Library Progress International
Vol.44 No. 3, Jul-Dec 2024: P.12993-12999

Print version ISSN 0970 1052
Online version ISSN 2320 317X

Original Article

Available online at www.bpasjournals.com

Comparative Constitutionalism: Exploring the Genesis and Essence of Fundamental Rights in the US, UK, and Indian Constitutions

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How to cite this article: Sudhakaran (2024). Comparative Constitutionalism: Exploring the Genesis and Essence of Fundamental Rights in the US, UK, and Indian Constitutions. *Library Progress International*, 44(3), 12993-12999.

Abstract

Human Rights are generally defined as those rights which are inherent in individuals' nature and without which one can't leave as human being. Human being possesses by virtue of their being human, certain basic inalienable rights which are called Human Rights. Since these rights belong to them because of their very existence, they become operative with their birth. Human Rights being the birth rights are therefore inherent in all the individuals irrespective of their caste, creed, religion, sex and nationality. Human rights are not rights which derive from a particular station; they are rights which belong to a man simply because he is man. Human Rights are those minimal rights that individual need to have against the state or other public authority by virtue of their being members of the Human family irrespective of any other consideration. Justice J.S Verma has rightly stated 'human dignity' is the quintessence of human rights. All those rights which are essential for the protection and maintenance of dignity of individuals and create conditions in which every human being can develop his personality to the fullest extent may be termed as Human Rights

Human thought has been leaning toward the idea that since the 17th century, man has possessed certain fundamental, natural, and unalienable rights and freedoms. It is the role of the state to acknowledge these rights and freedoms and permit them to exist freely in order to protect human liberty, foster the development of the human personality, and advance an efficient social and democratic life. An attempt has been made to compare the concepts of fundamental rights in the United States, the United Kingdom, and India through this paper.

Introduction

Human Rights being essential for all-round development of the personality of the individuals in the society, be necessary protected and be made available to all the individuals. They must be preserved, cherished and defended if peace and prosperity are to be achieved. Human rights are the very essence of a meaningful life, and to maintain human dignity is the ultimate purpose of government. The need for the protection has arisen because of inevitable increase in the control over men's action by the governments which by no means can be regarded as desirable. There are several States where fundamental standards of human behavior are not observed. The consciousness on the part of the human beings as to their rights has also necessitated the protection by the States. It has been realized that the functions of all the laws whether they are the rules of municipal law or that of international law should be to protect them in the interest of the humanity.

Origin of Human Rights in Western Tradition

Hammurabi's Codes

The roots for the protection of the rights of man may be traced as far as back as in the Babylonian laws .Babylonian King Hammurabi had issued a set of laws to his people which is called Hammurabi's Codes, established fair wages, offered protection of property and required charges to be proved at trial. The codes, while often harsh in their punishments provided standards by which Babylonians could order their lives and treat one another.

Greek Philosophy

The fact that the human rights were recognized as natural rights of man is illustrated by a Greek Play ***Antigone***. In this play, Sophocles describes that Antigone's brother, while he was rebelling against the King, was killed and his burial was prohibited by the King Creon. In defiance of the order Antigone buried her brother. When she was arrested for violating the order she pleaded that she had acted in accordance with the "immutable, unwritten laws of heaven" which even the king could not override. In Greek Philosophy the concept of Human Rights can be found through the concept of virtue as justice. They talked about virtue as justice and social control of man through this conception virtue and justice. In essence they differentiate justice as virtue, the character of a just man from which the concept of right or justice come. Therefore according to this philosophy every person is entitled to the right of virtuous conduct on the part of other. In fact, it was more dominated to duty rather than right. For Greek Philosophy virtue was justice in the sense of inner harmony and balance. Aristotle said that Justice is all virtue found in sum and justice is perfect virtue because it is the practice of perfect virtue and perfect in a special degree, because its possessor can practice his virtue towards other and merely by himself. Thus by this way Aristotle recognizes the right of man in society based on virtue. Aristotle mentor Plato had talk about a universal standard of ethical conduct.

