FREEDOM, COMPULSION AND THE LAW

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"Law is simply politics by other means" [David Kairys, *The Politics of Law*]

THE JOURNEY of human freedom through history is as fascinating and troubling, as complex and captivating as the diverse stands of human history itself. The concern of compassionate and elegant minds with the moral autonomy[1] of the individual as equally with the creation of facilitation of the conditions necessary for the well-being of the individual, are its absorbing dimensions. Ceaseless as the waves of the ocean, this concern battles against those tendencies of human nature – the male versus the female, for example – and the organised concentration of power and intellect, which has placed at their mercies the economically and socially inferm and the materially and spiritually emaciated. It is this part of human consciousness and its concern which has rebelled against oppression and exploitation and has decried slavery of any sort.[2] It is not the scope of this piece to analyse the class or social conditions of the people who were agents of social change in the past, but to look at the promises and failures of the modern instruments invoked for such change, *viz.*, law, democracy and human rights, and their scope and limitations.[3] It is important to look at them from the point of view that freedom of all human beings in all essential respects is central to the process of development[4] and *vice versa*.

Very often legal discourse ignores certain political and sociological realities behind several idioms and expressions freely used in law. Also deviant human

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1. Immanuel Kant is seen as the most influential exponent of the idea of moral autonomy as the supreme principle of morality. See, Immanuel Kant, *Groundwork of Metaphysic of Morals* (1964).

2. "To renounce one's freedom is to renounce one's status as a man, the rights of humanity and even its duties... such renunciation and even its duties... such renunciation is incompatible with the nature of man...." Rousseau Jean-Jacques, *Social Contract* (1978).

3. "For the story of democracy is as much a record of failures as of success: of failures to transcend existing limits, of momentary breakthroughs followed by massive defeats, and sometimes of utopian ambitions followed by disillusionment and despair." See, Robert A. Dahl, *Democracy and its Critics* (1989).

4. See, G.A. Cohen "On the Currency of Egalitarian Justice" *Ethics* vol. 99 (1989) talking of equal access for advantage and Amartya Sen, *Development as Freedom*, talking of basic capability equality.

conduct is sought to be treated by undifferentiated penal or coercive measures, whether the transgression is of matrimonial obligations or of the injunctions against polluting activities. A closer analysis of several definitions in law, for example, employer or trustee, or of legal obligations imposed upon a husband, or rights such as livelihood, right to work, wholesome and cultured living[5], right to dignity, freedom from want, will reveal that they subsume several undefined or assumed human conduct or behaviour, which are themselves outside the sphere of enacted law. They were traditionally dealt with by religion, morality, or even shared community values. Yet it is the ambition and project of law to deal with these matters and to offer solutions to diverse disputes. It is, therefore, important to look at some of the developments in constitutional and human rights law to dissect the dichotomies between rights and social practices[6] and between rights and governance. The seemingly parallel developments in international economics and trade, diluting traditional national sovereignties on the one hand[7] and the international human rights instruments on the other, which envisage greater interventionist role for national governments, constitute and reflect these dichotomies.

The famous statement of J.S. Mill, that in each person's own concerns his individual spontaneity is entitled to free exercise, and to individuality should belong the part of life in which it is chiefly the individual that is interested, deserves a footnote.[8] This domain of the individual (which can neither be the void or emptiness of being alone) in order to be fulfilling requires and is contingent upon, several generative conditions. These conditions are themselves the creations and products of human interaction – both material and spiritual. The fields of these interactions are described as economic, political and social, though each one of them coalesce. It is this material condition of liberty or freedom which has been and is the contentious realm of human history and its most onerous burden. The proposition is, that for the majority of human beings, through the major mapped periods of history, compulsion and not freedom or liberty has been the state of their lives. While philosophically and rhetorically freedom has been proclaimed to be as essential as the air we breathe, the question however is the freedom of subjugated peoples to invest in the pursuit of freedom.[9] Can democracy and rule of law really contribute towards this freedom

5. See, art. 25, the Constitution of Japan.

6. For an interesting discussion on the interlink between practices and principles, see, Mark Tunick, *Practices and Principles* (1998).

