

A Critical Analysis of the Proximity of Natural Law to the Indian Constitution

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Abstract: The term “Natural law” refers to principles about ultimate right and wrong that go beyond particular notions and cultures, which arises from the nature of human beings itself, or it may simply express the necessities for anything identifiable as a society. The usefulness of natural law is indeed indispensable for constitutional adjudication. Through this paper, the authors have discussed the relation between natural law and the Constitution. The authors have also asserted the necessity of “natural law” as a tool to provide meaning to various constitutional principles, as some of these clauses can be established, in their meaning, only by attaching them to the properties of a moral argument. The authors also emphasize that moral reasoning not only illuminates the proper reach of existing constitutional principles but may properly be employed to create new constitutional principles, which would then become just as binding on the polity as the written law of the Constitution.

Keywords: Natural law, constitution, adjudication, moral reasoning;

I. Introduction

A natural law theory argues of natural rights which is inherent in every human being by virtue of his personality and is inalienable and imprescriptible.ⁱ From natural law there has been a gradual transition to natural rights. The idea of natural rights has its origin in the natural law and natural law speaks of natural rightsⁱⁱ. The doctrine of natural rights is itself an offshoot of the doctrine of natural law.ⁱⁱⁱ Although Greek thinkers Socrates^{iv} Plato^v, and Aristotle^{vi} did not use the word ‘natural rights’, and devoted their work on the concepts of ‘natural justice’, ‘equality’ and ‘non-arbitrariness’. Cicero used the law implying ‘right’ and universal and unchangeable law implies ‘natural rights’^{vii}. During 16th century the concept of natural rights suffered a temporary set back by the teachings of Machiavelli who opposed the idea of natural right and supported absolute monarchy^{viii}.

The concept of natural rights was criticized for the following reasons:

- a) As the doctrines of natural rights were recognized as inalienable, inviolable and indestructible could instigate the common people to the revolutionary actions.^{ix}
 - b) B. Bentham^x, JS Mill^{xi}, and David Hume^{xii}, opposed the idea of natural rights and the social contract as vague, obscure and contrary to empirical truth.^{xiii}
 - c) The concept of natural law had also attracted the criticisms of Marxist philosophy.^{xiv}
- However in the 16th to 18th century Hobbes and Locke^{xv} used natural law theory to develop the novel theory of the social contract.^{xvi}

The main cause for the revival of natural rights towards the end of the nineteenth and in the twentieth centuries was the failure of positivists to find answers to the problems such as the shattering effects of World Wars, the decline in standards, a growing insecurity and uncertainty that have stimulated a new quest for moral order afforded by natural law in the past.^{xvii} It is in this twentieth century that the doctrine of natural rights had been recognized and had been inserted into the sphere of constitutional law in the form of Bill of Rights. In England, where there is unwritten Constitution, the natural rights are called by different nomenclature as ‘civil rights’^{xviii}, ‘civil liberties’^{xix}, freedoms^{xx} or individual liberties^{xxi}. When natural rights are guaranteed and entrenched by a written constitution, they become fundamental right because they are guaranteed by the fundamental law^{xxii}. In the Indian Constitution, Part III is devoted to fundamental rights and hence accounts for the natural law element in the constitution. Although, as discussed later in the paper, that it is not part III alone but the basic structure doctrine which is the light bearer of natural law in the Indian Constitution.

II. Jurisprudential Study

Philosophers and jurists do not lag behind the theologians, in their endeavour to search for a law which is higher than positive law; and they developed the theory of natural law. The natural law theory was founded and elaborated by Aristotle, the Stoics of Greek Hellenistic period and later by Cicero during the Roman period.^{xxiii} They believed that natural law comprised of certain principles of justice and truth which were discovered by right reason i.e., in accordance with nature.^{xxiv} Medieval Christian philosophers such as Thomas

Aquinas attempts to transform natural law into a part of Law of God.^{xxv} The freedom of religion gained momentum during this period. However, Christian philosophers could not consider practice of slavery and severe limitations on serfdom as against ideas of freedom and equality.^{xxvi} As feudalism declined, modern theory of natural law arose, particularly as enunciated by Grotius^{xxvii} and Pufendorf^{xxviii} who detached natural law from religion laying the foundation for the secular, rationalistic version of modern natural law.^{xxix} Natural law theory led to natural right theory, a theory most closely associated with modern human rights.^{xxx} Locke and Rousseau who with the help of the new concept of 'social contract' developed philosophy that right to life, liberty and property were inherent rights of human beings.^{xxxi} The critiques pointed out most of norms setting of natural law theories contained a priori elements deduced by the norm setters.^{xxxii} In other words, natural law that considers rights as 'natural' differs from theorist to theorist depending upon their conception of nature. Because of this, natural law theory became unpopular with legal scholars and philosophers.^{xxxiii}

