

HUMAN RIGHTS: THE ESSENCE OF CONSTITUTIONAL GOVERNANCE - INTERNATIONAL SCENARIO*

[LECTURE I]

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1. INTRODUCTION

I am greatly privileged and deeply honored to be invited to deliver this memorial lecture. I have many reasons for this feeling. Late Shri Dashrathmal Singhvi was an illustrious son of Rajasthan who was associated with Shri Jainarain Vyas in the movement for responsible government as a freedom fighter and then in the building of nascent free India. His contribution as a social reformer, patriot and votary of secularism and national integration is commendable. This contribution was in addition to his role as a leading member of the legal profession. His illustrious son, Dr. L.M. Singhvi, is continuing the unfinished task of his eminent father. I and Dr. L.M. Singhvi have known each other for long, even before I came to Rajasthan as Chief Justice in 1986. Since then, we have come closer. Paying homage to, and associating with the memory of his revered father Shri D.M. Singhvi is, for me, a matter of personal satisfaction. Even though I did not have the privilege of meeting Shri D.M. Singhvi, having known his son Dr. L.M. Singhvi for so long and also having lived in Rajasthan for some years, I feel an affinity with Shri D.M. Singhvi.

The theme for this memorial lecture suggested by Dr. L.M. Singhvi is apposite and contextual. It relates with the late Shri D.M. Singhvi and with the locale - Rajasthan. Shri D.M. Singhvi

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was deeply involved in promoting the cause of civil rights and public law. He was a social reformer and defender of the rights of the disadvantaged in society, a votary of secularism, national integration and responsible government. These continue to remain important human rights issues and depend for their achievement on good governance. I am sure the theme would be dear to his heart. Another good reason is my association as Chief Justice in Rajasthan with such issues. It was here that the foundation laid earlier in Madhya Pradesh was strengthened for my subsequent effort in the Supreme Court to pursue with greater vigour serious human rights issues through the judicial process, which came to be branded as judicial activism. The effort is continuing now in the National Human Rights Commission. Some instances will suffice. A custodial death at Ajmer, taken up as a PIL led me to make an order of the kind which I later reiterated in *Nilabati Behara v. State of Orissa*, [AIR 1993 SC 1960], spelling out in detail the principle of constitutional tort and the public law remedy for enforcement of the right wherein sovereign immunity is no defence. Pollution of river *Bandi* at *Pali* [*Agarwal Textile Industries, Sumerpur Road, Pali v. State of Rajasthan*, decided on October 14, 1987, at Jodhpur], by discharge of trade effluents of the industry was restrained by judicial intervention. The discrimination of Dalits in entry into the *Nathdwara Temple* [*Suryanarain Chowdhary v. State of Rajasthan*, AIR 1989 Raj. 99] was checked by direction given to the state government to ensure enforcement of their right to equality. Gender justice was promoted in *Jani Bai's case* [*Jani Bai v. State of Rajasthan*, AIR 1989 Raj. 115] by liberal construction of a statute to prevent gender discrimination resulting from a literal construction. These human rights issues were addressed judicially enlarging the ambit of judicial review in constitutional governance. The theme is, therefore, appropriate and contextual.

2. WHAT ARE HUMAN RIGHTS?

It is not necessary to delve into the philosophic foundations of human rights except to remember that the function of philosophy is to deepen the understanding of truth. Fidelity to human rights law is deepened by appreciating the underlying moral justifications to

it. Understanding the nature of '*right*' involved can help to appreciate the degree of protection available, the nature of derogation permissible and the priorities '*inter se*' in case of a possible conflict between them. Louis Henkin says '*human rights are the idea of our time*'. Ronald Dworkin regarded '*rights as trumps*' that set limits on state action whenever it encroaches on the individual's protected sphere. No state can now claim that it does not stand for human rights. Basic human rights are non-derogable and non-negotiable. The common theme emerging from the various theories is that '*a minimum absolute or core postulate of any just and universal system of rights must include some recognition of the value of individual freedom or autonomy*'.

Incorporation of a Bill of Rights in some early national constitutions indicates that the concept is not of recent origin after the Second World War but has been recognized for long. The Virginia Bill of Rights (1776) proclaimed:

All men are by nature equally free and independent and have certain inherent rights, of which, when they enter a state of society they cannot by any compact deprive or divest their posterity: namely, the enjoyment of life and liberty, with the means of acquiring and possessing property and pursuing and obtaining happiness.

