CHAPTER - 2

HUMAN RIGHTS APPROACHES
2.1: Natural Law

The account of Natural Law, which begins with the Roman idea of a universal system of laws, is in fact dependent not merely on stoic cosmopolitanism, but also on the earlier Greek discovery of the idea of nature. The Greeks allowed two kinds of distinction that were important in the subsequent development of the theory of natural rights. In the first place, an ideal world constructed on rational principles from a theory of nature could be set alongside the real one permitting criticism of the mundane and not mere conformity to what was customary. Secondly, it meant that what was general could be set apart from what was particular. It was this idea of the nature that Antigone appealed in defiance of king Creon’s edict that her brother Polynices should remain unburied on the battle field because he had fought traitorously against his own city. And it was an appeal that showed the incompleteness of the moral community of the polis, which was the subject of classical political theory.

In treating justice, as a quality that existed in a whole community, a polis, Plato and also Aristotle, had subordinated the good

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of the individual to that of the state, and allowed him no appeal beyond the polis to any wider notion of community.

Stoic doctrine, reflecting, no doubt, in the Greek period the Hellenization of much of the world by Alexander the Great, and in the Roman period the imperial integration of diverse cultures, broke open the enclosed community of the polis and upheld the individual as an independent moral agent. The master concept making this development possible, was that of reason yoked to nature. The stoic ideal of 'living agreeably to nature' had an external and an internal aspect from the point of view of the individual. It supposed that there was a natural order in the world at large, governed by reason, and that it benefited individuals to discover and live in conformity with this order. And, internally, the individual was to subordinate will to reason in order to live a moral life.²

While the individual had, in these respects, a central place in stoic ethical thought, it was not at the expense of the older idea of obligation to community. Virtue was still a social thing. The difference was that the idea of community did not stop at the frontiers of the

polis, or at any other more or less arbitrary divide. For the community was not one of Kinship or neighbourhood, but of reason, and this was universal. The individual belonged to a universal community which existed by nature and whose rules were apprehended by the use of reason.

These are the rules of Natural Law, which Cicero described as 'of universal application, unchanging and everlasting---we cannot be freed from its obligations by senate or people, and we need not look outside ourselves for an expounder or interpreter of it. And there will not be different laws at Rome and at Athens, or different laws now and in the future, but one eternal and unchangeable law will be valid for all nations and for all times, and there will be one master and one ruler, that is, God--- Cicero foreshadows both the natural aspect of Roman law and the Christian idea of a universal law. And Cicero's conception of the equality of men, a single definition applying to all men because all have received the gift of right reason, has been located as 'the beginning of a theory of human nature and society of which the "Liberty, Equality and fraternity" of the French Revolution is only the

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Let us take first the bridge to Roman law. Each of the three divisions of the Roman law had a part in the foundations on which natural rights are constructed. The 'ius naturale' not as a body of law so much as a way of interpreting it, kept alive the idea of a universal and rational standard of justice. The 'ius gentium' in its practical definition as a body of law which applied in cases that might involve foreigners as well as citizens, provided something like the fact of universality to accompany the theory of natural law. And over the 'ius civil' and improbable source for universal rights, being the law which applied only among Roman citizens also played a practical part in forming the basis of the canon law which applied in the ecclesiastical courts of the Middle Ages. Roman law in this form was the law of an international civilization, and relatively universal.

It may be, however, that it was not by running with the ball of a universal law that Roman jurisprudence made its chief contribution to the evolution of the modern idea of a right, but by providing the

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wherewithal for a new sense of ‘ius’ (as a right as well as what was rightful) derived from the concept of ‘dominium’ (proprietary power). The ancient doctrine was that under the ‘ius naturale’ everything was held and used in common. There were no natural property rights. Property rights came in by way of ‘ius geentiurn’, which recognised the fact of possession by identifying rights that came to be defended as natural rights in order to defeat the old idea that the ius naturale ruled out ‘dominium’. Then the defence of a right to private property as coming from nature, because it allowed the cultivation that made survival possible, was a stretched to include not merely possessions but the faculties of individuals: control over one’s life came to be described as the exercise of a dominium. And so the natural rights to life, liberty and property (which are associated, as a starting-place or political theory with Locke) where all derived from an idea of possession borrowed from the Roman law concept of dominium, going back, it is urged, to the French scholar Gerson in the 14th and early fifteenth century and before him to the 12th century. In the course of this process, it is suggested dominium had become a ‘ius’ had taken on an additional meaning: what was rightful, good or just was now joined by a right in the modern sense of a moral possession.