Roman Philosophy

The stoic philosophers formulated the theory of natural law after the breakdown of Greek City States. The central notion of the stoics Philosophy was that the Principle of natural law was universal in nature. Their application was not limited to any class of persons of certain states. Rather, it applied to everybody everywhere in the world. The natural rights of man being its embodiment were not the particular privileges of citizens of certain state but something to which every person being everywhere was entitled by virtue of the simple fact of being human and rational. They set forth further that men could comprehend and obey this law of nature because of their common possession of reason and capacity to develop and attain virtue. In this way the stoic philosophers put forward their idea of universal brotherhood of mankind and laid stress upon equality and freedom for all. Roman jurist also expressed the same thought. **Cicero** also laid emphasis upon universal nature of rules of natural law and described true law is right reason in agreement with nature which is of universal application, unchanging and everlasting.

Modern Secular Natural Law and Human Rights: - Modern secular natural law philosophy given by Grotius, Thomas Hobbes, John Locke and Jean Jacques Rousseau detached natural law from religion laying down the groundwork for the secular rationalistic version of modern natural law. It developed on ideal system of precepts of universal validity and applicability demonstrated by reason. Therefore they defined natural rights as moral quality of man by virtue of which they ought in ideal law to have certain things or be able to the certain things. This theory was an outgrowth of Protestantian and led to Political development by the Puritans in seventeenth century. In England this philosophy was for formulated by Locke led to Political dogma in American Declaration of Independence and the French Declaration of the Rights of man. According to Natural Rights, rights are that interest which in reason ought to be recognized and secured. They are ideal claims or interests which are to be treated as binding beyond the reach of any law-making.

Thomas Hobbes (1558-1679), in his theory of social contract recognized the right to life, liberty, peace and cooperation in society through individual cooperation He gave primacy to individual right in indirect way. He said that originally man in law of nature was leaving in state of war where might was right. Therefore in order to create peace and protect one from other every member of society made a contract among them by which they entrusted to a sovereign all their power to protect themselves. It is generally said that in Hobbes Social Contract theory sovereign has full power and subject has no right against him therefore he does not talk about individual right. But when we interpret his social contract theory he seems to be individual right supporter also. He by describing the purpose of society says that since all human behaviour is motivated by individual self-interest, society must be regarded merely as a means to an end. He says that power of the State and the authority of the law are justified only because they contribute to the security of individual Human beings and there is no rational ground of obedience and respect for authority except the anticipation that these will yield a larger individual advantage than their opposites. Society is merely an 'artificial' body a collective term for the fact that human beings find it individually advantageous to exchange goods and services. It is thus clear cut individualism which means Hobbes philosophy the most revolutionary theory of the age. According to him the advantage of governments are tangible and they must accrue quite tangibly to individuals in the form of peace and comfort and

security of person and property. This is the only ground upon which government can be justified or even exist. A general or public good, like a public will is a figment of the imagination; there are merely individuals who desire to live and to enjoy protection for the means of life. The absolute power of the sovereign, a theory with which Hobbes name is more generally associated is really the necessary compliment of his individualism.

John Locke (1632-1704), developed natural law theory into natural right theory based on the social-contract in which superiority of individual right prevails over the state. He said that natural law could be understood as protective of the subjective interest and rights of individual persons. He also put forth the social contract theory which was closely linked with the theory of natural law because the basis for which the natural law theories were formulated was the same for the social contract doctrine also. He argued that man by nature endowed with enough freedom to become a man in conformity with law. He held that state of nature is one of peace, goodwill, mutual assistance and preservation and on this ground law of nature provides a complete equipment of human rights and duties. But the defect of the state of nature was in the fact that it has no organization to give effect to the rules of right. Therefore to protect these natural rights state is created through social contract. Locke also set up the proposition that moral rights and duties are intrinsic, that morality makes law and not law makes morality, and the government has to give effect to what is naturally right prior to its enactment. He says that law in shape of reason obliges every man to preserve his life and limits his liberty and possession and to be active in rendering some service to others. For every man his original liberty has meaning only by reference to this law. It is in this connection between man's liberty and law, between liberty and obligation that the idea of natural right emerges. The natural right of man is then a right of freedom, freedom of will and liberty of acting according to law of nature, freedom from all constraints and all violence. He said that such claim of individual rights can never be set aside, since society itself exists to protect them, they can be regulated only to the extent, that is necessary to give them effective protection. In other words the life, liberty and estate of one person can be limited only to make effective the equally valid claims of another person to the same rights .In this way Locke gave primacy to individual rights over state.