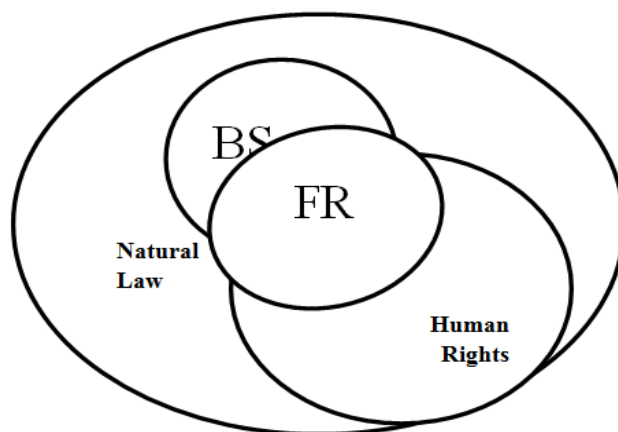
However, it should be forgotten that natural theory was impetus for the wave of revolt against absolutism. It can be seen in the French Declaration of the Rights of Man, in the U.S. Declaration of Independence, constitutions of many liberated from colonialism (including India) and even in the principal United Nations human rights documents.

III. Analysis On Indian Legal Provisions

More than four decades ago in the April 1973 in the famous case of Kesavananda Bharti v. State of Kerala^{xxxiv} the Supreme Court exhibited extreme creativeness and courage and came up with its most innovation in the country's constitutional history. In this case it came up with the 'doctrine of basic structure'. This is of particular importance in halting the legislature's ever extending arms of amending the constitution under Article 368^{xxxv}, a plain reading of this article suggests that the power of the parliament is absolute and covers all parts of the constitution but the court put a brake on the executive and legislative overzealousness which would alter the fundamental structure of the Indian Constitution by this basic structure^{xxxvi} doctrine.

The quest by the Indian judiciary for a principle of constancy in the constitution resulted in the emergence of the basic structure doctrine, and one may find its spiritual inspiration in the efforts of natural law jurists who empathize with Antigone^{xxxvii} when she proclaims that the King's order or laws will not override the unwritten and unchanging laws of the Gods.^{xxxviii} Antigone faced the king's wrath when she defied his order and buried her slain brother. Similarly, the Indian judiciary had to face the challenge of the executive, which was constantly interfering with judicial machination and was undermining to a large extent, the rights of the people in general.^{xxxix} The Indian judiciary has consistently taken a high domain in defining the spirit of amendment.^{xl} It is of the opinion that "the concept of amendment within the contours of the Preamble and the Constitution cannot be said to be a vague and unsatisfactory idea which parliamentarians and the public would not be able to understand"^{xli}

There exists a link between and the basic structure of the Indian Constitution as has been illustrated with the help of the diagram.^{xlii} [BS = Basic Structure; FR= Fundamental Rights]



As shown in the diagram natural law is the superset of all rights. Natural law had its origin in Greece through the dialogues of Thomists and Sophists and was brought out in its true essence in the, abovementioned, play Antigone. Antigone's defence when she was brought before the king, for defying his order and burying her slain brother, was "I did not think anything which you proclaimed strong enough to let a mortal override the gods and their unwritten and unchanging laws. They're not just for today or yesterday, but exist forever, and no one knows where they first appeared."^{xliii} Thus Natural law always appealed to oppressed as the means of salvation as it guaranteed rights which was the pre-ordained by Nature.^{xliiv} Therefore it can be concluded that

natural law is based on the premise that there is a higher law which is unamendable and is thus above the whims of the sovereign. The entire rights body is hence attributed to Natural law and is thus the ultimate Rights superser.