5 See the argument that follows is from Richard Tuck, Natural Rights Theories: Their origin and Development (Cambridge, Cambridge University Press, 1979), ch. 1.
Meanwhile, the canon law of the Middle Ages was raising natural law in both origin and dignity. In medieval political theory, it was the law which expressed the organic unity of the whole of mankind. The fact of disunity, such as in the division between Church and state, was rationalized by reference to a theoretical synthesis at a higher level—the total claim to overlordship of both the spiritual and temporal domains.

But as the facts, not merely of this twofold division but also of the plurality of independent states, became more and more palpable, the medieval doctrine of unity became harder to sustain. And when it gave way, according to Otto Gierke, it revealed the 'antique-modern' theory, which looked back to the ancient theory of state, and forward to a new theory of natural law based on the individual. So the 'fundamental fact' at the close of the Middle Ages was the obliteration by the state and the individual of all intermediate groups in society, and it is in the contest between the victors that the western theory of human rights is marked out.

The emergence of the individual from the communal cocoon of the

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7 Ibid, pp. 4-5.

8 Ibid, p. 87.

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Middle Ages is celebrated in Renaissance humanism. Now it is legitimate, indeed it is part of the definition of man, to pursue excellence in everything, to pit human creativity against the hand dealt by fortune, and to accept the glory that goes with success in this enterprise. But if this was the platform from which the idea of the individual dignified by the responsibility of bearing rights as well as duties could eventually be launched, there was before this the extreme reaction to Renaissance hubris in the view of man taken by the early reformers. The importance of this, in turn, was first to unshackle the absolutist state, and then to assemble a theory of resistance against it which ended up with individual rights.

Against the humanist view of the dignity of man was placed, in the early Reformation, Luther's idea of his total unworthiness, his fallen nature and his inability to escape from sin except by the grace of God. And along with this miserable estimate of the worth of individuals went a return to medieval ideas that were careless of mere worldly arrangements. 'For what doth it matter in respect of this short and transitory life'; St Augustine had asked, 'under whose dominion a mortal man doth live as long as he be not compelled to acts of impiety

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or injustice'.\(^{10}\) This idea was sharpened by Luther to enjoin the obedience of Christians to the Secular authorities by reference to St. Paul's command, 'Let every soul be subject unto the higher powers. For there is no power but of God; the powers that be are ordained of God'. This was interpreted to mean that it was wrong to resist even tyrannical rulers, even particularly wrong to do so because tyrannical rule had been established because of the people's sins.\(^{11}\)

This was the doctrine that legitimised the absolute state, but it was not a legitimacy that meant unchallenged. There were, firstly, the arguments against it already available from medieval and older political theory. From the later Middle Age came the idea that political authority resided in the body of the people; that the lordship of an individual prince was only a temporary and representative exercise of a power in the polity; an office or function; and that there was a right arising from the popular sovereignty of an assembly of the people to depose magistrates who failed to fulfil their proper functions.\(^{12}\)

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order tradition came the Roman private, law power to use force against unjust force, and the injunction of natural law, emphasised by Aquinas, that every man-made law must derive from it and serve to give the moral law force in the world.

In the second place, there were the arguments against absolutism that added to the stock of political theory, and that were worked out in the battle with it.

In correcting such errors lay part of what came to be the right of resistance. But it was a duty before it was a right: Christians, according to Calvinist doctrine, had covenanted with God to do what they could to remove evil, and they broke that covenant if they endured a tyrannical prince. The last step from a duty to a right of resistance was taken in the Huguenot struggle against the French government in the late 16th century. If the early reformers had insisted on the liberty of princes, who derived their right to rule directly from God, to determine the religion of their subjects, the problem of the later reformers was that of providing the domestic dissenter with a political defence against his prince. Huguenot political theory achieved this in two stages the first consisted in a constitutionalist appeal to the checks

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on the power of the monarch, established over centuries, in order to
demonstrate to all Frenchmen, not merely to the Huguenots, the excesses
of the present authorities against Frenchman. And the second returned
to natural law. But it was not the natural law that been exclusively about
obligation, but one which took natural liberty as the starting-place for
political society. This was taken to be axiomatic, since magistrates
were made by people and not people by magistrates, and any infraction
of the liberty and security of the people, for which the original contract
have was said to have been made, was now thought to trigger a right
of resistance. So, to the Calvinist of an individual's covenant with God
was added the medieval notion of a contract between the king and
representatives of the people, and to a religious duty was added a
political right.

