

Are foreign nationals entitled to the same Constitutional Rights as the citizens of India?

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ABSTRACT

“To deny people their human rights is to challenge their very humanity”

-Nelson

Mandela

The Indian Constitution is the largest written constitution, containing the maximum number of rights, in written, that should be provided to its citizens. It gives various fundamental rights to its citizen and also to its non-citizens. The position of these rights in India has been made clearer by the Supreme Court of India, which has an ambivalent approach in dealing with the citizens of India, and the foreigners. The apex court also held that since the word ‘life’ has been used by the article 21 of the constitution as a basic human right in the same sense as understood in the Universal Declaration of Human Rights of 1948, there is no reason why it should be given a narrow meaning.²

In this paper, efforts have been made to bring out a clear distinction between rights provided to the citizens of the country, and to the foreigners. For this, the concept of citizenship also plays a crucial role, and has also been discussed. The major task of this paper is to bring out the differences as to the rights of the foreign nationals and citizens, and to provide justifiable reasons for such a distinction.

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² Chairman Railway Board and others v. Chandrima Das: AIR 2000(1)S.C. 280

KEYWORDS:-

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INTRODUCTION

“For a successful revolution it is not enough that there is discontent, what is required is a profound and thorough conviction of justice, necessity and importance of political and social rights”

-Dr. B.R.Ambedekar

Do the foreign nationals, who are not the citizen of a country, deserve the same and equal constitutional rights as the citizens of the country do.? To understand this question. It is primarily important to understand what rights are.

Rights, as defined by Laski in his definition, are the social claims without which, a man cannot give his best to the society. Now what are social claims The word ‘claims’ as described by WHARTON’s Concise Law Dictionary, by justice V.R.KrishnaIyer, means, “ a demand for something which is due.” According to this meaning of the word ‘claim’, social claims are something demanded, which is due from the society. The word ‘RIGHT’, in ordinary usage of English, not only means “Lawful entitlements” but also means “justified entitlements”.³The concept of Rights discussed and defined by various eminent historians and political thinkers, and each of them had a unique definition of rights, in accordance with their own prudence. However, without going into the details of various definitions it would suffice to say that rights are something which we are entitled to.⁴

³Mummun Jain, Morality legality and human rights, Gandhi and Ambedekar in a Right Framework, at <http://www.mkgandhi.org/articles/gandhiambedkarrights.htm>

⁴Mummun Jain, Morality legality and human rights, Gandhi and Ambedekar in a Right Framework, at

Now that when we have understood the concept of rights, let's go back to the question, which we are dealing with, that is are foreign nationals entitled to the same and equal constitutional rights as the citizens of the country are. Answer to this question is different for different countries because different countries have different rules and laws as to who are to be the citizens of the country and who are the aliens or non-citizens for the country. For instance, Israel is a country which opens its citizenship for all Jews on the earth. The Law of Return grants all Jews the right to immigrate to Israel and almost automatically Israeli citizenship upon arrival in Israel. In 1970s the law of Return was expanded to grant the same rights to the spouse of a Jew, the children of a Jew and their spouses, and the grandchildren of a Jew and their spouses, provided that the Jew did not practice any other religion other than Judaism willingly.⁵ In Indian laws, a foreign national will not be entitled to the same constitutional rights as a citizen of a country will have. Looking at the history of India, the framers of the constitution found it better to keep a check on the rights and privileges provided to the foreigners. The main motive behind such a step is to stop the illegal activities by the infiltrators or trespassers, and to secure the sovereignty of the nation. Although they are provided with the basic human rights, which they also deserve which are also mentioned in Universal Declaration of Human Rights and belong to every person irrespective of their nationality, race, caste or sex, being a non-citizen of the country, they are deprived of certain rights, which are exclusively reserved for the citizens of the country. Sometimes due to these reservations, these foreign nationals have to face various problems also.

