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AMPLIFICATION OF HUMAN RIGHTS IN INDIAN CRIMINAL JURISPRUDENCE

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Abstract

Human Rights have always traditionally hailed to have been on a higher pedestal when compared to other state sanctioned rights. The various rights as enumerated and interpreted as having their edifice in the Indian Constitution have long been regarded as a virtual resonance of the internationally recognised Human Rights.

These are universally regarded and considered to be sacrosanct in their essence. It is for this reason, that their presence is warranted in any branch of the societal sanction of law. Perhaps it is more so in criminal jurisprudence as this dimension of the law presents one too many opportunities where human rights may be blatantly disregarded. These safeguards are important protections against abuses of power which affect the life, liberty, and physical integrity of individuals. Without these protections and limitations on the potential abusive exercise of power by the State, democracy could not exist.

Thus, there is an inseparable link between the protection of individual and collective human rights and democracy, which assumes great significance in Criminal Jurisprudence. This paper proceeds on the abovementioned premise, with an evaluation of the prevailing situation culminating in suggestions to undo the inherent drawbacks therein.

Introduction

The famous American lawyer Ramsey Clark once remarked *"A right is not what someone gives you; it is what no one can take from you."* Human rights, to put them in the simplest terms as to distance from needless jargons, are those rights that one is entitled to, basically by the virtue of being a human being. The protection that is offered to human rights has seen a

significant increase in the preceding century, owning to the fact that a majority of nations in the world have a common edifice of legal values.[1]

The origination of this concept of human rights, some argue, as traceable to the Magna Carta of 1215. In so far as the modern world is concerned, the jurisprudential aspects of human rights, have largely been agreed to as having taken source from the Universal Declaration of Human Rights (UDHR) under the aegis of the United Nations in 1948. This was regarded as the culmination of the importance given to this concept, mostly understood as a mechanism for undoing the large scale of atrocities committed during World War II.

India is only the third country of the Common Law system to incorporate within it, a justifiable bill of rights, apart from U.S. and Ireland[2]. It may be noted that the entire human rights jurisprudence of India centres on Part III and Part IV of the Constitution. Part III of the Constitution, under the caption of Fundamental Rights, guarantees a fairly comprehensive array of basic human rights to citizens and casts a duty on the State not to violate these rights.[3]While as Part III rights are enforceable rights, Part IV, the Directive Principles of State Policy incorporating socio-economic rights, are not enforceable, nevertheless they are fundamental in the governance of the country.

The Indian judiciary has always been proactive in according protection to Human Rights. Enumerating their special position in the realm of Indian jurisprudence, Mathew, J. in *Kesavananda Bharti vs. Union of India*[4] observed, "they are rights, which are inherent in human beings, because they are human beings, whether you call them by human rights or any other appellation. It was to secure the basic human rights like liberty and equality that people gave unto themselves the constitution. These basic rights are essential features of our constitution"[5]

India has been and still is, to this date a signatory to the Universal Declaration of Human Rights, 1948 as well as to the United Nations Covenant on Civil and Political Rights, 1966.

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[1]See generally Jack Donnelly & Rhoda E. Howard, International Handbook Of Human Rights 4-6 (1987)

[2] Justice Sujata Manohar, Human Rights Protection: Current Challenges, XXII DELHI LAW REVIEW 15-20 (2000) at 16.

[3] Ajay Hasia v. Khalid Mujib Sehravardi, (1981) 1SCC 722

[4] AIR 1973 SC 1461

[5] *See also In Re Kerala Education Bill, 1957,* AIR 1958 S.C.956

Pursuant to the judgment of the Supreme Court in *Vishaka vs. State of Rajasthan*[6], international covenants to which India is a party are a part of domestic law unless they are contrary to a specific law in force. This ratio has furthered the infusion of Human Rights into the Indian legal scenario.

Human rights are universally regarded and considered to be sacrosanct in their essence. It is precisely for this reason, that their presence is warranted in any branch of the societal sanction of law. Perhaps it is more so in criminal jurisprudence as this dimension of the law presents one too many opportunities where human rights may be blatantly disregarded. These safeguards are important protections against abuses of power which affect the life, liberty, and physical integrity of individuals. Without these protections and limitations on the potential abusive exercise of power by the State, democracy could not exist.