The American Declaration of Independence further said:

We hold these truths to be self-evident: that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and the pursuit of happiness.

The French Declaration [1789] said:

Men are born and remain free and equal in rights—the purpose of all political association is the conservation of the natural and inalienable rights of

man: these rights are liberty, property, security and resistance to oppression.

The basic premise to remember is that human rights are not the gift or bounty of any political sovereign through legislation or any edict, but are rights inherent in human existence. The purpose of any law dealing with these rights is merely to recognize them, to regulate their exercise and to provide for their enforcement, and the ancillary matters. Non-derogation of some basic rights in a civilized society is based on this premise. Human rights are considered to be universal, indivisible and interdependent.

Jack Donnelly argues that internationally recognized human rights have become a new international '*standard of civilization*'. After the Second World War a body of international human rights law reaffirming the morally appealing idea of adherence to shared standards of justice to qualify for membership of the international community developed. It has become a factor of political legitimacy. These standards of civilized behaviour link national and international legitimacy. The visible rise of universal human rights culture depicts moral progress and is an effective response to major threats to human dignity posed by modern market trends and development projects. Viewing development with the '*rights*' perspective for sustainable development appears to be gaining ground. We are all equally human seems to be more acceptable now, with the current slogans: '*All human rights for air* and '*the world is one family*'. To us Indians, it is nothing new. We have for long believed: '*Sarve Bhavantu Sukhinah*' [Peace and Happiness for All], and '*Vasudhaiv Kutumbakam*' [World is One Family]. With this background we may proceed to examine in some detail the meaning of human rights.

'*Human rights*' in practice have been redefined to encompass every aspect of dignified human existence, which makes every human being an equal member of the human family. Human dignity is the quintessence of human rights. It is the wide comprehension of this aspect and appreciation of the amplitude of dignity of the individual which must define the true scope of human rights. '*All human rights for all* and '*the world is one*

family are concepts which have depended on the expanded meaning of human rights assuring full human dignity to every member of the human race in the global village. Globalization of human rights by making it universally acceptable, eradicating the global inequities is the clarion call of the human rights movement. It cannot be doubted that any humiliation of a human being is an affront to his human dignity, and, thus, a violation of his human rights. Mahatma Gandhi said:

It has always been a mystery to me how men can feel themselves honoured by the humiliation of their fellow beings.

To achieve this end must be the agenda of the human rights movement in the new millennium. At the threshold of the new century, the world leaders gathered in New York for the World Summit to consider the challenges faced in the new century, and they set out their aims in their Millennium Declaration. By the year 2015, all 189 United Nations member states have pledged to:

- Eradicate extreme poverty and hunger.
- Achieve universal primary education.
- Promote gender equality and empower women,
- Reduce child mortality.
- Improve maternal health.
- Combat HIV/AIDS, malaria and other diseases,
- Ensure environmental sustainability.
- Develop a global partnership for development.

The UN Secretary General, Kofi Annan in his UN Day (24 October, 2000) message referred to the Declaration and said:

— They pledged themselves to free their peoples - from the scourge of war, from abject and dehumanizing poverty, and from the threat of living on a polluted planet with few natural resources left. They undertook to promote democracy and the rule of law; to protect children and other vulnerable people; and to meet the special needs of Africa. And

they promised to make the United Nations itself more effective, as an instrument for pursuing all those aims.

These pledges give us cause for hope. But they will change nothing if they are not followed by action—.

Kofi Annan also emphasized that the biggest responsibility falls not only on the leaders but also on the *people*. The goal is yet too far, but the course has been charted. To achieve this end must be the agenda of the human rights movement in the new millennium. Equal respect for the dignity of every individual in the human family is the goal of the human rights movement.

Amartya Sen's concept of '*Development as Freedom*'¹ is the recognition of the aim to secure the freedom, well-being and dignity of all people everywhere. The seven freedoms essential are:

- Freedom from discrimination - by gender, race, ethnicity, national origin or religion.
- Freedom from want - to enjoy a decent standard of living.
- Freedom to develop and realize one's human potential.
- Freedom from fear - of threats to personal security, from torture, arbitrary arrest and other violent acts.
- Freedom from injustice and violations of the rule of law.
- Freedom of thought and speech and to participate in decision-making and form associations.
- Freedom for decent work - without exploitation.