It was a right cautiously advanced, and there was, even in the
late 16th century, still a preference for the language of duty14. But
in the course of the Reformation the modern sense of right had been
established in a usage sufficiently general to include conservative as
well as radical thinkers. The Spanish 16th-century jurist Francisco
Suarez thought the true meaning of 'ius' to be 'a certain moral power
which every man has, either over his own property or with respect to

14 Ibid, pp. 335-7
that which is due to him. There is in this definition not only the idea of a night as a power over possession, but also the equally modern idea of a right as something which imposes a duty on others. This allows the notion, absent from classical Roman law, of law as a system of rules connecting up rights and duties.

If the reciprocity of rights and duties means that the content of the law can be got at just as easily from either and of a legal relationship, it is the Dutch jurist Grotius in the 17th Century who suggests that we should make a habit to start with rights. In his work, it has been said, the law of nature becomes 'respect one another's rights'. Then his contemporary Hobbes pushes the idea of right beyond legal restraint by calling it a liberty to do or to forbear. Contrasted with law, 'which bindeth to one of them'-and allowing, in the form of a right of nature, anything which is necessary to an individual's self-preservation


2.2: Individualism and Rationalism

In Locke's work later in the 17th Century, so often taken as the foundation of modern natural rights theory, by virtue chiefly of his impact on the American Revolution, those earlier developments join up. The 'dominium' of the scholastic philosophers becomes the right to property, meaning of life and liberty as well as mere possession. The Huguenot theory of popular resistance to a tyrannical prince becomes in Locke an individual right of resisting.\(^{18}\) And from Grotius and Hobbes comes the notion of individual rights as the starting-place for political theory, the purpose for the achievement of which the social contract is agreed.

Its individualism, together with its rationalism and its radicalism have been taken to be the distinguishing marks of the theory of natural rights that underpinned the French and American Revolutions. The theory was individualist both in its assumption that individuals came before community in the imagined history of the state of nature and the origin of civil society, and in its assertion of the priority of the moral claim that individuals had over groups. The social contract catered for

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both these aspects of individualism by providing the means through which national and autonomous people could construct a society, and by taking the purpose of the contract to be the better provision for the values of the individuals who agree it.

In political theory of this kind, reason has a prominent part. But by the rationalism of modern rights theory is meant chiefly two things. The idea that reason can act alone in political life without the assistance of authority, or tradition, or God, and the notion of the constructive power of rational thought. This is Tom Paine's retort to Burke's astonishment at the French revolution. It was not a creation from chaos, but the consequence of a mental revolution. 'The mind of the nation had changed before hand, and the new order of things has naturally followed the new order of thoughts'.

In this trust in the power of thought to produce social change lay part of the radicalism of the theory of rights. And beneath this was the mere substantial idea of the theory of rights predisposing revolution because it had become detached from the discipline of duty, or even from any legal constraint. So that in the passage from natural law to natural right, from objective principles to subjective claims, it is often

reasonably agreed, there is a substantial discontinuity in the naturalist tradition even though the change was effected in a series of small steps.

However, this may be, French revolutionary doctrine now took the failure to observe the rights of man to be the cause of all public misery, much as earlier conservatives had blamed the neglect of degree, and later radicals were to find fault with the exclusion of a particular class. The preamble to the Declaration of the Rights of man and of the citizen announced that 'ignorance, neglect, or contempt of human rights, are the sole causes of public misfortunes and corruptions of Government.' While this diagnosis of social ills has been an important theme of liberal political theory down to the present day, it is not one that went unchallenged at the time of its invention—even by the proponents of the theory of revolution themselves. Article 3 of the Declaration Seemed to come up with a rival doctrine in its description of the nation as 'essentially the source of all sovereignty; nor can any individual, or any body of men, be entitled to any authority which is not expressly derived from it'. In this regard, Rousseau, whose influence on French revolutionary doctrine is clear, has been described as a Janus-like figure in the history of natural law, manifesting its individualism and universalism, but looking forward to romantic German thought in

\[20\] Ibid, p. 94.
his idea of the general will.\textsuperscript{21}

The stress on the community, which the doctrine of general will presaged, weakened each of the three props of the theory of natural nights. The individualism which arrived at the state through social contract theory was set aside by the idea of the state as itself a real personality with the capacity to will and to act. And instead of showing the community to be the outcome of individual decision, the emphasis was on the extent to which the individual was shaped by the community; language, law, morality were all the products of society. 'Individuals parts like shadows', Burke said, 'but the commonwealth is fixed and stable.\textsuperscript{22}

