

Judicial Recognition of Fundamental Rights: Human Security Considerations

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The Human Security Concept

Four Freedoms:

- Freedom of Religion
- Freedom of Speech
- Freedom from Want
- Freedom from Fear

Aspects of the Rule of Law

- Accessibility
- Just Laws
- Open Government
- Accessible and Impartial Dispute Resolution

Just / Unjust laws

The Rev. Dr. Martin Luther King Jr., in his famous “Letter from the Birmingham Jail,” wrote, “How does one determine whether a law is just or unjust? A just law is a man-made code that squares with the moral law or the law of God. An unjust law is a code that is out of harmony with the moral law. To put it in the terms of St. Thomas Aquinas: An unjust law is a human law that is not rooted in eternal law and natural law.”

Just / Unjust laws

“Law is something more than mere will exerted as an act of power... Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude... Notwithstanding the representative character of our political institutions.”

- Justice Matthews, in *Hurtado v. California*, 110 U.S. 516 (1884)

The Object of Government

“The object and the end of all Government is to promote the happiness and prosperity of the community by which it is established, and it can never be assumed that the Government intended to diminish its power of accomplishing the end for which it was created While the rights of private property are sacredly guarded, we must not forget that the community also have rights, and that the happiness and wellbeing of every citizen depends on their faithful preservation.”

- Justice Taney, in *Charles River Bridge*, 36 U.S. 420 (1837)

General Principles of Law and Reason

“There are certain vital principles in our free republican governments which will determine and overrule an apparent and flagrant abuse of legislative power, as to authorize manifest injustice by positive law or to take away that security for personal liberty or private property for the protection whereof the government was established. An act of the legislature (for I cannot call it a law) contrary to the great first principles of the social compact cannot be considered a rightful exercise of legislative authority. . . . [T]he general principles of law and reason forbid them.”

- Justice Chase, in *Calder v. Bull*, 3 U.S. 386 (1798)

The Reason and Nature of Things

“I do not hesitate to declare that a State does not possess the power of revoking its own grants. But I do it on a general principle, on the reason and nature of things: a principle which will impose laws even on the deity.”

- Justice Johnson, concurring in *Fletcher v. Peck*, 10 U.S. 87 (1810)

The Declaration of Independence

Laws of Nature and of Nature's God

We hold these truths to be self-evident . . .

- Created equal
- Endowed by their Creator with certain unalienable rights . . . Life, liberty, and the pursuit of happiness
- To secure these rights, governments are instituted

- Deriving their just powers from the consent of the governed
- Right to alter or abolish
- Effect their safety and happiness

Mason / Jefferson

“All men are born equally free and independent”

- “All men are created equal”

Men “have certain inherent natural rights, of which they cannot, by any compact, deprive or divest their posterity”

- Unalienable rights

Mason / Jefferson

“among which are the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety”

- Life, liberty, and the pursuit of happiness

Lincoln on the Declaration

The founders meant “simply to declare the right so that the enforcement of it might follow as fast as circumstances should permit. They meant to set up a standard maxim for free society, which should be familiar to all, and revered by all; constantly looked to, and constantly labored for, and even though never perfectly attained, constantly approximated, and thereby constantly spreading and deepening its influence, and augmenting the happiness and value of life to all people of all colors everywhere.”

Due Process

Amendment V: “No person shall be ... deprived of life, liberty, or property, without due process of law”

Amendment XIV; “No State shall ...deprive any person of life, liberty, or property, without due process of law.”

Identifying Fundamental Rights for the Purpose of Selective Incorporation

Twining (1908) – “immutable principles of justice which inhere in the very idea of free government”

Snyder (1934) – “so rooted in the traditions and conscience of our people as to be ranked as fundamental”

Palko (1937) – “the very essence of a scheme of ordered liberty”

Duncan (1968) – can “a civilized system [be] imagined that would not accord the particular protection”

McDonald (2010) – historical analysis of the importance of the claimed right

Life, Liberty, and Property

Liberty – “By the term “liberty,” as used in the [14th Amendment], something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such a manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give them their highest enjoyment.”

