

V. HOMO SACER: THE CONDITIONALITY OF HUMAN RIGHTS ON FUNDAMENTAL RIGHTS

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Abstract:

This paper aims to explore the complex relationship between human rights, fundamental rights, and the concept of Homo Sacer, a life deemed bare of political value and stripped of legal protections. It argues that while universal human rights are an ideal, their practical implementation faces limitations. It is being examined as to how citizenship status and sovereign power can influence the entitlement to and enforcement of human rights. The notion of absolute human rights can be academically challenged, arguing that political considerations and citizenship status can influence the realisation of human and fundamental rights. The concept of Homo Sacer exposes the limitations of human rights framework, particularly in exceptional circumstances and for individuals deemed outside the political and legal system. The paper emphasizes the importance of fundamental rights enshrined in constitutions as they offer stronger legal protections compared to human rights alone. Conclusion highlights the ongoing struggle for universal human rights and the need for a nuanced understanding that considers the complexities of political realities.

Keywords: *Human rights, Fundamental rights, Homo Sacer, Citizenship, Sovereign power.*

I. INTRODUCTION

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Throughout history, humans have grappled with the complex question of human rights and whether they are inherent or a grant. Social Contract theorists like Thomas Hobbes and Jean-Jacques Rousseau have made a distinction between natural life and political life. Natural life emphasizes the fundamental aspect of simply being alive, prioritizing this over the quality of one's lifestyle. On the other hand, political life involves classifications such as citizen, non-citizen, or refugee, which influence one's status and experience. According to social contract theorists, in the state of nature there was neither State, nor society, nor law. In their conceived State of Nature, the subjects seemed to live a natural life, which they had to give up for a political life to enter into a cooperative and peaceful society regulated by law. In our contemporary world, it appears that no life can fall in the former category because any seemingly apolitical or natural life would always arise out of its active exclusion from the political system. Further, this line of thinking is the concept of *Homo Sacer* given by the Italian philosopher Giorgio Agamben in his book "*Homo Sacer: Sovereign Power and Bare Life*".¹ Translated literally as 'Sacred Man,' *Homo Sacer* is a life that exists outside the political State. This life of a *Homo Sacer*, disassociated from any political value, makes her/his killing justifiable, but such killing cannot be called murder because she/he does not have any legal right to life. Agamben in his book argues that this life is not inherently apolitical; on the contrary, it is a political decision of the state to make it so that this life remains outside of the

¹ Giorgio Agamben, *Homo Sacer: Sovereign Power and Bare Life* (Daniel Heller-Roazen tr, Stanford University Press 1998)

political protection. This human being deprived of her right to life does not exist as a legal entity and is subject to the coercive brute power of the State. The Nazi Concentration camp² is a significant instance of the creation of Homo Sacer, which finds its most significant manifestation in the Jews who were systematically deprived of citizenship and their legal right to life under the Reich Citizenship Law³.

This raises concerns about the human rights of Jews in relation to the concept of Homo Sacer. Why does the most urgent need for human rights often coincide with their denial? Are human beings not entitled to fundamental rights simply by virtue of their humanity?

Contrary to the common understanding, entitlement to Human Rights just by virtue of being human is not a necessary reality. Every life holds a specific value within the political system, with citizens often having greater access to rights than refugees, making human rights conditional of having a legal identity like that of a citizen. Treating Human Rights as Fundamental Rights is the only way to guarantee their protection for the majority. However, with Fundamental Rights, there comes a definite distinction between those who are entitled to them and those

² Ulrich Raulff, 'An Interview with Giorgio Agamben' (2005) 5(5) German Law Journal <<https://doi.org/10.1017/S2071832200012724>> accessed 20 February 2024

³ 'The Nuremberg Race Laws', Holocaust Encyclopedia, (United States Holocaust Memorial Museum) <<https://encyclopedia.ushmm.org/content/en/article/the-nuremberg-race-laws>> accessed 20 February 2024

who are not. This very distinction presents a significant challenge to the universal ideal of human rights.

