Himachal Pradesh National Law University, Shimla (India)

A UGC CARE Listed Journal

Journal Articles | *ISSN:2582-1903* | *Shimla Law Review*

Volume: VI (2023)

EXAMINING THE DICHOTOMOUS RELATIONSHIP BETWEEN UNIVERSALS AND PARTICULARS

Aditi Sharma

https://doi.org/10.70556/hpnlu-slr-v6-I1-2023-08

Contents

Volume VI | *ISSN: 2582-1903* | *April 2023 - March 2024*

EXAMINING THE *DICHOTOMOUS* RELATIONSHIP BETWEEN UNIVERSALS AND PARTICULARS IN HUMAN RIGHTS

Aditi Sharma*

[Abstract: *The 'presumed' universality of human rights has been brought in focus in contemporary times and is challenged on many, reasonable if not legitimate, grounds. The notion of universality has always been used against the recognition of socio-economic rights for being particular in their tendencies and thus destructible of the very essence of human rights. The research work attempts to thoroughly examine the dichotomy of universals and particulars in the concept and substance of human rights by delving into the dialectical relationships of neutral and judgmental justice, cultural relativism and moral universalism, and conceptualism and realism. These relationships have been analyzed in the light of three primary concerns in the province of human rights: Indigenous rights, Minority rights, and Homosexual rights, respectively.*]

Keywords: *human rights, universal, particular, cultural relativism, moral universalism, and indigenous rights etc.*

I

Introduction

Article 1 of Universal Declaration of Human Rights, 1948 (UDHR hereinafter) states: 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.' There are two things that can be understood from this article. Firstly, that all human beings are born free and are equal not only in dignity but also have equal rights that flow from that dignity. Secondly, since a human is a rational being, he is also bestowed upon a duty to act in the spirit of brotherhood towards all other rational beings. The main idea projected under the very first article of Declaration is that the *reason* and *conscience* differentiate humans from any other living or non-living beings, which is the core philosophy that emanates itself in the form of human

* *Ms. Aditi Sharma* is student of LL.M. at Faculty of Law, Banaras Hindu University, (India). *Email*: aditisharmaguna@gmail.com

rights and their corresponding duties. It is the common denominator that binds all human beings by universalizing human nature and thus endows them with rights and bestows upon various duties as against each other and towards humanity as a whole. The universal common: human reason and human dignity is the basic foundation upon which the entire fulcrum of human rights rests and functions between various dialectical relationships that further shape and mould the arrangement of human rights jurisprudence.

The running articles of UDHR or of any other legal instrument for that matter are manifestations of its preamble which is the horoscope of the legislation. Thus, any Article has to confirm to the essence of the preamble of the instrument. The UDHR proclaims in its preamble: 'Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge'[1]. The prima facie perusal of these words clearly necessitates the universal recognition, acceptance and more importantly agreement on the list of the rights. This recognition, acceptance and agreement is however plausible owing to the dichotomies that have prevailed or have been prevailing but ignored for some or many political reasons and have thus become some of the intricate challenges in achieving the *universality* of human rights.

The 'presumed' *universality* of human rights has been brought in focus in contemporary times and is challenged on many reasonable if not legitimate grounds (reasonable means which appeals to reason while legitimacy is something that is subject to recognition by the power or rule). Human rights are also referred to as universal rights. These rights are universal in the sense that they are globally recognized and respected as a 'common', 'inherent', and 'sacrosanct' rights of individuals. However, the rights under principal human rights instruments are often cited as the heritage of Western liberal traditions for being 'individualistic' and 'negative' in nature, thus challenging its universality. The notion of universality has always been used against the recognition of socio-economic rights for being *particular* in their tendencies and thus destructive of the very essence of human rights. The so-called second generation human rights though recognized under the Covenant do not receive that respect and acceptance that the first generation rights does. The arguments like illegitimate proliferation of rights, absence of duty-holder, and expensive enforcement further weaken the claim of these rights and are nothing but tangents of this presumed *universality*.