Jean Jacques Rousseau (1719-1778), he also supported the individual right but in conformity with the general will of society. He says that in society, man can only makes a claim; he can assert that he is entitled to make that claim. He can say not only that he does not want to be killed or injured but that he ought not to be killed or injured, on the ground that society as such must entail an understanding that peaceable man will be left in peace and that everyone is entitled not to be injured so long as he does not injure anyone else. To protect these rights Rousseau creates a social order based on general will to which he regards a sovereign. He says that this social order is a sacred right which is the basis of all other rights. In this social order each individual puts his person and all his power in common under the supreme direction of the general will and receive each member as an individual part of the whole. He says that the right which each individual has is always subordinate to the right which the community has over all. In this Rousseau's conception of Human Rights was based on the protection of rights in the interest of whole society.

Grotius also supported individual rights but his main concern was society. He said that man is, to be sure, an animal but an animal of a superior kind, much further removed from all other animals than the difference kind of animals are from one another. But among the traits characteristics, of man is an impelling desire for society, that is, for the social life- not of any and every sort but peaceful and organized according to the measure of his intelligence, with those who are of his own kind. For Grotius the preservation of a peaceful order is itself an intrinsic good, and binding as those which serve more strictly private ends. He says that there are certain minimal conditions or values which must be realized, among them the main are, the security of property, good faith, fair dealings and a general agreement between the consequences of men's conduct and their desire. Thus it can be said that Grotius supported the rights of individual as a member of society in protection of which society has also its own interest.

Kant and Human Rights in Individual Freedom:- Kant's metaphysical theory of right also regarded individual freedom as superior. Kant had a strong belief in the inherent dignity of the human personality and he said that no man had the right to use another person merely as a means to attain his own subjective purposes; each human individual is always to be treated as end in itself. Kant said that knowledge is product of mind dictated by will and

by this conception he replaced moral equality by the will. According to him the task of law is to assure the maximum of free individual self-assertion to the extent compatible with free exercise of those assertions by all other .For Kant, the concept of freedom is central in his moral and legal philosophy .He makes a distinction between ethical and juridical freedom. Ethical or juridical freedom meant to him the autonomy and self-determination of the human will, one is morally free in so for as he is capable of obeying a moral law which is engraved in the hearts of all. Juridical freedom on the other hand, he defines as independence of an individual from the arbitrary will and control of another. This freedom he considered as the only original and inborn right belonging to man by virtue of his humanness. Although Kant supported for maximum individual freedom but he limits it though the concept of categorical imperative when he says that you maxim of action should be such as to be maximum of others. Kant defined the law as the totality of condition under which the arbitrary will of one can co-exist with the arbitrary will of another according to a general law of freedom. Thus it can be said that Kant's conception of freedom and law, seems to be the final form of an ideal of the social order of the maximum of individual self-assertion as the end for which the legal order exists .In this way Kant treats individual freedom as superior to State.

Bentham's Utilitarianism and Human Rights:- Human Rights in Bentham's Philosophy can be found through the concept of utility. According to Bentham, the business of government is to promote the happiness of society by furthering the enjoyment of pleasure and affording security against pain. It is the greatest happiness of the greatest number that is the measure of right and wrong. He said that if the individuals comprising society were happy the whole body polity would enjoy happiness and prosperity. He emphasized that community can have no interest independent of the individual; community interest meant to him nothing but the sum of the interests of the several members who compose it. Thus Bentham talks about Human Right in the form of maximum benefit of maximum number.