- Justice Field, dissenting in *Munn v. Illinois*, 94 U.S. 113 (1877)

Life, Liberty, and Property

Liberty – “The liberty mentioned in [the 14th] amendment means, not only the right of the citizen to be free from the mere physical restraint of his person, as by incarceration, but the term is deemed to embrace the right of the citizen to be free in the employment of all his faculties; to be free to use them in all lawful ways; to live and work where he will; to earn his livelihood by any lawful calling; to pursue any livelihood or avocation . . .”

- Justice Peckham, in *Allgeyer v. Louisiana*, 165 U.S. 578 (1897)

Life, Liberty, and Property

Liberty – “not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of [her] own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men [and women].”

- Justice McReynolds, in *Meyer v. Nebraska* (1923)

Limitations

“... when private property is ‘affected with a public interest, it ceases to be *juris privati* only.’... When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good ...”

- Justice Waite, in *Munn v. Illinois*, 94 U.S. 113 (1877)

Limitations

“The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others, which has been a shibboleth for some well known writers, is interfered with by [many laws]... a constitution is not intended to embody a particular economic theory, whether of paternalism ... or of *laissez faire*. It is made for people of fundamentally differing views ...”

- Justice Holmes, dissenting in *Lochner v. New York*, 198 U.S. 45 (1905)

Limitations

“In prohibiting that deprivation [of liberty] the Constitution does not recognize an absolute and uncontrollable liberty. Liberty in each of its phases has its history and connotation. But the liberty safeguarded is liberty in a social organization which requires the protection of law against the evils which menace the health, safety, morals and welfare of the people.”

- Chief Justice Hughes, in *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937)

Limitations

“I like my privacy as well as the next one, but I am nevertheless compelled to admit that government has a right to invade it unless prohibited by some specific constitutional provision.”

- Justice Black, dissenting in *Griswold v. Connecticut*, 381 U.S. 479 (1965)

Police Power

“... which are nothing more or less than the powers of government inherent in every sovereignty, ... that is to say, ... the power to govern men and things ... when such regulation becomes necessary for the public good.”

- Chief Justice Waite, in *Munn v. Illinois*, 94 U.S. 113 (1877)

Police Power

“Many attempts have been made in this court and elsewhere to define the police power, but never with entire success. It is always easier to determine whether a particular case comes within the general scope of the power, than to give an abstract definition of the power itself which will be in all respects accurate. No one denies, however, that it extends to all matters affecting the public health or the public morals.”

- Chief Justice Waite, in *Stone v. Mississippi*, 101 U.S. 814 (1880)

Resort to the Polls

“For protection against abuses by legislatures the people must resort to the polls, not to the courts.”

- Chief Justice Waite, in *Munn v. Illinois*, 94 U.S. 113 (1877)

Procedural / Substantive Due Process

Procedural Due Process: basic fair procedures

- Notice
- Opportunity to be heard
- Neutral decision maker

Substantive Due Process: laws must be fair and reasonable and further a legitimate governmental objective (in addition to specific constitutional protections)

- Prohibit the government from imposing unjust and arbitrary laws
- Economic liberties
- Other liberties – Privacy

Libertarianism

Libertarian wants the smallest, least intrusive government consistent with the maximum freedom for each individual to follow his own ways, as long as he doesn't interfere with someone else's freedom.

Robert Nozick - Anarchy, State and Utopia (1974)

“Only a minimal state, limited to enforcing contracts and protecting people from force, theft, and fraud, is justified.”

“Any more extensive state violates persons’ rights not to be forced to do certain things, and is unjustified.”

The *Lochner* Case

Lochner, the owner of a NY bakery, challenged a New York law that limited employees of bakeries to no more than 10 hours per day, and 60 hours of work per week

Lochner argued for freedom of contract and property rights

The court agreed with Lochner

Holmes’ dissent in *Lochner*

“A constitution is not intended to embody a particular economic theory, whether of paternalism ... or of *laissez faire*.

“It is made for people of fundamentally differing views ...”

Substantive Due Process

In the modern era, the Supreme Court for the most part has rejected substantive due process as it applies to laws governing economic relationships.

But it uses it to justify the protection of certain civil liberties, such as the right to privacy.