The larger claims of socio-economic rights are however not entirely accommodated in this article. The major focus of this research work is to thoroughly examine the dichotomy of universals and particulars in the concept and substance of human rights by delving into the dialectical relationships of neutral and judgmental justice, cultural relativism and moral universalism, and conceptualism and realism. These

[1] United Nations, Universal Declaration of Human Rights, at para 7 (1948).

relationships have been analyzed in the light of three primary concerns in human rights arena: Indigenous rights, Minority rights, and Homosexual rights, respectively.

The claims of indigenous groups suffer by the hands of harbingers of the universality. Open borders, diplomatic arrangements, globalization and liberalization have all affected the lives of indigenous populations, especially in the developing countries. The central point of friction among the liberals and the communitarians to make justice neutral or judgmental takes the centre stage in the issue of protection of indigenous collective rights. The *encumbered self* devised by the communitarians defines the inseparability of an individual's societal position from its moral character and obligation. They thus argue for the *particularity* in reasoning as against the *universality* to save the claims of indigenous populations that flow from their 'particular' conditions and position in a region, a nation and in the international community as a whole. It is strongly argued in this part that the rights of indigenous community groups should be protected from the turbulences of globalization and liberalization that are nothing but manifestations of universality.

Not only the indigenous populations but the rights of minority citizens are often defeated by the claims of universal morality as against their cultural relativist values for that would be again entering into the *particulars* and thus would arguably be against the universality of human rights. Minorities' claims are often compromised as the utilitarian calculations are equated with the democratic operations. It is thus, argued in this article that the efforts of both of the legislature (with its utilitarian calculus) and judiciary (in its reverence to universal morality) are highly deficient in considering the cultural relativism as an inevitable and indispensable feature of human rights of minorities which ought to be recognized and be given due respect in human rights spectrum.

Homosexual rights is one of the most burning debates of recent times especially in the traditional and orthodox societies where the rights associated with sex are particularly reserved for men and women. These societies argue that sex or institutions like marriage that legitimizes any form of sexual intercourse shall be reserved for men and women for only they can procreate a child which is the ultimate purpose of marriage. This presumed universal conception of sexual relationships again fails to entertain the particular cases of relationships meant not only for pleasure and procreation but for life-long companionship and burden-sharing which exist not only between men and women but also among homosexuals which divorces the conception from the empirical realities. This dichotomy between concept and reality has been a topic of debate since a long time.

These various human rights vexations have to be seen in the light of competing claims that informs the above debates. It is to be seen whether the 'presumed universality' of human rights is the only norm or the existence of 'particulars' mold

and shape the human rights spectrum. It has to be further examined whether the universality of human rights can be kept intact without entering into the particulars and serving the claims of classes or persons that rest their claims on such pillars. Also, if at all particulars become impossible to ignore upto what extent can they interplay with the universals while maintaining the essence of human rights.

II

Neutral Justice Versus Judgmental Justice: A Case for Indigenous Rights

Indigenous rights can be defined as the rights of the group inhabiting a specific area or region that makes their culture, identity and even survival peculiar to that particular area or specific region. Some examples could be *Sentinelese, Santhals, Bhils, Gonds, Khasis* in India and *Masai (Africa), Inuit (Arctic regions), Navajo (Americas), Sami (Nordic region)* etc. in and around world. These groups are often categorized as scheduled tribes under the domestic laws to extend special protection and rights to them owing to their cultural distinctiveness, isolation and peculiarity to their land of origin, making them vulnerable to the hegemony of globalization projects, encroachment upon lands and exploitation by the hands of mainland populations.[2] Indigenous rights can also be termed as '*group rights'* or '*collective rights'* as they are held by indigenous groups per se and not by individuals.[3] A collective right is a right held by a group per se, a collection of persons that one would identify as the same group even under some conditions in which some or all of the individual persons in the group changed.[4] The recognition of these rights is however resisted by many major state powers due to their nature (allegedly) of being in conflict with individual claim rights. The classical position of United States with regards to collective rights and the right to self-determination speaks volume of this resistance.[5] After a long interagency consultation, a 2001 U.S. Security Council position paper on indigenous peoples, again referring to the concern of possible conflict with individual rights, indicated a preference for the intermediate concept of rights held by 'individuals in community with others' rather than by indigenous

---

[2] State of World's Indigenous People, Dept. of Economic and Social Affairs, United Nations, ST/ESA/375 (Vol. 5) (2021).