Developments of the Concept of Human Rights in Various States:-

The conception of human rights as individual political legal claim, implying limitations and obligations upon society and government is a product of modern history. The ideas of elaboration and protection of rights of human beings have been gradually transformed into written norm. Looking at human rights from the recognition of rights perspectives, it may be fairly said to begin with **Magna Carta in 1215**. The main object of Magna Carta was to prevent King John from substituting violence for legal process from taking law into his own hands and going against them with an army at his back or sending against them in similar wise. This great charter promised that no plea civil or criminal should henceforth be decided against any free man until he had failed in the customary proof at as such this Charter made it clear that there were certain rights of the subject which could not be violated even by Sovereign in whom all power was legally vested.

Petition of Rights (1628): The movement continued through the repeated confirmations of the Magna Carta and the petition of Rights 1628 and culminated in the Bills of Rights 1689, which enacted in a parliamentary statute the declarations which the people made the prince and princess of orange to subscribe at their accession in 1688. The contribution of this instrument towards the development of Fundamental Rights will be evident when we look at its concluding words:

"It may be declared and enacted, that all and singular the rights and liberties asserted and claimed in the said declaration are the true, ancient and indubitable rights and liberties of the people of this kingdom".

Virginia Bills of Rights (1776):-

The Bill of rights adopted in the state Constitution of Virginia in 1776 was the first declaration of rights in a written constitution. The doctrine of natural rights is reflected in the preamble of the Declaration. The declaration emphasis that all men are by nature equally free and enjoyment of life and liberty and that government is or ought to be instituted for the common benefit, protection and security of the people, nation or community. The rights asserted by the Virginia Bill of Rights were- equality of men, freedom of press, freedom of religion, right not to be taxed without consent or not to be deprived of liberty except by law of land,

right against general warrants, cruel punishments and self-incriminations.

American Declaration of Independence (1776):- American notion of independence and their determination to overthrow the authority of the imperial tyrannical government has led them to make the Declaration of independence on **July 4, 1776**. This famous document was drafted by Thomas Jefferson. It mounted attack not only against the divine right of the king to rule but also against a government which did not reflect the will of the people. The significance of this Declaration lies in the assertion that all men are created equal, that they are endowed by their Creator with certain inalienable rights, which are Life, Liberty and pursuit for happiness. It also states that to secure these rights Governments are instituted among men, deriving their just powers from the consent of the governed, i.e., it is the right of the people to institute new government to protect their rights and happiness.

French Declaration of the Rights of Man (1789):- The French Revolution was based upon those principles which were set in motion by the English and American Revolution. It differed mainly in that it was basically the result of economic and social inequalities and injustices of the French ancient regime. These inequalities were conspicuous not only among the Third Estate (lower classes) but also in the First Estate (clergy) and in the Second Estate (nobility) it had caused the greatest amount of concern among the writers, who were apparently influenced by the teachings of Rousseau. They enthusiastically claimed that it marked the dawn of new age for the mankind in general and believed in the prospect of right reason and natural and imprescriptible right to life, liberty and the pursuit of happiness.

The National Assembly on 26th August, 1789 published the Declaration of Rights of man and its Citizen (hereinafter referred as the French Declaration).The writings of Rousseau, Locke and Montesquieu were used in drafting the declaration.

Origin of the Fundamental Rights in the US Constitution

The United States Constitution is credited with starting the current trend of ensuring that everyone has access to fundamental rights. There was not a single fundamental right in the initial 1787 draught of the constitution. On this point, the US Constitution was harshly criticised. The Americans were the first to give the Bill of Rights constitutional status when they incorporated it into their constitution in 1791 in the form of Ten Amendments, drawing inspiration from both the British Magna Carta and the Declaration of the Rights of Man and the Citizens of France.

Objective- In ***West Virginia State Board of Education v. Barnette***[1], Justice Jackson explaining the nature and purpose of Bill of Rights in the USA observed:- "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials, to establish them as legal principles to be applied by the courts. One's right to life, liberty and property, to free speech, a free press, freedom of worship and assembly and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections."