From natural law arose the doctrine of human rights. The Stoics argued that all humans have reason within them and can therefore know and obey its law.^{xlv}

In India human rights were positively transcribed in Part III of the Constitution. However only certain human rights were guaranteed as Fundamental Rights. However coming to the question of the basic structure as a further subset of the fundamental rights yet encompassing other natural law doctrines which are outside the fundamental rights domain. As discussed prior the basic structure doctrine was an attempt of the judiciary to prevent the all assuming executive from altering any fundamental features of the Constitution. The Basic Structure protected the constitutional supremacy, a democratic and republic form of government, the constitutional secularity; the federal character of the Constitution and separation of power. Justice Shelat and Grover added three features to the Chief Justice's list:

1. The mandate to build a welfare state contained in the Directive Principles of State Policy;
2. Maintenance of the unity and integrity of India;
3. The sovereignty of the country.

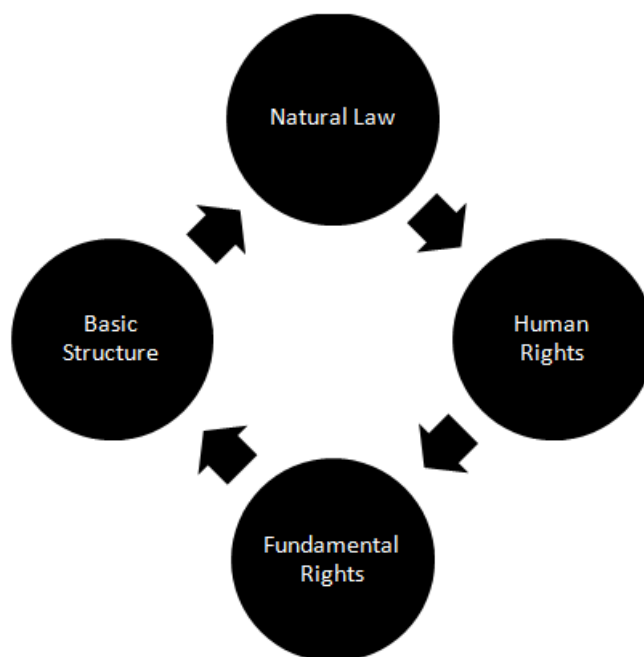
Justices Hegde and Mukherjea instead provided, in their opinion, a separate and shorter list:

1. The sovereignty of India;
2. The democratic character of the polity;
3. The unity of the country;
4. Essential features of individual freedoms;
5. The mandate to build a welfare state.

Justice Jaganmohan Reddy preferred to look at the Preamble; stating that the basic features of the Constitution were laid out by that part of the document, and thus could be represented by:

1. A sovereign democratic republic;
2. The provision of social, economic and political justice;
3. Liberty of thought, expression, belief, faith and worship;
4. Equality of status and opportunity.

Later other features were included within the ambit of basic structure like free and fair elections^{xlvi}, the principle of equality^{xlvii}, rule of law^{xlviii}, powers of the Supreme Court under Articles 32, 136, 141 and 142.^{xlix} In *Minerva Mills v. Union of India*^l the supremacy of Fundamental Rights and judicial review was protected as basic structure. The Basic structure contains much more than the fundamental rights; it contains the basic essence of natural law in the form of democratic institution, rule of law, etc. Thus a rights chain emancipating from natural law (which has ultimately led to natural right as discussed prior) can be constructed as follows through the diagram below.^{li}



IV. Comparative Study

The Romans tried to copy natural law to their law books, however at that point there arose the controversy as to the practice of slavery. Natural law claimed that all men are born equal and thus they have an inborn right to liberty, this became the dogma in Rome, however Rome condoned slavery a practice which seemed as direct detriment to the province of natural law, jurists like Cato and Cicero tried to find a solution by claiming that slaves are not human at all.^{lii} This dichotomy was removed by Thomists propounded by St. Thomas Aquinas who postulated that natural law was part of God's perfect law. All human beings were endowed with unique individual identity distinctly separate from state. This was followed by Grotius who gave a non-theistic approach to natural law. Scott Davidson argues that it was this Grotian view that was transmuted into the individual Human rights theory. Thus we can surmise human rights as a subset of the broader natural law regime. The Indian Constitution can be compared to UDHR for Human Rights inclusion and the American Constitution for being extra-legal, both of which is important for establishing a base for the element of natural law in the constitution.

A. Indian Constitution and UDHR:

A brief comparison of UDHR and Part III of the Indian constitution would indicate that Right to life and liberty under Article 3 of UDHR have been transformed into Article 21 of Indian Constitution, also the right to fair trial under Article 10 of UDHR became Article 22 of Part III of the constitution, right to property which is Article 17 of UDHR was earlier Article 31 of Constitution later was repealed and placed as a constitutional right under Article 300, Right to freedom of expression under Article 19 of UDHR is Article 19 in Constitution of India. However there are many other human rights like the right to work (Article 23 UDHR), Right to participate in governance of one's country (Article 21 UDHR), Right to Education (Article 26 UDHR), Right to adequate standards of living (Article 25 UDHR) which finds mention in Indian constitution as Directive Principles of State Policy in Part IV a somewhat loose guidelines given to the government to follow. Thus the second link of the rights chain namely that Fundamental Rights are a subset of broader human rights is also established.

