

● EXISTENTIALISM AND CONTEMPORARY LEGAL PHILOSOPHY



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Abstract

Life and its related dimension are part of human thinking. To make life more dignified and respectful is the essence of existentialism. Man is the measure of everything in society. Law and life can be understood in light of existentialism. Human consciousness is empirical and realistic. Expression of life is subjected to mind and matter, body and soul, faith, and reason and freedom and necessity. Man is an end or object in itself, depending upon the arrangement of the social, economic, and political systems. Law is for the improvement of human happiness. Freedom is the index of human happiness and human growth.

Key words

Human Life, Existentialism, Legal Philosophy

1. Introduction

Law should be made for the sake of man, not man is for the sake of the law³. *Eudemonia, hedonism, the law of nature, eternal law, dasein, logical positivism, realism empiricism, and rationalism* are the dimensions of legal philosophies which think about the improvement in human happiness. Human happiness, human freedom, and human justice is more important for human existence. Human being is not object in himself but it is end himself. Human pain, suffering, rights, moralities and sensitivities are the base of existentialism. Existence of law is depending on the respect for life. Existentialism is also about the human freedom, liberty and enjoyment of rights. Human happiness and improvement in human freedom and dignity and human respect is the primary function of this philosophy. Human mind is the creation of rationalism, impression, naturalism, realistic and transcendentalism⁴. Respect for life and meaningful life is the basic features of existentialism. Idea has the power to change the mind and human being can be changed on the reception of ideas. Modern legal philosophy is human centric, which emphasis on human development, humane freedom and enjoyment of life with respect

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³George Lukas History and Human Consciousness Studies in Marxist Dialectic p 195 (Aakar Publication 2016)

⁴Transcendentalism is an American literary, philosophical, religious, and political movement of the early nineteenth century, centered around Ralph Waldo Emerson; Goodman, Russell, "Transcendentalism", The Stanford Encyclopedia of Philosophy (Winter 2019 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/win2019/entries/transcendentalism/>>.last visited on 18thMay, 2021

and dignity. This is also essence of existentialism. "Existence precedes essence" is the famous quotation by Sartre⁵. Human existence, human needs and human freedom are deciding factors for human essence. Contemporary legal philosophy is dominated by existentialism. Human existence is everything. Existence will decide the essence. Social context adjudication and pragmatism and realism are the creation of this philosophy. Existentialism is influenced by the writing of Soren Kierkegaard, Karl Jasper, Sartre, Albert Camus Kafka and Martin Heidegger. Justice V.R Krishna has rightly pointed,

*Perhaps, I have failed but some failures are higher than success, some defeats are nobler than victory. I am small man in his sombre evening but struggle for human justice through human law must continue*⁶.

2. Existentialism and Human Life

Social insecurity is the stimulus of social unrest in the society. In the ear of modern capitalism, every human being is lacking the time and busy with the worldly things. In other words, it can be said that modern society is timeless and spaceless society. Expression of life and condition of life and way of life are basic of mental, social and political discourse. Human being is the essence of humanity and mankind. Conditions of life and thoughts are the main component of legal consciousness. Man is time binding creation. Life is all about the value system. Human sensitivity and human sensibilities are the base of human life. Man is for man. Social solidarity, economic solidarity are the essence and existence of the society. Renaissance, reformation and positivism are for improvement of human happiness and human prosperity. Life, liberty and property are main component of law and its philosophies. Law is consisting of rights, duties, state and sovereign power of state. Law can never against the reason. Morality is science of good and evil. But all these concept, doctrine and principles cannot be ignored and avoided by human being. Law has influenced the human life directly or indirectly in term of right, duties, liabilities and obligations. Human life is the precious for every philosophical thinking, it's analysis and investigation. Many ideas, thoughts and philosophy are tried to redefine the human life. New modes of life are also developed whether it is industrialization, post industrialization and postmodern society. Human happiness, peace and security are the essence and existence of any law in the society.

Bentham has rightly pointed out that, "*Rights are the fruits of law and of the law alone, there is no right without law, no right contrary to law, no right anterior to law*"⁷. Human Being are mainly participatory in the senseless interactions in the world. This leads his distraction from basic phenomenon of life. These distractions always give rise to a question on the human existence. Life with meaning has the essence in human society. With the shaping of life, society can be shaped⁸. But on other hand, Man can feel as an alien or stranger in a universe, when suddenly divested of illusions and lights⁹.