[3] Dwight G. Newman, *Theorizing Collective Indigenous Rights*, XXXI AM. INDIAN L. REV., 275 (2006).

[4] *Id*.

[5] S. James Anaya, *Superpower Attitudes Toward Indigenous Peoples and Group Rights*, XCIII AM. SOC'Y INT'L L., 254 (1999).

communities themselves.[6] Indian law however recognizes these groups as separate communities and thus stretches constitutional as well as legal protection to them. Moreover, Indian judiciary too has declared them as a separate community groups that possess certain specific rights like 'community rights over the forest land which they have been inhabiting for generations'.[7]

Since the core issue in this part is of the protection of indigenous groups and more primarily the worldwide recognition and acceptance of their 'community' status and thus as possessor of distinct rights, the debate of justice being *neutral* or *judgmental* becomes central to this issue. The former being advocated by the liberals like John Rawls while the latter being defended by the modern communitarians like Alasdair MacIntyre, Michael Sandel and Michael Walzer. The conflicting yet synthesizing ideas of these thinkers provide a deep note to the idea of indigenous rights that is discussed under this section not as a chronological account of their emergence as to show who influenced whom but to provide a brief idea of how these philosophical debates undertone the contemporary issue of indigenous rights.

The liberals like John Rawls in his attempt to separate the personal goods from the political ones, an improvement done upon the utilitarian theories, stand for an *abstract liberal self* who is posited away from its encumbrances in the society. Rawls through his veil of ignorance (the hypothetical device of his contractarian project) distances the political life of an individual from their personal spheres. Rawls portrays an 'antecedently individuated subject, standing always at a certain distance from the interests it has'[8]. Communitarians like Sandel on the other hand advocate for a *living encumbered self*-recognizing the inseparability of communal bonds from moral character and obligation of an individual. While liberals want to protect the right of individuals to choose their good, communitarians emphasize the right of the collectivity to autonomy.[9] Communitarians insist that 'we cannot justify political arrangements without reference to common purposes and ends, and that we cannot conceive our personhood without reference to our role as citizen, and as participants in a common life'[10]. Walzer insists distribution of common goods based on the shared meanings intrinsic to the goods and not according to the universal principles held by some imaginary observer standing outside society.[11] MacIntyre states that moral principles arise out of particular social conditions and are comprehensible

---

6 *Id*., at 276.

7 *D.C. Bhatia* v. *Union of India*, (1995) 1 S.C.C. 104 (India).

8 Michael Sandel, LIBERALISM AND THE LIMITS OF JUSTICE 62 (1982).

9 Robert B. Thigpen & Lyle A. Downing, *Liberalism and the Communitarian* Critique, XXXI J. POL. SCI., 647 (1987).

10 *Supra*, note 6.

11 *Supra*, note 7, at 641.

only in those conditions. The concept of human rights was generated to serve 'as part of the social invention of the autonomous moral agent'.[12]

The core contention of the communitarians is that they stand against any universal moral authority that distances itself from the real self of the individual. For them the societal status, historical evolutions, placements and conditions all define an individual and thus any attempt to place individual away from these positions will be rupturing its self. It can be said that communitarians defend the *particularity* (based of particular social conditions and positions) as against the *universality* (based on reason and dignity) in notion human rights. They recognize the inseparability of individual status from its membership in societal communities be it family, tribe, nation or continent and so any right pertaining to protection of individual should duly acknowledge and incorporate his social standing and preferences.

