THE EVOLUTION OF THE CONCEPTION OF ‘RIGHTS’

( Legal Rights, Human Rights and Right to Health)

We all are shouting for our “rights”, for our “civil rights”, for “freedom “or for “liberty”. For what ones? For what? Our contract, judicial interpretations, governments, statutes and our constitutions are founded upon the strong rock of rights. The Proclamation of Independence of America, French Revolution and Great World Wars are the consequences of the conflicts of rights.

The concept of right is as old as the world, and it is often said we cannot think of a world without rights, whatever it might be good and virtue but it would become morally insolvent. Right is something, which arises from the obligation; it is something, which imposes a constraint, whether by way of forbearance, acquiescence or active support, on the people. The US Constitution declares, “No State shall deprive citizens of the US of their ‘privileges and immunities’. Does anyone know what these words mean? Founding fathers did not. They may have in their own minds identified them with ‘rights and ‘privileges’. The preamble to the Constitution of India stresses on the ‘rights’ but there is no explanation in the Constitution. Any uncertainty, ambiguity, litigation, civil conflict and even war can be resolved with the analysis of rights. The concept of rights help to the maintenance of legal, political, social, economic, cultural and educational status quo.

2.1. Historical perspectives:
2.1.1. Origins in Greek philosophy: The celebrated Greek philosophers Socrates, Plato and Aristotle treat the social control as a whole, by the concept of justice as a

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2 Joel Feinberg, defines right as ‘something which a man stand on, something which can be demanded or insisted upon without apprehension, embarrassment or shame’, Duties rights and Claims American Philosophy Quarterly 1966 (3), p. 136.
4 Amendment XIV of the Constitution of the United States of America and Articles 14 and 21of the Constitution of India.
5 Supra Note 2.
7 Plato, the Republic (translated) by Lindsay, AD, Everyman’s Library 1950, Book I, p.338.
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virtue rather than by the law. They had the idea of duty i.e. legally established moral
duty. Plato uses the idea of duty in terms of distribution of labor and Aristotle uses
for legal justice. Later, by usage, Latin word ‘Jus’ came to be recognized as there was
no clear idea of a right.

2.1.2. Origins in Roman Procedure: The Roman literatures distinguish actions in
rem and actions in personam. This distinction is corresponding to the modern
classification of rights in rem and in personam based on remedies. The term ‘jus’
which means in translation ‘law’ or ‘right’ has a great variety of meanings. At
least ten deserves to be mentioned. Yet there is no clear differentiation and no clear
conception of a right.

2.1.3. Jus in from twelfth to the sixteen century: Although there is little advance in
the Roman literature, there is no clear conception of a right. In the sixteenth century a
distinction is drawn between jus as “right” and jus as “what is right backed by law”.

2.1.4. Rectum, right, in medieval law: In medieval law Latin ‘rectum’ is used as
equivalent to jus in most its meanings, tending to become “that which is right applied
to the case”. It is often used as a synonym of juticia e.g., Magna Carta 1215.

2.1.5. Natural Rights: the transition from natural law to natural rights: The idea
of natural rights has its origin in the natural law and natural law speaks of natural
rights. Although Greek thinkers Socrates, Plato, and Aristotle did not use the
word ‘natural rights’, devoted their work on the concepts of ‘natural justice’,

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11 a) what is just and right, in reason, in morals, in ethical custom; b) law- what is legally established as
right and just; c) law or a legal precept; d) legal institution-rightful or customary institution legally
recognized or established; e) presence of magistrate- where right and justice are administered; f) political
capacity e.g., jus honorum; g) authority- legally backed customary or moral authority; h) power- a legally backed moral or customary power; i) a liberty- rightful liberty legally recognized; j) legal position-rightful position under a rule of law, legally conferred privilege. (Henri Maine, Early
12 Supra Note 9, p.60.
13 Winfield, The Chief Sources of English Legal History (1925) 262-263
15 Supra Note 6.
16 Supra Note 7.
17 Supra Note 8.
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‘equality’ and ‘non-arbitrariness’. Cicero used the law implying ‘right’ and universal and unchangeable law implies ‘natural rights’. During 16th century the concept of natural rights suffered a temporary setback by the teachings of Machiavelli who opposed the idea of natural right and supported absolute monarchy.

2.1.6. Rise of Church Authority: Gierke points out two vital principles animated in medieval thought and Thomas Aquinas believes Church as the authority to interpret divine law and support property rights and acquisition of property by man as he derives satisfaction from it which helpful in maintenance of peace and order in the society.

2.1.7. Sixteen to eighteenth century: The strong protest emerged against the spiritual order of Catholic Church as well as against the worldly order of feudalism. The common man asserted his right and rebuked the government political system, which had conferred the feudal nobility and its privileges. As a consequence, it strengthened secularism, individualistic and liberalistic forces in the political, economic and intellectual life. Hobbes and Locke had used natural law theory to develop the novel theory of the social contract.

2.1.8. Onslaught on the concept of natural right: The concept of natural rights was criticized for the following reasons:

A. As the doctrines of natural rights were recognized as inalienable, inviolable and indestructible could instigate the common people to the revolutionary actions.

B. Bentham, JS Mill, and David Hume, opposed the idea of natural rights and the social contract as vague, obscure and contrary to empirical truth.

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18 Republica (translated) Keves Loeb, CW, Classical Library, 1928, Book III
19 Lord Llyod’s Introduction to Jurisprudence, London; Sweet and Maxwell, 1984, p. 433
20 Unity, derived from god and involving one faith, one church, one empire and the supremacy of law. see Maitland, FW, Political Theories of Middle Age, Cambridge University Press, 1987, at p.9
22 Ibid.
24 For Bentham: “natural rights is simple non-sense upon stilts” or as brawling upon paper. Bentham, Anarchical Fallacies: works Vol II p. 502 cited in note 3. Rights are then the fruits of the law and of the law lone. There are no rights without law - no rights contrary to law - no rights anterior to law. Before the existence of law there might reasons for wishing that there were law and doubtless such
The dominance of analytical positivism which, divested law from morality and justice destroyed the very foundation of the natural law.\(^{28}\)

C. The concept of natural rights had also attracted the criticisms of Marxist philosophy\(^ {29} \).

2.1.9. 20\(^{th}\) Century Renaissance of the Natural Rights: The main cause for the revival of natural rights towards the end of the nineteenth and in the twentieth centuries was the failure of positivists to find answers to the problems such as the shattering effects of World Wars, the decline in standards, a growing insecurity and uncertainty that have stimulated a new quest for moral order afforded by natural law in the past\(^ {30} \). The alarming growth of totalitarian regimes, has called for the development of some new ideological control that could prevent abuse of law. In these circumstances, there has been as attempt to revive natural law and natural rights in a new from which strives to take into count, not only of the knowledge contributed by the analytical, historical and sociological approaches but also of the increasingly collectivist outlook on life. As Dr. Allen rightly pointed out, “the new natural law is value loaded, value-oriented and value conscious and is relativistic and not absolute, changing and varying and not permanent and everlasting in character. It represents revolt against the determinism of historical school on the one hand and analytical school on the other hand”\(^ {31} \).

\(^{25}\) Mill Js defends the doctrine of utilitarianism by pointing out the standard of justice should be grounded on utility. Bodenheimer Edgar Jurisprudence p. 86.

\(^{26}\) David Hume, supreme rationalist (1711 – 1776) in his Treatise of Human Nature, first published in 1739, he wrote: ‘in every system of morality, which I have hitherto met with, I have always remark’s, that author proceeds for sometime in the ordinary way of reasoning, and establishes the being of God or make observation concerning human affairs; when I am surprised to find, that instead of the usual copulations of propositions, is and is not, I meet with no proposition that not connected with an ought, or an ought not. See Harris JS. Legal Philosophies, London, Butterworths 1980 p.12.

\(^{27}\) Supra Note p 19.

\(^{28}\) Ibid.

\(^{29}\) Karl Marx viewed that political civil rights of individuals were meaningless in the absence an economic and education foundation quoted from Richie IG Natural Rights, Allan and unwin Limited P 100-102

\(^{30}\) Dias RWM, Jurisprudence, London Butterworths 4\(^{th}\) edition 1976, p 664

\(^{31}\) Allen CK, Law in the Making (1964) Oxford University Press , p 22
With a view to distinguish the new revived natural right from the old one, Rudolf Stammler called the former as “Natural law with variable content”\textsuperscript{32}. Rawls made significant contribution to revival of natural law by propounding basic principles of justice\textsuperscript{33}. In the twentieth century, the doctrine of natural rights has been recognized and inserted into the sphere of constitutional law in the form of Bill of Rights.

2.2. Theories of Rights:

There are two important theories, which are rivalry to each other. Kant\textsuperscript{34}, Hegel\textsuperscript{35}, Austin\textsuperscript{36}, uphold the will theory on the ground that the very purpose of the law is to grant the widest possible means of self-expression\textsuperscript{37}. This theory extends the doctrines of natural rights, which declare that there are certain spheres of personal life with which the State cannot legally interfere. This creates a confusion between what is and what ought to be; whether all rights are enforceable in the court of law? There are certain rights, which cannot be enforced, how does the will theory enforce such rights? It is argued that law exists to protect the individual will; it would narrow down the sphere of State. Duguit attack’s on the notion ‘right depends upon will’ by arguing that will is not the essential element in law or in the right which flows from it, for the real basis of law lies in the objective fact of social solidarity\textsuperscript{38}.

The exponents of the interest theory argue that the fundamental basis of right is ‘interest’ and not ‘will’, because persons may have rights although they have no wills\textsuperscript{39}. Ihering support this theory arguing that social interest of the society must gain priority over individual interest and the purpose of law should be to protect the

\textsuperscript{32} Supra N 27.
\textsuperscript{33} a) equality of right to securing generalized wants including basic liberties, opportunities, power and minimum means of substance and b) social and economic inequalities should be arranged so as to ensure maximum benefit to the community as a whole. John Rawls, Theory of justice, Universal Law Publishing Company Limited 2000 (reprint)
\textsuperscript{34} Kant observes that,” the freedom of man to act according to his will and ethical postulates are mutually co-relative because no ethical value is possible without man’s freedom of self-determination”. Kant, Philosophy of Law Hastie translated, Philosophy and Phenomenological Research, Vol. 23 No.1. 1962, p 46.
\textsuperscript{35} Hegel carried futher Kant’s doctrine of freedom of will. In his opinion, legal right is objective realization of the fact that the freedom of each ego is limited by like freedom of other’s ego.
\textsuperscript{36} According to Austin, right of a person means that other are obliged to do or forbear from doing something in relation to him. Right is based on the sovereign will of the state.
\textsuperscript{37} Paton, G.W. A Textbook of Jurisprudence, Oxford Univeristy Press, 4\textsuperscript{th} edition, 1972, p.287.
\textsuperscript{38} Supra Note 31 p.156.
\textsuperscript{39} Supra Note p.37.
interest of the society. Critiques point out that “Ihering had drunk deeply from the orthodox nineteenth century jurist springs. Ihering does not answer to the criticism how much way the individual interest should give to the social in the event of conflict between the two.

