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Consortium for Educational Communication

(An Inter University Centre of University Grants Commission on Electronic Media)

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Ref: CEC/Addl.Dir/GEN/2021

28th December, 2021

To,

Prof. (Dr) Faizan Mustafa
Vice-Chancellor
National Academy of Legal Studies and Research (NALSAR)
Post Box No. 1 Justice City, Shameerpar, Medchal District
500101 Hyderabad
Telangana,

Sub: Hosting online course on Indian Constitution through SWAYAM- Reg.

Dear Sir,

1. This is to inform you that Consortium for Educational Communication (CEC), New Delhi is one of the National Coordinator for SWAYAM. It has been entrusted with the responsibility of offering non-technology UG and PG courses through SWAYAM. CEC, as National Coordinator has received a communication from MoE to consider your - Online Course on Indian Constitution for hosting on SWAYAM Portal for wider dissemination.

2. In this regard, we request you to kindly provide your course content so that the course may be scheduled on SWAYAM. All courses on SWAYAM are developed and delivered following 4-Quadrant approach. An Instructional Manual and MOOC Structure Guideline (attached as Annexure - A & B respectively) are being shared herewith for your ready reference. It would be highly appreciated if the course content is provided in 4-Quadrant.

A line in confirmation would be appreciated.

Yours sincerely,

(R. Shrivastava)
Additional Director

Encl: as above

Copy to:

1. Dr. Anju Rathi Rana, Joint Secretary & Legal Adviser, Dept. of Legal Affairs, Ministry of Law & Justice, 4th Floor, Shastri Bhavan, New Delhi 110001
2. Ms. Pushpa Gautam, Under Secretary (TEL), Room No. 408-C, Ministry of Education, Shastri Bhavan, New Delhi - 110001



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347.



NALSAR University of Law, Hyderabad
National Academy of Legal Studies and Research University
(established by Act 34 of 1998)

Prof. (Dr.) V. Balakista Reddy
(L.M., M.Phil., Ph.D. (JNU))
Vice-Chancellor (I/c) & Registrar

No. Admin/V.C.(I/c)/CPC/4552/2022

August 27, 2022

To,
Shri. R. Shrivastava
Additional Director,
Consortium of Educational Communication
IUAC Campus, Aruna Asaf Ali Marg,
New Delhi – 110067.

Sub:- Submission of course content for online course on Indian Constitution in requested quadrants to offer through SWAYAM as a non-credit course – Reg.

Ref: Letter No. CEC/Addl.Dir/GEN/2021 dt. 1st July 2022 & D.O.F.No. 12/5/2019-IC dt. 2nd August, 2022.

Dear Sir,

With reference to your letters cited above, Please find attached herewith the course content for online course on Indian Constitution in the four quadrant format as requested by you.

Yours Sincerely,

(V. BALAKISTA REDDY)
Vice-Chancellor(I/c) & Registrar

Copy to:

Dr. Anju Rathi Rana, Joint Secretary & Legal Adviser, Dept. of Legal Affairs,
Ministry of Law & Justice, 4th floor, Shastri Bhavan, New Delhi 110001

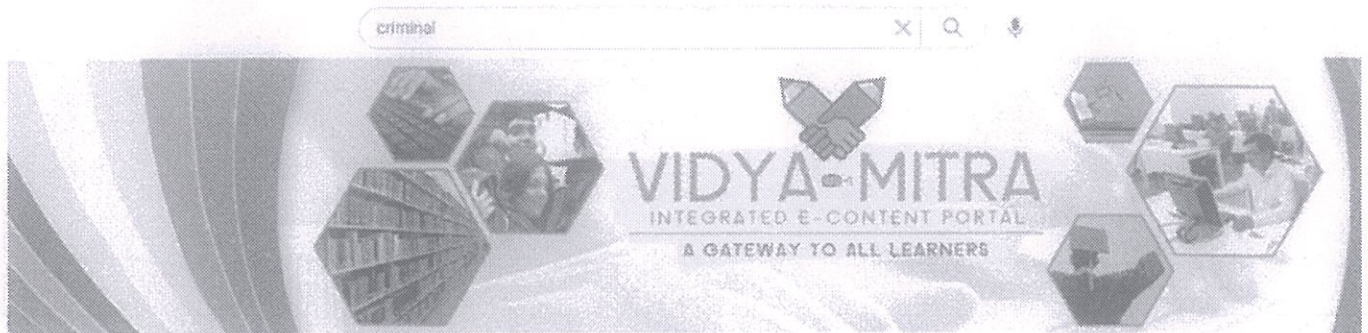
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ज्ञान-विज्ञान विमुक्तये



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MODULE 1:

Promotion and Protection of Human Rights: Enforcement of Fundamental Rights and Custodial Justice

Component I(A) - Personal Details:

Role	Name	Affiliation
Principal Investigator	Prof. (Dr.) Ranbir Singh	Vice Chancellor, National Law University, Delhi
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Component I(B) - Description of Module:

Subject	Criminology
Paper	Human Rights and Criminal Justice
Module title	Enforcement of Fundamental Rights and Custodial Justice
Module ID	
Learning Objectives	<p>This module is intended to evoke a discussion on the rights of prisoners and build perspective on justice. It attempts to comprehend the philosophical basis of the rights of the prisoners. After studying this module, the student should be able to,</p> <ul style="list-style-type: none">• Understand the constitutional basis of the rights of the prisoners• Identity various rights and legal status of the persons in custody in India• Comprehend the special attention to be paid to their problems.
Key words	Fundamental Rights, Enforcement, Custodial Justice,



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Module on Enforcement of Fundamental Rights and Custodial Justice

Introduction

As an idea, custodial justice has been acquiring prominence in governance across the countries. Since 1970s, custodial justice has been one of the primary focuses of judicial activism by Indian higher judiciary. The judiciary expanded the ambit of its intervention into the darker corners of incarcerations. It has subjected the arbitrary and colonial practices of the executive in prisons to severe scrutiny and laid down guidelines for reformative measures. The thrust was largely to the reformation of custodian. The Indian judiciary has tried to reframe the prison regime through guidelines on the basis of constitutional and human rights norms. Here we will see the judiciary's attempts to define the prisoner as citizen. The approach of the courts towards the status of prisoners and their implications for the rights of the prisoners are discussed here.


The prisoners, as human beings are entitled for all the rights meant for citizens, except the right to mobility. The right to freedom, in the sense of mobility is considered as one of the most important aspects of human existence in the modern world. The loss of this right to liberty therefore is the severest punishment the civilized society can imagine to inflict upon any one for violation of others' rights by crime. Therefore considering the imprisonment itself as the punishment and not for punishment, all other rights necessary for decent existence of human beings should be restored to the prisoners. From this point of view let us examine the judgement of the courts for the rights of the prisoners.

One more stand point from which the prisoner's rights can be interpreted is that since the State handles the prisoner on behalf of the society, it is obligatory on the part of both of them to provide for all the human rights of prisoner. In the dispensation of justice and punishment by the state on behalf of the society there may not be consent from the prisoner as he may differ with it from his own sense of justice and social order. Yet the convict is sent to prison as a means of punishment in the interest of justice required for sustenance of a social order. The conflict in the understanding of justice and social order between individual convict, state and society is overridden by the later two and it is therefore their responsibility to meet all the other rights, loss of which are incidental to the state of imprisonment.

After India emerged as independent nation state and political system, its Constitution, the largest ever devised in the world has been the basic document that provides normative principles for governance. The Constitution envisioned social, political and economic justice, equality of status and opportunity before law and freedom of thought, expression, belief, faith, vocation, association, and action as fundamental norms that should guide all the institutions, public or private, of society. This is the liberal philosophy of the Constitution that should reflect in the day to day functioning of the institutions of the new polity. Articles 14, 19, and 21 of Indian Constitution basically reflect the normative principles to be followed in the governance and social arrangement.

The Prisons Act, 1894 continues to govern the prison administration in India. In fact this Act is the result of consolidation and amendment of the Prisons Act of 1870. The Civil Jails Act, 1874 is the oldest of all acts that is in vogue for administration of prisons at present. The legal position of the prisoner as the confined *for punishment*, constructed in 19 century is yet to undergo a change. The Acts consolidated the status of the institution of prison long before the idea of reformation became popular. The Prisons Act 1894 has a preamble, which makes no attempt to stress its objectives.




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Sunil Batra case I

This is a case related to one prisoner called Sunil Batra, who filed a writ under article 32 of the Constitution. In this case, the Supreme Court asserted that the judges, even within prison setting are the real though restricted ombudsmen empowered to proscribe, prescribe, humanize and civilize the life-style within the prison. The operation of the articles 14, 19 and 21 of Constitution may be pared down for a prison but not ousted altogether. It declared that all the restrictions imposed on the prisoner not necessary for the confinement are doing violence to the part III of the Constitution. Though prior to this case, the Supreme Court dealt with many cases of custodial violence, this is the first case in which public came to know the horrors of prison life in the independent India. The fundamental questions the Court addressed are: in spiritual terms, whether the prison system has a conscience; in Constitutional terms, whether a prisoner, ipso facto forfeits personhood to become a rightless slave of the state and, in cultural terms, whether man-management of prison society can operate its arts by 'zoological strategies'. Until then the autonomy of prison functioning is so much that the prison authorities in this case resisted the intervention of the apex court into intramural affairs of its functioning relying on Section 30 and 56 of Prisons Act 1894. The Court lamented the attitude of the (Prison) Executive, which defended the prison wrongs as right even thirty years after independence and quipped that legislatures, over the decades, are perhaps pre-occupied with more popular business than concern for the detained derelicts who are a scattered, voiceless and noiseless minority. The prison administration glibly invoked dangerousness of inmates and the necessity of peace in prison to resist the judicial intervention. The Court dismissed the argument of the prison executive that murderers deserving death sentence continue to be dangerous. The petitioners invoked Articles 14, 19 and 21 of the Constitution. The apex court made it once and for all clear that the jurisdictional reach and range of its writ to hold prison impulse and cruelty in Constitutional leash is incontestable and prisoners have enforceable liberties devalued may be but not demonetized. It strongly asserted that the prison laws do not swallow up the fundamental rights of the legally unfree and said that as sentinel it would guard freedom behind bars, tempered, of course, by environmental realism but intolerant of torture by prison executive. It accepted that the right to mobility to prisoner is limited but ruled that binding hands and foot with hoops of steal is violative of article 19 of the Constitution. It made it amply clear that even a person under death sentence has human rights, which are non-negotiable and even a dangerous prisoner, standing trial, has basic liberties, which cannot be bartered away and said that every prisoner is entitled to integrity of personality viz. freedom from crippling on body, mind and moral fibre. It said that prison practices are too discriminatory to be valid under Article 14, too unreasonable to be ultra vires of Article 19 and too terrible to qualify for being human law under article 21. It strongly objected to the unaccountable prison autonomy. It questioned the hypersensitivity about the safe custody by prison officials even when the life and liberties of prisoners are in danger.