Indigenous communities' claims thus, should be based on their position in the society, in the nation and even in the international community. It is argued here that their rights thus must be made immune from the hegemonic globalization projects and liberal ideas of universal moral goods. The order of protection must flow from their regional identity (the narrow community) towards their international identity of being a member of human kind (the giant community) for it is the nearest sphere of membership that an individual finds himself mostly connected with and shares the strongest solidarity which binds himself to that community. So far as community status is concerned it seems no reason why such should not be conformed to them. The major argument against conferment of such status is that it would conflict with the individual rights or the negative rights of other individuals. This argument however seems flawed. The rights which are argued here are firstly based on the 'individual's position and preferences' who makes the basic unit of any given community and thus conferring rights to an individual based on his association with so and so community group cannot be said to endanger any others' individual right.

Arguably, at least some collective moral rights necessarily exist if certain individual moral rights exist. This is so because it is possible to identify certain group interests, things that make a group's or community's life go better, that make the community thrive and flourish that are irreducible to individual interests whose fulfillment is at the same time a precondition to the meaningful realization of individual interests that ground rights.[13] As long as other human rights are not violated it is absolutely okay to prioritize the ones who are nearest at our hand like family and friends. Obligations of solidarity are objectionable only if leads us to violate a natural duty.[14]

So the answer to the question that whether justice can be neutral between two rival conceptions of good can only be answered by appreciating the preferences and

---

[12] Alasdair MacIntyre, AFTER VIRTUE 70 (1984).

[13] *Supra*, note 3, at 281.

[14] Michael Sandel, JUSTICE WHAT'S THE RIGHT THING TO DO 120 (2009).

positions, and associated burdens and responsibilities. It is only then, communitarians argue that justice becomes judgmental and no more remains neutral. To make decisive judgments it becomes pertinent to enter into the particular situations of an individual where his identity is defined by his community and owing to this association which exists not merely as a sense of emotional or social bond but also as an encumbrance to give back to the community for its contribution in constructing and demarcating his self.

III

Cultural Relativism *Versus* Moral Universalism: Defending Minority Rights

A universal moral philosophy affirms principles that protect universal, individual human rights of liberty, freedom, equality and justice. It advocates for trans-cultural and trans-historic rights. The cultural relativism on the other hand, stands for the non-absoluteness of these universal values. They rather advocate the rights based on the principles of any given cultural society in which the one is raised. It suggests that human rights may be overridden or adjusted in the light of cultural practices while asserting that all cultures are valid and equal. This view became predominant during the nineteenth century as a counterpoint to Western imperialism which reduced all other cultures as 'native', 'primitive', or 'barbaric'.[15] However, this turned out to have a repressive side by creating an obligatory homogeneity and diminishing the place of individual in identity politics as was evident during the Nazi regime.[16] In contemporary times the totalitarian regimes in Afghanistan, Venezuela and North Korea (to name few) have been abusing this notion to serve their pernicious ends. When vicious dictators regularly appealed to culture to justify their depredations, a heavy, perhaps even over-heavy, emphasis on universalism seemed not merely appropriate but essential. However, enquiry has to be made even now that whether these so-called universal moral values are universal both conceptually (implied by the very idea of human rights) and substantively (particular conception or list of human rights)[17] or just reflect the hegemonic assertions of one dominant culture over all others.

Conceptual universality is in effect just another way of saying that human rights are 'equal' and 'inalienable'. It does not address the central point of divergence of

---

[15] Jack Donnelly, *The Relative Universality of Human Rights,* XXIX J. HOPKINS. U. PRESS, 282 (2007).

[16] Jerome J. Shestack, *The Philosophic Foundations of Human* Rights, XX J. HOPKINS. U. PRESS, 230 (1998).

[17] *Supra*, note 15.

substantive list of those rights. The notion of cultural relativism stands against this point of divergence. It gives three hierarchical levels of variation: *substance of lists* of rights, *interpretation* of individual rights, and *implementation* of particular rights.[18] At all these levels especially at the first level, cultural notions inform the way these rights are shaped, recognized and respected. The variations in substance are defined by the notions of human nature and dignity from which any list of human rights derive its source.