Giving limited rights to foreign nationals or aliens have both positive and negative aspects. Where on one hand, foreigners cannot hold any constitutional posts of the country, like The President, Vice-President, Governor, ministers, etc., as they are not entitled to enjoy article 16 of the constitution, on the other hand they have been given various important constitutional rights, to which they are entitled to, just by being a human being, which brings them at par with the citizens of the country, to some extent. These rights given to the foreign nationals, such as right to equality before law, right to

<http://www.mkgandhi.org/articles/gandhiambedkarrights.htm>

⁵ Israeli Nationality Law- at

http://en.m.wikipedia.org/wiki/Israeli_nationality_law

protection of life and personal liberty, are those rights which every 'person' deserve, irrespective of his nationality and where he/she is residing, as in accordance with the Universal Declaration of Human Rights.

CITIZENSHIP: - DOOR TO RIGHTS

Citizenship is the most important aspect, which should be present, in order to make a 'person', a 'citizen' of a country. The meaning of the word citizen as given in the WHARTON'S Concise Law Dictionary by Justice V.R. Krishna Iyer is a person under the citizenship or the nationality law for time being in force in that country is citizen or national of that country. Every country has their own

legislation for determining citizenship of the country. For instance, as discussed earlier, Israel is a country which has expanded its ambit of its citizenship to all the Jews of the world. Any Jew, from any part of the earth, can go and reside in Israel, and he/she will be given the Israeli citizenship almost automatically, according to the rule of Law of Return. They get full rights to participate in the political system of Israel, and also have the right to Israeli passport. However Israeli law does not itself determine Israeli citizenship. Israeli law distinguishes between Law of Return, which allows for Jews and their descendants to immigrate to Israel, and Israel's nationality law, which formally grants Israeli citizenship.⁶⁶ Citizenship becomes an important aspect for a 'person' to become the 'citizen' of the country, because until and unless a 'person' becomes the 'citizen' of a country, he will not be entitled to important fundamental rights of that country.

There are two concepts that are followed in granting citizenship to any individual:-

- 1- *Jus soli*
- 2- *Jus sanguinis*

These principles are general employed for the determination of citizenship. Jus soli is the concept in which, citizenship is determined by the place of birth and on the other hand,

⁶⁶ Israeli Nationality Law- at http://en.m.wikipedia.org/wiki/Israeli_nationality_law

jus sanguinis is the concept in which the citizenship or nationality is given based on the fact that where had your parents or your ancestors reside so a child born to Nigerian parents inside the Indian premises is Indian by the concept of jus soli, but is of Nigerian nationality by jus sanguinis concept. Often controversies arise between two countries as to the conflicting claims, which are settled by treaty but in absence of any kind of treaty the person's nationality is to be the nationality of that country in which he is residing.

Israel's nationality follows the jus sanguinis principle as the primary mechanism through which, a person may obtain citizenship, rather than jus soli. Which means the determination of the citizenship of a person in Israel will be determined by the nationality of his/her parents. However, article 11 of Israeli nationality law establishes three circumstances in by which the citizenship of a person can be revoked:-

- 1- A person obtains the citizenship of another country which is an enemy state.
- 2- A person committed an act which is considered a breach of loyalty.
- 3- Person's citizenship was given to him on the basis of false information.

Although, any country in the vicinity of Israel that is not democratic, has issues with Israel, in 2008, an amendment to the Nationality Law of 1952 of Israel designated 9 countries as the enemy states .: Afghanistan, Iran, Pakistan, Iraq, Lebanon, Libya, Sudan, Syria and Yemen, as well as the Gaza Strip.

In Indian Constitution, citizenship is dealt from article 5 to article 11, and also the Citizenship Act, 1955, has been enacted, which constitutes the exhaustive laws relating to the citizenship of India. Although there are various variations in Indian laws guiding any person's citizenship, but largely, India follow the concept of jus sanguinis, that is citizenship by right of blood, as opposed to jus soli. Unlike the United States of America law of citizenship, which has the provision for Dual citizenship, India provides for the provision of Single Citizenship, no person who is the citizen of India, and is holding the domicile and passport of India, shall be entitled to hold domicile and passport of any other nationality, and if he does so, his citizenship of Indian nationality stands cancelled, according to the article 9 of the Constitution of India.