The rationalism of the theory of natural rights also suffered from the new stress on community. Against a universal natural law based on reason was placed a particular national law based on the spirit of an historical community. Instead of the law of nations within the state,


which had expressed that part of any legal system which was common to all legal systems, the new concern was with what sets the systems apart from each other, and with ridding them of artificial foreign elements. The revolt of the nation against 'Natural' has been called 'the essence of the revolution in German thought.\(^2^3\)

The radicalism of the theory of natural rights went the same way as its individualism and rationalism. The treasure of liberty was a possession to be secured, rather than prize to be contended for by political exertions.\(^2^4\) Society required that the inclinations of men should frequently be thwarted, their will controlled, and their passions brought into subjection.\(^2^5\) Not rights but duties, not nature but Convention, not reason but authority. This seemed to be the result of the return to the medieval, or even ancient, stress on community above the individual.

Certainly, it was the recapturing of the ancient Greek sense of

\(^2^3\) Earrest Barker in Otto Gierke, Natural Law and the theory of society 1500-1800, 2 vols (Cambridge, Cambridge University Press, 1934), Natural Law, p. II.


\(^2^5\) Ibid, p. 333.
solidarity with the polis, the community, that provided part of the incentive for the work of the German philosopher Hegel in the 19th Century. But it was not to be done at the expense of the liberty of the individual. Rather individual freedom was to be realized in the political community, through a synthesis which provided a view of history as a vehicle for the cosmic spirit uniting man and society in a larger whole. To the Moralitat of his predecessor kant, concerned merely with what individuals ought to do, Hegel added the higher imperative of the moral obligation to the community in which there was no gap between ought and is, because is had matched ought. Freedom reigned once this was achieved. And this, it has been said, in the great distinction between the liberal conceptions of the 18th and 19th centuries 'the one places liberty at the beginning, the other at the end of the historical process.\textsuperscript{26}

The importance of this, from the view point of the history of human rights, is its elevation of group rights to a dignity equal to or greater than those of individuals. Such group rights as that to self-determination so important in contemporary world politics, may be traced back to the French Revolution, but are consolidated in German

thought. And the idea of self determination connects to that of positive freedom, which, in the twentieth century discussion of human rights, has had an equal claim with that of the negative liberty associated with Locke and the 18th Century that followed him. The economic and social rights which are often associated with Marx's criticism of bourgeois rights, and which the countries with Marxist-Leninist ideologies lay a special claim to, are in some degree the product of 19th century thought about what is now called positive freedom.

Before this positive contribution to ideas about rights in the 20th century came the attack on the 18th-Century idea of natural rights. It was an attack that began as soon as the ink was dry on the Declaration of rights of Man, and it came from all political directions. Here it is intended to look, first at Burke and Hegel, then at Bentham, and finally at Marx. These authors, taken together, constitute what can be called the classical objection to the theory of natural rights.

Close to the heart of Burke's criticism of the theory was its tendency to turn the complexities of politics into the false simplicity of metaphysical abstraction. Natural rights, so clear and seemingly unequivocal, were foreign to the complex nature of politics, which consisted in manoeuvre, adjustment, and above all, attention to
circumstances, which gave to every political principle its distinguishing
colour. Against the 'Rights of Men, he said, there can be no prescription;
against these no agreement is binding; these admit no temperament,
and no compromise; anything withheld from their full demand is so
much of fraud and injustice. The language of rights deepened the
antagonism of political opponents while raising their expectations, and
made more difficult the task of statesmen, which was to bring them
together. Worse, the rights of man led down a path to anarchy. They
were among the pretexts behind which pride, ambition, avarice,
revenge, hypocrisy, and all the train of disorderly appetites hide. From
these nobody was safe. The rights of man of the Jacobins were a
challenge not merely to this or that ruler, but to civil society itself, and
it was out of this fear that Burke regarded the events of the revolution
as a European civil war rather than a local French difficulty. 27