The confinement given to Sunil Batra as a condemned prisoner had all the features of solitary confinement, which, can only be imposed, by court as a judicial punishment under section 73 of Indian Penal Code. The sections 73 and 74 at least provide some respite to prisoner, as it is a punishment of maddening severity. The prison superintendent argued that the prisoner is not under solitary confinement but under statutory confinement under the authority of section 30 (2) of the Prisons Act read with section 366(2) of Criminal Procedure code 1973. None of these sections provide for complete seclusion of prisoner from others. But the prison in practice made the safe custody virtually into a solitary confinement.

Charles Shobraj

The Supreme Court bench, which heard the case of Sunil Batra also heard the case of Charles Gurumukh Sobhraj, who was subjected to persistent bar fetters for two years without break notwithstanding wounds on the heels and medical advice to the contrary. In this Supreme Court asserted that poverty cannot be degraded as 'dangerousness' except by subversion of our egalitarian ethos of Constitution. The court described this as soft justice syndrome towards the rich, not social justice response towards the poor and denounced it as the class character of the jail justice.



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The Court in this case said that the predictions of dangerousness of prisoners are hazardous and its management in the prison setting is often overkill or under scientific. The irrationality of bar fetters based on subjective judgment by men without psychiatric training and humane feeling makes every prisoner dangerous. The Court hoped that the state would revise the sections 30 and 56 of the Prisons Act, which are out of tune with human rights moorings. It clearly stated that the Constitution outlawed the brutality and inhumanity and if they enter the prison through backdoor entry, masked as security they cannot escape the Constitutional gauntlet.

In this judgment one of the important mechanisms the court suggested is to establish necessary infrastructure for independent review of such actions. In the absence of such mechanism such actions should be invalid, as arbitrary, unfair and unreasonable. The prison officials will then be liable civilly and criminally for just to the person of the prisoner.

Miss. Veena Sethi Vs State of Bihar

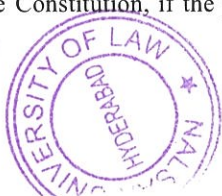
In the case of Miss. Veena Sethi Vs State of Bihar and Others in 1982, the Supreme Court found that six prisoners in Hazaribaug Central prison were kept in illegal detention for two to three decades without any justification whatsoever. The court said that these specimens of humanity were languishing in jail for years behind stonewalls and iron bars deprived of freedom and liberty, which are the inalienable rights of human beings. These prisoners were lost in the oblivion of time and had become merely ticket numbers in the jail.


The Supreme Court found it shocking that such a situation should prevail in any civilized society. Particularly shocking was the case of Gomia-Ho who was incarcerated on 2-5-1945 and was sentenced to undergo a rigorous imprisonment for only three years and to pay a fine of Rs.100. Purely on account of carelessness of the state and prison authorities he spent 37 years in jail. The court anticipated that "one day the cry and despair of large number of people would shake the very foundation of our society and imperil the entire democratic structure. When that happens we have only ourselves to blame". Also particularly agonizing was the case of Bhondua Kurmi who rotted in jail for nine years in excess of his sentence period, because of the controversy between different departments as to the spelling of his name.

In Sunil Batra case II

In this case one prisoner called Prem Chand was tortured by inserting a baton into his anus by the Warder Maggar Singh as a means to extract money from the victim. The Supreme Court recognized the prisoner as a person in the prison under the order and direction of the court and said that not recognizing him, as a person would amount to convicting the nation and the Constitution of dehumanization and to repudiate the world legal order, which recognizes the rights of prisoners in the international covenant on prisoners' rights to which India is a signatory. Finally it said that the prisoners have enforceable liberties and are too precious to be left to the jailers. In response to Additional Solicitor General, who argued for realistic circumstances of prisons to defend the violations of rights by the prison officials, Supreme Court described the prisoners as the legally unfree and said that even a person under death sentence has human rights, which are non-negotiable and even a dangerous prisoner, has basic liberties, which cannot be bartered away.