Origin of the Fundamental Rights in the Britain Constitution

There was not a legal proclamation of people's fundamental rights in Britain until **1998**. There was a prevalent orthodoxy on the sovereignty of Parliament, which did not allow for any legal restraint on the body's authority. The idea of the Rule of Law is, in essence, the idea that the executive branch is accountable to the courts for any actions that violate the national laws. There was a growing awareness that civil rights guarantees were beneficial and that Britain ought to have a codified Bill of Rights. A resolution calling for the creation of an English Bill of Rights was introduced in the House of Commons on July **7, 1975.**

Later, the European Charter on Human Rights was ratified by Britain. However, this was insufficient because the Charter could only be applied to interpret municipal law; it did not bind the Parliament. Therefore, a Bill of Rights that may limit the legislative authority of parliament was required.

In the year 1998 British Parliament have enacted the Human Rights Act, 1998. The objective of the act is to put into practise the freedoms and rights protected by the European Convention on Human Rights. The Convention is incorporated by the Act in Schedule I. These are the rights that are made effective by the Act. Section 3(1)(a)

[1]. 319 US 624.

mandates that all legislation be interpreted and implemented in a way that is consistent with the Convention on Human Rights, to the greatest extent practicable. An important constitutional innovation is the Act.

Origin of the Fundamental Rights in the Indian Constitution

India got independence on **15th August, 1947.** The Constituent Assembly accomplished the herculean task of drafting the Constitution which was enacted and adopted by the people of India on 26th January, 1950. The genesis of vision, need, recognition, protection and enforcement of human rights lies in the freedom struggle of Indians for more than a century which culminated in the form of Fundamental Rights and Directive Principles of State Policy on which the mammoth structure of Indian Republic stands today. After witnessing " the colonial rule, every Indian was of the firm opinion that these rights are not only basic but also inalienable for them for leading a civilized life. In fact, Indians wanted the same rights and privileges that their British Masters were enjoying in India. The Constituent Assembly incorporated in the Constitution of India the substance of most of the rights proclaimed and adopted by the General Assembly in the UDHR. Dr. S. Radha Krishnan has rightly described these rights as pledge to our people and a pact with the civilized world. The UDHR was proclaimed on 10th December, 1948 in where inherent dignity and equal and inalienable rights of all members of human family were recognized as the foundation of freedom, justice, and peace in the world. The Constitution came to force on **26th January, 1950** and the dawn of the day brought a Sovereign, Socialist, Secular and Democratic Republic with concepts of Justice, Liberty, Equality, Dignity and Fraternity. Our Constitution is a unique document, it is not a mere pedantic legal text, but it embodies certain human values, cherished principles and spiritual norms and recognizes and upholds the dignity of man. It accepts the individual as the focal point of all development and regards his material, moral and spiritual development as the chief concern of its various provisions. It does not treat the individual as a cog in the mighty, all powerful machine of the State, but places him at the centre of the constitutional scheme and focuses on the fullest development of his personality. Human Rights are not the alien concern of distant lands and distant civilizations that have been thrust upon us. The assertion of such rights and the determination to give constitutional form to them were central to the National Movement for the independence of our country. Human Rights have been incorporated in Indian Constitution in the guise of Fundamental rights and Directive principles of State policy. Part III of the Constitution includes the following Fundamental Rights:

Right to Equality (Arts 14-18)
Right to Freedom (Art 19-22)
Right against Exploitation (Art 23 and 24)
Right to Freedom of Religion (Art 25-28)
Cultural and Educational Rights (Art 29 and 30)
Right to Constitutional Remedies (Art 32).

Foundation of Justice: Essentiality of Fundamental Rights and Supreme Court Insights

In ***A.K Gopalan v State of Madras***[2] in this Chief Justice Patanjali Shastri had observed that "It is evident that the rights of individuals should take precedence over ordinary laws made by the state, as evidenced by the placing of fundamental rights at the centre of the Constitution, the express prohibition against legislative interference with these rights, and the provision of constitutional sanction for the enforcement of such prohibition through judicial review."

In ***Kharak Singh v State of Punjab***[3] the term 'personal liberty' was interpreted to be a compendious term including within itself all the varieties of rights which go to make up the personal liberty of man other than those dealt with in Art 19(1). While Art.19 (1) deals with particular species or attributes of that freedom, 'personal liberty' in Art.21 takes in and comprises the residue. It is true that in Art.21, the word 'liberty' is qualified by a 'word personal' but this qualification is employed in order to avoid overlapping between the incidents of liberty which are mentioned in Art.19 (1).