7. See, Henry Steiner & Philip Aston, *Globalisation, Development and Human Rights* Ch. 16 (2nd ed.).

8. It is appropriate to quote: 'Freedom has a thousand charms to show that slave however contended never know'. William Cowper on freedom.

9. "To counter the problems that we face, we have to see individual freedom as a social commitment.... Development consists of the various types of unfreedoms that leave people with little choice and little opportunity of exercising their reasoned agency". See, Amartya Sen, *Development as Freedom* xii.

of every individual to invest in her/his freedom? Given both the gross and subtle commands and manipulations of the process of democracy and rule of law, by individuals, agencies and institutions which create the unfreedoms of the others, the child labour, the land-deprived famished rural peasant, the unorganised work force who produce and serve the infinite needs of the urban populace, the destitute women who are sucked into the way of all flesh, this question becomes poignant.

There is one formidable point of view, which recurs in history, challenging the claim for formalised designation of natural human needs as rights and their enforcement. From Bentham who said, "Right with me is the child of law... and a natural right is a son that never had a father", to judge Posner who held, that, "the concept of Liberty in the fourteenth Amendment to the U.S. Constitution does not include a right to basic services"[10] such as education, housing and welfare assistance,[11] the argument is not distinct. How is this argument to be overcome, through counter-rhetoric or demonstrated praxis?[12]

The Supreme Court of India however endeavoured to articulate into 'liberty' and 'life', the twin pillars of article 21 of the Constitution, the major themes of economic empowerment social justice, etc. both as legal theory and practice.[13] There is an attempt to mask this exercise in didactics, as respectable jurisprudence, curative[14] of the social ills which resist change towards dignity and regardful living. It can be seen that Newton's third law of motion as stretched to human conduct and affairs necessarily breeds counter didactics which seem to sleight these bold initiatives and to question by disregard, the compassionate seriousness of attacking through law of the unfreedoms of peoples.[15] This clash between the forces for and against expansion of law, and constitutional rights, is however an interesting modern equation, which is awaiting its Einsteins for deliverance.

In every aspect of modern life, there is an element of compulsion. Within the family, in the work place, in the choice of command over resources of

10. *Jackson* v. *City of Joliet*, 715, F. 2d. 1200, 1204 (7th Cir. 1983).

11. See an interesting ruling of the constitutional court of Hungary in 1977, which considered the acquired character of the pregnancy benefit and child care allowance and opined that the shift to a new system infringing the stability of the welfare systems, must at least guarantee a period of preparation for adjustment and for organisation of finances in Vicky C. Jackson & Mark Tushnet, *Comparative Constitutional Law* 1452-1476 (1999).

12. See for an interesting discussion on distributive justice and enforcement error, Randy R. Barnetts, *Structure of Liberty.*

13. See e.g., *Panchayat Varga Shramajivi Samudaik Shakari Khadut Co.Operative Society* v. *Haribahi Mevabhai*, (1996) 10 SCC 320; *Dalmia Cement, (Bharat) Ltd.* v. *U.O.I.*, (1996) 10 SCC 104; *Consumer Education & Research Centre* v. *U.O.I.*, (1995) 3 SCC 42; *Ashok Kumar Gupta* v. *State of U.P.*, (1997) 5 SCC 201.

14. 'Jurisprudence is therapeutic but not curative', see, Posner, *Overcoming Law* pt. I ch. 1 (1995)

15. *Narmada Bachao Andolan* case, (2000) Supp. 2 JT 6.