It recognized the prisoner as poor, mute, illiterate, desperate and destitute and too distant from law to be aware of their rights or ask for access to justice, especially when the running tension of the prison and grisly potential for zoological reprisal stare them in the face. The Supreme Court noted the fact that prisoners are peculiarly and doubly handicapped. The fact is that firstly most prisoners belong to weaker segment, in poverty and illiteracy. Secondly the prison house is a walled off world which is incommunicado from the human world, with the result the bonded inmates are invisible, voiceless and their injustices unheeded. The life in this state for prisoner will remain as an animal existence, contrary to article 21 of the Constitution, if the principles of fair procedure do not flow into prison.




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The fundamental responsibility to protect the person of the prisoner therefore lies with the courts. It also therefore said that no iron curtain could be drawn between the prisoner and the Constitution

It claimed that it has a continuing responsibility as performance auditors of legality to ensure that the Constitutional purpose of the deprivation is not defeated by the prison administration. It asserted that it has power and responsibility to intervene and protect the prisoner against mayhem, crude or subtle and use habeas corpus for enforcing in-prison humanism. It asserted that jailers are bound by the rule of law and cannot inflict supplementary sentences under disguises and defeat the primary purposes of imprisonment. And therefore it recommended series of instant administrative grievance procedures such as visits by family member, judges, dissemination of rules and regulations and such other measures to improve the situation in the prisons.

From the above judgments of the apex court it is clear the judiciary tried to redefine the legal status of prisoner as a human being from that of a subject, obedient to endless rules of prison authorities. It categorically tried to establish the rule of law within the prison by suggesting certain mechanism of external control to comply with humane norms of administration. The compliance to such measures by the courts will be discussed hereafter.

In the case of D.B.Patnaik V/S state of M.P the Supreme Court said, "Convicts are not by mere reason of the conviction denuded of all the fundamental rights which they otherwise possess.... Even a convict is entitled to the precious right guaranteed by Article 21 of the Constitution that he shall not be deprived of his life or personal liberty except according to procedure established by law". Here is an effort by the court to recognize the prisoner as a citizen. The process of prisoners' prosecution for prison offences does not follow any principles of natural justice. In Pattar Singh's case the apex court said that the prison administration should follow the principles of natural justice in awarding serious punishments to the prisoner. The arbitrary power that the manual grants to the prison Superintendents completely erases the distinction between legality and illegality.

Safeguards provided by the courts for the protection of the rights of prisoners

What are the safeguards the courts provided for the protection of the rights of the convicts from the arbitrary power of the prison authority?

The Indian High courts and Supreme Court have tried to carve out a role for themselves for the defence of prisoners' rights. In the initial years of judicial activism the prisons resisted the intervention into their affairs of courts. In Sunil Batra case I, the Supreme Court has rejected the hands-off doctrine and ruled that the fundamental rights don't flee the person as he enters the prison although they may suffer shrinkage necessitated by incarceration. It reminded the prison administration that the convict is in prison under the order and direction of the court. It also said that no iron curtain could be drawn between the prisoner and Constitution. And said: "suffice it to say that so long as judges are invigilators and enforcers of Constitutionality and performance auditors of legality, and convicts serve terms in that grim microcosm called prison by the mandate of the court, a continuing institutional responsibility vests in the system to monitor the incarceratory process and prevent security excess. Jailers are bound by the rule of law and cannot inflict supplementary sentences under disguises or defeat the primary purpose of imprisonment".

The apex court recognized that the power to punish in the hands of prison officials is one of the greatest sources of prisoners' rights violation and therefore laid down the following guidelines to be followed while dealing with the prisoners:

1. Section 56 of the Prisons Act, 1894, which authorizes the prison superintendent to impose the punishment of fetter, should be tamed and trimmed by the rule of law and his powers should be pruned and his discretion bridled.
2. Undertrials should be deemed to be in custody, but not undergoing punitive imprisonment.

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3. When the punitive restraints are imposed, the burden of proof of the ground is on the custodian.
4. The punishment should in no case go beyond the intervals, conditions and maxima laid down for the purpose.
5. The discretion to impose punitive restraints is subject to quasi-judicial oversight, even purportedly imposed for reasons of security.

In the same judgment the apex court ordered that within the three months after delivery of that judgment the Grievance Deposit Boxes should be maintained by or under the orders of District Magistrate and the Sessions Judge, which will be opened as frequently as is deemed fit and suitable action taken on complaints made. In this context the apex court observed the following: "In the sensitive area of prison justice, the judicial members have special responsibilities and they must act as wholly independent overseers and not as ceremonial panelists. The judges are guardians of prisoners' rights because they have duty to secure the execution of the sentence without excess and to sustain personal liberties of prisoners without violence or violation of inmates' personality. Moreover when a wrong is done inside the jail the judicial visitor is virtually a peripatetic tribunal and sentinel, at once intramural and extramural – observer, receiver and adjudicator of grievances".