Inclusive democracy is necessary, wherein there is fair representation of all sections of the community in governance and the rule is not by majority alone. Corruption free governance also is a right of the people because it is directly related to development, which is the benchmark of progress of the nation. Human rights has a comprehensive meaning to include all aspects of human dignity and all measures needed for full human development, all of which depend on good governance.

The Preamble to the Charter of the United Nations [1946] states that '*We the people of the United Nations determined to save succeeding generations from the scourge of war, which twice in our life time has brought untold sorrow to mankind, and to reaffirm faith in fundamental human rights —*'. Article 1 of the UN Charter states that promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion is one of the purposes of the United Nations. Article 56 of the Charter further states that all members pledge themselves to take joint and separate action in cooperation of the United Nations for the above purpose. Thus, human rights are a legitimate concern of the international family. Signatories to the UN Charter undertake the responsibility of promoting human rights individually and collectively.

The UN Charter was followed by the adoption of the Universal Declaration of Human Rights (UDHR) in 1948. Its Preamble proclaims that 'recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world'. Since then a plethora of human rights instruments have been adopted which seek to address issues relating to specific themes or sections of people, namely, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the Convention on the Rights of the Child (CRC), the International Convention on the Elimination of All Forms of Racial Discrimination (CERD) and the Convention on the Prevention and Punishment of the Crime of Genocide etc.

Mahatma Gandhi in a letter to Julian Huxley in 1947 had emphasised the correlation of rights and duties and said:

I learned from my illiterate but wise mother that all rights to be deserved and preserved come from duty well done. Thus the very right to live accrues to us

when we do the duty of citizenship of the world. From this one fundamental statement, perhaps it is easy enough to define duties of man and woman and correlate every right to some corresponding duty to be first performed —.

The Inter Action Council comprising of eminent persons (including Dr. L.M. Singhvi) has proposed to the UN a draft: '*A Universal Declaration of Human Responsibilities*' dated 1 September 1997. The basic premise of the draft is: '*human aspirations for progress can only be realized by agreed values and standards applying to all people and institutions at all times*'; '*to aim at the greatest amount of freedom possible, but also to develop the fullest sense of responsibility that will allow that freedom itself to grow,*' and '*freedom without acceptance of responsibility can destroy the freedom itself, whereas when rights and responsibilities are balanced then freedom is enhanced and a better world can be created.*' The Preamble in the proposed draft referring to Mahatma Gandhi reaffirms faith in recognition of the inherent dignity and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world which implies obligations or responsibilities. It advocates teaching and promotion of awareness and acceptance of these responsibilities throughout the world. The Articles in the draft are classified as: Fundamental Principles of Humanity; Non Violence and Respect for Life; Justice and Solidarity; Truthfulness and Tolerance; and Mutual Respect and Partnership. The meaning of '*Human Rights*' requires a wide comprehension.

It is, therefore, obvious that the proper synthesis of the human rights philosophy with that of human responsibilities is essential for effective realization of the rights of the human family.

In a civilised society, in case of conflict, individual interest must always give way to public interest. This requirement in difficult times needs balancing of the two interests to the extent of irreconcilable difference. Article 4 of the ICCPR enables the State Parties to take measures derogating from the obligations under the Covenant to the '*extent strictly required by the exigencies of the*

situation' during public emergency which threatens the life of the nation, provided that such measures are not inconsistent with the other obligations under international law and do not involve discrimination on prohibited grounds. However, certain civil liberties are deemed so important that even in times of public emergency their derogation is not permitted. Article 4(2) of ICCPR makes non-derogable the right to life (art. 6), prohibition against torture (art. 7), prohibition against ex-post-facto laws (art. 15), and freedom of thought, conscience and religion (art. 18), to name some. Similarly Indian Constitution makes non-derogable the right to life (art. 21) and protection against ex-post-facto laws and testimonial compulsion (art. 20) which cannot be suspended even during emergency.

The Human Rights Committee of the United Nations which oversees the implementation of the rights contained in ICCPR interpreted art. 4 for the guidance of the State Parties. It has said that the measures derogating from the provisions of the Covenant must be of an exceptional and temporary nature only during a public emergency which threatens the life of the nation. Emphasis is laid on the maintenance of the '*principles of legality and rule of law*' at times when they are most needed. The obligation to limit any derogation required by the exigency of the situation reflects the principle of proportionality which is common to derogation and limitation of power. It has been expressly said that in the provisions not listed in art. 4(2) there are elements that cannot be made subject to lawful derogation such as persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person. *The guiding factor is the respect for the inherent dignity of the human person which is non-derogable in any situation.* The principles of legality and the rule of law inherent in the Covenant as a whole is reaffirmed. The presumption of innocence of the accused and the fundamental requirements of fair trial must be respected even during a state of emergency.