Dr. Allen has attempted to reconcile the two theories by pointing out that essence of a legal right is not legally guaranteed power by itself nor legally protected interest by itself, but the legally guaranteed power to realise an interest. Thus, a sound theory would be to consider both the elements of will and interest as essential ingredients of legal right.

2.3. Nature of Rights:

The noun ‘right’ is one that has variety of meanings. A common dictionary definition of it is that the standard of permitted action within a certain sphere. Accordingly, unless one is clear about the sphere of which he is speaking, however, it is absurd to argue whether a particular act is right or not. But in the sphere of jurisprudence we sometimes find bitter dispute because of reckless ambiguity in the use of the term ‘right’. Whether a particular action is right, depends upon the general principles on which a system is based. A natural law theory argues of natural rights which inherents in every human being by virtue of his personality and is inalienable and imprescriptable. From this perspective, use of the term distinguishes from a legal right. Salmond defines legal right as an interest recognized and protected by legal rules. It is an interest in respect of which there is duty and the disregard of which is wrong. If an interest is not recognized by law, it remains as de facto and de jure. Violation of such interest is no wrong and respect for it is no duty. Salmond definition leads to confusion between interest and advantage and there is no reason why the interest to be the right, it should not only be recognised but also be protected by the law. Contrarily, Austin defines, without taking into consideration the element

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40 Rudolph Von Ijering, Law as Means to an End, 1913
42 Supra 38.
44 Supra 37.

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of interest involved in the conception of right\textsuperscript{48}. The critic points out that Austin holds right, duty, sovereignty and state are necessary conceptions, presupposed logically by the very idea of the legal order\textsuperscript{49}. He derives the idea of duty from that of command, the idea of a right from that duty. The point is how Austin derives these ideas is not clear\textsuperscript{50}.

Dr. \textbf{Holland} prefers to take objective view regarding the nature of right and observes that a right is capacity of a person controlling the action of others, with the assent and assistance of the State\textsuperscript{51}. It is the force of the state which lends validity to a legal right\textsuperscript{52}. Taking more or less a similar stand, Prof. \textbf{Gray} says “a legal right is that \textit{power} which a man has to make a person or persons do or refrain from doing a certain act or certain acts so far as the power arises from society imposing a legal duty upon a person or persons”\textsuperscript{53}. Every right whether moral or legal imposes a relative duty on a party or parties other than the party in whom the right resides. This relative duty would not be a duty if it were not enforced by the State. Dr.Holland brings out the distinction between ‘right’ and ‘might’. Where a person executes his wishes by the force of the state, he is said to have legal right to carryout his wishes\textsuperscript{54}. If it is a question of might, enforcement depends upon a man’s own powers of force or persuasion. If it is question moral right, all depends on the readiness of the public opinion. If it is a question of legal right, depends upon the readiness of the state to exert its force on his behalf\textsuperscript{55}.

Thus, a moral and a legal right are not identical but opposed to one another. Moral rights generally have a subjective support and legal rights have the objective support of the physical force of the state.

\textsuperscript{48} “Party has a right when another or others are bound or obliged by law to do or forbear towards or in regards of him”. John Stuart Mill illustrates the inadequacy of Austin’s definition of right by point out when a prisoner is sentenced death the jailor is duty-bound to execute him. Then will it be proper to say that convict has a right to be changed? In fact it is only a disability imposed by law and no right at all.
\textsuperscript{49} Supra Note 9.
\textsuperscript{50} Ibid.
\textsuperscript{51} Holland, TE., The Elements of Jurisprudence, Oxford Calendon Press, 13\textsuperscript{th} edition 1924, p.82.
\textsuperscript{52} Ibid.
\textsuperscript{53} Gray, Nature and Sources of Law, Newport, Mc Millan Company 1948 2\textsuperscript{nd} edition p. 18.
\textsuperscript{54} Supra Note 51.
\textsuperscript{55} Ibid p. 87.
2.4. Meaning of the term ‘right’:

There is no more ambiguous word in legal and juristic literature than the word ‘right’. As a noun, it can be used in several senses in the legal literature. One meaning is *interest* which covers both legal and moral rights\(^{56}\) or which involves protection by law\(^{57}\). A second meaning is recognised *claim* to act or forbearances by another or all others in order to make the interest effective. Legally, interest is enforceable through the application of the force of a politically organized society or morally, by the pressure of the moral sentiment of the community or extra legal agencies of social control\(^ {58}\). A third use is to designate a *capacity* of creating, divesting or altering rights and duties. Here, the proper term is ‘power’\(^ {59}\). A fourth use is to designate certain *condition* of general or special non-interference with natural faculties of action. These are called ‘liberties’ and ‘privileges’\(^ {60}\). The ambiguity in the meaning compels to distinguish a broader sense of a ‘right’ and a narrower or stricter sense.

2.5. Analysis of Right:

The term ‘right-duty’ covers several legal relations, each with its distinct characteristics. For a moment, there are four elements in every legal right: a) the holder of the right; b) the person bound by the duty; c) the act or forbearance to which the right it relates; d) the object of the right\(^ {61}\). Every right signifies the jural relationship that exist between two or more persons namely holder of legal rights and the person bound by the legal duties. The rights and duties are correlatives, that is, there can be no right without a corresponding duty or a duty without a corresponding right\(^ {62}\). The legal right having a correlative duty is termed as legally ‘assertable-

\(^{56}\) Supra note 47.

\(^{57}\) Supra note 9.

\(^{58}\) Ibid p. 56.

\(^{59}\) Gray considers legal right as that ‘power by which a man makes other persons to do or refrain from doing a certain act by imposing a legal duty upon them through the agency of law.’ For instance, if a man lends some money to another, the right of the creditor to recover his money from the debtor is in reality, not his legal right but it is rather a power conferred on him by law by the exercise of which he recovers the debt. In other words, the creditor’s interest to get back his money from the debtor is protected by law but this interest is not a legal right itself, it is rather his ‘object’. It is the power conferred on him by law to recover the money which is his legal right. Gray, Nature and Sources of Law, p.51.

\(^{60}\) Hobbes has defined right as “right consist in liberty to do or forbear; whereas law binds to one of them” so that law and right differ as much as liberty and obligation”. Leviathan 1651 Chap.14 as cited in Roscoe Pound, Jurisprudence p. 57


\(^{62}\) Ibid.
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claim\textsuperscript{63} or right ‘in the strict sense’. It has been argued that the right-duty are correlative and two faces of the same coin\textsuperscript{64}. But the critique points out that the term right-duty was overworked and was frequently used for relationships which were not in reality the same, thus causing confusion in legal argument\textsuperscript{65}. It is also not necessary that every duty should have its corresponding right. There are, in fact, many duties to which there are no corresponding rights\textsuperscript{66}.

2.5.1. Analysis of a Right in the Wider Sense\textsuperscript{67}.

Where the juristic conceptions by which interests are recognised and protected by law, they are popularly called as ‘legal right in the strict sense’; and the conception of right in terms of powers, liberties, privileges, duties and liabilities is what is known as ‘rights in the wider sense’ or ‘Hohfeldian analysis of rights’\textsuperscript{68}. Hohfeld believes that all legal problems can be resolved with the help of following fundamental conceptions.

\begin{center}
\begin{tabular}{cccccc}
Jural Opposites: & right & privilege & power & immunity \\
No-right & duty & disability & liability \\
Jural Correlatives: & right & privilege & power & immunity \\
Duty & no-right & liability & disability \\
\end{tabular}
\end{center}

Hohfeld proceeds to elucidate his own classification of ‘jural opposites’ and ‘jural correlatives’. Glanville William makes an attempt to present these jural correlatives and opposites in the following diagram\textsuperscript{69}.

\textsuperscript{63} Supra note 9, p. 70.
\textsuperscript{64} Supra note 47, p. 299.
\textsuperscript{66} Austin, Jurisprudence Lecture xii 3\textsuperscript{rd} edition, Robert Campbell, John Murry, London, at 356.
\textsuperscript{68} Ibid.
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(The vertical arrows link jural correlatives and the diagonal arrows connect
Jural opposites and the horizontal arrows connect the jural contradictories).

‘Claim’ in the strict sense, is an interest which the law protects by imposing
duties upon other persons. It is an affirmative control over another. ‘Liberty’ means
the benefit which a person derives from the absence of legal duty imposed upon him.
In this sense, it may be called ‘freedom’ or ‘privilege’ which denotes of restraint. ‘Power’ is an ability conferred upon a person by the law to alter by his own will, the
rights, duties, liabilities or other legal relations, either of himself or of other persons\(^70\).
‘Immunity’ is an exemption from having a given legal relation changed by another.
Each species has correlatives such as duty, no-right or claim, liability and disability
respectively.

Critics take the chance to criticize the Hohfeldian analysis of legal right by
attacking that some terms used in the diagram such as the idea of ‘no-right’ or ‘no-
claim’ are not used in jurisprudence\(^71\) and in modern days people do not quest for an
all embracing catalogue or definition of the terms, instead, they prefer to the
exploration of the proposition that the meanings of these general terms will differ
according to the context in which they are used\(^72\).

Another attack contemplates that there is no convenient word to express the
correlative of power. The term ‘liability’ suggests something disadvantages which
one would seek to avoid. But Hohfeld generalises the term so as to cover a chance of
being benefited as well as of suffering loss, if X has power to make a will and his
children are liable to benefit. Similarly, the state has power to punish a criminal and

\(^70\) Supra at p. 215.
\(^71\) Harris P. Introduction to Law, Weigndenfelf and Nicolson, London p. 62.
\(^72\) Hart HLA, the Concept of Law, Quarterly Review 1954, p. 37.
he is liable to suffer the penalty. Hohfeld’s table appears to be incomplete because one may be under a liability to have legal position changed by an event beyond human control as well as by the act of another. Besides, the thesis points out that there is also lack of clarity regarding the extent to which Hohfeldian analysis is applicable in the sphere of moral rights and whether judges decide every case in terms of rights, liberties, powers and immunities. Further, there is no role of power-liability, immunity and liability in the dimension of human rights. Among four classes of rights, in individual is concerned with only right and duty.

2.5.2. Correlativity of Rights and Duties:

It is argued that rights and duties are necessarily correlative; there can be no right without a corresponding duty or a duty without corresponding right. Every right or duty involves a ‘vinculum juris’ or a bond of legal obligation by which two or more persons is bound together. In this perspective, the right is a basis of duty and vice-versa. Thus, if X has right to secure medical care in the hospital, there is duty on the part of hospital authority to extend the service with required facilities for the treatment. Right in this context appears to be relevant and appropriate since rights to receive medical service and participate in the decision-making process provide for corresponding duties on the part of health service providers.