II. HOMO SACER AS A CHALLENGE TO HUMAN RIGHTS

Agamben talks about a state of exception, a space where the law is suspended, and the sovereign exerts total control without limitations. Even the most robust Human Rights framework can be selectively disregarded when a certain group of humans are deemed outside political protection. Anyone or any institution that operates in this state of exception has sovereign power; this could even include doctors deciding to turn off life support for a comatose body or a judge sentencing someone to death. Here, we can say that Human Rights are the rights of citizens and not of stateless people beyond legal protection. The German-Jewish political philosopher Hannah Arendt stressed that political equality is not a natural Human Right but a constructed attribute of citizenship. This equality only exists within a functioning democratic political system⁴.

This state of exception is analogous to our modern-day state of emergency. The Emergency period in India from 1975 to 1977 witnessed countless major Human Rights violations like arbitrary

⁴ 'Hannah Arendt', Stanford Encyclopedia of Philosophy (Spring edn, 2024) <<https://plato.stanford.edu/entries/arendt/#CitiPublSphe>> accessed 20 February 2024

detention, imprisonment, slum clearance, and forced sterilisation⁵. Which would have been prohibited under normal circumstances. However, Agamben points out that this 'State of Emergency' can often become the normative operational structure for a selectively disregarded group of humans; wherein such acts violating their Human Rights not only become permissible, but it becomes legally impossible to commit crimes against them.

Agamben also used the term 'Bare Life' to refer to Homo Sacer, the life that is bare of any political qualifications or descriptors. However, the fact that creating Homo Sacer is a sovereign decision indicates its relation to politics. The life that is dehumanized still holds a particular value to it. In contrast, Homo Sacer is made to seem like it is a natural valueless life. To simplify, the active and intentional exclusion of natural life from a politically qualified life is, at the same time, its inclusion in it⁶. This blurring between political life and natural life pushes Homo Sacer into a 'State of Indistinction.' In this state of indistinction, all human rights remain suspended.

III. HUMAN RIGHTS AND FUNDAMENTAL RIGHTS

⁵ Adrija Roychowdhury, '48 years of Emergency: Here is what happened over the two years that changed India's history' *The Indian Express* (New Delhi, 25 June 2023) <<https://indianexpress.com/article/research/emergency-48-years-timeline-history-8685088/>> accessed 21 February 2024.

⁶ Jenny Edkins, 'Sovereign Power, Zones of Indistinction, and the Camp' (2000) 25(1) *Alternatives: Global, Local, Political* 3, <www.jstor.org/stable/40644981> accessed 22 February 2024.

Born with a 'tabula rasa'⁷ or a blank slate, John Locke states that every human should be endowed with a series of inalienable and universal rights. Human Rights are some basic fundamental rights and freedoms inherent to all individuals, regardless of origin or background. The Universal Declaration of Human Rights⁸ states that all human beings are born free and equal in dignity and rights. It also states that everyone has the recognition everywhere as a person before the law. But how does this help the numerous stateless Palestinians whose human rights are nowhere in sight? Where is their entitlement to legal recognition? Coming to the theory of realism⁹, essentially, it is the state that grants us rights, not a universal government, and those rights only exist and become meaningful in a particular political context when that state decides to implement them. This brings us back to the fact that the sovereign exists outside legal bounds as a stark exception to the law. Moreover, these sovereign powers, existing in a constant state of exception, can suspend Human Rights when dealing with those they have deemed to be Homo Sacer.

Recognition of the legal concept of Human Rights does not necessarily imply their concrete existence in the real world; it would no doubt help

⁷ 'Tabula rasa' (*Encyclopedia Britannica*, 23 February 2024) <<https://www.britannica.com/topic/tabula-rasa>> accessed 24 February 2024.

⁸ 'Universal Declaration of Human Rights' (United Nations) <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> accessed 24 February 2024.

⁹ Duncan Bell, 'realism' (*Encyclopedia Britannica*, 23 December 2023) <<https://www.britannica.com/topic/realism-political-and-social-science>> accessed 24 February 2024.

create a better legal system; despite being well-defined, enforcing human rights at a global level remains complex. While influential, the Universal Declaration of Human Rights lacks the legal power to punish violators effectively. The contemporary understanding of Human Rights discourse is predominantly shaped by Western ideology, and relativism further weakens the universality of the concept. A relativist interpretation would define values and beliefs, and therefore, rights, as products of culture and assert that rights will vary from culture to culture. However, pure relativism has the potency to excuse major violations of basic rights as a result of cultural practices. To better illustrate, cultural relativism can justify the lack of gender equality in the Iranian regime and its differential treatment of women based on religious considerations. The right to marry and find a family is one of the most basic of Human Rights; cultural relativism would also justify the disparities in marriage laws when it comes to sexual minorities in India.