Thus, there is an inseparable link between the protection of individual and collective human rights and democracy. The dynamics of democracy will fall into the nadir of despair when human rights are either compromised or strangulated by the elected rulers. The field of battle in which democracy and human rights are tested is the administration of criminal justice, which encompasses all processes and practices by which a State affects, curtails, or removes basic rights.[7]

It would be wrong to suggest that the Indian Criminal System has been oblivious to the protection of human rights; however, the truth still remains that in spite of widespread efforts to uphold the protection of these rights, the implementation of this essential protection still stays put to a very large extent and is questionable to say the least. Various human rights have been enunciated in multiple cases decided by the Supreme Court, in addition to being statutorily granted under the Code of Criminal Procedure of 1973.

Every Criminal trial begins with the presumption of innocence in favour of the accused and the provisions of the Code are so framed that the criminal trial should begin with and be governed throughout by this indispensable presumption.[8] Some of the most important human

[6] (1997) 6 SCC 241
[7] M. Cheif Bassiouni, Human Rights in The Context Of Criminal Justice: Identifying International Procedural Protections And Equivalent Protections In National Constitutions3 DUKE J. COMP. & INT'L L. 235 (1992-1993) at 236.
[8] Talabhaji Hussain vs. M.P.Mondkar AIR 1958 SC 376

rights that have been recognised in Indian Criminal Jurisprudence can be summarised as follows.

The right to have a fair trial as held in *Prabha Dutt vs. Union of India*[9]; the right against handcuffing as in *Prem Shankar Shukla vs. Delhi Administration* [10]; the right against torture and custodial violence as a human right in *DK Basu vs. State of West Bengal*[11]; the right against being compelled to be a witness against oneself in the cases of *Nandini Sathpathy vs. P L Dani*[12], and *Selvi vs. State of Karnataka*[13]; the right of access in the broadest possible terms, including access to free legal aid[14] and in an expedited manner as held in *AR Antulay vs. RS Nayak* .[15]

In *State of West Bengal vs. Committee for Democratic Rights, West Bengal*[16], it was held that "under Article 21, the State has a duty to enforce the human rights of a citizen providing for fair and impartial investigation against any person accused of commission of a cognizable offence, which may include its own officers. In certain situations even a witness to the crime may seek for and shall be granted protection by the State…"

In spite of these various human rights being broadly provided, it is rather unfortunate that one is forced to state that there has been no effective implementation. In Para 219 of the Selvi judgment[17] it has been declared *"In constitutional adjudication, our concerns are not confined to the facts at hand but extend to the implications of our decision for the whole population as well as the future generation.*"

If this statement were something to go by, then the recent gang rape of a photojournalist in Mumbai[18] should not have occurred, fairly arguing, following the introduction of stringent laws by the Criminal law (Amendment Act) 2013[19] enacted with a view of preventing the

[9] AIR 1982 SC 6
[10] (1980) 3 SCC 526
[11] (1997) 1 SCC 416
[12] AIR 1978 1025
[13] C.A no. 1267 of 2004
[14] State of Maharashtra vs. M P Vashi AIR 1996 SC 1
[15] (1992) 1 SCC 225
[16] (2010) 3 SCC 571
[17] Supra note 13
[18] http://www.thehindu.com/news/national/other-states/outrage-in-mumbai-over-gang%20rape/article5050225.ece , last visited June 25, 2014
[19] http://www.thehindu.com/news/national/stringent-antirape-laws-get-presidents-nod/article4576695.ece , last visited June 20, 2014

brutal happenings such as the gang rape of a student in Delhi on December 16, 2012[20].This only suggests that there exists a void in the operation of these rights. It is like the practical problems faced here in hand have not been looked into. [21]

In fact the recommendations of the Malimath Committee Report on Reforms in Criminal Justice System of 2003[22] focus on such issues. Nevertheless, as rightly pointed out by Professor Upendra Baxi, these recommendations rely merely on common sense expressions in judicial reiteration of the maxim –"It is better that ten guilty persons may escape than one innocent person may suffer".[23] He also goes on to state that "the committee report is based on shoddy research and ramshackle reasoning."[24]

For instance, granted that free legal aid is available as a right to an accused, however, practically speaking, what is observed is that most of the lawyers that are assigned cases under the umbrella of free legal aid are either reluctant to pick up the case in the first instance, or even if they do, they do not participate in it whole heartedly, due to the lack monetary incentives.[25] Rather than this rueful situation, existence of such a legal platform itself is not known even to the educated litigants!