In ***Daryao v. State of U.P***[4] "The fundamental rights are intended not only to protect individual's rights but they are based on high public policy," the SC stated. Individual liberty and the defence of his fundamental rights constitute the cornerstones of the democratic lifestyle that the Constitution represents.

In ***Golak Nath v. State of Punjab***[5], the SC held that, Part III of the Constitution of India guarantees certain

[2] AIR 1950 SC 27.
[3] AIR1963 SC 1295.
[4] AIR 1961 SC 1457
[5] AIR 1967 SC 1643.

fundamental rights because they are considered necessary for the development of human personality. These rights enable a man to chalk out his own life in the manner he likes best.

In ***Kesvanand Bharti vs. State of Kerala***[6], the landmark decision made by the Constitution Bench in overturning Golaknath's case stated that while Parliament might change any provision of the Constitution, including the Fundamental Rights, it was not authorised to change the Constitution's essential elements.

In ***Maneka Gandhi v. Union of India***[7], SC observed that, fundamental rights are calculated to protect the dignity of the individual and creates conditions in which every human being can develop his personality to the fullest extent.

In ***R. D. Shetty v. International Airport Authority of India***[8] the Court further stated in this case that the State and its instrumentalities must obey the law and cannot be allowed to act arbitrarily when it comes to the distribution of largesse. A person with or without legal standing can always contest an arbitrary government action or government agency.

In ***Jolly George Verghese v. Bank of Cochin***[9] the SC held that if there is no evidence of a person's deliberate failure to pay while having sufficient resources, it would be too blatant an infringement of Article 21 to imprison someone for their poverty and ensuing inability to ful-fill their contractual obligations. According to the court, it is unlawful to send someone to civil prison for failing to pay debts when they are in financial hardship and to violate both Article 11 of the International Covenant on Civil and Political Rights and Article 21 of the Constitution when enforcing a money decree. In this ruling, the Supreme Court for the first time connected the life and liberty granted to this nation's residents under Article 21 with the human rights envisioned by the International Covenants.

Conclusion

Theoretically, the journey that started in 1950 in A.K. Gopalan has arrived at its destination. Prominent politicians, journalists, and social and political activists have all approached the Court to address issues pertaining to the broader public, and public interest litigation has become a component of our system for resolving the complaints of individuals unable to advocate for themselves. This not only demonstrates the confidence the people of this nation have in the Court, but it also demonstrates that even social and political activists believed that the Court was the only appropriate venue for resolving complaints because the Executive had failed to carry out its obligations. However, unless the aforementioned is put into practice and Mahatma Gandhi's ambition of seeing the last man in this country cry no longer remain an illusion; all of this will remain theoretical. Only then will the goal be accomplished.

There is nothing that a citizen of this nation cannot imagine being covered by the canvas that now contains fundamental rights. This canvas is essentially stretched across infinite horizons. There is nothing more that needs to be done to ensure that the 1.42 billion people in the nation have access to what has been promised. Art. 21 and other fundamental rights, read with directive principles and human rights based on International Covenants to which India is a party, guarantee everyone the right to live with dignity.

Another crucial question is whether the 1.42 billion people who live in this country can only have their hopes fulfilled by the Apex Court, which has been granted authority under Article 32 of the Indian Constitution and the ability to declare laws under Article 141 of the same document. In his article (published in 1995 January–March Part 0' Judicial Training & Research Institute. U.P. Lucknow Journal), Justice K. Ramaswamy stated that not only the Apex Court but also "the subordinate courts also have greater role to play in this area." These are broad questions that all of us involved in this judicial system must deal with. The common man would be able to obtain justice from a lower court at a lower cost thanks to the declaratory reliefs granted by the legal process. Rapid decision-making would foster public confidence in the effectiveness of the law.

[6] (1973) 4 S.C.C.225.
[7] AIR 1978 SC 597
[8] (1979) 3 S.C.C. 489
[9] (1980)2 S.C.C. 360