The term 'domicile' also holds great significance in determining the citizenship. Although this term 'domicile', has not been defined in the constitution of India, but a clear distinction has been brought about between a 'domicile' and a 'residence in article 5 of the constitution of India. As Lord Chancellor Cornwath says "if the intention of permanently residing in a place exists, a residence, in pursuance of that intention, however short will establish a domicile, on the other hand, mere length of residence will not itself constitute domicile."⁷ The important thing for a domicile to be constituted is intention to reside in the country, legally saying, there should be the animus morandi. The basic idea of domicile is permanent address or permanent home. A person's domicile is the country he is residing in. the Indian Successions Act, 1925, also provides for a provision regarding the domicile of a person and says that every person has "domicile of origin", which prevails until and unless he acquires a new domicile. Briefly, his domicile of origin is in the country in which at the time of his birth, his father was domiciled, and he can take another domicile, by taking up a fixed habitation in another country.⁸ as observed by the supreme court in Central Bank of India v. Ram Narain⁹, that an intention to reside forever in a country in a country where one has taken up his residence is an essential constituent element for the existence of domicile in that country.

The Supreme Court has also expounded this theory in Louis De Raedt v. Union of India¹⁰ as follows:-

"For the acquisition of a domicile of choice, it must be shown that the person concerned had a certain state of mind, the animus manendi. If he claims that he acquired new domicile at a particular time. He must preserve that he had formed the intention for making his permanent home in the country of residence and of continuing to reside there permanently. Residence alone unaccompanied with this state of mind, is insufficient. "

RIGHT TO LIFE AND LIBERTY-BASIC HUMAN RIGHTS

⁷ Om Prakash Aggarwala and S.K. Aiyar, The Constitution of India, 1st edition, 50(1950)

⁸ Om Prakash Aggarwala and S.K. Aiyar, The Constitution of India, 1st edition, 50(1950)

⁹ AIR 1955 SC 36

¹⁰ AIR 1991, SC 1886, 1889.

Human Rights are the rights which every Human being is entitled to, just by being a human being, irrespective of his nationality, and the fact that whether he holds the citizenship of the country he is residing in or not. As it is also mentioned in the universal declaration of Human Rights that “ whereas it is essential if a man is not be compelled to have resources, as a last resort to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.”¹¹ Every person irrespective of the fact that he is an alien or a citizen in any country is entitled to certain rights which are inalienable from anyone. These are rights like:

- ❖ Right to life and liberty
- ❖ Right to equality before law, irrespective of any discrimination on grounds of race, caste, sex, nationality, language, religion or place of birth.
- ❖ Right against forced labour.
- ❖ Right to effective remedy.

The universal Declaration for human rights has provided 30 such rights in given 30 articles, which gives any person, without any discrimination, 30 rights, which every human being is entitled to.

In Indian law, the framers of the constitution had taken great caution, as to what rights should be given to and what rights should be abstained from the foreign nationals. Certain such rights given to foreign nationals, by the Indian Constitution are:-

Article 14- right to equality before law and equal protection of laws

Article 20- right to protection in respect to conviction for offences.

Article 21- right to protection of life and personal liberty.

Article 21A-right to elementary education

¹¹ The Universal declaration of human Rights
At
<http://www.un.org/en/documents/udhr/>

Article 22- right to protection against arrest and detention in certain cases.

Article 23- prohibition of traffic in human beings and forced labour

Article 24- prohibition of employment of children in factories etc.

Article 25- right to freedom of conscience and free profession, practice and propagation of religion.

Article 26- right to freedom to manage religious affairs

Article 27- right to freedom from payment of taxes for promotion of any religion.

Article 28- right to freedom from attending religious instructions or worship in certain educational institutions.

These rights are a part of fundamental rights given to us in part 3 of our constitution.

These rights are not reserved for any individual group or community, and is applicable to each and every 'person' residing on the territory of India.

However, there are certain rights, which are reserved exclusively for the nationals of the country itself, and not to the foreign nationals. These rights are,

Article 15- prohibition of discrimination on the grounds of religion, race, caste, sex, or place of birth.

Article 16- equality of opportunity in matters of public employment.