B. Indian Constitution and the American Constitution:

In America in particular, the framers and ratifiers of a written constitution evidently sought to protect natural rights and insure the conformity of governmental acts to the requirements of natural law.^{liii} Similar analogy can be made in India w.r.t. the protection of natural law through the basic structure doctrine as has been discussed above.

The Indian Constitution like the American one is extra-legal and developed after rebellion against the British. The original constituent states of America achieved independence by way of rebellion against the lawful authorities of the English crown. Each of these communities then established a constitution for itself, by way of popular consent expressed directly or through representatives. The same was followed in India, as the people of the nation (we the people), through representatives, have given the nation the constitution. The only difference being that in India the rebellion was carried out by the nation as a whole and not by the constituent states individually and the constitution too was drafted by representatives for the nation as a whole.

The American constitution being an extra-legal constitution faced the challenge as to whether they qualified as legal rules. However the fact that these constitutions are not determined by pre-existing law does not prevent the fundamental rules of such constitution from qualifying as legal rules. Rules consist of external observance of a custom or usage and an internal mental element of obligation towards the rules. This criterion applies to the rule of recognition in a legal system and to the constitution which incorporates them i.e. to say that the basic rules of the constitution, or of any legal system for that purpose, must be accepted and recognized by the people i.e. of a customary nature. However, according to Salmond, "any such basic customary rules differ from any customary rules of law in that strictly they are not amendable to alteration by legislation or judicial decision. Ordinary customary rules can be amended or abrogated by such method."^{liv} While it would be safe to conclude that Salmond's stand on this does not stand as the American Constitution and the Indian Constitution likewise has been amended time and time again, although the process for the same isn't flexible but a rigid one. However Salmond backed up his previous statement by stating that, "The basic rules of the system too can in fact be altered, but the new rules arising from such alteration owe their validity to the former basic rules, which remain like axioms, from which the whole legal system is derived."^{lv} Therefore one can safely conclude that the axiom he had been talking about is the basic structure doctrine laid down in India which cannot be amended and likewise in America the amendments have very rare (49 amendments in 200 years). These amendments have only been made to accommodate the periods of growth in the legal system and shifts in the natural law premises as there is a necessity for extension of legal principles when old system of natural law becomes sterile.^{lvi}

Hence in both the constitutions there is the natural law which has been recognized and cannot be removed.

V. Conclusion

The concept of natural law emerged from the endeavour of jurists and philosopher in discovering something which is above the positive law, and through this they developed the concept of natural law. The concept of natural law has seen a gradual transition to natural rights, so much so that natural rights is seen as an offshoot of natural law. Later in the twentieth century through the Bill of Rights, natural rights were recognized and when this was recognized in the written constitution it became a fundamental right. The believers of Natural law have laid down that natural law is supreme and cannot be amended but every constitution which recognizes natural law (the American and Indian Constitution have been selected for the purpose study in the paper) has been amended over the course of time. But a careful study of these amendments would reveal that there would be certain axioms which remain constant, like the *basic structure* in the Indian Constitution, which remain unamendable and it is from where the basis of law is derived and this *axiom* is the natural law element in the constitution. Therefore, the hypothesis stands and natural law *is* the basis of the Constitution and the constitution fulfils the criteria of rule of recognition of the constitution.

VI. Suggestions

Having undergone an in-depth analysis of natural law the author has proved his hypothesis that natural law is indeed the basis of the constitution. Having established so and realized that the element of natural law is present in the Indian Constitution in the form the Basic Structure Doctrine it is of prime importance to first understand the principle of natural law and then go on to understand Constitutional law. However in practice it is often the other way round and this in the view of the author is something that needs to be changed