2.6. HUMAN RIGHTS:

(If the right to health is a commercial commodity, it cannot be a human right)

Human rights is one among the most powerful concepts of the twentieth century. It has particularly acquired a central place in the post World War II period, ever since the adoption of the Universal Declaration of Human Rights in 1948. While general legitimacy and popularity of the human rights discourse has grown consistently, it has also opened up simultaneously various grey area of ambiguity. An important area of ambiguity is regarding the ‘meaning’ and the ‘origin of human rights’. Human rights do possess legal as well as non-legal dimensions. They are amenable to expression in moral or ethical terms and the obligations they often

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73 Campbell AH, 7 Cambridge Law Journal (1940) 206 at 209.
impose at moral level; they have impact upon social and cultural orders. The debate has addressed, inter alia, some questions such as is human rights essentially modern or conversely European or Western? What are the essential characteristics of human rights and in what socio and political context those characteristics emerge?

### 2.6.1. Legal Perspectives:

Human rights operate in different forms. From a legal dimension, human rights attract characteristics of legal right when it is recognised and protected by legislative means. Such rights can be exercised within the framework of the legal system. Legal rights include fundamental rights as well as statutory rights. It has been pointed that fundamental rights are the modern name for what have been traditionally known as ‘natural rights’. The doctrine of natural rights is itself an offshoot of the doctrine of natural law.

#### 2.6.1.1. From Natural Rights to Fundamental Rights:

In England, where there is an unwritten Constitution, the natural rights are called by different nomenclature as ‘civil rights’, ‘civil liberties’, freedoms or individual liberties. When natural rights are guaranteed and entrenched by a written constitution, they become fundamental right because they are guaranteed by the fundamental law.

#### 2.6.1.2. Magna Carta 1215:

The conception of human rights from the recognition of U.K. perspective may be found in Magna Carta. This great Charter promised that no civil or criminal action would be taken against any free man without sufficient

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77 Gokalnath Vs State of Punjab, 1967 SC 1643 at para 16
79 However, in international context, the expression ‘civil rights’ is used to denote rights derived from private law as opposed to public law. See 10 Y.B.H.R. 170; Halsbury, 4th edi. Vol. 18, 0.1674.
83 Hood Philips, O., Constitutional and Administrative Law, Sweet & Maxwell, 1987, P 15 and see also, Ministry of Home Affairs Vs Collins, (1979) 3 AER 21 PC.
84 Magna Carta 1215, provided “to no man will we deny, to no man will we sell or delay, justice or rights”. This famous twenty-nineth chapter of King John Charter of Liberties, or the twenty-nineth of Henry III is reissue of 1225, through which, it was mainly know, to our ancestor, as “the palladium of our liberties” cited in Lohit, D. Naikar, The Law Relating to Human Rights, New edition 2004, Puliani and Puliani, P 52.
The critics pointed out that this Great Charter was a set of baronial demands and not an assertion of the rights of all individuals. The movement of recognizing individual rights which started with Magna Carta continued through the Petition of Right 1628 and culminated in the Bill of Rights, 1689 which was enacted in the form of parliamentary statute.

2.6.1.3. Petition of Rights 1628: However, the movement of recognizing individual rights which started with Magna Carta continued through the Petition of Right 1628 and culminated in the Bill of Rights, 1689 which was enacted in the form of parliamentary statute. The Bill of Rights contributed towards the development of fundamental rights. This Bill was a part of major settlement between the Crown and Parliament and like Magna Carta it also constituted a demarcation of powers. Nonetheless, some of general principles such as prohibition of illegal and cruel punishments assumed universal significance and subsequently appeared in many instruments including UDHR.

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2.6.1.5. Act of Settlement 1701: The Act of Settlement which followed the Bill of Rights declared that ‘Rights and Liberties of the subject are the ‘birth-right of the people of England’.

2.6.1.6. Social Contract: The doctrine of natural rights, during the 17th and 18th century received further impetus with the proponents of social contract theory particularly Locke and Rousseau who attempted to trace the genesis of political society and government in the terms of social contract among the subjects, without disturbing the natural rights of men. The concept of ‘social compact’ reflects that

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86 It was the Charter of Concessions extended to feudal nobles than to the ordinary subjects. In 1222, the King Andrew II of Hungary guaranteed that no noble would be arrested or ruined without being first convicted in accordance with judicial procedure, see Sen AN “Human Rights” 1st edition 2002, Law publications, Haryana, p 16.
88 Basu DD, Select Constitutions of the World, 3rd edition 1990, MC Sarkar and Sons P.10
89 Brownlie Ian, “Basic Documents in International Law” 2nd edition 2000, Oxford University Press P.3
90 Supra Note 89.
91 John Locke theory was that, in the original state of nature, man was governed by the law of nature, but for the sake of better safety, he joined in a political society by means of ‘social compact’ for the mutual preservation of life, liberty and property. Thus, the legislature was limited by natural law; and a law made by the legislature contrary to the natural rights of the individual was invalid. Some of these natural rights were equality, liberty and property.(Government, x, 135; xiii, 149)
92 It was Rousseau who gave a kinetic impetus to the doctrine of social contract by emphasizing that the State should derive its authority from the people and guarantee the natural rights of man, of freedom and equality as they inherent in man in the state of nature. “Man is born free and everywhere he is in chains,” Rousseau, Social Contract, 1762(everyman), Li: Discourse on Inequality, pt. II
people set up the civil society and political government by virtue of social agreement in their desire of finding security to life and property. Even in such state of nature, they had retained the natural rights. But what extent theory can be relied upon is a debatable issue as the whole theory is developed on apriori rule.

The concept of natural rights finds its place in the thought of a legalist like Blackstone who draws the distinction between absolute and relative rights of persons. Though Blackstone has imported the doctrine of natural rights from the realm of political philosophy into the realm of jurisprudence, there is dichotomy in his principle that asserts: “power of parliament is absolute and without control and what parliament does no authority of earth can undo”. At the same time, he believed that “absolute rights of man shall be safeguarded by the laws made by parliament so long as the Constitution of England does not perish”.

2.6.1.7. Virginia Bill of Rights 1776: For the first time the Bill of Rights was adopted in the written constitution of the state as ‘the basis and foundation’ of the government. It was the constitution of Virginia that recognised the natural rights as bill of rights. Consequently, it inspired the makers of the American constitution to introduce the First Ten Amendment to the constitution.

2.6.1.8. American Declaration of Independence 1776: Theory of natural rights, then, entered into the realm of constitutionalism with two revolutionary documents, namely the American Declaration of Independence and the French Declaration of Rights of Man, which asserted that there were certain inalienable rights and it was the duty of the state and its organ to protect these rights.

93 Supra Note 87.
94 Blackstone, (1765)1 Comm., Chap.1, pp.123-125 (Coleridge Ed.)
95 Ibid pp. 161-162.
96 Ibid.
97 The Preamble to the Declaration acknowledges the doctrine of natural rights: “All men are by nature equally free and independent and have certain inherent natural rights of which when they enter society, they cannot by any compact deprive or divest of their prosperity, cited in Basu DD, Law relating to Human Rights and Constitution p. 51.
99 The Declaration as drafted by Jefferson in 1776 states: “We hold these truths to be self-evident; that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty and pursuit of happiness.” Supra Note 84.
2.6.1.9. French Declaration of Rights Man 1791: Inspired by the American Declaration of Independence, the French Nation Assembly in 1789 formulated the declaration of the Rights of Man. This Declaration recognised and declared natural rights as imprescriptible and inalienable rights and operated as limitation over the acts of the government\textsuperscript{100}.

2.6.1.10. American Bill of Rights 1789: The original draft of the Constitution of America didn’t contain the bill of rights. Therefore, some states urged for inclusion of Bill of Rights as precondition for their ratification to the federal constitution. The demand was conceded and ultimately led to incorporate a Bill of Rights in the form of First Ten Amendments to the Constitution in 1791\textsuperscript{101}. By the Fourteen Amendment, the First Ten Amendment has been extended to the states in the year 1868\textsuperscript{102}. Here, it should be noted that the fundamental rights emerged as limitation over governmental power, so that it could not be used tyrannically against the individuals\textsuperscript{103}.

Incorporation of Bill of Rights within the framework of the constitution of American was severely criticized by some British writers such as Bentham\textsuperscript{104} Jennings\textsuperscript{105} and Wheare\textsuperscript{106} who have questioned the utility of having a Bill of Rights in the constitution. But these criticisms do not hold water since today every written constitution has contained Bill of Rights in the form of fundamental rights. Where a bill of rights is incorporated in the constitution, it becomes the duty of the courts ‘to enforce’ as limitations or restraints against the State.

2.6.2. Genesis of Human Rights:

Human right is one among the most powerful concepts of the twentieth century. Fifty years ago there was none to speak of human rights at municipal or

\textsuperscript{100} Ibid.
\textsuperscript{101} Ibid.
\textsuperscript{102} See generally, Chemerisky E, Constitutional Law, Aspen Law Publishers, Newyork 2001
\textsuperscript{103} Adamson Vs California, (1947) 332 US 46
\textsuperscript{106} K.C. Wheare, Modern Constitutions (1960), Oxford University Press, p 49.
international sphere\textsuperscript{107}. However, there were some philosophies and theories but the use of the expression ‘human rights’ was absent\textsuperscript{108}. For the first time the expression ‘human right’ was used in the Charter of the United Nations, which adopted in 1945, after the Second World War\textsuperscript{109}.

With the establishment of UNO that the human rights got a momentum in the international sphere. In 1948, UN General Assembly adopted the Universal Declaration of Human Rights which guaranteed certain universal rights such as the right to life, liberty and equality to all human beings wherever they resided. As DD Raphael pointed out the UDHR 1948 is a revival of the 18\textsuperscript{th} century concept of the Rights of Man\textsuperscript{110}. Neither the Charter nor the Universal Declaration was a binding instrument and had no machinery for its enforcement\textsuperscript{111}. This deficiency was filled by way adopting two covenants for the implementation of human rights- a) the Covenant on Civil and Political rights 1966 and b) the Covenant on Economic, Social and Cultural Rights 1966. The fundamental difference between these two covenants is, while the former formulated legally enforceable rights of individual, the latter was addressed to the states to implement them by legislation.

\subsection*{2.6.3 Nature of Human Rights:}

One of the philosophical issues is, regarding the nature of human rights. Understanding of the meaning of human rights assumes very much significance in resolving some issues such as which rights are absolute, which are universal, which should be given priority, which can be overruled by other interests, which can demand for implementation and so on. Various scholars have attempted to answer these questions with varied approach.

The first approach focuses on the elements of the concept of human rights. The word ‘human’ is added to the concept of ‘right’ which signifies that rights

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{107} Sitharam Karkala, “Human Rights”, Human Rights Quarterly (1998) 201-234
\item \textsuperscript{109} Article 1 states….to achieve international co-operation….in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion…”
\item \textsuperscript{110} Raphael, DD, “Human Rights: Old and New”, Political Theory and the Rights of Man, Mc Millan Publication 1967 p. 54
\item \textsuperscript{111} Starke, J.G, An Introduction to International Law, London: Butterwoths 1984, p. 350
\end{itemize}
\end{footnotesize}
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possessed by one by virtue of being human. This approach reflects those who have rights are human and in order to have them one need only be human112. However, this approach has failed to answer the issue whether a lunatic or idiot possess rights, although he cannot assert and enforce them. Non-human being such as registered companies, trade unions, societies, and autonomous bodies possesses certain rights like individuals, can they be considered as human beings. It is common understanding that rights of human beings and non-human beings are separate and distinct with each other. To possess rights one needn’t be human being.