Article 19- protection of certain rights regarding freedom of speech, etc.

Article 29- protection of interests of minorities.

Article 30- rights of minorities to establish and administer educational institutions.

In a recent judgment, in response to the FIR registered by the Maharashtra Government, against three Ugandan citizens, including advisor to the President of Uganda, which was quashed by the Supreme court. It has reaffirmed that Article 21 of the Constitution is

available even to the foreign nationals. A vacation bench of justice A.K.Patnaik and RanjanGogoi said

“Article 21 of the constitution [right to life and liberty] applies to all citizens, whether Indian or foreign nationals. Their right to liberty cannot be restrained by police due to a business dispute. Our country gets a bad name because of the acts of few police officers, and it is unfortunate that the Mumbai Police, instead of protecting the rights of these foreign nationals, filed an FIR against them and the charges are baseless.”¹²

FUNDAMENTAL RIGHTS- WHY NOT GIVEN

Looking at the history of the Indian political system the story of Britishers ruling over India, the frames of the constitution considered putting a restriction on the rights of the foreigners a primary objective, in making of a constitution of a free and sovereign nation. In order to come at par with several nations of the world, economically and politically, it was very important to hold and reserve certain rights, more precisely, certain constitutional rights exclusively for the citizens of the country itself. The main aim and motive behind this move was to prevent the Indian nation from any kind of foreign influence directly, and to protect the sovereignty of the country. Thus, rights like right to speech, right to vote, etc. has been reserved only for the citizens of the country and not for the foreign nationals. According to the Merriam Webster’s collegiate dictionary, ”a citizen is a member of state to which he/she over allegiance and is entitled to its protection ”.Article 1 of United Nations Declarations of Human Rights of Individual who are not nationals of the country in which they live(1985) also gives a definition of non-citizens:-

“Any individual who is not a national of a state in which he/she is present?”¹³

¹² Right to life, liberty available even to foreign nationals, says Supreme Court- The Hindu: mobile edition At <http://m.thehindu.com/news/national/right-to-life-liberty-available-even-to-foreign-nationals-says-supreme-court/article4831250.eco/>

¹³ The Rights of Non-citizens at <http://www1.umm.edu/humanrts/edumat/studyguides/noncitizens.html>

A comparative study of the Rights given to the foreigners in UN declaration on the Human Rights of Individuals who are not the nationals of the country in which they live (1995) and the right given to foreigners, or the non-citizens of our country India, shows clearly that certain rights which should be given to every foreign nationals, according to the aforesaid declaration has been reserved exclusively by the Indian constitution for its citizens only.

Article 19 of the Constitution of India provides for 6 basic fundamental rights, which is provided to each and every citizen of the country. The foreigners are kept secluded from these 6 fundamental rights, which means, they do not have right to:

- 1- Freedom of speech and expression
- 2- Assemble peacefully and without arms
- 3- Form associations or unions
- 4- Move freely through the territory of India
- 5- To reside and settle in any part of India
- 6- Practice any profession or to carry any occupation, trade or business.

Along with all these rights, the foreigners are also secluded from the right to vote.

The freedom of speech and expression is a right, which every person should be entitled to, but the Indian Constitution does not give this right to foreigners. Although they have their say in case of judicial proceedings going against them, but they cannot participate in political debate, or criticize the government, because when they do not have the power to form the government, they also do not have the freedom to criticize the government. All these rights given in Article 19 of the constitution of India form the core rights which are only granted to the citizens of the country. In same way the framers of the constitution were a little selfish in providing these rights, and this was justified as well, looking at terrific 200years of rule of Britishers over India which began just because they were given much more right than they deserved, being non- citizens or aliens to our country.

In *Maenad Gandhi v. Union of India*¹⁴, Bhagwati J. has emphasized on the significance of the freedom of speech and expression in these words:-

“Democracy is based essentially on free debate and open discussions, fir that is only the corrective of government actions in a democratic setup. If democracy means government of the people, by the people, it is obvious, that every citizen must be entitled to participate in the democratic process and in order to enable him to intelligently exercise his right of making a choice, free and general discussson on public matters is absolute essential.”