Revisiting the Social Contract, Locke built on the natural rights theory, asserting that certain rights were universal and inherently beyond any sovereign's power and that obeying the sovereign is conditional upon whether or not it is efficient in protecting our Natural Rights¹⁰. To simplify, humans created this political society with legal protection to enjoy their natural rights, but what happens when the state arbitrarily decides to deny a particular section of the population a specific right?

¹⁰ 'Social Contract' (*Encyclopedia Britannica*, 12 February 2024) <<https://www.britannica.com/topic/social-contract>> accessed 24 February 2024

What difference does fundamentally recognizing a human right in the Constitution make?

There is no dispute regarding the fact that all Fundamental Rights are Human Rights, but Human Rights given constitutional recognition are considered Fundamental Rights.¹¹ In India, human rights jurisprudence takes its most overt manifestation in the Fundamental Rights and the Directive Principles of State Policy, part III and part IV of the Indian Constitution, respectively. With essential human rights being secured for citizens, some are enforceable while others are not. In the initially existing jurisprudential model, securing certain rights and directives into the ambit of the enforceable fundamental rights was not possible. The Indian Judiciary acted as the custodian of rights in interpreting the statutes broadly, aligning interpretations with international human rights charters.

Article 21: Protection of Life and Personal Liberty

"No person shall be deprived of his life or personal liberty except according to procedure established by law".¹²

¹¹ Sarbani Guha Ghosal, 'HUMAN RIGHTS: CONCEPT AND CONTESTATION' (2010) 71 The Indian Journal of Political Science <<https://www.jstor.org/stable/42748940>> accessed 24 February 2024

¹² *The Constitution of India*, 1950, Art. 21

Article 21 can most assertively illustrate the active role of the Indian Judiciary in securing various human rights by reading them within the ambit of the fundamental right to life and personal liberty. Its journey highlights the contingency of Human Rights on Fundamental Rights like no other. This article confers on every person, citizen or non-citizen, the fundamental right to life and personal liberty.

In the case of *Francis Coralie Mullin v. U.T. of Delhi*¹³, Bhagwati J conceded that: “the magnitude and content of the components of this right would depend upon the extent of the economic development of the country” While simultaneously emphasising that- “it must, in any view of the matter, include the right to basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self”

Looking at the expansion of Article 21, the Supreme Court initially focused solely on the existence of statutory procedural rules. It changed significantly with the landmark case of *Maneka Gandhi*¹⁴. This case established the principle of ‘substantive fairness,’ meaning the legal procedure used to deprive someone of their life or personal liberty must also be fair and just, leading to a significant expansion of human rights encompassed by Article 21.

¹³ *Francis Coralie Mullin v. UT of Delhi*, AIR 1981 SC 746

¹⁴ *Maneka Gandhi v. Union of India*, AIR 1978 SC 597

Prisoner Rights: Desai J notes that conviction does not reduce someone to a non-person exposed to maltreatment at the hands of authorities, and prisoners are always entitled to procedural safeguards established by law¹⁵. A prisoner has a fundamental right to protection from his co-prisoners¹⁶. If a prisoner develops a severe mental illness post-conviction, it would be a ground for commuting the death sentence¹⁷.

Right to legal aid: A person who cannot afford legal services for certain specified reasons is entitled to legal aid funded by the state¹⁸. This right is crucial for ensuring a fair legal process and is now considered an essential part of Article 21.

Right to Marry:

Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.¹⁹

¹⁵ *Sunil Batra v. Delhi Administration*, (1978) 4 SCC 494

¹⁶ *Kewal Pati v. State of U.P.*, (1995) 3 SCC 600

¹⁷ *Accused X v. The State of Maharashtra*, (2019) 7 SCC 1

¹⁸ *M.H. Hoskot v. State of Maharashtra*, (1978) 3 SCC 544

¹⁹ United Nations, 'Universal Declaration of Human Rights' <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> accessed 28 February 29, 2024

It is a well-settled fact that the Right to Marry is a basic human right and should be available to everyone. The Supreme Court, time and again, has recognised this right as a fundamental one in numerous judgements. What constitutes marriage is a topic attracting huge controversies, with many different perspectives supported and opposed across the world. If the sovereign strongly favours only one particular definition of marriage, where does the human not conforming to that particular definition go? What about their human right to choose a partner and find a family?