Popularly construed as a haven for the protection of human rights by the global community, India has thus far, come up with no convincing and feasible justification for the continuing operation of the Armed Forces Special Powers Act (AFSPA) of 1958 or the pressing issue of moribund practice of Death Penalty of the bygone era.

Passed by Parliament in 1958, the AFSPA automatically comes into force when the Indian Government declares any territory as a disturbed area. It empowers the armed forces to arrest; to conduct search and seizure without warrant and to shoot even to the causing of death on mere suspicion. No legal proceeding against abuse of such arbitrary powers can be initiated without the prior permission of the Central Government. The Act initially passed as an

[20] http://ibnlive.in.com/news/delhi-gangrape-what-happened-on-the-night-of-december-16-2012/420729-3-244.html , last visited June 21, 2014
[21]"A task only half finished", Aparna Vishwanathan,The Hindu Editorial dated August 28, 2013, available at http://www.thehindu.com/opinion/lead/a-task-only-half-finished/article5065462.ece, last visited June 20, 2014
[22] Available at http://mha.nic.in/hindi/sites/upload_files/mhahindi/files/pdf/criminal_justice_system.pdf, last visited June 23, 2014
[23] Upendra Baxi, Introductory Critique in "The (Malimath) Committee on Reforms of CriminalJustice System: Premises, Politics and Implications for Human Rights", 38 (2003).
[24] Available at http://articles.timesofindia.indiatimes.com/2003-09-18/india/27186404_1_justice-malimath-committee-report-criminal-justice-human-rights , last visited June 25, 2014
[25] Upholding the Rule of Law and Due Process in Criminal Justice Systems, consolidated summary, OSCE Human Dimension Seminar, May 2006, available at http://www.osce.org/odihr/20021, last visited June 25, 2014

ordinance in 1957 under emergency provisions of the Indian Constitution to handle problems in North eastern region of the Union has given a huge ambit to commit gross human rights violation by the Armed Forces. Several cases are pending before the Indian Supreme Court which challenges the constitutionality of the AFSPA. Some of these cases have been pending for over nine years. Since the Delhi High Court found AFSPA to be constitutional in the case of *Indrajit Barua vs. State of Assam.*[26]

There has been continued opposition against the unhindered operation of the AFSPA, especially in the North Eastern states. AFSPA has been subject to wide media coverage in recent times due to well deserved publicity that is being cast on the Manipuri Civil Rights activist Ms.Irom Sharmila, who has launched an indefinite hunger strike aimed at the repeal of the draconian law. AFSPA has garnered a lot of negative reaction from Human Rights Activists. The essential standoff between Human Rights and AFSPA is more apparent in the case of *General Officer Commanding v CBI & Anr*[27], in which the Supreme Court was asked to adjudicate upon the Pathribal fake encounter in Jammu and Kashmir in which five civilians were killed in cold blood.

The five accused officers of the Army took the defence that prior sanction of the Government was required under AFSPA to prosecute them. The Court sided with them but due to mounting public opinion against this move, the Army Court acquitted them citing the lack of prima facie evidence. This is a clear cut example of the inherent flaws that AFSPA manifests.[28]

Death penalty has been one of the largely debated issues in India. There is a widespread opposition to the continuing operation of the death sentence which is still resting on the somewhat shaky edifice of being awarded in the "rarest of rare cases". The composition of this phrase is mainly derived from the decisions of the Supreme Court in *Bachan Singh vs. State Of Punjab*[29] and *Machhi Singh and Others vs. State Of Punjab*[30].

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[26] AIR 1983 Del 514
[27] Criminal Appeal No. 257 of 2011
[28] See generally, Reopen the Pathribal Case, The Hindu Editorial dated June 27, 2014, available at http://www.thehindu.com/opinion/editorial/reopen-the-pathribal-case/article5620678.ece, last visited on June 27, 2014
[29] AIR 1980 SC 898
[30] 1983 SCR (3) 413

However popular legal opinion is that the guidelines issued in Machhi Singh are contrary to the law laid down in Bachan Singh. Therefore, in three decisions, viz., *Swamy Shraddananda (2) vs. State of Karnataka*[31], *Sangeet and Another vs. State of Haryana*[32] and *Gurvail Singh vs. State of Punjab*[33] the verdict pronounced by Machhi Singh was held to be per incuriam. In Swamy Shraddananda's case it was held in para 48 - "It is noted above that Bachan Singh laid down the principle of the rarest of rare cases. Machhi Singh, for practical application crystallised the principle into five definite categories of cases of murder and in doing so also considerably enlarged the scope for imposing death penalty. But the unfortunate reality is that in later decisions neither the rarest of rare cases principle nor the Machhi Singh categories were followed uniformly and consistently."