The second approach is offered by Maurice Cranston who identifies human rights as those, which are ‘universal’; ‘moral’ and ‘important’113. In this view, human rights are required to conform or comply with certain characteristics. However, such attributes themselves contain ambiguities, that words ‘universal’, ‘moral’ and ‘important’ are complex in their nature. What makes certain rights universal, moral and important? How these are rights justifiable? Where there are different cultural and philosophical traditions, how can there be universal, moral human rights114.

Human rights and Cultural Relativism: Cultural relativists115 in their most aggressive stance argue that there are no absolute human rights and the principles which determine behaviour of human persons are relative to the society116. Since history, culture and social conditions are unique, human rights are different in various countries117. It has also been argued that western civilisation is unique, not universal; human rights are not western discovery. They did not begin with Magna Carta and American and French Declaration of Rights formulated in the 17th and 18th centuries. Nor did the world come to know them through the philosophic and legal writings of

115 Howard, Human Rights and the Search for Community, Boulder, Col., Westview Press, 1995; see also her article, ‘Cultural Absolutism and the Nostalgia for Community’, Human Rights Quarterly, 15, (315), 1993; and ‘Dignity, Community and Human Rights’ in A.A. An-naim (ed) Human Rights in Cross-Cultural Perspectives, Philadelphia, University of Philadelphia Press, 1992. Howard points out that, ‘cultural relativist’ converts to ‘cultural absolutists’ when they maintain that there is one principle, which is to act in accordance with the principles of one’s own group.
116 Ibid.
Grotius, Locke, Montesquieu, Rousseau and Jefferson\textsuperscript{118}. The Concept of human rights can be traced in the origin of race itself\textsuperscript{119}. Westerns attempt to assert their own moral culture as general and universal cultures\textsuperscript{120}. In view of this, plurality of culture contributes towards the sources of human rights.

### 2.6.4. Sources of Human Rights: Philosophical Issues:

It is a known fact that no religion scripture has used the language of human rights. Yet, religion forms the basis for a human rights theory as it is strongly believed that human rights theory stems from the law higher than the State and whose source is the Supreme Being. The Jewish-Christian faith shows that Adam was created in the ‘image of God’ therefore, this divine stamp give human being a high value of worth\textsuperscript{121}.

The Bible prescribes various human rights concepts such as limitation on slavery\textsuperscript{122}, justice to poor\textsuperscript{123}, fair treatment to strangers/foreigners\textsuperscript{124}, racial equality\textsuperscript{125} and protection labor\textsuperscript{126}. In similar vein Islam religion emphasizes on the dignity of the individual, self-esteem that secures personal identity and human community\textsuperscript{127}. Shariat Law sates that individuals also have certain obligations towards God, fellow beings and nature\textsuperscript{128}. According some Islamic scholars like Khalid human rights lie at the core of Islamic doctrine\textsuperscript{129}. Fundamental rights quoted in Koran are right to protection of life; rights to justice; right to equality; right to freedom; right to protection of honour and good name; right to privacy and right to property\textsuperscript{130}.

\textsuperscript{119} Raul Manglapus, Human Rights are not Western Discovery (World View 4, 1978) p.4-6
\textsuperscript{121} This expression comes from the Talmud: ‘A man may coin several coins with the same matrix and all will be similar, but the King of Kings, and Almighty has coined every man with the same matrix of Adam and no one is similar to the other. Therefore, every man ought to say the whole world has been created for me’, Sanhedrin 38:1, ed, Soneino.
\textsuperscript{122} Exodus 2:2.
\textsuperscript{123} Isaiah 1:16-17.
\textsuperscript{124} Leviticus 23:22.
\textsuperscript{125} Amos 9:7.
\textsuperscript{126} Deuteronomy 23: 25-26.
\textsuperscript{128} Ibid p. 73-74.
\textsuperscript{130} Ibid.

\textsuperscript{58} \textit{The Evolution of the Conception of right}
In the Hindu philosophical thought, the concept of ‘Dharma’ signifies certain religious, moral, social and legal duty. Sages have emphasized ‘duties’ in all walks of life, such as duties of kings, priests, parents, warriors, peasants and servants. The Bhagavadgita prescribes karma-marga (action-path) as one of the ways to liberate oneself, which emphasizes one’s duty appropriate one’s person. Duties prescribed are towards God, fellow human beings.

Thus, from religious perspective, every human being is considered sacred because he is believed to be in the image of God. Rights stem from a divine source, are inalienable by mortal authority. This concept is found not only in Judaism-Christian tradition but also in Islam and Hindu religion. Therefore, common phenomenon is every religion speaks of truth of the fatherhood of God and the brotherhood of all human beings, what kind of human rights flow from the religious faith is a matter of debate. Indeed, religious generally imposes limitation on individual freedom and their emphasis falls on ‘duties’ rather than ‘rights’. Moreover, some religions are quite restrictive towards slaves, women non-believers, status high and low, even though all are God’s creations. These are opposed to modern human rights.

**Natural Law- Autonomous Individual:** Philosophers and jurists do not lag behind the theologians, in their endeavour to search for a law which is higher than positive law, they developed the theory of natural law. The natural law theory was founded and elaborated by Aristotle, Stoics of Greek Hellenistic period and later by Cicero during the Roman period. They believed that natural law comprised of certain principles of justice and truth which were discovered by right reason i.e., in accordance with nature. Medieval Christian philosophers such as Thomas Aquinas attempts to transform natural law into a part of Law of God. The freedom of

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134 Ibid.
135 Ibid.
136 Supra note 47, p.15
137 Ibid p. 17.
religion gained momentum during this period. However, Christian philosophers could not consider practice of slavery and severe limitations on serfdom as against ideas of freedom and equality\textsuperscript{138}.

As feudalism declined, modern theory of natural law arose, particularly as enunciated by Grotius\textsuperscript{139} and Pufendorf\textsuperscript{140} who detached natural law from religion laying the foundation for the secular, rationalistic version of modern natural law\textsuperscript{141}.

Natural law theory led to natural right theory, a theory most closely associated with modern human rights\textsuperscript{142}. Locke and Rousseau who with the help of the new concept of ‘social contract’ developed philosophy that right to life, liberty and property were inherent rights of human beings\textsuperscript{143}. The critiques pointed out most of norms setting of natural law theories contained a priori elements deduced by the norm setters\textsuperscript{144}. In other words, natural law that considers rights as ‘natural’ differs from theorist to theorist depending upon their conception of nature. Because of this, natural law theory became unpopular with legal scholars and philosophers\textsuperscript{145}.

However, it should be forgotten that natural theory was impetus for the wave of revolt against absolutism. It can be seen in the French Declaration of the Rights of Man, in the U.S. Declaration of Independence, constitutions of many liberated from colonialism and even in the principal United Nations human rights documents.

\textsuperscript{138} Supra note, 108.
\textsuperscript{139} Hugo Grotius who has been called “the Father of modern International Law”, defined natural as a ‘dictate of right reason’ that is an act in conformity with the quality of moral necessity or moral basis. The natural characteristic of human beings is the social impulse to live peacefully and in harmony with other. Malcolm N. Shaw, International Law, 4\textsuperscript{th} edition, Cambridge University Press, 1997, p. 21 and also see Grotius, The Rights of War and Peace, Campbell A.C., translation, De Jure Belli ac Pacis, Washington: M. Dunne, Newyork: Oxford University Press, 2004, p 72.
\textsuperscript{140} Ibid p. 22.
\textsuperscript{142} Supra note 108, p.37.
\textsuperscript{143} Ibid.
\textsuperscript{144} Ibid p. 38.
\textsuperscript{145} Bentham, considered natural rights as so much ‘bawling on paper’. His colourful attack: Right is child of law; from real laws come real rights, but from imaginary law, from laws of nature, come imaginary rights. Natural rights is simple non-sense; natural and imprescriptible rights, rhetorical non-sense, non-sense upon stilts, Bentham Anarchichal Fallacies, Works of Jeremy Bentham, Edinburgh, William Tait, 1845.
2.6.4.1. Positivism-Authority of State: The attack on natural law intensified during the 19th and 20th century. J.S. Mill claimed that right are founded on utility, Savigny in Germany and Henry Maine in England pointed out that right are a ‘function of cultural variables’. The most serious attack on natural law comes from a doctrine called ‘legal positivism’. This philosophy dominates legal theory during the most of 19th century and commands considerable applause in the 20th century146.

The positivist philosophers deny the core theme of natural law that morality is the basis for human rights. The doctrine of human rights cannot stem from a priori source but the statute enacted by the sovereign authority, coupled with sanction147. This philosophy rejects the views on what law ought to be, have no place in law and are cognitively worthless. The positivism draws the distinction between law as it is and what it ought to be and condemns natural law thinkers for having ignored this vital distinction.

Critiques are of the view that positivists concern with the source of law and in no way they promote the human rights. Indeed, by divorcing the legal system from the ethical and moral foundation of society, positive law attempts to argue that law must obeyed, no matter immoral it may be or even disregards the freedom of the individual, for eg: Nazis orders obeyed as positive law although they were immoral148. Further, positive law may be used as a means to suppress the voice of human rights as it happens in Tibet. Positivism tends to undermine an international foundation for human rights inasmuch as its overemphasis on supremacy of national sovereignty. Under this view, rules of international law are not law but merely rules of morality imposed by opinion. Even though criticisms seem to be correct, the positivist contribution is still significant. By positive law, implementation of any human right becomes easy and it offers flexibility to meet changing needs since positive law is always under the human control.

2.6.4.2. Specie being: It is another philosophy that treats men and women as ‘ specie being’ argues that every one should satisfy his needs by using his ability or potentiality to the fullest extent. In capitalist society where the means of production

146 Supra note 108.
147 Ibid.
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is controlled by a few, Marx regards individual rights as bourgeois illusion\(^{149}\). Such society prevents the existence of individual rights rooted in the state of nature\(^{150}\). On the other hand, it has been argued that Marxism does not confer autonomous on individuals and the world does no longer believe a communist state which is known for a systematic suppression of civil and political rights\(^{151}\). On international scenario, Marxist theory has proved incompatible with a functioning universal system of human rights. Above all, this theory reflects unlimited role of the State in deciding what is good for the ‘specie being’.

**Sociological Approach - Process and Interest:** This approach draws its attention on the questions of institutional development. Sometime it aims to classifying behavioral dimensions of law and society\(^{152}\) and focuses on specific problems of public policy which is having a bearing on human rights\(^{153}\). This approach goes beyond classical civil and political liberties to help the unemployed, the handicapped, underprivileged, minorities and other elements of society\(^{154}\). Roscoe Pound analysis enlarges understanding the scope of human rights and their correlation with demands. His identification of interests also shows taking into consideration the realities of social process\(^{155}\).