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 - [5]. Plato, *The Republic* (translated) by A.D.Lindsay,338(Everyman's Library, Book I, 1950);
 - [6]. Aristotle, *Politics*(translated) by E.Barker, 338(Oxford University Press, Book I,1946)
 - [7]. Cicero, *Republica* (translated) by Clinton Walker Keyes, (Loeb Classical Library, Book III ,1928);
 - [8]. Lord Lloyd's Introduction to Jurisprudence, 433 (Sweet and Maxwell, London,1984);
 - [9]. U. Chandra, *Human Rights*,15(Allahabad Law Agency, Allahabad, 1990);
 - [10]. For Bentham: "natural rights is simple non-sense upon stilts" or as brawling upon paper. Bentham, *Anarchical Fallacies: works Vol. II* p. 502 cited in note 3. Rights are then the fruits of the law and of the law lone. There are no rights without law - no rights contrary to law - no rights anterior to law. Before the existence of law there might reasons for wishing that there were law and doubtless such reasons cannot be wanting and those of the strongest kind- but a reason for wishing that we possessed a right does not constitute a right; See David Miller, *Social Justice*,55(Clarendon Press, Oxford,1976);
 - [11]. Mill Js defends the doctrine of utilitarianism by pointing out the standard of justice should be grounded on utility. Bodenheimer *Edgar Jurisprudence* p. 86.
 - [12]. David Hume, supreme rationalist (1711 – 1776) in his *Treatise of Human Nature*, first published in 1739, he wrote: 'in every system of morality, which I have hitherto met with, I have always remark's, that author proceeds for sometime in the ordinary way of reasoning, and establishes the being of God or make observation concerning human affairs; when I am surprised to find, that instead of the usual copulations of propositions, is and is not, I meet with no proposition that not connected with an ought, or an ought not. See J.S. Harris, *Legal Philosophies*,12(Butterworths, London, 1980);
 - [13]. *Supra* note 10 at 19;
 - [14]. Karl Marx viewed that political civil rights of individuals were meaningless in the absence an economic and education foundation .See Richie IG ,*Natural Rights*, Allan and Unwin Limited,p.100-102;
 - [15]. John Locke theory was that, in the original state of nature, man was governed by the law of nature, but for the sake of better safety, he joined in a political society by means of 'social compact' for the mutual preservation of life, liberty and property. Thus, the legislature was limited by natural law; and a law made by the legislature contrary to the natural rights of the individual was invalid. Some of these natural rights were equality, liberty and property,(*Government*, x, 135; xiii, 149)
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 - [23]. See, S. Greenberg, *Foundations of a Faith*,(Burning Bush Press, New York, 1967);L. Swidler, *Religious Liberty and Human Rights*, (Ecumenical Press, Philadelphia, 1986); A.E. Mayer, *Islam and Human Rights: Tradition and Politics*, 258 (West view Press et Pinter publishers, Boulder, Colaraod et Londres,2nd edition);
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 - [25]. *Ibid*, at 17;
 - [26]. Jerome J Shestack, *The Philosophy Foundations of Human Rights*, in Janusz Symonides (ed.) *Human Rights: Concepts and Standards*,31(UNESCO ,Ashgate Publishing Company Limited, England, 2000);