The 65th UN General Assembly voted in December 2010, for the third time, in favour of abolishing death penalty and called for a moratorium on executions.[34] Clause 3(e) of the Resolution 2000/65 dated 27.04.2000 of the U.N. Commission on Human Rights titled "The Question of Death Penalty" urges "all States that still maintain the death penalty…not to impose the death penalty on a person suffering from any form of mental disorder or to execute any such person".[35] Similarly, Clause 89 of the Report of the Special Rapporteur on Extra-Judicial Summary or Arbitrary Executions[36] published on 24.12.1996 by the UN Commission on Human Rights under the caption "Restrictions on the use of death penalty" states that "the imposition of capital punishment on mentally retarded or insane persons, pregnant women and recent mothers is prohibited". Further, Clause 116 thereof under the caption "Capital punishment" urges that "Governments that enforce such legislation with respect to minors and the mentally ill are particularly called upon to bring their domestic criminal laws into conformity with international legal standards".

These global views have given a welcoming change as rendered by the Supreme Court in its recent decision in the case of *Shatrughan Chauhan & Anr. vs. Union of India & Ors*[37], in which the court has given its judgment as regards a number of Mercy petition related cases.

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[31] (2008) 13 SCC 767
[32] (2013) 2 SCC 452
[33] (2013) 2 SCC 713
[34] Resolution number A/RES/65/206 available at http://www.un.org/depts/dhl/resguide/r65_en.shtml , last visited June 25, 2014
[35] Available at http://www.refworld.org/topic,50ffbce582,50ffbce59d,3b00f29a14,0,UNCHR,,.html, last accessed June 26, 2014
[36] Available at http://www.ohchr.org/Documents/HRBodies/HRCouncil/RegularSession/Session23/A-HRC-23-47_en.pdf, last accessed June 25, 2014
[37] Writ Petition (Criminal) NO. 55 OF 2013

While generally hailing that the successful implementation of Human Rights ought to be given prime importance, fifteen death-row prisoners, whose mercy petitions were rejected by President Pranab Mukherjee, received commutation to life imprisonment with the Supreme Court ruling that inordinate delays ranging from seven to eleven years in the disposal of their pleas, as well as psychiatric conditions developed during incarceration, are grounds for clemency.

In the well-known case of *State of Tamil Nadu v. Nalini & others,*[38] DP Wadhwa, J. took the following view: "… Judges should never be bloodthirsty. Hanging of murderers has never been too good for them. Facts and figures, albeit incomplete, furnished by the Union of India, show that in the past, courts have inflicted the extreme penalty with extreme infrequency- a fact which attests to the cautions and compassion which they have always brought to bear on the exercise of their sentencing discretion in so grave a matter.

India somehow or other, has chosen to be blissfully ignorant of the global opinion in respect to Death Penalty. While very many nations appreciably take a leaf of Gandhian thought of non-violence to write obituary to the concept of death penalty, India is yet to wake up from the self-administered comatose!.

Perhaps, one of the prime reasons for the non realisation of these human rights in the Criminal arena may be attributed to a plethora of cases that add fuel to fire by causing increased confusion as witnessed in *P.Ramachandra Rao v State of Karnataka*[39], wherein the Apex Court successfully made the right to speedy trial murkier.

The objective herein is not to prejudicially criticise the existence of these rights. However, it is an indisputable fact that the mere existence of these rights is going to do no good to anyone unless and until a foolproof mechanism to prevent their non-implementation is come up with.