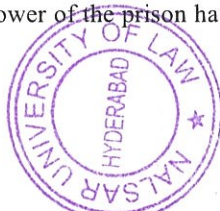
The courts have tried to tame the power of prison over the inmates by trying to establish rational relationship between the restrictions imposed and the maintenance of internal order and discipline. They questioned various blanket restrictions imposed on the prisoners in the name of security and discipline. The Bombay High court in a case, Madhukar Bhagwan Jambhale Vs State of Maharashtra struck down the prison rules that imposed restrictions on the prisoners' right to communicate with the outside world as violative of article 14, 19(1)(a) and 21 of the Constitution.


The case of Ranchod Vs State of Madhya Pradesh brought into sharp focus the dictatorial role of the prison doctors and its implication on the prisoners. This is a case filed in the High court of Madhya Pradesh by the prisoner Ranchod along with his father, Bhanta from the central jail, Indore, alleging that his brother Vengariya, prisoner serving sentence in the same prison died of poisoning by the jail doctors on 18 November 1986. They alleged that some poisonous injection was given to Vengariya who refused to wash clothes of the doctor, nurse and compounder. In this case the court found out that the prison authorities tampered with the prison records to show the deceased had been ill for two weeks and also the collusion of doctors of Indore City hospital with the former. It deprecated the indifferent attitude of city police, magistrates and doctors to record the dying declaration of the deceased. It also expressed its agony about how the father and brother of the deceased prisoner staying in same prison were kept in darkness about the critical condition of the prisoner.

Conclusion

After examination of the attempts by the judiciary to defend the rights of prisoners we find a certain process is underway in the prison discourse. First of all the judiciary tried to question the unaccountable autonomy of prison. It claimed its own rights to intervene into the prison for the defence of prisoners' rights. To attribute the rights to the prisoners the judiciary tried to define the character of the prisoner beyond criminality and recognized his individuality with personality and humanity and declared that most of the rights provided in the Constitution should be available to him. In the process of applying constitutional norms to do justice to the prisoner the judiciary recognized him almost a citizen. It also tried to demystify the dangerousness of the character of prisoner as criminal by trying to invoke the social factors involved in it.

Having once recognized the prisoner as citizen, the judiciary tried to redefine the limited meaning of imprisonment as being legally unfree under its own direction. The loss of freedom itself was recognized as the most severe form of punishment and therefore the supplementary punishments imposed on the convict by the prison were declared as illegal and against the constitutionality of punishment. To that extent the power of the prison has to come under the purview of constitutionality




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by revising the prison laws and regulations and taming the authority of the personnel. It declared that the power of judiciary continuous to flow within the prison to preserve the rights of prisoners. The judiciary thus made an attempt to delineate the limited and defined meaning of sentence and corresponding shrinkage in the power of prison.

The judiciary declared that the power of prison is too arbitrary to be reasonable under the norms of the constitutional law. The prison is recognized as resorting to crime of punishment. Therefore judiciary tried to provide certain mechanisms to apply principles of natural justice and enforce the constitutional norms within the prison. In the mechanisms provided one can see the trend of policing of the reformer.



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MODULE 1:

Promotion and Protection of Human Rights: Role of Supreme Court in Enforcement of Fundamental Rights or Human Rights


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Component I(B) - Description of Module:

Subject	Criminology
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Role of Supreme Court in Enforcement of Fundamental Rights or Human Rights

Introduction

Supreme Court of India is the apex of large number of courts functioning across the country. The court has been bestowed with the power of formulating the rules and procedures applicable to all the courts. In a way within the apparatus of judiciary, the Supreme Court to a large extent, determines the nature and quality of dispensing the justice. Hence around the role of Supreme Court, the question of enforcement of human rights discussed. The module provides a brief description of interrelationship between law, executive and supreme court and their impact on the enforcement of human rights in the first part of the module. After brief review of historical context of constitution making and its impact on the drafting of fundamental rights, the independence of judiciary and its power of judicial review of constitutional validity of laws are discussed in order to lay down the foundational arrangements for enforcement of rights. In the second part of the module, the role of Supreme Court in democratizing the rule of law and expanding it towards protecting various fundamental rights are discussed.

Topic 1: Foundational Arrangements for Human Rights


Modern states have taken upon themselves the task of enforcing human rights. The ability of state to implement the rights of citizens gives the legitimacy to it as a democratic dispensation. Rights of citizens are to be enforced by the state. This task of state requires clearly specified laws and regulations and mechanisms in place.