The correct way to think about rights, according to Burke, was
in terms of the ancient and indisputable laws and liberties inherited
from our forefathers, and this meant particular rights, the rights of
Englishmen, not the rights of man. Property rights were the model for
all rights, and the agency for their establishment was prescription from

time immemorial. The mechanism for generalizing the prescripion associated with property to embrace all rights in that of prejudice, the latent wisdom in a community predisposing its members to the established way of doing things without the necessity of submitting it to the test of reason. Rights had a part in this pattern, but it was better that it be discerned than defined, felt as much as thought. Civil Society was to be interpreted, not as a collection of right and duty-bearing individuals who were united by some abstract principle of equality, but as a differentiated community in which wants were satisfied according to ancient rituals, and to which people were attached more by sentiment than by mere advantage. Even if society was a contract, its ends could not be maintained except in many generations, and it was partnership therefore between the living, the deed and those yet to be born.

Burke, then, brought down the three props of the theory of the rights of man single-handed. Its rationalism was defeated by the idea that commonwealths grow rather than being constructed. Its individualism was confronted by the injunction that mere temporary possessors of the commonwealth should not think it amongst their rights to cut off the entail by destroying at their pleasure the whole original fabric of their society. And its radicalism was weighed down by the attention to custom, and to the wisdom of our ancestors.
In Hegel's writing, there was a good deal to be found that was similar to Burke. There was the same concern to fill in the gap between the individual and the state in the recognition that all manner of intermediate attachments helped bind the community together more firmly than could a mere contract. There was the same notion of society as differentiated and hierarchical rather than uniform and equal. And there was the same fear that the doctrine of absolute freedom would lead to the destruction of the social order.

Hegel did not deny that there was rights of individuals to life, liberty and property. Indeed they formed the basis for man's participation in civil society. But this was not civil society in Locke's sense. Hegel meant by it the system of needs that were met by exchange in the market-and this was a society into which men entered as men, and not as members of a particular community. But political society was about the particular community, and, in regard to participation in this, private rights meant very little. This was because freedom in the negative sense of the Enlightenment, meant the freedom merely to choose between passions and impulses it there was no control over the contents of choice.28

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Bentham, the founder of utilitarianism, was more coldly destructive of the theory of natural rights of the French Revolutionaries than either Burke or Hegel. First of all, they had made a simple mistake of philosophical method. They imagined that principles preceded consequences, whereas in fact particular propositions always came before general ones, which were built up on the basis of agreement among the particular. Then the generality of the propositions made it difficult to keep them within the bounds of truth and reason. And this was compounded by another scientific error, that of appealing to abstract propositions for proof of the existence of abstract propositions and so begging the question.

The propositions themselves were not wise enough planly, men were not born free, nor did they remain so, any more than they were born equal and remained so. All men were born in subjection to their parents; into families uniquely endowed, to live lives in a society constructed on inequality-apprentice and master, ward and guardian, wife and husband.

30 Ibid, p. 496.
So these pretended indefeasible rights were false, and to make matters worse, inconsistent with each other. And the nonsense was not harmless as an improper word right be in a play or a novel, but dangerous because in a body of laws such a thing might be a national calamity: 'out of one foolish work may start a thousand daggers'.

Here, Bentham was as frightened of anarchy as Burke, and as contemptuous of the selfishness of rights as Hegel. Society was held together by the sacrifices that men could be induced to make by those practised in the art of government, and talk of rights parted the cords that held in the selfish passions.

2.3: Positivism and the Socialist Concept

The reason that rights could be called, if anyone's, an English achievement, rather than a French one, was that here right had arisen as the child of law. From real law came real rights, but from imaginary laws, such as the law of nature, came imaginary rights. Sense could be made of a political system only by reading from government to law to rights and not in the opposite direction. Social contract theory was

33 Ibid, p. 497.
another piece of nonsense. There was no such thing; contracts came from governments, not governments from contracts.\textsuperscript{34}

The mainstream of international law has evolved out of the predominance of the state and the states system. Notions of rights evolved within the contexts of domestic political struggles. However, from Greek, Stoic, and Christian roots came ideas of human governance associated with relations between rulers and ruled anywhere. While medieval ideas of Christian unity and natural law were influential. Theorists of the emergent states system were ambivalent about such critical issues as rights of resistance - tyrannicide, and humanitarian intervention. That is, the prerogatives of the state were balanced against notion of 'higher law'.