Indian Criminal Jurisprudence sounds and reads gloriously, thereby painting a picture of being the harbinger of protecting cherished human rights. However, stark reality bears testimony to the realism that these rights exist, but merely on paper. It is disheartening to note that most of these rights stay to this very date, unknown to many an accused person. Most often we see cases wherein, due to lack of awareness, such people are taken for granted and hoodwinked by State-appointed lawyers, who ironically, act to their detriment of their clients,

[38] AIR 1999 SC 2640.
[39] (2002) 4SCC 578

in collusion with the opposite party.[40] The constituents of the elite intelligentsia on the bar are also mute witnesses to the horrendous crime of indifference! Large-scale violations of these rights are often witnessed during the time of arrest wherein the guidelines issued in the case of D K Basu vs. State of West Bengal[41] are paid no heed to.

More importantly, one notices that the factor of accountability for the violation of human rights, particularly in Criminal Jurisprudence in India has taken a back seat. Human rights violations often are not actionable under the criminal law, and in any event, the Code of Criminal Procedure requires prior government authorization, which is rarely forthcoming, before criminal proceedings may be initiated against any government official. In the few instances in which criminal charges have been brought, convictions have been few and sentences short.[42]

Individuals whose fundamental rights under the Constitution have been violated may seek compensation and prospective relief from the Supreme Court or a High Court by filing a writ petition. While the Supreme Court and the High Courts have ordered compensation in many cases and repeatedly criticised law enforcement officials for failing to take appropriate steps to curb human rights abuses by the government, these remedies have proven largely ineffectual.[43] When the Supreme Court and High Courts have ordered investigations of alleged abuses arising in cases already before them, investigators and prosecutors have frequently disregarded those orders.[44] This reluctance to investigate and prosecute appears to result in part from embedded conflicts of interest, since police and prosecutors in effect are expected to investigate and prosecute their colleagues, and in part from an attitude among law enforcement and security officials that torture, illegal detention, and related practices are tolerable and indeed necessary tools in combating crime and terrorism.

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[40] See generally C. Raj Kumar Corruption And Human Rights: Promoting Transparency In Governance And The Fundamental Right To Corruption-Free Service In India 17 COLUM. J. ASIAN L. 31 (2003-2004)
[41] AIR 1997 SC 610
[42] *R.V. KELKAR'S CRIMINAL PROCEDURE*, 226-32 (K.N. Chandrasekharan Pillai ,ed., 2001)
[43] Articles 32 and 226 of the Indian Constitution. See also Nilabati Behera v. State of Orissa, (1993) 2 S.C.C. 746
[44] Redress Trust, INDIA COUNTRY REPORT, In REPARATION FOR TORTURE: A SURVEY OF LAW AND PRACTICE IN 30 SELECTED COUNTRIES at 10 (2003).

The process of seeking remedies from the Supreme Court and High Courts is also beyond the means of many victims. Even with the assistance of counsel, the time and travel necessary limit the ability to seek recourse from the higher judiciary. When combined with the prevalence of attacks on and violent intimidation of victims, witnesses, and human rights attorneys and activists, many victims are unable or unwilling to pursue these remedies.[45]

Finally, the National Human Rights Commission (NHRC) and state human rights commissions offer limited recourse for victims of human rights abuses. While the NHRC has lobbied the government and suggested reforms to end torture by police and security forces, ensure accountability for violations, and encourage reparation and compensation for victims in individual cases, its recommendations often have been disregarded, particularly when it has recommended prosecution of government officials.[46] Moreover, the NHRC and state human rights commissions have many competing human rights responsibilities other than police oversight.

It would be sheer oversight to argue that the state has done nothing to improve the situation. The concept of plea bargaining has been brought into the system by way of an amendment to the Criminal Procedure Code in 2006[47], which makes this option open to convicts that have already undergone a sentence of a certain number of years. Mechanisms such as fast track courts and pre-trial hearings have initialised the process of streamlining litigation.

The objective herein is not to be sceptical about the existing system, however improvisation stems from an ability to evaluate critically. Perhaps, the most practical way to realise the operation of these rights is to promote awareness per force and create accountability in case of non-implementation, coupled with stringent actions with the ultimate intention of being deterrent in nature. As of now, it does seem to be a distant dream but certainly not an evasive one. As the maxim goes *there will be a way if there is a will for* and the attainment of human rights to the fullest extent to the homo sapiens will not be an exception to that principle!

[45] Ibid at 31
[46] Ibid at 5
[47] http://www.thehindu.com/todays-paper/tp-national/plea-bargaining-comes-into-effect/article3101111.ece , last visited June 25, 2014