⁵Sartre, Being and Nothingness 97 (Routledge Publication, 2003).

⁶VR Krishna Iyer A random Miscellony Legal and other p 2 (People Publishing House 1984)

⁷Bentham, The Theory of Legislation 53 (Lexis Nexis, 2013).

⁸Albert Camus, The Myth of Sisyphus p 5 (Penguin Books, 2005)

⁹Ibid.



Existentialism is all about the relationship between man and his life, how he enjoyed the life and what is the role of different institutions in enhancing the meaning of life. These institutions whether it legal, social, political and economic are not independent from this philosophy and these institutions are tried to enhance the life in more meaningful way. Every person has the choice in the society to lead the life in his own way. Life has the kindness, compassion, pity, ethics and values as the human basic instinct. Life has its own parameters and sometimes these parameters are beyond the defined pattern of life. Life is regulated by experience. It is not based on logic and defined essence of principles. Here existence would define any essence and its logic in human life. Life is the reflection of human existence. Law also defines the relationship between man and life. Although life cannot be defined, what is meaning of life it is difficult to define. Integrity has no need of rules. Everything is permitted does not mean that nothing is forbidden¹⁰. Life will serve another life. The Expression begins, where thoughts end. The success of thoughts and thinking is depending on the learning process which is derived from the thoughts. Like other things, philosophy is manifestation of minds or the societies that gave them birth¹¹.

Sartre has rightly pointed out that freedom is the foundation of all values¹². Existentialism has been described as a philosophy for living¹³. Law is for human; human is not for law. This is basic relationship between existentialism and genesis of law in the society. Existence precedes the essence. Human existence speaks many things. Existence is the base of existentialism in the society. In the society, existentialism is the philosophy relating to the essence and existence of human being, where the human being is free in public and private spheres. Legal philosophy also talks about the human existence, which regulate the human action in the society. Existence of human being is the main cause for the development of law. Kindness, compassion does not belong to any system. These are the natural instinct of human being. Existence is always deciding the essence. This principle can apply on material conditions of the society. Law is also a reflection of the society. Law is not beyond the human existence. Law is for the innocent enjoyment of rights. Law is for human peace, liberty and freedom. Always there is law behind law, law of law and law beyond law. There are two dimension of philosophy, first dimension of philosophy is talking about the things and second is about the ideas. But where is the human being in these two schools of thinking that is basic question of Existentialism. Existentialism is human centric philosophy which discuss about the freedom of individual in public and private sphere, it also talks about the autonomy of human being. Law is for man; man is not for law. Sensitivity is the power behind the law. Law is as broader as human life. Law has to serve the society. And man is not here to the servant of the concepts but concepts are here to serve the life.

¹⁰Id at 65

¹¹Monroe C. Beardsley, *The European Philosophers From Descartes to Nietzsche* xiii(The Modern Library, New York)

¹²David C. Cooper *Existentialism* 175 (Blackwell Publishers1999)

¹³Id., at 173.

"Existentialism", is defined as the philosophical theory which deals with human existence and human freedom¹⁴. It is the philosophical thinking which is based on human autonomy. Major philosophers identified as existentialists were Karl Jaspers, Martin Heidegger, and Martin Buber in Germany, Jean Wahl and Gabriel Marcel in France, the Spaniards José Ortega y Gasset and Miguel de Unamuno, Russians Nikolai Berdyaev and Lev Shestov.¹⁵