It is argued here that human rights though being trans-cultural (human nature being *universal*) are relative culturally. Take for example of the Hijab Ban in State educational institutions in Karnataka[19] where the Muslim students argued 'against the ban' being violative of their fundamental right of freedom of religion under Article 25 of Indian Constitution. While the 'anti-hijab' protests in Iran[20] against the ultraconservative Muslim laws speaks of a different story. This is a classic example perhaps to show how cultures defined by long history of recognition, customary practices, and national constitutions and ruling powers inform the human rights of people of the country. Cultural relativism is inevitable simply because human nature is itself relative in some measure. Jack Donnelly gives an example to prove this point- 'if marriage partners are chosen on the basis of largely cultural preferences concerning height, weight, skin tone or other physical attributes, the gene pool in a community would be culturally determined even if all human behavior is proved to be genetically endowed'[21]. The realized human nature is product of both the natural self and the social self of an individual. Moreover, it rests on the notion of self-determination, provides national diversity and does away with the fear of universal tyranny. The notion of minority rights shall not be deduced from the moral claims of the individuals of a group but from the irreducible elements of the culture itself.[22] It not only permits but also demands considerable cultural plurality in human rights.

The Indian Constitution under Article 25-28 gives fundamental freedoms of religion to both citizens as well as non-citizens of this country[23]. These rights are being made justiciable in the sense that constitutional remedies can be invoked in case of their violation or abridgment. Moreover, the cultural and educational rights under

---

[18] Jack Donnelly, *Cultural Relativism and Universal Human Rights*, VI J. HOPKINS. U. PRESS, 401 (1984).

[19] Supreme Court Observer, *available at* https://www.scobserver.in/reports/hijab-ban-judgment-summary-karnataka-hc/ (last visited Sept. 30, 2024).

[20] The New York Times, *available at* https://www.nytimes.com/2022/09/26/world/middleeast/women-iran-protests-hijab.html (last visited Sept. 30, 2024).

[21] *Id*. at 403.

[22] Miodrag A. Jovanovic, *Recognizing Minority Identities Through Collective Rights*, XXVII HUM, RTS. Q., 635 (2005).

[23] The Constitution of India, 1950.

Article 29-30 further bolster and corroborate these rights thus securing the cultural relativism within the precincts of universal moral values of fundamental rights like equality, freedom and justice. Fundamental rights under Part III therefore reflect the perfect blend of moral universalism and cultural relativism. This position is however not been immune from the tussle between the two notions as has been evident in many instances like the case of Shayra Bano[24], Sabrimala Temple[25] and now the proposed Uniform Civil Code (UCC hereinafter) where the culturally relative values were to be compromised to upheld the universal moral rights making the latter's case stronger. These legal developments again challenge the position of cultural values within the framework of human rights. The position seems quite different vis-à-vis minority rights pertaining to educational institutions wherein the Apex Court more proactively safeguarded and sustained cultural relativity, for example in St. Stephens College case[26], P.A. Inamdar case[27] and many others. The age old reluctance of Supreme Court to touch the personal laws is highly reflected in their cultural and religious footing. However, Hon'ble Court has time and again emphasized the need to formulate a UCC to do away with glaring inconsistencies of cultural relativist norms in personal laws and universal moral principles in Constitution.[28]

> 'The aforesaid provision is based on the premise that there is no necessary connection between religious and personal law in a civilized society. Article 25 of the Constitution confers freedom of conscience and free profession, practice and propagation of religion. The aforesaid two provisions *viz*. Articles 25 and 44 show that the former guarantees religious freedom whereas the latter divests religion from social relations and personal law'.[29]

The current position with regard to UCC where legislature seems committed towards this cause shows a hope not only to legal fraternity but also to all the communities and cultural groups. However, the art of drafting UCC is not in making it inclusive but participatory. The legislation should be kept immune from any dominant cultural hegemony and tyrannical overlordship.

Shri Alladi Krishanaswamy Ayyar while discussing UCC in Constituent Assembly made some views which seems relevant here (quoted in Shayra Bano case):

> 'When there is impact between two civilizations or between two cultures, each culture must be influenced and influence the other culture. If there is a determined opposition, or if there is strong opposition by any Section of the community, it

---

[24] *Shayara Bano and Ors.* v. *Union of India* (2017) 9 S.C.C. 1.

[25] *Indian Young Lawyers Association* v. *The State of Kerala* (2019) 11 S.C.C. 1.