The enforceable and justiciable rights derive from the laws. But beginning a debate on enforcement of human rights within the framework of ordinary statutes is inadequate as most unacceptable regimes of past like colonialism and racialism were also legal. Among the set of laws that govern a society, foundational laws are different. While ordinary laws are made from time to time depending on the social and political requirements of the society, Constitutions, the mother of all laws is made during important historical transformations of society which define the nature of future social order. The Indian Constitution was made under the influence of such historical struggles and national aspirations against the colonialism.

Historical Context

In modern times all the governments are governments of laws but not of socially and economically powerful people. The concept of limited government has its origin in the struggle against unlimited powers of kings and aristocrats in the medieval period. The status societies of medieval period were governed by the laws of religion, patriarchy and aristocracy in which the rights of individuals are subjected to age old traditions. The medieval societies were organized on the basis of traditional rules and laws, which structured different social groups in hierarchical model. In this model individuals were non-entities and had no rights, apart from the social status of their communities. The kings governed the society on the basis of these traditional rules and customs. The revolt of freedom loving individuals and communities against the traditional inequalities gradually forced the powerful to accept the written constitutions as the consensual and foundational laws to govern the affairs of society. Thus constitutions emerged as the limitations on the powers of the state. The separation of powers between different organs of the state- executive, legislature and judiciary are organized, distributed and limited by the constitutions. The nature of these arrangements is determined by the particular historical context in which the constitutions are framed.




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Indian Context

Indian constitution was framed after a long historical struggle of independence movement against the British colonialism. The right against racial inequality, right to political independence, right against repression by the state and right to freedom of expression are the important aspirations that united the diverse social masses of the Indian subcontinent against the British colonialism. The notion of independence from British was not only an emotionally abstract idea but also a concrete one in terms of better future for all individuals and social groups. The memories of suppression of civil liberties by colonial state, communal violence during partition of subcontinent into India and Pakistan and horrors of world war were fresh and determining factors during framing of constitution.

The constituent assembly considered Supreme Court as the watchdog of democracy and as an instrument to guarantee the fundamental rights of citizens from the executive. This high expectation of constitution makers consequently resulted in granting the supreme court the jurisdiction of widest amplitude. According to Law Commission of India, "the Supreme Court of India enjoys widest jurisdiction including the novel jurisdiction hitherto not enjoyed by any court in any country of having original jurisdiction to grant relief in case of violation of fundamental rights. And the right to move court itself is guaranteed as fundamental right" (Para 1.3 of LCI 125: Supreme Court: A Fresh Look 1988). The court further expanded its jurisdiction by conferring upon itself the epistolary jurisdiction to entertain the social action litigation. This particular jurisdiction of the court to protect the fundamental rights of citizens is considered to have made the Supreme Court of India into Supreme of Court of People.


Sub-Topic 1: Independence of Judiciary

The constituent assembly's expectation from the Supreme Court also determined its relationship with the executive and legislature. Thus Assembly debated about the separation of judiciary and executive and rejected the proposal to elect the judges through the two-thirds majority in the parliament. The trend of interfering into the administration of justice by the executive was observed during colonial period and checks against it were proposed. It ruled out the possibility of election of chief justice of India by the council of states as it would be giving primacy to the legislature over the judiciary. It also prevented the possibility of acceptance of any office of profit after retirement by judges in order to ensure their integrity and avoid quid pro quo between two organs. To secure impartiality in the appointment, tenure and transfer of judges, appropriate provisions are made. After prolonged debate, it was accepted that the judges of Supreme Court should be appointed by the president in consultation with the chief justice of India. This was proposed by Dr. Ambedkar to ensure the independence of the judiciary and that was intended to achieve superiority of neither executive nor the judiciary.

Right to Constitutional Remedies: Article 32

The part of III of the Constitution provides for fundamental rights of the citizens. The law of fundamental rights will remain a mere statement of intent unless a specified mechanism to enforce the rights is not provided. To fulfil this requirement, article 32 of the constitution provided the citizens the right to move the Supreme Court for the enforcement of the rights. This right to move the apex court can be considered as the mother of all rights given its vital importance. The Court has been given power to issue directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari, for the enforcement of the rights conferred by the constitution. The citizens can appeal to Supreme Court by a special leave petition under article 136 of the Constitution. Under article 134(1)(c), the court can entertain criminal appeals in the cases in which a substantial question of law of general importance are involved. Though the parliament has the power to confer the powers of Supreme Court on any other court, the superiority of Supreme Court in enforcing the rights of citizens has been respected. This right to constitutional remedy through Supreme Court cannot be suspended by the parliament under any circumstances except as provided by the constitution itself.