livelihood, in the distribution of material resources of the community. Compulsion as a process both physical coercion and personal interests disguised as moral pressure, has not been a thing of the past. It has not vanished with feudal structures or colonialism. The formal trappings have changed, but new substitutions have taken over. In the name of employment tender childhood is robbed. The pain, the cry and the anguish of women for instance, who throng matrimonial courts, against the unfreedoms of matrimonial compulsions stand out most. The unwritten stories of them who suffer silently the unseemly demands of sex can only however shake the discerning heart. The unfreedoms of all those living on the edges of survival and dignity, those no-persons, the AIDS afflicted, continue to be a mere moral matter. The life and destinies of the urban slums are both the products of unconcern and corruption and victims of judicial onslaught. Who judges the freedom of all these peoples and on what standards? What is the humane process by which law in the name of justice and justice in the name of administration can be forbidden from themselves creating the unfreedoms of these people? A willing probe will reveal the unwillingness of us to surrender the elemental forces of compulsion in diverse human relationships. Sometimes this is claimed to be necessary for the sake of knowledge and technology, sometimes from the need to avoid chaos, the need for discipline and productivity, and so on. Yet ideology and intellectuals busy with the task of speaking for others are not tired of turning out volumes of rights talk. Yet law claims a deliverance role. Can this be really fulfilled? Have we explored all means at our command? As long as law is alienated from the education of dharma-understood principally as non-injurious conduct-can it relate to the jurisprudence of unfreedoms? Are our law schools willing to design its curricula with reference to the history of unfreedoms and the role of law in decimating them? When will they consider, say Swami Vivekananda as a great contributor to Indian Jurisprudence? I consider that raising such questions is the department of real freedom, as profound problems of international trade and intellectual property cannot be away and isolated from answers to these questions.

It is widely acknowledged that elections alone do not exhaust democracy and representative governance in several parts of the world, is still an ideal. In the realm of choosing a representative, large numbers of people have no meaningful choice and they suffer this unfreedom of choosing under compulsion and imposition from without. In the realm of the chosen representatives' powers and capacities to mould or sublime the decision making process with human concerns, she is confronted with the power of the big business, the market, and the unyielding hunger of money. Given this scenario, is the observation of the Supreme Court that, "social justice is the comprehensive form to remove social imbalances by law, harmonising the rival claims or interests of different groups and sections... by means of which alone it would be possible to build up a

welfare State."[16] a naive gesture, expressed with the fond hope that the state (and fellow judges?) would receive it with attention and execute it with respect? Is such harmonising of the freedoms of some and the unfreedoms of others, which they create, possible, without structural readjustments of a different order?

What are those institutional collaborations, as opposed to separation of powers, which can effectively guarantee the participation of the individual in all matters affecting her life? What law making processes can answer and meet the demands of such participation? These are the real questions and challenges in the task of battling with the unfreedoms. Law, as an institutional process, flexible in structure, sublime in consideration and vision, is the medium, which can ill afford to be avoided.

The theory of judicial restraint and judicial deference to matters of economics and policy[17] while a sagacious judicial policy, can be easily seen fitting in with the notion that the Parliament and the executive are the arenas for conflict resolutions. Judicial review permits interpretation, but judicial deference forbids intervention.[18] It is not suggested that courts should run riot into the policy super-markets, but that such super-markets cannot be without their night watchman.

What cannot be wished away is again the sublime truth that the organisation of technology, economics, politics and culture is ultimately on the shoulders of law. The nexus between the unfreedoms which afflict the mass of people and compulsive aid of law which perpetuates these unfreedoms are to be dismantled. In the final analysis the battle against unfreedoms is the battle against the condition that freedoms (of some) are possible without the unfreedoms of many. The problem of doing away with unfreedoms or at least the creation of optimum conditions for freedom from unfreedoms has another dimension closely related to law which also needs study, as we are on the task of looking at the working of the Constitution.

16. (1996) 10 SCC 320 at 323, quoting *Dalmia Cement* (1996) 10 SCC 104.

17. *Delhi Science Forum* v. *U.O.I.*, (1996) 2 SCC 405. *R.K. Garg* v. *U.O.I.*, (1982) 1 SCR 947 at 969 (going back to Holmes, J., and quoting Frankfurter. J).

18. See, Hendry J. Abraham & Barbara A. Perry, "Freedom and the Court" *The Double Standard* ch. 2 (7th ed.).