[26] *St. Stephen's College* v. *University of Delhi*, (1992) 1 S.C.C. 558.

[27] *P.A. Inamdar* v. *State of Maharashtra* 2005 (6) S.C.C. 537.

[28] *Sarla Mudgal* v. *Union of India*, 1995 S.C.C. (3) 635; see also Shayra Bano, supra, note 17.

[29] *John Vallamattom* v. *Union of India*, (2003) 6 S.C.C. 611, para 44.

would be unwise on the part of the legislators of this country to attempt to ignore it'.[30]

An informed public opinion and discussion based on the democratic values and not using any utilitarian calculus where majority outnumbers minority thus making it reflective of majority designs, becomes indispensable and not merely desirable. The desirability of moral plurality in UCC needs to be appreciated and duly recognized.

IV

Conceptualism *Versus* Realism: Arguing for Homosexual Rights

Conceptualism admits the existence within us of abstract and universal concepts. These concepts have an ideal value; they have no real value, or at least we do not know whether they have a real value.[31] These *universal* representations have no contact with external things, since they are produced exclusively by the structural functions (a priori forms) of our mind. Not only theses conceptions remain in mind independent of their real existence in empirical world but also the empirical realities cannot occur outside these conceptions. In his slogan Kant sums up the doctrine of conceptualism, *'Thoughts without content are empty, intuitions without concepts are blind'*.[32] Thus, Kant's *reason*, Kelson's *grundnorm* and Hegel's *self-centered consciousness* are all but manifestations of this conceptualization.

In contrast, realism attacks any form of abstract reality that is inconsistent or averse to realities situated in empirical world. There is nothing in the abstract concept that is not applicable to every individual; if the abstract concept (a *universal notion*) is inadequate, because it does not contain the singular notes of each being (the *particulars*), it is none the less faithful, or at least its abstract character does not prevent it from corresponding faithfully to the objects existing in nature.[33]

The 'universal' notion of legitimacy of sexual relations between man and woman and its non-legitimacy between homosexuals reflects the doctrine of conceptualism, wherein the abstract notion of morality *vis a vis* sexual relations is associated only with male and female. This notion is abstract in the sense it is indifferent to the realities of the empirical world where such relations had existed outside the heterosexuals throughout human history and perhaps in all human cultures. Homosexuality is often conceptualized as a result of manipulated sexuality and

---

[30] *Supra*, note 17, at para 94.

[31] THE CATHOLIC ENCYCLOPEDIA, *available at* https://www.newadvent.org/cathen/11090c.htm (last visited Sept. 30, 2024).

[32] Y. Gunther, *Essays on Non-Conceptual Content*, CAMBRIDGE MIT PRESS, 1, (2003).

[33] *Supra*, note 23.

corrupt individual morality by which 'sexuality' is only equated with pleasure and physical acts of sex while neglecting the aspect of emotional intimacy, companionship and burden-sharing in relationships. This dichotomy between concept and reality has been a topic of debate since a long time.

A jurisprudential debate on the interplay between criminal law and morality was set off when Lord Devlin delivered the 1959 Maccabean Lecture, titled 'The Enforcement of Morals.' Lord Devlin's lecture was an attack against the Report of the Wolfenden Committee on Homosexual Offences and Prostitution (hereinafter Wolfenden Report), which had recommended the decriminalization of sodomy laws in England.[34] Devlin believed that society depends upon 'a common morality' for its stability and existence. Countering Devlin's theory, Hart argued that society is not held together by a common morality, for, after all, it is not a hive mind or a monolith, governed by a singular set of morals and principles.[35] This common morality is nothing but a shared conception divorced from the ground realities and indifferent to any future possibilities.