**2.6.5. Modern Human Rights Theories**

*Rights Based on the Value of Utility:* Bentham and Mill advocate for maximizing satisfaction and minimizing frustration of wants and preferences. The strong criticism come from Dworkin in whose opinion, the doctrine of utilitarianism functions as a “collective goal” rather “rights”. It was stated that the doctrine of utility does not recognize the individual autonomy and one’s desires or welfare has to be sacrificed at the cost of aggregate welfare\(^{156}\). The issue of how to compare one person’s happiness with another’s remained unanswered\(^{157}\). Affirmative action programmes cannot be taken for minorities for their welfare.

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\(^{149}\) Ibid p. 40.
\(^{151}\) Ibid.
\(^{152}\) Ihering places greater emphasis on the function of law as an instrument for serving the needs of society.
\(^{153}\) Roscoe Pound, Interpretation of Legal History, Yale University Press, revised edition 1959, p.50
\(^{154}\) Ibid.
\(^{155}\) Roscoe Pound, Jurisprudence, St Paul, Minn, West Publishing Company 1959, 244.
2.6.5.1. Rights Based on Justice: As Rawls put it, justice is the first virtue of social institutions. Human rights protection being an end of justice, to understand human rights, the role of justice is crucial. A principle of justice requires the fair distribution of benefits and burdens of social co-operations. Today, in modern society, no theory of human rights can be advanced without considering Rawl’s thesis. Each person possesses inviolable rights founded on justice which even the welfare of society as a whole cannot override.

The central focus of Rawls thesis which states that ‘all social primary goods, liberty and opportunity, income and wealth and basis of self-respect are to be distributed equally taking into account the greatest benefit to the least advantage assumes high reliance in the protection of the human rights’. Rawls ‘difference principle’ that provides justification for welfare rights of least advantaged reflects the construction of constitutional democracy as well as concept of universality of human rights.

2.6.5.2. Rights Based on Reaction to Injustice: According to this approach it is easier to identify the rights from the approach of injustice than justice. Prof. Cahn focuses of the sense of injustice on the ground that it is a part of human biological endowment and alive with movement that results in outrage and anger. In this context, the right to life, liberty and property arose out of the injustice done by the absolute sovereign. Where the right to food, shelter, environment, medical care etc., is not protected, it creates the need of human rights. Therefore, the concept of need enhances the significance of human rights. However, today Cahn’s theory has no relevance, as it is not necessary to show the condition of injustice being caused by the State for the promotion of human rights.

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159 Ibid p. 47.
160 Supra note, 108, at page 47.
161 Supra note p. 154.
164 Ibid.
2.6.5.3. Rights Based on Human Dignity: Under this approach, the human dignity constitutes as a basis to explain the scope of human rights protection\textsuperscript{165}. The concept of human dignity does not carry any exact meaning, since it considers various values of life\textsuperscript{166}. Contrary to this, it has been argued that if the human dignity depends upon the various values such as respect, power, enlightenment, well-being, health, skill, affection and rectitude, it would be difficult to identify hierarchy of values\textsuperscript{167}. In the absence of such hierarchical order, there is no scope for priority in the event of clash of values\textsuperscript{168}.

2.6.5.4. Equality of Respect of and Concern: This theory is based on the reconciliation between natural rights and utilitarian theories. Therefore, it is also called ‘modern theory’\textsuperscript{169}. According to this, the State is required to treat all citizens with equal respect and concern, failing which there is likelihood of disturbing the rights and claims\textsuperscript{170}. The State must adopt the egalitarian principle that ensures social welfare of all without any distinction. Consequence of this theory would be, men as a matter of right can claim certain benefits/entitlements from the State, fellow being and from any one with human dignity\textsuperscript{171}.

The crux of each theory may be found in the preamble to the International Bill of Human Rights such as Universal Declaration of Human Rights1948, the International Covenant on Economic, Social and Cultural Rights 1966 and the International Covenant on Civil and Political Rights 1966\textsuperscript{172}.

\textsuperscript{167} Supra note 161 pp. 376-378.
\textsuperscript{169} Dworkin R.(1978) and his later book, Laws Empire (1986), appears to modify his original thought in order to deal with the value of community, see coleman JL, “Truth and Objectivity in Law; Legal Theory, 1, (33), 1995 as cited in Janusz Symonide p 54.
\textsuperscript{170} Ibid.
\textsuperscript{172} Generally, see Preamble which states that “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world”, Ian Brownlie, Basic Documents in International Law, Oxford University Press, 2002, 5th edition p 192; www.unhchr.ch/udhr, visited on 06-12-2006.
2.6.6. Definition of Human Rights:

The concept of human rights is susceptible of variety of interpretations, as such, the issue of definition has become the most controversy. Different philosophers and thinkers define the concept in their own perceptions. The idea of human rights, unlike science and technology which gives comforts and conveniences, nor does it fulfil biological needs of mankind, rather, it connotes fundamental and inalienable rights which are so essential to life as human beings. Human rights are referred to fundamental in the absence of which one cannot live as human being.  

i) **J.E.S. Fawcett** describes human rights fundamental, basic, natural or common rights. Fundamental or basic rights are rights which cannot be taken away by the government and are often found in the Constitution. Natural or common rights are rights which are available to all men and women by virtue of their nature.

This definition involves certain amount of ambiguity as to difference between fundamental and natural rights. In the broader perspective, fundamental and natural rights are similar. Fawcett has used different terminologies with similar meaning that ultimately causes confusion and uncertainty in understanding the content of human rights. It has also ignored rights which are essential for the welfare of the persons.

ii) **Tiber Macham** defines human rights in terms of universal, irrevocable elements in the administration of justice. All rights are connected with justice. Accordingly, justice is the moral virtue and the centre point of the human rights. This definition seems to be based on a priori principle that the whole human society is the same in respect of human culture, traditions moral virtues and way of life. Tiber Macham has overlooked the fundamental difference between legal and moral justice.

iii) **Richard Wasserstrom** states as entitlement of those minimal thing without which it is impossible to develop one’s capabilities and to have life as human

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beings\(^{176}\). In this sense, human rights are moral entitlements possessed only by persons. Critics pointed out that the phrase ‘moral entitlement’ poses some practical difficulties namely, which rights should have priority in the event of conflict of rights, whether one could supercede another, is it possible to give equal importance to all rights, can a person claim a right which in his view essential but abolished by law on the ground of national security\(^{177}\). Notwithstanding the criticism, Wasserstrom’s definition cannot be ignored since it highlights on ‘minimal things’ such as right to life, liberty and pursuit of happiness.

iv) For **Joel Feiberg**, human rights are moral claims based on primary human needs\(^{178}\). Critiques contend that Joel Feiberg has considered human rights as a commodity that fulfills the human needs. The line differentiation between human rights and human needs being ignored. Further variability in needs and their relationship with rights create a situation of unsatisfaction\(^{179}\).

v) Just opposed to the human rights in terms of commodity, **Martin Golding** defines as ‘act of claiming, performing, on the level of the human community’\(^{180}\). Human rights in terms of ‘activity’ focus on human rights movement of behaviour.

In addition to the aforesaid definitions, the Protection of Human Rights Act 1993, defines as the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India\(^{181}\). So far as Indian Constitution concerned, only rights enumerated in the Part III of the Constitution are enforceable. In this context, human rights can be distinguished from other rights such as legal, contractual and conventional rights. The above, analysis shows that the human rights may be understood in terms of ‘moral entitlement,’ ‘human needs’ ‘commodity’ or ‘activity’.

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\(^{181}\) Section 2(d) of the Protection of Human Rights Act 1993.
2.6.7. Sphere of Human Rights:

It raises many questions such as what is the scope or content of the human rights, what is their interrelationship, there exist any limitations, who should hold moral duty to uphold the rights, should there be hierarchy of human rights and against whom these right are enforceable, are remained as complex issues in the discourse of human rights.

One viewpoint is human rights are moral rights possessed by human being. In contrast, another states that human rights cannot be confined to human persons, because animals, plants, corporate bodies too have certain human rights. However, the view point is denied on the ground that Charter of Human Rights are concerned for the benefit of natural persons, for their development and welfare; for instance, right to health, medical drugs, education cannot be claimed by artificial persons, although the Constitution guarantees right to freedom expression, equality to all persons.

Another issue is, against whom the rights are enforceable; do they impose corresponding duties, if so, upon whom. William N. Nelson suggests that human rights imply correlative duties on the State; therefore, every one has rights against his own State. By the Constitution of India, human rights which are expressly enumerated in its Part III enforceable against the State action and the other rights which are found in the Part IV are idealistic which cannot be given effect in the court of law. Thus, the scope of human rights in the Constitution of India has been restricted.

Lastly, one important question pertaining to the ambit of human right is, what are the human right? Whether all human rights are fundamental or only rights which are considered to be fundamental should be deemed to be human rights. Fundamental

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184 See Preamble to the UDHR, 1948; ICESCR and ICCPR 1966.
186 Articles 12 to 32 of the Indian Constitution.
187 See Article 33 to 51 of the Indian Constitution.
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Rights are one of the manifestations of the human rights. Therefore, fundamental rights are human rights but not vice-versa; of course, it is also a narrower view that restricts the ambit of the human rights.

2.6.8. Interdependence of Human Rights:

The existence of human rights raises a question as to whether human rights are independent of one another. As has been frequently reiterated by human rights organizations, all human rights and fundamental freedoms are indivisible and interdependent\(^\text{188}\). For instance, the right health cannot be protected effectively, without respect for other recognised rights like the right to food, housing, sanitation, healthy environment and right to participate in decision affecting the health\(^\text{189}\).

2.6.9. Limitation of Rights:

Generally, human rights are not absolute in national and international legal system and they are always subject to limitation on certain grounds\(^\text{190}\). Thus, the right to liberty of movement, freedom of expression and association maybe limited on the of protection of public health\(^\text{191}\). But some scholars like John Finnis\(^\text{192}\) and Alan Gewirth\(^\text{193}\) pointed out that some rights are absolute and cannot be limited under any circumstance such as right to life, right not to be condemned knowingly false charges; rights not to be deprived of one’s reproductive capacity, freedom from torture, inhuman degrading treatment, freedom from slavery or servitude, non-applicability of expost laws\(^\text{194}\).

2.6.10. Clash of Human Rights:

In human rights discourse, a question arises whether the body of human rights exists in a hierarchy or undergoes derogation\(^\text{195}\). There are ways of resolving the conflict of rights situation. John Rawls in whose opinion the rights have always

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\(^{188}\) Article 1(a) of UN General Assembly, Res. 32/130; 16\(^\text{th}\) December 1977, [www.hsph.harvard.edu/fxbcentre](http://www.hsph.harvard.edu/fxbcentre), sighted on 29-11-2006.


\(^{190}\) Francois-Xavier Bagnoud Centre for Health and Human Rights, Daniel J. Whelan p 10.