- [27]. Hugo Grotius who has been called “the Father of modern International Law”, defined natural as a ‘dictate of right reason’ that is an act in conformity with the quality of moral necessity or moral basis. The natural characteristic of human beings is the social impulse to live peacefully and in harmony with other. Malcolm N. Shaw, *International Law*, 4th edition, Cambridge University Press, 1997, p. 21 and also see Grotius, *The Rights of War and Peace*, Campbell A.C., translation, *De Jure Belli ac Pacis*, Washington: M. Dunne, New York: Oxford University Press, 2004. p 72;
- [28]. *Id.*, at 22;
- [29]. Jerome Shestack, *The Jurisprudence of Human Rights*, in Theodore Meron (ed.), *Human Rights in International Law: Legal and Policy Issues*, 77 (Clarendon Press ,Oxford, 1984);
- [30]. *Supra* note 27, at.37;
- [31]. *Ibid.*
- [32]. *Id.*, at 38;
- [33]. Bentham considered natural rights as so much ‘bawling on paper’. His colourful attack: Right is child of law; from real laws come real rights, but from imaginary law, from laws of nature, come imaginary rights. Natural rights is simple non-sense; natural and imprescriptible rights, rhetorical non-sense, non-sense upon stilts, Bentham *Anarchical Fallacies*, Works of Jeremy Bentham, Edinburgh, William Tait, 1845.
- [34]. AIR 1973 SC 1461: (1973) 4 SCC 225;
- [35]. Article 368(1) of the Constitution of India: Power of Parliament to amend the Constitution and procedure therefore—(1)Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article....”
- [36]. The ‘basic structure doctrine’ is a judicial innovation whereby certain features of the Constitution of India are beyond the limit of the powers of amendment of the Parliament of India. This reflects judicial concern at the perceived threat to the liberal constitutional order. The Basic Structure doctrine applies only to the constitutionality of amendments and not to ordinary Acts of Parliament, which must conform to the entirety of the constitution and not just its basic structure.
- [37]. Antigone is a Greek tragedy where Antigone’s brothers’ fight over throne and when both get killed the new king allows one brother to be buried but other’s body is not allowed to be buried.
- [38]. Ian Johnston, *Antigone* (Translation) available at <http://www.mala.bc.ca/~johnstoi/sophocles/antigone.htm> (Last visited on February 3, 2015).
- [39]. Originally, the Constitution guaranteed a citizen, the fundamental right to acquire hold and dispose of property under Article 19(f). Under Article 31 he could not be deprived of his property unless it was acquired by the State, under a law that determined the amount of compensation he ought to receive against such an acquisition. Property owned by an individual or a firm could be acquired by the State only for public purposes and upon payment of compensation determined by the law. Article 31 has been modified six times — Beginning with the First amendment in 1951 progressively curtailing this fundamental right. Finally in 1978, Article 19(f) was omitted and Article 31 repealed by the Forty-fourth Amendment. Instead Article 300A was introduced in Part XII making the right to property only a constitutional right. This provision implies that the executive arm of the government (civil servants and the police) could not interfere with the citizen’s right to property. Removal of right to property as a fundamental right led to wide spread dissent among landed gentry and the lawyers who mostly belonged to the landed section of the society. Conservative jurists like H.M. Seervai were highly critical of the move by Indian legislature to remove the right to property which was guaranteed in all other major democratic constitutions around the world.
- [40]. As per Conrad, the Indian judiciary has consistently taken a balanced view of amendability of Indian Constitution, while in the formative years they gave total amending power to Indian Parliament (Sajjan Singh and Shankari Prasad cases) in the later stages the judiciary completely changed its position in Golaknath and finally brought out the famous ‘basic structure theory’ in the Kesavananda case, with this judgment and later cases like Election case, Minerva Mills, WamanRao, Indian courts have demonstrated that the judiciary is also evolving with the evolving nation. In the first years of independence the judiciary allowed the legislature to make laws which may be necessary for implementation of greater social good but with changing times and progress the courts decided to implement the inherent limitations of the amending provisions of the Constitution. For further details please refer to Dieter Conrad’s *Zwischen Den Traditionen*.
- [41]. *Supra* note 34, at 315.
- [42]. Navajyoti Samanta & Sumitava Basu, *Test of Basic Structure: An Analysis*, 1 NUJS Law Review, 499,503 (2008);
- [43]. Ian Johnson, *Sophocles’ Antigone*, 442 BC, available at www.mala.bc.ca/~johnstoi/sophocles/antigone.htm (Last visited on February 3, 2015).
- [44]. Thomas Hobbes, *Philosophical Rudiments concerning Government and Society*, 38 (English translation of *De Cive*), see also Aquinas *Theologica*, as given in ‘Lloyd’s Introduction to Jurisprudence’, p 142.
- [45]. *Id.* at 104;
- [46]. *Kihoto Hollohan v. Zachillhu*, AIR 1993 SC 412;
- [47]. *Raghunath Rao v. Union of India*, AIR 1993 SC 631;
- [48]. *Indira Sawhney v. Union of India*, (1992) Supp (3) SCC 217;
- [49]. *Delhi Judicial Service Association v. State of Gujarat*, AIR 1991 SC 2176;
- [50]. 1 AIR 1980 SC 1789;
- [51]. *Supra* note 42, at 506;
- [52]. A strikingly similar argument was taken in early 1800s when in US law courts gave judgments like “A slave is in absolute bondage. He has no civil rights.” So said Judge Crenshaw, in *Brandon et al. vs. Planters’ and Merchants’ Bank of Huntsville*, Jan. T., 1838; 1 Stewart’s Ala. Rep., 320. Same principle in *Bynum vs. Bostwick*, 4 Desauss., 266. Wheeler, at 6. “Slaves are deprived of all civil rights.” “Emancipation gives to the slave his civil rights.” Judge Matthews, in *Girod vs. Lewis*, May T. available at <http://www.dinsdoc.com/goodell-1-2-1.htm> (Last visited on February 3, 2015).
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