3. Legal Positivism and Existentialism

The concept of justice is rationalistic, empiricist positivistic and existentialistic in nature. Social sense of justice is based on morality of the society. Social sense of justice is part of social process. It is no independent from the given society. Sense of justice is very related to the social theory. Family, social institution, political institution, economic institution are the elements which creates the social sense of justice. Existentialism is human specific philosophy where the human being is free in public and private sphere to enjoy the life. Existentialism takes its name from a philosophical reference to human existence. Law as social fact. Hartian's concept of law is the combination of primary or secondary rules. Law regulates the society. Law is the tool of social transformation, social change and social control. Law and society are the main concern of jurisprudential understanding of law. Justice is the favorite virtue of human civilization as discussed by the John Rawls. After Second World War lot of literature was written on the concept of justice and its development in the society. The idea of logical positivism was developed during 1920 and in 1930 with the sense of logical empiricism. Logical positivism was the essence of practicality of law in the society. Human needs and human beings both are essential for the logical positivism. Law is deeply rooted in the concept of justice. Behavior of law is to there to promote the justice-based society. Justice is the reflection of law and law is the reflection of justice. Justice is the part of structure, system and structuration of society. Justice is the combination of materialistic and idealistic approach of philosophy. Idea of justice always promotes the idea of human right, human dignity and human freedom. Satisfaction of human life is the purpose of justice-based society. Law and its related principles can be analyzed on the basis of justice-based society. Human happiness and human welfare are the part and parcel of justice-oriented society. Justice has metaphysical, transcendental and more over sometimes, it is also deontological in nature. Justice has the cultural, emotional and psychological dimensions. Justice is natural, positivistic, historical, sociological and realistic in nature. Judicial realism is the reinterpretation of law in form of justice. Behavior of law is the reflection of justice. Transparency, accountability and good governance are the basic feature of justice-based society. Justice has the social, realistic and philosophical meaning. Justice is distributive in nature and it is the social construction.

As per writing of Jeremy Bentham, legislation is the most appropriate method of social change and social transformation. Positivism is based on empiricism and rationalism

¹⁴Crowell, Steven, "Existentialism", The Stanford Encyclopedia of Philosophy (Summer 2020 Edition), Edward N. Zalta (ed.), available at <https://plato.stanford.edu/archives/sum2020/entries/existentialism/>. Last visited on 1st March, 2021

¹⁵Ibid



There are two types of law that is natural law and positive law or divine law and human law. Law is the highest achievement of human civilization. Positivism was influenced by the writing of Hobbes, Bentham, John Austin, Kelson, Comte and H.L.A Hart

4. International law and Human Existence

Existentialism is core principle in various International and National Legal document. The U.N. Charter set forth the main goal of acknowledging the fundamental right of existence of all human beings. It was passed with the sole moto of enhancing human rights and basic freedoms, so that everyone can live with dignity¹⁶. In the year 1948, UDHR was adopted which is also based upon the equalitarian existentialism¹⁷. The acknowledgement of the due existence of the elderly people is given in U.N. General Assembly Resolution of 1991. U N. has asserts on States to include the principle of independence, self fulfilment and participation in their different National Programme in order to protect the rights of elderly people¹⁸. All these principles aimed, to secure the sense of existence of the elderly people alive, so that they can enjoy their lives to the fullest. Similar provisions are also there for women. She is entitled to participate in decision making in both political and public life. Her existence is acknowledged and as well as her right to vote, contest election as well as part of any public office is also acknowledged and provided¹⁹. State parties are also directed to ensure non-discrimination towards the women, in representation in their govt at international level as well as in participation in work of International Institutions²⁰. Even efforts are made for acknowledging the due existence of women, by specifying a specific goal on gender equality as well as their upliftment²¹. Similar provisions ensuring the existence of women is provided by UNSC Resolution 1325 (2000) also. Her existence in Family life is also acknowledged by the Convention on the Elimination of All Forms of Discrimination against Women, by providing her right to actively participate with her spouse to plan her family, spacing between the children²². One more provision of this Convention which ensures her education right so that she can be participate in decision making at various aspects of her life is embodied in Article 10. The right of existence of the child is also acknowledged under Convention on the Rights of the Child. Its Article 6 is encompassing the existence right of every child. So, states are regulated to took all necessary steps for maximizing the survival and sustainable growth of child²³.

Existentialism is the core mandate of International Humanitarian Law also. It is mainly concerned with preservation of human existence by regulating the tactics used in

¹⁶Article 1 , the Charter of United Nations 1945.

¹⁷Article 1, Universal Declaration of Human Rights

¹⁸United Nations Principles for Older Persons Adopted by General Assembly resolution 46/91 of 16 December 1991, available at <https://www.ohchr.org/en/professionalinterest/pages/olderpersons.aspx#:~:text=Adopted%20by%20General%20Assembly%20resolution%2046%2F91%20of%2016%20December%201991&text=1,2.>

¹⁹Article 7, Convention on the Elimination of All Forms of Discrimination against Women.