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The Constitution-makers' expectation of Supreme as the guardian of democracy and constitutional order had taken serious beating during the internal Emergency of 1975. The Presidential order of 27 June 1975 under article 359 imposing Emergency resulted in repression of thousands of political dissidents and their arrests under Maintenance of Internal Security Act, 1971. The fundamental rights of the citizens were suspended and constitutional remedies under articles 32 and 226 of the constitution were also removed by the government. Unfortunately, the Supreme Court could not stand by the convictions of the constitution makers and citizens. In ADM Jabalpur v Shivakant Shukla, 1976 (AIR 1976 SC 1207) case, popularly known as habeas corpus case, the court held that "no person has any locus standi to move any writ petition under Article 226 before a High Court for habeas corpus or any other writ or order or direction to challenge the legality". It also upheld constitutional validity of the section 16A (9) of the Maintenance of Internal Security Act. The people of India considered that the Supreme Court seriously compromised its independence as well as the rights of the citizens.

Sub-Topic 2: The Power of Judicial Review

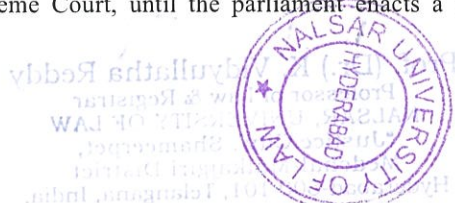
The judiciary enforces the fundamental rights on the basis of statutes, which in turn depends on the principles of the Constitution. The Constitution also delineates the powers of judiciary and fundamental rights of the citizens. While enforcement of human rights depends on the law, the one crucial question we have to ask is what if the law itself is violative of fundamental rights of citizens? The article 32 (4) of the constitution mandates that the rights guaranteed by the article 32 should not be suspended except as provided for by the constitution. Under the article 32, the Supreme Court went on exercising the power of judicial review of constitutional validity of laws made by the government of India. For instance the legislations of land regulation had been struck down by Supreme Court in the name of protection of individual right to property. The power of the judiciary was seen as an obstacle by then executive-government. In order to take away the power of judicial review, the government of India amended the constitution through 42 Amendment Act 1976.

The Forty-second Amendment Act 1976 inserted 32A barring the Supreme Court from considering the constitutional validity of any state law in the proceedings for the enforcement of fundamental rights. Insertion of article 131A and 226A deprived the High Courts of their jurisdiction to decide the constitutional validity of any central law. Article 228A stipulated at least five judges for deciding constitutional validity of any state law and mandated a special majority for a judgment invalidating such a law. These restrictions seriously compromise the independence of judiciary and consequently the rights of citizens are also in danger. The same constitutional legislation also conferred sweeping powers on parliament to make laws in the name of anti-national activities. All the changes made to Constitution under this Amendment were repealed through the Constitution (forty-third amendment) Act, 1977 in order to protect the intent of constitutional makers and ensure the independence of judiciary.

In L. Chandra Kumar vs Union Of India And Others, 1997, the Supreme Court held that the power of judicial review of the Supreme Court under article 32 and of the High Courts under Articles 226/227 cannot be excluded as they form part of the inviolable basic structure of the Constitution. The first ingredient of this principle is that the power of the High Courts and of the Supreme Court to test the constitutional validity of legislation can never be ousted or excluded.

The Power to Make laws: Article 141

The process of making constitution and statutes do not exhaust the need for making new laws to meet the demands of changing society and rights of individuals. The constitutional makers thought the apex court can also discover vacuum in the statutes in the process of adjudication and undertake the responsibility of filling it. Article 141 of the Constitution confers the legislative power on the Supreme Court, until the parliament enacts a new law to fill the gap. Such law declared by the



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Supreme Court is binding on all the courts within the territory of India. Similarly under article 412, the Supreme Court has the power to pass any order to do complete justice in any matter pending before it. The judgments of D. K. Basu and Visaka Guidelines, right to education and right to legal aid are the best example of enforcement of human rights of citizens in the absence of any specific law for the purpose.

The apex court recognized the vulnerability of the persons in police custody and rampant misuse of power of arrest in this regard by the state. It also took cognizance of the fact that all accused are innocent until proved otherwise in the court of law and are entitled for all the fundamental rights enlisted in part three of the constitution. But there was no specific statute to ensure the right to life and dignity of the citizens in the specific circumstances of the custody. To ensure the constitutional right to life and dignity, the apex court felt that there is a need for specific rules and to fill the void it laid down the detailed guidelines in DK Basu Judgment. These guidelines were followed by the enforcement agencies and some of them later were incorporated as part of the law by the parliament.

Similarly the apex court recognized the possibility of rampant sexual harassment of women at work places. Often the sexual harassments are subtle and invisible but their effects are real and tangible. The harassment violates rights of women in terms of their career, physical and psychological harm and depressions. Democratizing work spaces to ensure the right to dignity and equality of women is necessary but there was no specific law that penalizes sexual harassment. More over there is need to recognize particular forms of these violations which are beyond the reach of law. The Supreme Court understood the working conditions of women even in modern spaces and laid down guideline in Visaka judgment and provided for a mechanism to enforce the rights of women.