“21. The right to marry a person of one’s choice is integral to Article 21 of the Constitution. The Constitution guarantees the right to life. This right cannot be taken away except through a law which is substantively and procedurally fair, just and reasonable. Intrinsic to the liberty which the Constitution guarantees as a fundamental right is the ability of each individual to take decisions on matters central to the pursuit of happiness. Matters of belief and faith, including whether to believe are at the core of constitutional liberty. Society has no role to play in determining our choice of partners.”²⁰

²⁰ *Shafin Jahan v. Asokan K.M.*, (2018) 16 SCC 368

Furthermore, the Supreme Court, in the case of Navtej Singh Johar²¹, declared Section 377 of the Indian Penal Code 1860 as unconstitutional to the extent that it criminalized consensual intercourse among consenting adults. This landmark judgment recognized the rights of LGBT individuals to dignity, privacy, freedom of expression, and equality under the Indian Constitution. It was a highly progressive step of the Indian judiciary in upholding its citizens' basic fundamental and human rights. Chandrachud J concluded that the members of the LGBT community:

'Are entitled, as all other citizens, to the full range of constitutional rights including the liberties protected by the Constitution (and) are entitled to the full range of constitutional rights.'

Then, contrary to the previous judgments, in the most recent case of Supriyo v. Union of India²², three out of five judges refused to legally recognize unions that are not heterosexual. Although the Chief Justice of India and Justice Sanjay Kishan Kaul disagreed with this decision, the majority denied that marriage is a fundamental right for people of the LGBTQIA+ community guaranteed by the Indian Constitution, denying a human right as fundamental as the right to marry. The government argued against the legal recognition of LGBTQIA+ marriages, stating that marriage is fundamentally between a man and a

²¹ *Navtej Singh Johar v. Union of India*, (2018) 10 SCC 1

²² *Supriyo @ Supriya Chakraborty & Anr. v. Union of India*, 2023 INSC 920.

woman. The government also argued that legalizing same-sex marriages would fundamentally disrupt traditional family structures and that same-sex unions would be detrimental to children's development. Again, this exemplifies, on a minute level, the sovereign suspending some specific human rights towards a specific community of citizens and also puts forth the conditional nature of human rights on constitutional recognition.

The expansive interpretation of Article 21 has significantly broadened the scope of human rights in India. It has empowered individuals to challenge unfair state actions and ensured the protection of fundamental human needs. Recognising a human right as a part III right under the constitution guarantees its protection to the masses, on the contrary, a human right loses its authority if it goes outside the ambit of fundamental rights.

IV. HUMAN RIGHTS, HOMO SACER AND THE NON-CITIZENS

Agamben suggests that modern democracies might appear different, but they still retain the power structures of totalitarian regimes and have the potential to produce dehumanised as well as bare life. These power structures take more disguised, subtle forms, and one has to learn to recognize them. When the government decides who is entitled to marry and who is not, sovereign power determines the political qualifications of different lives. The sovereign here is operating in a state of exception

where it gets to deny a particular community the right to marry without it being a violation of their human or fundamental rights.

Extending this discussion further to human rights protection available to non-citizens and the Homo Sacer, the case of Mohammad Salimullah v. Union of India²³ presents a very relevant example. The Rohingyas are a small minority community facing persecution from the Myanmar regime for over a century. They claim native ancestry to the Rakhine region in Myanmar. However, the Myanmar government considers them to be Bangladeshi refugees.

A judgment by the International Court of Justice in 2020 acknowledged the genocidal conditions that forced nearly 775,000 Rohingya people to seek refuge in neighbouring countries like Bangladesh and India. The community has been systematically disenfranchised, made stateless, and subjected to atrocious persecution²⁴. Their status in the state of Myanmar is reduced to that of the Homo Sacer, with no legal entitlements or protections of any sort.

The Universal Declaration of Human Rights States that:

²³ AIR 2021 SUPREME COURT 1789.