While it is first important to ascertain whether homosexuality is actually an empirical fact or is just and another conception of few rallying against the majoritarian beliefs. Human homosexual behavior is an aggregate of number of factors like particular lineages, birth order, and in part depends on one's social network.[36] Homosexual behavior is correlated with social and demographic variables. Present evidence suggests that homosexual behavior though weakly, but significantly, correlated with numerous traits, some genetic, some developmental, and some experiential. Even some theories of kin selection and parental manipulation make homosexuality a natural phenomenon.[37] That means homosexuality is a result of number of sociological and environmental factors that makes it an empirical reality and not mere a conception. As such the conceptual universal notion of legitimacy of sexual relations among heterosexuals fails to satisfy the empirical test of existence of homosexuality.

Mainstreaming homosexuality within human rights framework has been a challenge not only among domestic jurisdictions but also at international forums despite strong waves of homosexual rights activism with the foundation of Human Rights Campaign in 1980, the world's largest gay rights organization today.[38] The dominant narrative about the emergence of gay rights as an internationally sanctioned norm points to the success of the human rights community in expanding

---

[34] *Navtej Singh Johar* v. *Union of India (UOI)* (2018)10 SCC 1, at para 484-485.

[35] *Id*. at para 486.

[36] R. C. Kirkpatrick, *The Evolution of Homosexual Behaviour,* XLI U. CHI. Press., 390 (2000).

[37] *Id*., at 391.

[38] Omar G. Encarnación, *Human Rights and Gay Rights*, CXIII CURRENT HIST., 38 (2014).

the boundaries of the 1948 Declaration.[39] Today, even if homosexual rights have been recognized by means of judicial activism and have culminated into abolition of anti-homosexual laws, the notion of homosexuality is still seen as 'obscene', something which can be tolerated in private spheres but are not considered as moral as a marriage or other heterosexual relationships. This is because of universal conceptions of good or moral life in a society dictated by the majoritarian beliefs and practices. As such putting liberalist arguments to bracket those universal moral conceptions while deciding the law that is neutral between rival conceptions of good life (majoritarian versus individual) actually defeats the purpose of assigning value to a right.[40]

Indian Supreme Court while decriminalizing homosexuality, also took a liberalist argument of bracketing moral conceptions and held a stand against any societal notions of *heteronormativity* that regulate constitutional liberties based on sexual orientation and by invoking arguments resting on autonomy rights.[41]

> 'In protecting consensual intimacies, the Constitution adopts a simple principle: the state has no business to intrude into these personal matters'.[42]

Thus, universal moral arguments cannot be fully done away with if at all the rights of homosexuals are to be secured and placed at par with other fundamental rights. A fuller respect cannot be cultivated in terms of autonomy rights alone.

V

Reconciling 'Particulars' and 'Universals' in Human Rights

A mindful perusal of all the issues in hand and arguments advanced for and against each case of *universals* and *particulars* manifested in dialectical enquiries of neutral-judgmental justice, moral universalism-cultural relativism, and conceptualism-realism suggests a mid-way approach to the above problems. It can be articulated that the core of the problem is neither in the differentials which each case has invented nor in the points of divergence that have arisen in the process of interpretation and implementation. The problem lies in the water-tight compartmentalization of 'universality' and 'particularity'. The iron wall separation of these two notions has been so far the major cause of the bifurcation of human rights jurists and philosophers.

---

[39] *Id*.

[40] Michael Sandel, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, LXXVII CAL. L. REV., 537 (1989).

[41] *Supra*, note 26, para 503.

[42] *Id*.

Communitarians' attack on the unencumbered self wholly devoid of its preferences and positions in society can be and should be appreciated upto the extent that it reserves the place for abstract self to make a choice independent of its encumbrances in society; the argument that most communitarians have agreed to. Sandel thinks that self is not completely defined by a particular society. He refers to 'the capacity of the self through reflection to participate in the constitution of its identity'[43]. As a 'self-interpreting being, I am able to reflect on my history and in this sense to distance myself from it, but the distance is always precarious and provisional'[44]. The 'attitude of mind' basic to a theory of justice is respect for 'those deeper opinions that are the reflections in individual minds, shaped also by individual thought, of the social meanings that constitute our common life'.[45] It emphasizes that although people cannot escape social ties, they can critically evaluate shared understandings.[46]

We therefore argue for intrastate autonomy of indigenous peoples, with right of self-governance so that these groups can better bargain themselves the claims and conditions of survival, cultural protection and protection against exploitation. A non-paternalistic protection to indigenous peoples from the disruption of losing their customary law without losing the core ideas of the universal morality like abolition of slavery, manslaughter, indiscriminate deforestation should be kept intact.