Again from this decision of the Supreme Court, same thing is reflected that a democratic setup is a setup of the people by the people and here the people are the citizens of the country. It needs the involvement of its people in various democratic procedures, and also their participation in the political setup of the country, which is possible for only the residents of the country, as the foreigners do not have the right to hold any constitutional posts or to participate in any type of political procedure of the country. Only those people, who are the citizens of the country, and are a part of the democratic setup, can have the right to debate or have their say in any democratic process. Therefore as regards to the right to be heard, there is no hard and fast rule in which a person concerned is to be given such an opportunity.

The right to assemble given in Article 19(1) (b), of the constitution shares some common grounds with right to speech of article 19(1) (a). Words like demonstrations, seminars, meetings, which form an example of 19(1) (a), are also automatically covered by the ambit of article 19(1) (b). Providing these rights to foreigner’s means, also providing them the right to speech, this should not be done. Although they are allowed to join the meetings or assemblies made by the locals or the citizens of the country, for any particular purpose, like business purpose or any other purpose, but they do not have the right to make their own assembly.

The Right to form associations given in the article 19(1) (c), of the constitution, is also not provided to the foreigners. The main motive behind providing this right to our

¹⁴ AIR 1978 SC 597; (1978) 1 SCC 248

citizens, is to enable them to form political parties, without which it is an impossible task to run a democratic setup of government, especially that of the parliamentary type. If this right to form associations is given to foreigners as well, this would amount to the meaning that they are equally rightful in forming political parties and participate in our political and democratic setup. This move will allow the non-citizens to form political parties in India, and contest elections, thereby, violating the principles for eligibility criteria as given in Part 5 for union, and in part 6 for states of the constitution, and will also pose a threat to the sovereignty of the nation.

Further, a foreigner cannot claim right 'reside and settle in any part of the country'. The government has thus the unrestricted right to expel a foreigner. A foreigner who came to India in 1937 on a Belgian passport engaged himself in the Christian missionary work. HE had been staying continuously in India since 1937. By an order dated 8-7-1987, his request for further stay in India was rejected and he was told to leave the country. He challenged the order through a writ petition under article 32 which was rejected.¹⁵ The court ruled that he had not become a citizen of India under Article 5 of the constitution as he has not acquired his domicile in India.¹⁶

In brief, these fundamental rights are those claims, which can be made only by the citizens of the country and not by the foreigners or the non-citizens. They have been reserved exclusively for the Indians and may have unwanted consequences if extended to foreigners.

COMPARATIVE STUDY: - RIGHTS IN INDIA AND UNIVERSAL DECLARATION

Universal Declaration of Human Rights is a universal and egalitarian declaration, which provides the most basic rights to the human beings, that is human rights, and lay down certain standards of human rights. The idea of the Human Right suggests "if the public

¹⁵ Prof. M.P.Jain, Indian Constitutional Law, 5th edition,981(2008)

¹⁶ Louis de Raedt v. Union of India :AIR 1991 SC 1886

discourse of peace time global society can be said to have a common moral language, it is that of human rights.”¹⁷

In Indian context, the Indian Constitution which deals with the fundamental rights in its part 3, gives every citizen 6 basic fundamental rights, which are only for its citizens. However , except for article 15,16, 19,29 and 30, and the right to vote and constitutional posts, every right given in the part 3 of the constitution of India is available to the non-citizens, or is available to every ‘person’, irrespective of his/her nationality, and not specifically to the citizens. The citizens are privileged with the reservations of aforesaid 5 articles, and right to vote and constitutional posts, which were thought not fit to be extended to the non-citizens.