A conspectus of the universally recognised principles of international law as also those in our Constitution indicates the guarantee of protection of civil rights and liberties which are

essential for the respect of the inherent dignity of the human person even during national emergency. Derogation when permitted is only to the extent necessary in the exigency of the situation based on the principle of necessity and proportionality. Provision is also made to prevent misuse of the larger powers meant to be exercised only for the avowed purpose of promoting and protecting national interest.

The UN Security Council Resolution 1373 of September 28, 2001, is quite often misconstrued to canvass support for anti-terrorism laws subsequent to September 11, 2001, terrorist attacks in the United States. The Resolution calls upon the States, *inter alia*, to take '*appropriate measures in conformity with the relevant provisions of national and international law, including standards of human rights*'. The General Assembly in its Resolution 22/158 of December 12, 2000, while considering '*Measures to Eliminate International Terrorism*' and while strongly condemning all forms of terrorism as criminal and unjust, reiterated its call to all States '*to adopt every measure in accordance with the Charter of the UN and the relevant provisions of the international laws, including international standards of human rights*.' This mew has been subsequently reiterated in later resolutions of the UN.

Such is the significance of human rights even in difficult situations wherein certain basic human rights remain non-derogable.

The core values of our constitutional philosophy indicated in the Preamble to the Constitution are '*dignity of the individual*' and '*unity and integrity of the nation*'. The two, obviously, co-exist, and are not incompatible. The message is clear. Every attempt must be made to strike a balance between the two in all state actions including legislation, its interpretation and implementation. This is the demand of the rule of law in the republican democracy. The Constitution of India by amendment of art. 359 expressly makes non-derogable art. 20 (protection against ex post facto penal law, double jeopardy and testimonial compulsion) and art. 21 (protection of life and personal liberty) even during national emergency. The Constitution of India respecting these basic human

rights requires combating terrorism under the rule of law within the constitutional mandate.

The Constitution of India guarantees the Fundamental Rights in Part-III which include the right to equality, right to freedom, right against exploitation, right to freedom of religion, cultural and educational rights and the right to constitutional remedies. Article 32 is the constitutional remedy in the form of original jurisdiction of the Supreme Court of India for the enforcement of these Fundamental Rights. This is the protection of individuals against invasion of their human rights. Part-IV of the Constitution contains Directive Principles of State Policy which are the principles fundamental in governance, to be observed by the State in the formulation of its policies. These include the duty of the State to secure a social order for the promotion of the welfare of the people, distributive justice, right to work, to education and social security, provision for just and humane conditions of work, promotion of interests of the weaker sections, duty to raise the level of nutrition and the standards of living and to improve public health, protection and improvement of environment, ecology and wild life etc. In addition, the Fundamental Duties of every citizen covering a wide spectrum to strengthen the guarantee of Fundamental Rights is in art. 51A (Part IV-A) of the Constitution. In addition to art. 32 empowering the Supreme Court to enforce the Fundamental Rights, the High Court is empowered by art. 226 for the same purpose to exercise its writ jurisdiction. The primary duty of the higher judiciary to protect and enforce human rights is the constitutional mandate. Rule of law is a basic feature of our Constitution, as is judicial review.

The Protection of Human Rights Act, 1993 was enacted to provide for the constitution of a National Human Rights Commission (NHRC); State Human Rights Commissions in States and Human Rights Courts for better protection of human rights and for matters connected therewith or incidental thereto. '*Human rights*' is defined in sec. 2(1)(d) of the Act to mean the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India. The functions of the Commission

are enumerated in sec. 12 which encompass a wide area to enable the Commission not only to enquire into the violations or negligence in prevention of violation of human rights but also to promote the human rights culture and perform any function necessary for the promotion of human rights.

Ever since its constitution in 1993, the NHRC has been discharging a role complementary to that of the Supreme Court of India by performing those tasks which by their very nature the NHRC can perform better e.g. monitoring any situation or functioning of an institution. The complementarity between these institutions has considerably improved the mechanism for the protection of human rights in the country, which is primarily a state responsibility.

