horrors of the war and the regimes which unleashed it. This is very much evident from the preamble of the U.N. Charter. The experience of the two wars led to a firm conviction that the international protection of human rights was an essential condition of international peace and progress. It was this conviction that led to the drafting of human rights provisions in the U.N. Charter and also the International Bill of Human Rights. By all these developments, international standard for the protection and promotion of human rights has been established. The modern notion of human rights describes them as "three human rights generations". The first human rights
generation consists of "negative rights" which represent the "civil and political rights" as enshrined in articles 2 to 21 of the Universal Declaration. These rights are aimed to ensure freedom from any curtailment of individual liberty.

The second human rights generation consists of "positive rights" which represent the "economic, social and cultural rights" as set forth in articles 22 to 27 of the Universal Declaration of Human Rights. These rights are aimed at ensuring social justice to all and their participation in economic, social and cultural life. The "third generation" of human rights consists of certain "collective rights" which are embryonically indicated in article 28 of the Universal Declaration of Human Rights. In an increasingly interdependent world, the recognition of the interdependence of the three human rights generations is gaining momentum. Although human rights are enshrined in separate international instruments, they are perceived as forming wholes. In the present era, it is necessary for peace, security and human development that human rights should be given prime importance not only in international instruments but also they should receive due recognition at the national level.

All the three generations of human rights find a prominent place in most of the constitutions of the world. Indian Constitution is one such example where human rights find reflection in the preamble and Parts III and IV dealing with fundamental rights and directive principles of state policy. In fact, the Indian Constitution has also added in 1976 a new Part IV - A which deals with fundamental duties of the citizens. These fundamental duties are nothing but a charter of human duties which helps in promoting the human rights. India was also a party to the Universal Declaration of Human Rights and has ratified the International Covenant on Civil and Political Rights as well as the International Covenant on Economic, Social and Cultural Rights. However, it has not ratified the Optional Protocols to the Covenant and Civil and Political Rights.
In this background there are certain key issues which require consideration. To what extent the UN Charter shows its concern for human rights? What has been the impact of Universal Declaration of human rights and other two major Covenants relating to human rights on the protection and promotion of human rights at the national as well as international level? To what extent the Constitution of India is aimed at protecting and promoting the human rights of the people? Has India been able to achieve that target or not? What has been the role of judiciary in India?

Particularly, in relation to protection and promotion of human rights in the background of the constitutional commitments and various provisions in the international human rights instruments? What role the National Human Rights Commission is playing and what all it can do in further ensuring the human rights to all the people of the country?

In order to find answers to the above mentioned questions, the present work has been divided in different Chapters, the scheme of which is as under:

The First Chapter is "Introduction". It acquaints us with what is proposed to be done and how it is proposed to be done. It also deals with the importance of the research problem, the objectives of the study, the hypothesis formulated and the methodology applied.

Chapter II is related to the various provisions in the U.N. Charter relating to human rights. An attempt has also been made to study all the three generations of human rights as found in the Universal Declaration of Human Rights and as they are further elaborated in the International Covenant on Civil and Political Rights and in the International Covenant on Economic, Social and Cultural Rights. The implementation mechanism under the said two Covenants has also been discussed; the two Optional Protocols to the
Covenant on Civil and Political Rights have also been discussed.

Chapter III is related to the constitutional scheme of human rights in India. An attempt has been made to show that how various provisions of the Indian Constitution correspond to the International Bill of Human Rights and to show further that all the three generations of human rights have been raised to the status of *suprema lex*. The need and role of the national institutions such an Ombudsman and National Human Rights Commission has been highlighted. The provisions of Human Rights Protection Act 1993, have been analyze.

Chapter IV is related to the role of Judicial System in India and Judicial Activism. This starts with the discussion of the position of the India judiciary in relation with the socio-political development of the country. It explains the areas where the Supreme Court and also the Subordinate Courts can contribute.

Chapter V depicts the judicial activism and human rights in India. In this Chapter, an attempt has been made to show the judicial interpretation has made it possible for the people to enjoy the human rights.

The Last Chapter titled "Conclusions and Suggestions" evaluates the entire study and also proposes an agenda in the form of suggestions and recommendations to the policy makers for better promotion and protection of Human Rights.