India was signatory to the Universal Declaration of human rights, therefore has taken great precaution to be in accordance with norms and guidelines laid down by the declaration. The rights given to us in the fundamental form, in part 3 of the constitution, similar to a maximum extent as that to the provisions of UN declaration of Human Right. The following table shows some of these rights:-

Serial Number.	Name of Right.	Universal Declaration.	Indian Constitution.
1	Equality before law	Article 7	Article 14
2	Protection in respect of conviction of offences.	Article 11(2)	Article 20(1)
3	Protection of life and personal liberty	Article 3	Article 21
4	Protection of slavery and forced labour.	Article 4	Article 23
5	Freedom of conscience and religion.	Article 18	Article 25(1)
6	Remedy for enforcement of	Article 8	Article 32

¹⁷ Human Rights- at http://en.m.wikipedia.org/wiki/Human_rights

	rights		
7	Right against arbitrary arrest and detention	Article 9	Article 22
8	Right to work, to just and favorable conditions to work	Article 23(1)	Article 41
9	Right to equal pay for equal work	Article 23(2)	Article 39(d)
10	Right to just and favorable remunerations	Article 23(3)	Article 43
11	Right to rest and leisure	Article 24	Article 43
12	Right of everyone to a standard of living adequate for him and his family.	Article 25(1)	Article 39(a) and Article 47
13	Right to a proper social order.	Article 28	Article 38

In *KeshavandaBharti v. State of Kerela*¹⁸, the supreme court observed, ” the Universal Declaration of human rights may not be a legal binding instrument, but it shows hoe India understood the nature of the human rights at the time the constitution was adopted”

Another such declaration for human rights in civil and political issue is the International Covenant on Civil and Political rights. India has ratified the International Covenant on Civil and Political rights and the International Covenant on Economic, social and cultural rights on March 27, 1979. Various rights given in the international covenant for civil and political rights have been recognized in the Indian constitution in part 3 of the constitution. They may also be called the “specified” fundamental rights because they mentioned in the constitution by particular names. The given table shows some of such rights, which are similar in our Indian constitution to that of the Covenant of Civil and Political rights.

Serial	Fundamental Rights	Covenant on Civil and	Indian Constitution
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¹⁸ AIR 1973 S.C. 1461 at 1510

number.		Political Rights	
1	Forced Labour	Article 8(3)	Article 23
2	Equality before Law	Article 14(1)	Article 14
3	Protection in respect of conviction for offences	Article 15(1)	Article 20(1)
4	Protection from prosecution and punishment	Article 14(7)	Article 20(2)
5	Not to be compelled to testify against himself	Article 14(3)(g)	Article 20(3)
6	Right to child education	Article 26(1)	Article 21(A)
7	Protection against arrest and detention	Article 9(2)(3) and (4)	Article 22
8	Right to life and liberty	Article 6(1)and 9(1)	Article 21
9	Freedom of conscience and religion	Article 18(1)	Article 25

A comparison our fundamental rights enshrined in part 3 of the constitution of India, with the Human Rights Declaration and the covenant on Civil and Political rights, show clearly, that India has successfully followed the norms laid down in both the declarations, and has provided to its citizens and non- citizens basic human rights. part 3 of the constitution may be regarded as the ‘Magna Carta ’of India, because it not only provides the fundamental rights to the citizens but also provides the basic human rights to the non-citizens.

CONCLUSION

Our constitution, that is The Constitution of India, is enriched with various kinds of Human Rights. It is the most elaborate form of document of laws in world, constituting laws, so meticulously framed, that it does not harms the human rights of any person, whether citizen or non-citizen, residing within the territory of India. Certain

differentiations have been made between the citizens and the non-citizens, and also among the citizens themselves, but these differentiations are to ensure and to safeguard the principle of 'Equality among Equals'. It is a settled law that differentiations are not always discriminatory. If there is a rational nexus on the basis of which differentiation has been made with the object sought to be achieved by certain provision, then such differentiation is not discriminatory and does not violate the principles of the Article 14 of the constitution.¹⁹ The constitutional rights provided to the non-citizens of our country are sufficient for them to live their life with dignity and respect, and to get justice in case of irrational discrimination being made on non-justifiable grounds. Article 21, the most significant right of a person, is available to the foreign nationals in the very similar manner as it is available to the citizens of our country. This shows that on the one hand, the Indian Constitution restricts the non-citizens from enjoying certain rights; on the other hand, they welcome them by extending to them all the human rights that they deserve.

¹⁹ Union of India v. M.V Valliappan: (1999) 6 SCC 259 ,269: AIR 1999 SC 2526