²⁴ Chander Uday Singh, 'Supreme Court must rethink its order on deportation of Rohingya refugees' *The Indian Express* (New Delhi 26 April 2021) <<https://indianexpress.com/article/opinion/columns/rohingya-refugees-crisis-india-supreme-court-7288913/>> accessed 28 February 2024.

Everyone has the right to seek and to enjoy in other countries asylum from persecution.²⁵

The Supreme Court of India, in the present case, rejected the petition seeking to prevent the deportation of Rohingya refugees back to Myanmar. The petitioners argued that over 6,500 Rohingya refugees were being held illegally in Jammu, with around 150-170 facing imminent deportation at a particularly vulnerable time due to the recent military coup in Myanmar.

However, the Court ultimately sided with the Indian government's stance. The government argued that the principle of non-refoulement, which prohibits forcibly returning refugees to a place where their lives are in danger, only applies to signatories of the 1951 UN Refugee Convention and its 1967 Protocol, which India has not signed. The Court also referenced a previous case from 2018 where a similar petition to prevent the deportation of seven Rohingya refugees from Assam was dismissed.

The Court held that the right not to be deported stems from the right to reside and settle in India under Article 19(1)(g), which only the citizens are entitled to, as opposed to Article 21, which is applicable to all human beings.

²⁵ United Nations, 'Universal Declaration of Human Rights' <<https://www.un.org/en/about-us/universal-declaration-of-human-rights>> accessed 28 February 29, 2024.

A noteworthy point here is the Genocide Convention of 1948, to which India is a signatory, emphasizes preventing genocide, and complicity in genocide is an international crime. In addition, as a member state of the "International Convention on the Elimination of All Forms of Racial Discrimination", we must adhere to the UN Human Rights Council's recommendations, explicitly addressing the principle of non-refoulement. These recommendations clarify that states, including India, are obligated to protect individuals from being returned to places where they face a severe risk of human rights violations like torture or degrading treatment. It is also well settled in International Law that the principle of non-refoulment is Jus Cogens,²⁶ and no derogation of such a norm by any state can be done. So it was not that India had no obligations under the principle of non-refoulment, this is a clear instance of various sovereign powers operating outside the boundaries of law without any consequences. Here again, we see sovereign power determining the values of particular lives based on political valuations. These states operate in a state of exception, where they at times even perform major atrocities and human rights violations without it being criminal in any sense and doing away without any liability.

V. CONCLUSION

²⁶ 'Jus Cogens' (Oxford Bibliographies 29 May 2015) <www.oxfordbibliographies.com/display/document/obo-9780199796953/obo-9780199796953-0124.xml> accessed 28 February 2024.

The concept of Homo Sacer has significant implications for our understanding of Human Rights. Its existence challenges the universal nature of human rights and poses significant implications about their conditionality. The mere existence of bare life outside the political realm questions the extent to which human rights are enforceable. In exceptional circumstances, such as during an emergency, even the most robust Human Rights framework can be violated, leading to concerns about their universality. It is essential to acknowledge that political valuations and citizenship condition Human Rights and treating them as Fundamental Rights is also crucial to ensure their entitlement to everyone because fundamental rights with the constitution backing them act as an assurance and carry more power than pure human rights that do not have this formal recognition.

Only recognizing the legal concept of Human Rights does not necessarily imply their concrete existence in the real world. However, the concept itself has a lot of positive outcomes for the legal system. The findings presented here call for a nuanced understanding of human rights. While the ideal of universal human rights remains crucial, practical limitations require continuous efforts to strengthen international legal frameworks, promote global accountability for human rights violations, and bridge the gap between human rights and their practical implementation. Further research could explore how other countries navigate the tension between human rights, fundamental rights, and sovereign power in the context of non-citizens and marginalized groups.

Moreover, it is essential to recognize that every life is valuable within the political system, and we must strive towards a more just and inclusive society where everyone's rights are protected. The idea of universal human rights is not without its challenges, and we must work towards a more inclusive understanding of them, recognizing that political equality is not a natural Human Right but a constructed attribute of citizenship.

The fight for human rights continues to evolve in the face of complex political realities. Recognizing the inherent value of every human life and actively seeking solutions that address the multifaceted challenges hindering the full realization of human rights remain crucial in building a more humane world.