\(^{194}\) Ibid.

lexical priorities appear to be relevant. In the event of clash of rights, the basic liberties take precedence over the socio and economic rights\textsuperscript{196}. Secondly, for the purpose of resolve conflict, some hierarchy of rights have been suggested by some scholars such as H.L.A. Hart who has pointed out that there is only one natural right that the equal right to liberty\textsuperscript{197}. Ronald Dworkin while the right “trumps” suggested that all rights flow from the right to equality of respect and concern\textsuperscript{198}.

2.6.11. Kinds of Human Rights:

One of the ways of avoiding the clash of human rights is resorting to classify rights into various categories. On the basis their nature, rights may be divided into negative and positive human rights. Positive rights that flow mainly from the Roussueanian Continental European legal tradition, denote rights that State is obliged to protect and provide for instance right to a livelihood, environment, education, medical care, medical drugs etc., These rights have been codified in the UDHR and in many 20\textsuperscript{th} century constitutions\textsuperscript{199}. Negative human rights that flow mainly from Anglo-American legal tradition, denote actions that a government should not take, regarding freedom of speech and expression, movement, assembly, right against arbitrary arrest and detention, freedom of thought and conscience, right to life etc., These right have been codified in the US Bill of Rights\textsuperscript{200}, the English Bill of Rights\textsuperscript{201}, Canadian Charter of Rights\textsuperscript{202} and the Indian Constitution\textsuperscript{203}.

In a simple and popular sense, human rights are classified into a) civil and political rights b) economic and social rights. Freedom of speech and expression, freedom of religion, rights against arbitrary arrest, detention or excile, freedom of slavery and servitude, right to property may be cited as example of ‘civil rights’. These rights are the product of glorious revolution against tyrannical form of the

\textsuperscript{197} Hart HLA, “Are there any Natural Rights in ? Philosophical Review 64 (1955) collected in Walsdron ed., Theories of Rights.
\textsuperscript{198} www.unhrchr/udhr, visited dated 15-12-06.
\textsuperscript{199} www.wikipedia.org/wiki/humanrights sighted on 15-12-2006
\textsuperscript{200} See the First Ten Amendments to the US Constitution 1891 (incorporation of human rights into the municipal law with the purpose of enforce them against the state/any individual.
\textsuperscript{201} English Bill of Rights are commonly referredas common law rights. In UK, recently introduced Human Rights Act 1998 to give effect rights and freedoms guaranteed under the European Conventon on Human Rights, thus make conventional rights enforceable in the courts of United Kingdom.
\textsuperscript{202} In 1982, Canada adopted the Canadian Charter of Rights and Freedoms and incorporated it as Part I of the Canada Act, 1982.
\textsuperscript{203} Part III of the Constitution under the title “Fundamental Rights”.

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government. The right to vote, participate in the democratic government, right of people to self-determination, equal access to public office, the right to freedom of peaceful assembly and association are some of the instances of ‘political rights’. These civil and political rights are often referred to as the ‘first generation’ or ‘first dimension of human rights’. The rights such as right to work, leisure, social security, health care, education, housing, just and favourable remuneration, equal pay for equal work, just and humane condition of work are called ‘economic and social rights’. These economic, social and cultural rights are popularly called the ‘second generation’ or ‘second dimension of human rights’. Beside, another category of rights which include right to development, environment etc., are described as ‘collective or solidarity rights’ or ‘third generation of rights’.

2.6.11.1. Economic, Social and Cultural Rights: Origin, Content and State Obligations:

The historical origins of the recognition of economic and social rights are diffuse. These rights have their source in the religious traditions of caring the poor people and those cannot look after themselves. In Catholicism, papal encyclicals, have long history of promoting ‘the right to subsistence with human dignity’ while liberal theology have sought to build upon this ‘preferred option for the poor’. Virtually, all of the major religions manifest comparable concern for the poor and oppressed. Besides, philosophical analyses and political theory of authors like Thomas Paine, Karl Marx, Immanuel Kant and John Rawls; political programmes of nineteenth century in Britain; Chancellor Bismarcks in Germany, (who introduced social insurance schemes in 1880s), the New Dealers in the US; and subsequent Soviet constitution also constitute the major source of the economic and social rights.

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207 Ibid.
At the international sphere, these rights came into picture with the emergence of the International Labour Organisation by the Treaty of Versailles in 1919. The said treaty called upon to abolish ‘injustice, hardship and privation’ which workers suffered and guaranteed fair and humane conditions of labour\textsuperscript{208}.

ILO which adopted international minimum standards in relation to wide range of matters coming under the fabric of economic and social rights included inter alia, conventions dealing with freedom of association, the right to organize trade unions, forced labour, minimum working age, hours of work, weekly rest, sickness protections, accident insurance, old age insurance, freedom from discrimination in employment\textsuperscript{209}. The Great Depression of the early 1930s emphasized the need for social protection of those who were unemployed and give a strong impetus to fulfill employment policies\textsuperscript{210}.

As a result of these developments, various proposals were considered for their inclusion in the drafting of the UN Charter. However, the US and other countries such as Australia, South Africa and UK opposed the proposal on two grounds, namely, a) such understanding would involve interference in the domestic, economic and political affairs of states\textsuperscript{211} and b) existence of such condition does not constitute a Fundamental Human Rights but leads to more or less totalitarian control of economic life of the country\textsuperscript{212}. Ultimately, an agreement was reached to incorporate proposals in the Charter of UN which states that the UN shall promote ‘higher standards of living, full employment and conditions of economic and social progress and development’\textsuperscript{213} but does not call for implementation at the international level.

This approach was subsequently reflected in the International Bill of Human Rights which consists of the Universal Declaration of Human Rights 1948\textsuperscript{214}. Incidentally, a strong support for the inclusion of economic and social rights came

\begin{itemize}
\item \textsuperscript{208} Alston Philip, the United Nations and Human Rights: A Critical Appraisal, Oxford University Press, 1992, p 582.
\item \textsuperscript{209} Supra note 206.
\item \textsuperscript{210} Ibid p. 242.
\item \textsuperscript{211} Sohn Louis, The Human Rights Movement: From Roosevelt’s Four Freedoms to the Interdependence of Peace, Development and Human Rights 1995 Steiner and Alston p 243.
\item \textsuperscript{212} UN Doc.E/CN.4/82/Add. 4 (1948) 11, 13
\item \textsuperscript{213} Article 55(a) of the United Nations Charter.
\item \textsuperscript{214} Article 22 to 28 of the Universal Declaration of Human Rights
\end{itemize}
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from the United States and other countries. After the adoption of the UDHR in 1948, the next step was to translate these rights into binding treaty obligations215. This task consumed long period from 1949 to 1966 due to reasons including cold wards, dilemmas and controversies as to the inclusion of economic, social and cultural rights. With all obstacles, the UN adopted two separate international covenants, namely International Covenant and Civil and Political Rights 1966 and International Covenant on Economic, Social and Cultural Rights 1966 which constitute the bedrock of the international normative regime for human rights216.

Presently, economic and social rights can be found as part and parcel of many international instruments, universal and regional. Among the universal instruments adopted by the United Nations are Universal Declaration of Human Rights217; International Covenant on Economic, Social and Cultural Rights218; the Convention on the rights of the Child 1989219; the Convention on the Rights of Migrant Workers and Their Families220; the Convention of the Elimination of All Forms of Discrimination Against Women 1963221. At the regional level: the American Declaration of Rights and Duties of Man222; the American Convention of Human Rights223; the Additional Protocol to the American Convention of Human Rights in the area of Economic, Social and Cultural Rights224; African Charter on Human and People’s Rights225 and European Social Charter226.

The Covenant on ESCR was brought into existence after its ratification in 1976, it took two years in order to set up monitoring mechanism. The first mechanism failed miserably as incompetent and therefore, it was replaced by an independent Committee of Experts in 1987227. At this juncture, a point is, does the

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215 Supra note 206 p. 245.
216 Ibid.
217 Supra note 215.
218 Part III, Article 6-15.
219 Article 27(3).
220 Article 27.
221 Article 5(e).
222 Article 16.
223 Article 26.
224 Article 16.
225 Article 18 and 20.
226 Article 14.
Bill of International Human Rights live up to the expectations of the original proponents? Surely, the length of time it took to complete the Bill and the length of time it has taken to secure ratifications for two covenants are ridiculous. Nonetheless, the fact that so many states have signed up to the covenant is commendable. The reason behind the delay in the implementation of covenant can be studied as under.

2.6.11.2. Objections against Economic and Social Rights:

The philosophers and Western societies are reluctant to ratify the covenant on economic and social rights on the two grounds. Firstly, economic and social rights are not ‘proper human rights’, such scepticism with outright negative attitudes derives from cultural traditions. Western societies believed that the human rights should be considered as natural rights securing the freedom of the individual from the State. The expression ‘human rights’ does not cross the boundary of the natural rights.

Secondly, human rights cannot be classified into different categories nor can they be classified as to represent a hierarchy of values. All rights should be protected and promoted at the same time. Without economic, social and cultural rights, civil and political rights might be purely nominal in character; without civil and political rights; economic, social and cultural rights could not be long ensured. Classification of rights creates the fundamental difference between civil and political rights on the one hand and socio, economic and cultural rights on the other. The former are rights of the individual ‘against’ the state, i.e., against unlawful and unjust action of the state, while the latter are rights about which the state can take ‘positive action’ to promote. The critic says it is not possible to have sufficient resources to implement them. However, with the evolution of society, west extended its unconditional for the introduction of economic and social rights in the International Bill of Human Rights, contrary to what has often been argued.

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230 Supra note 206 p. 245.
231 Ibid.
2.6.11.3. Dissimilarities between the ICESCR and the ICCPR:

There are many differences between the two major covenants, including terminology. The ICCPR contains terms such as “every one has right to …or no one shall be…”232 Whereas the ICESCR generally, uses the formula “State Parties to recognise the right of every one….233”. The terminology difference has two implications, first, the obligations of State Parties are subject to the availability of resources234 and second the obligation is one of the progressive realisation235.

This difference has become the subject of conflicting critiques. On the one hand, it is often suggested that the nature of the obligation under the CESCR is so onerous that virtually no government is able to fulfill particularly developing countries that will have to confront with this impossible task236. On the other hand, it is argued that the state may take the defense that these rights could not be implemented due to lack of availability of resources. Such position renders the states obligation devoid of meaningful content237. Therefore, it becomes difficult if not impossible to determine when those obligations ought to be fulfilled.

Another point of difference from legalistic viewpoint is that ICCPR are considered to be “ legal rights “ which are enforceable in the court of law, while ICESCR are considered to be ‘programme rights’ which are not justifiable.