In Vishakha v. State of Rajasthan[x], (AIR 1997 SC 3011 : (1997) 6 SCC 241) the Supreme Court has declared sexual harassment of a working woman at her work as amounting to violation of rights of gender equality and rights to life and liberty which is clear violation of Articles 14, 15 and 21 of the Constitution. In the landmark judgment, the court in the absence of enacted law to provide for effective enforcement of basic human rights of gender equality and guarantee against sexual harassment laid down the guidelines.


II Expansion of Right to Life: the Ark of all fundamental Rights

In this section, the specific role of Supreme Court in the protection and enforcement of human rights with reference most important right to life is discussed. Its role as expansive interpreter of meaning of law and its making are touched.

Sub-Topic 1: Principle of interpretations

All laws including constitutions are made at particular times, social contexts and for political needs. The original intent of the framers of constitution are determined by those historical times but over a period of time, new contexts demand fresh look at the meaning of law but the power to interpret is bestowed on the shoulders of Supreme Court by the Constitution. But what could be the principle of interpretation to be followed by the court? It cannot be in a constricted sense. It has to be wide and liberal to accommodate the changing circumstances and purposes. This is also necessary if the provisions of constitution do not become atrophied but remain flexible enough to adapt to new challenges posed by the society from time to time. The American Constitutional expert Ronald Dworkin felt that for meaningful interpretation of Constitution, the judges needed to be aware of historical and sociological process of society and just the knowledge of law was not enough. This perspective of interpretation of law is more applicable to right to life of citizens and communities more than any other provisions of law. The broad and expansive spirit with which the court interpreted the provision of right to life has actually invested it with significance and vitality to endure




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for years. It has enhanced the dignity and worth of citizens in principle. (Francis Coralie Mullin vs The Administrator, Union ... on 13 January, 1981)

Sub-Topic 2: Right to Life and Role of Supreme Court

The article 21 has been regarded as the heart and soul of Indian Constitution. It reads as follows: “*No person shall be deprived of his life or personal liberty except according to a procedure established by law.*” The right has several components in it. This right is applicable to all 'persons' but not just to citizens of this country. It secures two rights: life and liberty. It also implicitly guarantees all persons the right to rule of law. The word deprivation connotes it can only be claimed when a person is denied her life and personal liberty by the state. The meaning of the state is covered by article 12 of the constitution.

Indian Supreme court has never been as creative as with the interpretation of this article. It has actively opened-up a new angle to it when it said in Maneka Gandhi's Case that the article is not only a guarantee against the actions of the state without law, but is also a restriction on the nature of law made. The fundamental question raised is whether any law is enough to justify the deprivation of right to life and liberty of persons? What if that law is undemocratic in terms of procedures followed and not in conformity with procedures of principles of natural justice? It is not just some semblance of law that is required to be complied with article 21. The court made it clear that the procedure prescribed by law must be reasonable, fair and just. If the law does not reflect these qualities, it would be void as violating the guarantee of article 21. The expansion of the scope of the right to life and personal liberty further widened the possibility for enlarging other fundamental rights.

What constitutes deprivation of right to liberty?

Life and personal liberty are integral to each other. One cannot be imagined without the other. The constitutional makers perhaps rightly conceived the organic link between life and personal liberty of persons and provided for both of them in the same article. It is difficult to identify them distinctively from each other. Imagining right to dignified life being intact while the personal liberty of persons is treated cruelly is very hard. The right to personal liberty is more often at risk from the actions of the executive than the right to life per se, though the later bound to suffer.

In the popular imagination, the deprivation of personal liberty by the executive does not go beyond the gates of police station and prisons. The court rightly pointed out that deprivation is not an act which is complete once and for all. In fact the deprivation of personal liberty begins at the gates of executive but lasts as long as the persons are in their custody. The deprivation can only be physical deprivation of personal liberty and it cannot inflict any damage to any limb or faculties of thinking and feeling. Hence any action of the executive, which injures or interferes with the use of any faculties of the person in custody attracts the article 21. The physical deprivation of personal liberty should ensure the preservation of dignified life of the person.

Once the tone and tenor of its approach towards right to life was set, the apex court invoked it on all issues of paramount importance to expand and ground the fundamental rights. The right to minimum wages, social security and protection of family, right against handcuffing, right to education, right against illegal detention and right to clean environment are some of the important rights which were interpreted by the court in the light of expansion of right to life. An elaborated discussion of the expansion of the rights would be taken up another module that follows.



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Summary

All modern democracies emerged against the arbitrary powers of erstwhile regimes. The constitutional democracies are based on separation of powers between executive, legislature and judiciary. Indian constitution provided prominent position for Supreme Court as the guardian of democracy. The powers of restricting arbitrary actions and legislations of government are entrusted to the Supreme Court. It has travelled far from the criticism in 1960s and 1970s that its decisions created road blocks in the way of improving the conditions of the tillers of the soils by blocking zamindari abolition statutes and persons of humble origin and low economic status were unlikely to get justice to public interest litigations. It tried to creatively interpret the article 21 and expand its ambit from human rights perspective.



A handwritten signature in blue ink, appearing to read "K. Vidyullatha Reddy".

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