The interpretation of the fundamental rights, particularly, art. 14 (right to equality) and art. 21 (right to life) by the Supreme Court, *inter alia*, by reading the requirements of Directive Principles into them, together with the impact of the *Vishaka* judgment [*Vishaka v. State of Rajasthan*, AIR 1997 SC 3011] enabling provisions in the international instruments being read into these guarantees has considerably enlarged the meaning and scope of human rights in India. The NHRC also has interpreted its functions enumerated in sec. 12 of the Act expansively to include therein monitoring of the functioning of the institutions of governance with a view to ensure better protection of human rights and to prevent their violation. The NHRC visualizes its role as that of a catalyst to improve the quality of governance with the firm belief that good governance in accordance with the Constitution and the rule of law alone can be effective for better protection of human rights. The linkage between the two is direct and clear.

The nature and extent of State's responsibility for the protection of human rights was indicated by the NHRC in its orders made in the case of recent Gujarat communal disturbances. The Commission observed:

It is the primary and inescapable responsibility of the State to protect the right to life, liberty, equality

and dignity of all of those who constitute it. It is also the responsibility of the State to ensure that such rights are not violated either through overt acts, or through abetment or negligence. It is a clear and emerging principle of human rights jurisprudence that the State is responsible not only for the acts of its own agents, but also for the acts of non-State players acting within its jurisdiction. The State is, in addition, responsible for any inaction that may cause or facilitate the violation of human rights.

3. LINKAGE BETWEEN HUMAN RIGHTS AND HUMAN DEVELOPMENT

Emphasis on human dignity is laid not only in the UN Charter, the UDHR and several other international Covenants but also in the Constitution of India which mentions '*dignity of the individual*' as a core value in its Preamble. The debate on the classification of human rights based on different generations of these rights is purely academic since all of them must co-exist for full development of the human personality. Empowerment of the people through human development is the aim of human rights. The Human Development Index (HDI) is the new measure of development and it is said: '*a nation's ability to convert knowledge into wealth and social good through the process of innovation is going to determine its future*'. There is now a paradigm shift towards emphasis on intangible intellectual assets as the index of wealth. That is why the 21st century is considered to be the century of knowledge. Economics of knowledge is the methodology of improving governance through human development. Knowledge has, therefore, come to be identified not only as a significant form of wealth but also as power. Acquiring knowledge and making its profitable use to convert it into wealth and social good has to be the goal. Human development must be linked with human rights to achieve this end.

The Human Development Reports in the last decade have analyzed and focused on the new vistas of human rights while integrating

human rights with human development as the true measure of progress. The four essential components of human development paradigm indicated in the Human Development Reports are: Productivity - economic growth with people's participation in income generation; Equity - people's access to equal opportunities; Sustainability - access to opportunities must be not only for the present generations but also for future generations to all forms of capital i.e. physical, human, environmental; and Empowerment - opportunity with developed capabilities of all people to participate in policy and decision making processes that shape and affect their lives.

4. CONCLUSION

It is, therefore, clear that the essence of good governance is the respect for human rights of every individual so that the human resources are augmented by full development of each individual with his empowerment. Human rights and human development share a common vision and serve a common purpose. The dignity of the individual assured in the Constitution along with unity and integrity of the nation emphasizes respect for human rights as the essence of constitutional philosophy embodied in the Preamble to the Constitution. The provisions in the Constitution indicated above, particularly the Directive Principles of State Policy determine the nature of polity in which dignity of the individual is central and the focus of governance. Elaboration of the nature of constitutional governance envisaged and its modalities would follow.

The impact of human rights has brought about a profound change on the notions of State sovereignty. Today no nation can say that the way it treats its citizens is purely a domestic concern. Globalisation of human rights with the modern concept of a global village has resulted in the human rights situation anywhere in the world becoming a matter of international concern. The response of the international community to massive human rights violations in the former Yugoslavia (Kosovo, Bosnia etc.), Rwanda, East Timor, Sieraleone and the number of other theaters of conflict are obvious examples of this concern. Submission by States of reports to a

treaty organ (Human Rights Committee, Children's Committee, Women's Committee, Committee on Elimination of Racial Discrimination etc.) about their internal implementation of human rights obligations has now become a familiar requirement. Half a century back such a practice would have appeared inconceivable that sovereign States would periodically submit a report to an international body about their internal matters involving treatment of their citizens by the government, and then the State's participation in a discussion of the report with members of an international body drawn from all over the world. Such is the power of the idea of human rights today. Impact of human rights on constitutional governance is no longer debatable. The impact is clear and visible.

It would be worthwhile examining the scheme of constitutional governance in India with this background.