2.6.12. Interdependence of the ICCPR and ICESCR:

It should be noted that two categories of human rights are part and parcel of UN doctrine. The UDHR which is the starting point of human rights movement covers both categories without any sense of separateness or priorities238. The

232 For instance, Article 6: every human being has the internal right to life. This right shall be protected by law. Article 9 provides “everyone has the right to liberty and security of persons”.
233 Article 12: ‘the State Parties to recognize the right of everyone to the enjoyment of …physical and mental health…all medical service and medical attention in the event of sickness’.
234 Article 2(1) “ Each State Parties to the present covenant undertakes to take steps, individually and through international assistance and co-operation, with a view to achieving progressively the full realization of the rights recognized in the present covenant by all appropriate means, including particularly the adoption of legislative measures”.
236 Supra note 206 p. 246.
237 Ibid.
238 See the preamble to the ICESCR with reference to those used in the ICCPR, states that “in accordance with the Universal Declaration…, the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights as well as the civil and political rights.
preamble to the ICCPR and ICESCR reflects that neither logically nor practically these two categories of rights can be separated in watertight compartments. Civil and political rights may constitute the condition for the enjoyment of the economic, social and cultural rights and vice-versa, for instance, the right to form trade unions is contained in the ICESCR, while the right to freedom of association is recognised in the ICCPR\(^{239}\); the right to education and parental liberty to choose a child’s school are dealt with in the ICESCR\(^{240}\), the liberty of parents to choose their child’s religious and moral education is recognised in the ICCPR\(^{241}\).

Vienna World Conference 1993 states that all rights are indivisible, interdependent and interrelated. In 1993, a group of developing countries urged the United Nations devoted equal budgetary and human resources to each of the two sets of rights\(^{242}\).

2.6.13. State’s Obligation:

One issue that dominated in the discourse of human rights was the nature of state’s obligation to implement the rights contained in the ICESCR and ICCPR. The duties/obligations of states are based upon the respect for and observance of human rights and freedoms\(^{243}\). ICCPR impose negative duties on the states not to interfere with or restricted by state action, while the ICESCR imposed positive duties to take steps for the implementation at national sphere. In this context, the rights contained in the ICESCR can be described as “socialist pattern of rights” which requires that the state may take positive measure to fulfil the requirements of the right-holders\(^{244}\).

The rights contained in the ICESCR do not create corresponding obligation on the states parties. Their implementation depends upon the availability of the resources. The phrase ‘achievable progressively’ used in Article 2 connotes that the full realisation of all economic, social and cultural rights are not able to be achieved

\(^{239}\) Article 8 of ICESCR and Article 22 ICCPR.
\(^{240}\) Article 13 (3).
\(^{241}\) Article 18(4).
\(^{242}\) UN Doc.E/CN-4/1999/120, Para 103(b).
\(^{243}\) Preamble to the ICESCR and ICCPR provides that ‘considering the obligation of states under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms.
in a specific period. The phrase must be interpreted in the light of over all objectives\textsuperscript{245}. All states have an obligation to take steps towards the full realization of the rights through appropriate means including legislative, administrative and judicial.

This position makes it clear that the obligations under the covenant are directory in nature, and there is no correlativity between rights of the individual and duties of the state. The obligation under ICCPR is mandatory, while the obligation under the ICESCR depends upon the availability of economic resources. This difference as to obligation under the ICESCR and ICCPR itself operate as stumbling block in the way of the realisation of the economic, social and cultural rights. What is lacking? Is it economic resource or political will?

2.6.14. Resource Constraints:

Most of the criticism regarding economic and social rights is premised on assumption that wealthy industrialized countries are able to afford policies to such rights, but developing countries, countries in transition to democracy and others do not enjoy the sufficient means to pursue such policies. Maurice Cranston has written that: for a government to provide social security…it has to have access to great capital health, say a developing country like India cannot command resources that would guarantee every Indian adequate standard of living, medical care\textsuperscript{246}.

This viewpoint does not base upon sound reasoning. As far as India is concerned, it is affordable to generate adequate resources for the realisation of economic and social rights by way of resources from international monetary institutions, reducing the size of public sector, privatising the government undertakings, stimulate economic growth by reducing taxes. The major problems of India are lack political will and widespread corruption at the implementation level and the poll of huge resources for political rights. Assuming there exist financial constraints it cannot be a ground for the state to deny its constitutional obligations\textsuperscript{247}.

\textsuperscript{245} Supra 108 p. 125.
2.6.15. Enforceability:

Much controversial issue is whether economic and social rights are justifiable in domestic legal systems. It has been argued that economic and social rights must contain some elements which can be dealt with at national level as subjective rights. Consequently, individuals may claim effective remedy in the event of violations\textsuperscript{248}. On the other hand, it has also been contended that justifiability is not the inevitable feature of human rights, as a matter of practicability, human rights which are of economic and social significance cannot be enforced through the competent court or appropriate judicial mechanism as they are mere directive principles for the state\textsuperscript{249}.

Although all economic and social rights may not be being made justiciable legal rights, there are certain rights which can be seen as minimum rights that should available to every one. On that basis, some individual rights may emerge, for instance, the right to primary education, protection of environment and the right to health\textsuperscript{250}. In identifying the right which should be made being enforceable legal right, the domestic needs and benefit to the individuals are to be taken into account.

The right to health includes the right to have access to health services, which can be easily transformed into an individual subjective right. In this context, the Supreme Court has held that the ‘right to life’ includes the right health and it is the obligation of the state to ensure the creation and sustaining conditions congenial to good health\textsuperscript{251}. The Constitution also provides for the promotion of health of individuals in society\textsuperscript{252}.

Besides, for the purpose of protection of health interests of the individual, various legislations have also been enacted such as the Indian Penal Code, the Fatal Accidents Act 1855, Medical Termination of Pregnancy Act 1975, the Pre-natal diagnostic Techniques(Regulation and Prevention of Misuse) Act 1994, and the Transplantation of Human Organs Act 1994 etc.,

\textsuperscript{248} Supra 108 p.121.
\textsuperscript{249} Louis Henkin “International Human Rights as Rights” in Penock and Chapman at 266.
\textsuperscript{250} Supra note 149 p.122.
\textsuperscript{251} Vincent Panikurlangara Vs Union of India, (1987)2 SCC 165.
\textsuperscript{252} Articles 38, 42, 43 and 47 of the Constitution.
2.7. THE RIGHT TO HEALTH

(The fundamental right to life would be rendered meaningless and futile, if ‘life’ does not comprehend a healthy and vibrant life. Life is not mere vegetable existence- O. Chinnappa Reddy, J.)

2.7.1. International Sphere:

The right to health as a fundamental human right originates in the four pioneering documents, such as a) United Nations Charter; b) Universal Declaration of Human Rights; c) International Conventions on Civil and Political Rights and d) International Convention on Economic Social and Cultural Rights. These four are collectively known as the “International Bill of Human Rights”. Each of these documents has contained express provisions as to ensure the right health. Universal Declaration of Human Rights 1948 is not an international treaty, yet, it constitutes as a customary international law. Article 25 of the declaration provides as:

“Every one has the right to a standard of living adequate for health and well-being of himself and his family, including food, clothing, housing and medical care and the right to security in the event of… sickness and disability…”

The WHO Constitution declares: “the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being…”

International Covenant on Economic, Social and Cultural Rights provides in its article 12(1): “The State Parties to the present covenant recognised the right of everyone to the enjoyment of the highest attainable standard of physical and mental health”. Similarly, Convention on the Rights of the Child in its article 16 states “Every individual shall have the right to enjoy the best attainable state of physical and mental health”.

However, it is important to note the use of language “highest attainable standard” in the above international documents. Nowhere, this language has been explained so as to identify its precise dimension. Ostensibly, it implies that the ‘right to health’ is not absolute but presupposes a reasonable standard. Again, the question of interpretation arises as to the expression ‘reasonable standard’ and essentials implicit in the phrase ‘right to health’. By using the language of right to health, the International Bill of Human Rights contemplates that the right to health should not be

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254 G.A. Res.217A(III)UN Doc.A/810, at 71
255 See the Preamble to the Constitution of the WHO.
discriminated on the grounds of race, religion, economic or social condition. Much emphasis is given on the non-discrimination in relation to health.

Article 5(e) (iv) of the International convention on the Elimination of All Forms of Racial Discrimination states that “States parties undertake to prohibit and eliminates racial discrimination in the enjoyment of the right to public health, medical care, social security and social services”\(^{256}\). Article 12(1) provides that “state parties shall take all appropriate measures to eliminate discrimination against women in the enjoyment of the right to protection of health and to safety in working conditions, including the safeguarding of the reproduction”.

Article 12 of the same Convention directs state parties to take appropriate measures to eliminate discrimination against women in the field of health care the order to ensure, on the basis of equality of men and women, access to health care services, including those related to family planning. The Convention aims at not merely prevention of discrimination in the matter of women health, but also the protection of health of women in service during the pregnancy, confinement, and the post-natal period, granting free services where necessary, as well as adequate nutrition during pregnancy and lactation\(^ {257}\).

The Additional Protocol of American Convention on the Human Rights in the Area of Economic, Social and Cultural Rights uses the precise language “right to health” by stating that every one shall have the right to health”\(^ {258}\). The American Declaration of the Rights and Duties\(^ {259}\) contains the similar provision as exist in the African Charter on Human and Peoples’ Rights and European Social Charter\(^ {260}\).

\(^{256}\) G.A. Res.2106A(XX), 21 December 19965.
\(^{257}\) See article 12(2) of the Convention on the Elimination of the All Forms of Discrimination Against Women and Article 14 further provides that State shall ensure that rural women have access to adequate health care facility including information, counseling and services in the family planning.
\(^{258}\) Article 10(1) states that “everyone shall have the right to health, understood to mean the enjoyment of the highest level of physical, mental and social well-being.” (2) Provides that in order to ensure the exercise of the right to health, the State Parties agree to recognise health as a public good. However, this convention has not come into force, International Legal Materials (ILM) 156, (1989).
\(^{259}\) Article 11 declares that “every persons has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources”. This is approved by the Ninth International Conference of American States, Res.XXX, Bogota, 1948, Pan-American Union, Final Act of the Ninth Conference of American States 38-45, Washington,D.C., 1948.
\(^{260}\) Article 16(1) provides that ‘ every individual shall have the right to enjoy best attainable state of physical and mental health’. Article 11 of the European Social Charter states: With a view to ensuring the effective exercise of the right to protection of health, the contracting parties undertake, either directly or in co-operation with public or private organisations, to take appropriate measures designed inter-alia a) to remove as far as possible the causes of ill-health;
2.7.2. Constitution of India:

The international provisions concerning the right to health have two major dimensions: first, the right to access to health services and second, the obligations of the state to take specific measures for the purpose of protection of public health. The constitution of India not only provides for the health care of the people but also directs the state to take measures which improves the condition of health care of the people. For instance, the equality before law, the protection of life and personal liberty, the state to protect the health and strength of workers, men and women and children of tender age, the right to work, to education and to public assistance, provision for just and humane conditions of work and maternity relief, living wages for workers, duty of the state to raise the level of nutrition and the standard of living and to improve public health.

The right to health at international stage, is recognised as a fundamental human right. But it does not mean every individual has a right to be ‘healthy’ because a persons’s health depends upon the various factors such as family history, personal choices, environment and other factors which are within the responsibility of government that includes access to goods and services, adequate, affordable and...
culturally appropriate health care, nutrition, sanitation, clean water and air, safe working conditions and health information\textsuperscript{270}.