²⁰Id at Article 8.

²¹Goal3, United Nations Millennium Development Goals

²²Article 16, Convention on the Elimination of All Forms of Discrimination against Women

²³Article 6, Convention of the Right of the Child

armed rebellions so that the causalities and destruction of property is very less. Its main instrument is Geneva Conventions as well as ENMOD. Additional Protocol I of Geneva Convention prohibits the indiscriminate attacks on humans, the combatants are only allowed to attack military objectives²⁴. It also provide for the protection of the biological component of the environment, which are the key factor for existence of human being²⁵. The Additional Protocol II of Geneva Convention is emphasizing on the protection of human existence. It provides a mandate for securing the things which are essential for the existence of human.²⁶ One more article of this Protocol, emphasizes on the safeguarding of all the installations containing dangerous forces²⁷. Similarly the ENMOD is also revolving around the human existentialism. It banned the Environment Alteration Phenomenon as a method of hostility, so that a great long-lasting loss do not occur to the environment which question the survival of human existence²⁸. The human existentialism is acknowledged as a right in different International Instruments. Mechanism for the Enforceability of its violation is also enclosed in Rome Statute of International Criminal Court. The violation of right of human existence in the form of Crime of Genocide²⁹, Crimes against Humanity³⁰, War Crimes³¹, Crime of Aggression is executed under this³².

The principle 1 of Rio Declaration is also acknowledging the principle of Existentialism where they are declared as epicenter of sustainability³³. Stockholm Declaration also mandates the preservation of resources for ensuring the existence of present generation as well as future generation³⁴. The principle 11 of the World Charter for Nature also put a complete ban on the activities which can result into irreversible degradation to the nature so that human existence can be preserved³⁵. There are many other International instruments are adopted to secure the protection of environment so that existence of human can be secured such as, "The Chemical Weapon Convention Act 2000, UN Declaration on the Rights of Indigenous Peoples, International Convention for the

²⁴Article 36, Additional Protocol II to The Geneva Convention.

²⁵Id at Article 55

²⁶Article 14, Additional Protocol II, Geneva Convention.

²⁷Id., at Article 15

²⁸Article 1, UN Convention on the Prohibition of Military or any Other Use of Environment Modification Techniques (ENMOD Convention, 1976) available at

²⁹Article 6, Rome Statute of International Criminal Court, available at <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

³⁰Article 7, Rome Statute defines Crime against Humanity; Rome Statute of International Criminal Court available at <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

³¹Article 8 defines War Crimes; Rome Statute of International Criminal Court available at <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

³²Article 5, Rome Statute of International Criminal Court available at <https://www.icc-cpi.int/resource-library/documents/rs-eng.pdf>

³³Principle 1, 2 and 24 of Rio Declaration, available at https://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_CONF.151_26_Vol.I_Declaration.pdf

³⁴Principle 2, 3, 4, 5 and 21, Stockholm Declaration, available at https://legal.un.org/avl/pdf/ha/dunche/dunche_e.pdf

³⁵World Charter for Nature, available at <https://digitallibrary.un.org/record/39295?ln=en>



Prevention of Pollution of the Sea by Oil, 1954, Vienna Convention on Civil Liability for Nuclear Damage, Non- Proliferation Treaty, Convention of the Prevention of Marine Pollution by Dumping of Wastes and Other Matter , Convention on the Protection of the World Cultural and Natural Heritage, The Convention on the Prohibition of the Development , Production and Stockpiling of Bacteriological and Toxic Weapons and their Destruction, etc.

Even if the person is a criminal, due regard is given in the criminal justice system to its dignity. Even in sentencing also due regard is given to its individuality. Article 14 of ICCPR obliges that every person against whom the criminal charges has been framed must be treated due regard to his dignity. He must be provided with legal assistance also, if needed. Must be treated and considered as innocent until the charges against him has been proved. The dignity of suspects and defendants should not be given due regard even during investigation. They should be treated with degraded treatment for extracting confession or evidences. So, all provisions of this international instrument are also giving due regards to the right of existence of even suspects³⁶.