While attempting to reconcile cultural relativism and moral universalism two possible ways can be opted. First is 'weak cultural relativism'- in which certain core human values despite the undeniable and multifarious variations should remain immune to the relativist tendencies to keep intact the universal basic human rights but the inevitable relativity of human nature should be kept in mind; thus, incorporating the basic cross cultural human values within human rights framework, but the cultural context should be the decisive factor in making ethical choices and in resolving conflicting rights.[47] Second is 'value pluralism'- it is the affirmation that there are many distinct values which are not manifestations of one supreme value. The different values may be equally correct and fundamental.[48] It implies respect for different moral values originating from different cultural contexts but does not considers culture as decisive factor in decision making. It is the latter which I assert can be a better instrument for protection of minority rights

---

[43] *Supra*, note 6 at 144.

[44] *Id*., at 179.

[45] Michael Walzer, SPHERES OF JUSTICE, 320 (1983).

[46] *Supra*, note 7, at 645.

[47] *Supra*, note 17, at 401.

[48] Massimo Iovane, *The Universality of Human Rights and the International Protection of Cultural Diversity: Some Theoretical and Practical Considerations*, XIV INT'L J. MINORITY & GRP. RTS., 237 (2007).

and policy making towards this cause. This position can be best explained in the words of D.Y. Chandrachud J. (in his judgment)

> 'The Constitution has been adopted for a society of *plural* cultures and if its provisions are any indication, it is evident that the text does not pursue either a religious theocracy or a dominant ideology.'[49]

Projects like UCC thus, should be based on participatory approach incorporating the best practices and human values across all the cultures and groups where the basic human rights of dignity and freedom of religious conscience remain protected. While the aim is to promote equality and fairness, the impact on minority rights and cultural identities remains a contentious and sensitive issue, requiring careful consideration of both universal principles and cultural contexts.

Sexual orientation is integral to the identity of the members of the LGBT communities. It is intrinsic to their dignity, inseparable from their autonomy and at the heart of their privacy. The moral conception of heterosexual relations cannot sustain without acknowledging the ground realities of homosexual orientation. The dialectics of conceptualism and realism simply fails to entertain the cause and effect relationship between the two modes of theorizing human rights. The idea cannot be divorced from the fact nor can the fact be severed completely from the idea. The conceptual morality of sexual relations should take note of the possibilities and existence of relationships that do not within the pigeon holes of 'heteronormativity' or the 'existing morality'.

Homosexual rights protection should not be based solely on the principles of autonomy which has been the traditional approach of Indian judiciary so far:

> 'Section 377 is founded on moral notions which are an anathema to a constitutional order in which liberty must trump over stereotypes and prevail over the mainstreaming of culture.'[50]

It should appreciate the claims of morality in society so as to ascertain the place of homosexuality within the society for its societal acceptance and to bring homosexual rights at par with other fundamental rights. The aim is not only to give a legal or formal recognition but an acceptance that has passed the tests of 'minimum morality' as well as 'constitutional morality'.

It is pertinent to note and perhaps more important to conclude here that any dichotomy emanates from the failures to appreciate the tendencies of harmonious existence and gradual adaptation of each other's core values. The same is true for the dichotomy of universals and particulars which now even do not seem a dichotomy but a voyage of tussle and harmony between the two competing claims resting on these two philosophical pillars of human rights. However, the harmony

---

[49] *Supra*, note 18, at para 188.

[50] *Id*., at para 500.

seems no easy venture, for it needs a serious legislative intent and a committed judicial scrutiny to balance these two principal notions. Moreover, democratic values of informed and participatory decision making should be major instruments in devising any legal or policy instrument that balances the two. Participation and not mere inclusivity is what needed. Finally, the strength of human rights does not lie in their peculiarity with any philosophical or ideological notions but in an exquisite blend of all principal philosophical foundations of human rights.