By recognising the right health as a fundamental human right, international human rights law has removed the status of ‘commodity’. Health cannot be a commodity which can be purchased and sold in the market\textsuperscript{271}. However, in reality in view of the globalization, health has become a ‘marketable commodity’. WTO is given power to regulate health service by virtue of TRIPS Agreement. WTO plays leadership role in making health policy planning. World Bank spends ‘money’ on ‘health’ double the WTO budget. Consequently, World Bank can impose its own policies on health to influence poor countries that are desperately needed money from the World Bank. Doha declaration was failed since lack of support of the developed countries over the issue of public health. Paradoxically, WHO at Jakarta Declaration of Health Promotion of 1997 invited corporate business to take care of ‘public health concerns’ on global level? The critique describes the declaration as inviting ‘the fox to take care of hen-house’\textsuperscript{272}. If health is seen as a product which can be developed, purchased, consumed, digested and defecated, like any other product, then, it is no longer fundamental human rights\textsuperscript{273}.

\section*{2.7.3. Right to Health: definitions and paradigms}

The use of language in connection with health itself has led to controversy that the concept of ‘right to health care’ is more specific and easily understood than the ‘right to health’\textsuperscript{274}. Some favour the concept of health care and some oppose it as rhetorical, lacking in specificity and diversionary from the real problems of medic care\textsuperscript{275}. In the view of the critiques, a right to health care is based on ideological ground that it may authorize the ‘coercive method for distribution of individual’s resource’. Those who favour the terminology argue that use of such language

\begin{footnotesize}
\begin{enumerate}
\item Ibid.
\item Supra note 249.
\item www.idb.org/sydney/1998 sighted on 06-12-2006.
\end{enumerate}
\end{footnotesize}
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provides for equity and fairness in the provision of medical care\textsuperscript{276}. However, the argument and counter-argument over the terminology assumes importance in the academic circle. By substance it makes no difference between the right to medical care and the right health. What does constitute the phrase ‘right to health’ remained unsettled issue although the right to health has been treated as part of the right to life\textsuperscript{277}. It is argued that health is not a right, but it is a necessary condition of life\textsuperscript{278}. This view appears to be vague since there are number of references to health as a ‘right’ in the international human rights documents and the national constitution. The concept of health which is defined in WHO implies all peoples requirements to be protected, such as food, sanitary, social and cultural conditions\textsuperscript{279}.

The critiques point out that the definition of health as defined in the WHO is utopian definition, how is it possible to achieve the complete state of social, mental and physical well-being when, in reality estimation of completely healthy people around the globe is only a 10% to 25\%\textsuperscript{280}. WHO points at ‘aims’ rather than the meaning of the ‘health’. Achieving the complete state of well-being belongs not only to the medicine but also to politicians, the society and the individual. In developing countries like India, there are several socio-economic factors that influence the well-being of the people such as unstable economy, unfavourable currency change, growing poverty and deep social differences, economic and technological dependence etc\textsuperscript{281}.

Professor Ruth Roemer states “the right to health care guarantees perfect health”\textsuperscript{282}. This is somewhat extensive definition as it encompasses protective environmental services, promotion of health, housing and social welfare\textsuperscript{283}. This


\textsuperscript{277} State of Punjab Vs Mohinder Singh Chawla, AIR SC 1225.


\textsuperscript{279} WHO’s 1946 constitution, defines “health as the complete state of social, mental and physical well-being and not mere the absence of illness or infirmity. \url{www.tinuxmed.foe.org} sighted on 06-12-2006.

\textsuperscript{280} Ibid.

\textsuperscript{281} Ibid at p 17.


\textsuperscript{283} Ibid at p 17.
The extensive definition goes contrary to common understanding of the phrase ‘right to health care’ which includes the only provision of ‘medical services’.  

A more dynamic definition of the right to health can be found in Article 12(1) of the ICESCR which states the right to health is not a right to be ‘healthy’. It means the right contains both ‘freedoms’ and entitlements. The freedoms includes the right to control one’s health and body, including sexual and reproductive freedom and the right to be free from interference, such as by non-consensual medical treatment and experimentation. By contrast, the entitlements include a right to a system of health protection which provides equality of opportunity for people to enjoy the highest attainable level of health. The phrase “the highest attainable standard of health” in Article 12(1) takes into account both the individual’s socio-economic conditions and a state’s available resources. Consequently, the right to health must be understood as a right to the enjoyment of a variety of facilities, goods, services and conditions necessary for the realisation of the highest attainable standards of health.

Inspite the fact that the right to health is solidly embedded in various international human rights documents and the national constitution, there remains widespread confusion about the precise meaning of this right and its legal ramifications.

2.7.4. Essential Elements

The following are suggested as essential elements of the right to health.

a) **Availability:** Public health provision and health care facilities, goods and services and programmes should be available in sufficient quantity within the state party. The precise nature of goods and services will vary depending on numerous factors such as safe and potable drinking water, adequate sanitation

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284 Supra n 269.
facilities, hospitals, clinics and other health related drugs, trained medical and professional personnel receiving domestically competitive salaries and essential drugs.\(^{289}\)

b) **Accessibility:** Health facilities, goods and services have to be accessible to everyone without discrimination, within the jurisdiction of the state party.\(^{290}\) Accessibility has four overlapping dimensions firstly, non-discrimination that is health facilities, goods and services must accessible to all especially, the most vulnerable or marginalised sections of the population in law and in fact without discrimination on any of the prohibited grounds.\(^{291}\) Secondly, physical accessibility that health facilities, goods and services must be within safe physical reach for all sections of the population especially vulnerable or marginalised groups such as women, children, older persons, persons with disabilities etc., Accessibility also implies that medical services and underlying determinants of health, such as safe and potable water and adequate sanitation facilities, are within the safe physical reach including rural areas. Thirdly, economic accessibility that includes health facilities, goods and services must be affordable for all including socially disadvantaged groups. Lastly, information accessibility that includes the right to seek, receive and impart information and ideas concerning health issues.\(^{292}\)

c) **Acceptability:** All health facilities, goods and services must be accepted in terms of medical ethics, culture of individuals and communities. Ultimately, it should improve the health status of those concerned.\(^{293}\)

d) **Quality:** Health facilities, goods and services must also be scientifically and medically appropriate and of good quality. This requires, inter alia, skilled medical personnel, scientifically approved and unexpired drugs and hospital equipment, safe and potable water and adequate sanitation.\(^{294}\)


\(^{291}\) Supra n.289 para 18 & 19.

\(^{292}\) Ibid.

\(^{293}\) Ibid.

\(^{294}\) [www.unhchr./right_to_health](http://www.unhchr./right_to_health), 26-10-2006.
2.7.5. Scope of the Right

There have been serious efforts by international organizations\(^{295}\) and scholars\(^{296}\) to identify the scope of the right to health. It is not confined to availability of drugs and medicine but extends to realisation of other human rights including the rights to food, housing, portable water, access to health care facilities, just and humane condition of work, human dignity, life, non-discrimination, equality, privacy, access to information, freedom of association. These rights and freedoms constitute components of the right to health\(^{297}\). The right to health embraces a wide-range of social-economic factors that promote conditions in which people can lead a healthy life and extends to underlying determinants of health such as food and nutrition, housing, access to safe and portable water and adequate sanitation, safe and healthy working conditions and a healthy environment\(^{298}\).

2.7.6. Moving Towards Recognition of the Right to Health through Horizons of the Right to Life

It should noted that the Supreme Court of India being instrumental in enforcing various economic and social rights contained in Part IV as fundamental rights\(^{299}\), for instances, the right to food\(^{300}\), the right to work and right to livelihood\(^{301}\), environment\(^{302}\), shelter\(^{303}\), adequate nutrition and clothing\(^{304}\), the right of pollution free water and air\(^{305}\), and education\(^{306}\).

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295 Herman L. Fuenzalida-Puelma, Susan Scholle Connor, eds., The Right to Health in the Americas (Pan-America Health Organisation, Scientific Publication No. 509, Washignton, D.C.,
297 Supra 295.
301 Olga Tellis Vs Bambay Municipal Corporation, AIR 1986 SC 180, www.commonlii.org/in/cases/INSC/1985/155.html. However, in Delhi Development Horticulture Employees Union Vs Delhi Administration,( AIR 1992 SC 789), it was held that the same was not feasible.
302 Vincent Panikurlangara Vs Union of India AIR 1987 SC 990.
304 Francis Coralie Mullin Vs. Union Territory of India (1981)1 SCC 608.
305 Subhash Kumar Vs State of Bihar 1991 SC 420; SK Garg Vs Uttar pradesh, AIR All. 41.
The right to health and medical care to protect health and vigour while in service or after retirement, was held a fundamental right of a worker Under Article 21 read with Articles 39(e), 41, 43, 48-A and all fundamental human rights to make the life of workers meaningful and purposeful with dignity of persons\textsuperscript{307}. The right to health of a worker is an integral facet of meaningful right to life, to have only a meaningful existence but also robust without which the worker would lead a life of misery\textsuperscript{308}. Economic situation compels a person to work in an industry exposed to health hazards, but this should not be at the cost of the health and vigour of the workman\textsuperscript{309}.

2.7.7. Provision of Medical Service and Constitutional Obligation

One important question concerning the right to health is, whether State can plead financial constraints in extending medical service to preserve human life. It was held that in the welfare state, it is the constitutional obligation of the state to provide adequate medical services to all people\textsuperscript{310}. This duty includes to provide cheap medicine and drugs, better equipped hospitals with modernized medical technological facilities and these things have to be done by the State in accordance with the international declarations, mandate of the constitution and the judicial interpretation\textsuperscript{311}.

2.7.8. CONCLUSION:

The aforesaid discussion shows that the right to health is a human right guaranteed by the national Constitution and international Covenants on Human rights. The fundamental right to life and personal liberty would be rendered meaningless and futile, if life does not comprehend a healthy and vibrant life. The Constitution of India not only provides for the health care of the people but also directs the State to take adequate measures improving the healthcare conditions of the people such as workers, men and women and children of tender age. It also obligates the State provide work, education, provision for just and humane conditions of work and

\textsuperscript{307} Consumer Education and Research Centre Vs Union of India (1995)3 SCC 42.


\textsuperscript{309} Paschim Bangal Khet Mazdoor Samiti Vs State of West Bengal, AIR 1996 SC 2426

\textsuperscript{310} Paschim Bangal Khet Mazdoor Samiti Vs State of West Bengal, AIR 1996 SC 2426

\textsuperscript{311} AIR 2000 Journal Section 17 at p 21.
maternity benefit, living wages, environment, nutrition, adequate sanitation, clean water and air etc. However, these Constitutional directives are applicable to the State action and not private authorities like private health care hospital. Failure on the State to comply with these constitutional obligations does not amount to ‘medical negligence’ or ‘medical malpractice’. In law, doctors and medical institutions have a legal duty to take care of the patients. When they fail to treat their patients with reasonable care and skill, causing damage or injury is termed as ‘medical negligence’. In this context, the thesis will be focusing on the dimension of the phrase “medical negligence.”