With the advancement in society and effect of various social movements regarding the transgender rights, now the existence of the transgenders is also acknowledged and various countries has added new piece of legislations providing them equal rights as that of others. India is also one of the countries which has passed such legislation for transgenders. This piece of legislation embodied various principles suggested by expert panel at International Level on sexual orientation and gender identity³⁷. They have proposed various rights such as : "The Right to the Universal Enjoyment of Human Rights, The Rights to Equality and Non-Discrimination, The Right to Recognition before the Law, The Right to Life , The Right to Security of the Person, The Right to Privacy, The Right to Freedom from Arbitrary Deprivation of Liberty, The Right to a Fair Trial , The Right to Treatment with Humanity while in Detention, The Right to Freedom from Torture and Cruel, Inhuman or Degrading Treatment or Punishment ,The Right to Protection from all Forms of Exploitation, Sale and Trafficking of Human Beings, The Right to Work , The Right to Social Security and to Other Social Protection Measures, The Right to an Adequate Standard of Living ,The Right to Adequate Housing ,The Right to Education, The Right to the Highest Attainable Standard of Health, Protection from Medical Abuses, The Right to Freedom of Opinion and Expression, The Right to Freedom of Peaceful Assembly and Association , The Right to Freedom of Thought, Conscience and Religion, The Right to Freedom of Movement, The Right to Seek Asylum, The Right to Found a Family, The Right to Participate in Public Life, The Right to Participate in Cultural Life , The Right to Promote Human Rights, The Right to Effective Remedies and Redress"³⁸. The Transgender Persons (Protection of Rights) Act, 2019 enacted by India has acknowledged the right to choose their identity of transgenders³⁹. Transgenders can

³⁶Article 14 of ICCPR available at <https://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx>

³⁷THE YOGYAKARTA PRINCIPLES, Principles on the application of international human rights law in relation to sexual orientation and gender identity available at <https://www.refworld.org/pdfid/48244e602.pdf>

³⁸Ibid.

³⁹Section 4, THE TRANSGENDER PERSONS (PROTECTION OF RIGHTS) ACT, 2019 available at <http://socialjustice.nic.in/writereaddata/UploadFile/TG%20bill%20gazette.pdf>

get a legal certification regarding their recognized identity⁴⁰. Different types of obligations are imparted on the State to provide equal treatment to the transgenders in occupational opportunities, educational avenues etc⁴¹.

5. Conclusion

In order to create the social stability law is necessary. This was the mandate of social contract thinking in 16th and 17th centuries. Law creates the social cohesiveness and where every person is dignified member of the society and State is the important part of human thinking, state is indispensable context of human thinking and planning. Art of living together is the essence of law. Later part of nineteenth century or after second world war, legal philosophies are influenced by welfarism, human centric jurisprudence and realistic application of law. Internationalization of human rights is another example of human centric jurisprudence. Now in contemporary societies, law is an instrument of social engineering. Law is functional in nature. Legal philosophy covered basic three things, that is State of nature, nature of law and law of nature. Every human being is the dignified member of the society. Acknowledgement of other's right without any prejudice is essence of existentialism. Human being is absolutely free in public and private sphere of their life to enjoy his or her life. Human life cannot be regulated by procedure and technicalities of law apart from these things compassion, kindness, empathy, sympathy is regulating it. Decline of social and community attachment is not good for any society. Life is all about the value system. Existentialism is also about the human freedom, liberty and enjoyment of rights. Human happiness and improvement in human freedom and dignity and human respect is the primary function of this philosophy. Human mind is the creation of rationalism, impression, naturalism, realistic and transcendentalism⁴². Respect for life and meaningful life is the basic features of existentialism. Idea has the power to change the mind and human being can be changed on the reception of ideas. Over grown society, over grown institutions overgrown education are also influenced the society in different way. Human being is the base of humanity and he cannot be ignored and disrespected at any cost.

⁴⁰Id., at Section 5, 6.

⁴¹Id., at Chapter V and VI.

⁴²Transcendentalism is an American literary, philosophical, religious, and political movement of the early nineteenth century, centered around Ralph Waldo Emerson; Goodman, Russell, "Transcendentalism", The Stanford Encyclopedia of Philosophy (Winter 2019 Edition), Edward N. Zalta (ed.), URL = <<https://plato.stanford.edu/archives/win2019/entries/transcendentalism/>>.