Jean Bodin, writing in the sixteenth century, set forth the decisive argument in favour of centralized secular authority, prefiguring the actual emergence of strong governments enjoying the realities of sovereign control over domestic society. The Swiss eighteenth - century jurist Vattel extended Bodin's views of sovereignty to the external relations of states, providing an application of statist logic to the conduct of interstate or international relations accepted as authoritative virtually until the present time. He separated natural law from positive

\textsuperscript{34} Ibid, p. 501.

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law, placing emphasis on the requirements of governmental consent as critical to the formulation of international law obligations. Also, Vattel underscored the importance of accepting a government's own interpretation of its obligations, especially in relation to its own citizenry, or those present within its territory. External actors had no standing to complain in the absence of very specific agreements affording protection to aliens. That is, human rights were not a fit subject for global concern unless a particular government so agreed. The positive idea of sovereignty shielded abuses of rights committed within state territory. Some tension arose from the status of aliens abused by the territorial government, especially when the abuse was committed outside the European centre of the world political system. Thus 'capitulary regimes' and doctrines on 'the diplomatic protection of aliens abroad' complemented notions of nonintervention in the colonial period. With the collapse of colonial legitimacy, ideas of granting special status to privileged aliens and the more general approach of diplomatic protection lost their influence. Powerful governments continue to maintain a residual claim to intervene to protect their nations in a situation of

jeopardy.

The pure morality of the states system is, in its essence, both antiinter ventionary and antiimperial. The main contention, which continue to attract modern champions is that only imperial actors have, in general, the will and capabilities to do anything significant about abuses of human rights, and yet it is precisely these actors that are least trustworthy because of their own wider, selfish interests.36

In effect, an absolute doctrine of nonintervention is an ordering choice that acknowledges that some particular instances might justify intervention, but not sufficiently to create a precedent that other potential intervenors could invoke.

This view of world legal order rests heavily on the juridical ideas of equality of states and sanctity of treaties and on the geopolitical ideology of a pure states system. It presupposes the absence of imperial actors serving as global enforcers, or, put differently, of strong states assuming the role of assuring compliance by weak states. This model of

juridical and political equality, of a world of states mutually respectful of each other's sovereign prerogatives, necessarily precludes any missionary claim to intervene for humanitarian purposes. The highest goal in such a system is the autonomy of state actors protected through maximum adherence to the norm of nonintervention.

The statist matrix of political life also means that the most substantial contributions to the realizations of human rights arise from the internal dynamics of domestic politics. Far more significant than imposing human rights policies from outside is an effective commitment to their protection arising from within the body politic. Political theorists as different as Kant and Lenin have argued that the proper form of domestic government; in Kant's case, a liberal republic and in Lenin's Radical socialist state established after an armed struggle that overcame the old order. That is, the achievement of human rights is a matter primarily for domestic reform; global concern is neither necessary nor effective.

The positivist standpoint is relatively simpler and does not allow of so many interpretations. In positivism only those rights are acknowledged as human rights which are positive rights-part and parcel of the positive legal system; that is, they are either incorporated in the national laws as citizens rights, or appear in international positive
law. The positive concept professes the will of the state to be the direct cause of human rights on the international plane. It is held that human rights derive from the congruent wills of several states. Rights are not recognized unless expressed in statutory rules.

Moreover, the positivist theories are no longer content to stop at the point of statutory rules, but attempt to explain the formation, the origins of the state's will. Such explanations however, usually fall short of the investigation of the deeper reason of the state will, reacting-as they do-at most the factors directly provoking the state will. Nowadays the science of politics is making efforts to describe the elements directly leading to, or motivating, the normative positive law decisions of the states. This science, also engaged in studying the day-to-day politics, includes in its investigations the evolution of the power thus, the departure from the strict positivist standpoint, from the traditional grounds, indicates a definite change.

One could say, however, that it has still remained in the plane of positivist practicism, and has not become the real theory of rights since it has failed to dig into the deeper causes and theoretical foundations of law. Probably it does not ever wish to do so. The legal positivism bases its theory on the science of politics, whereas the latter is really no more than the applied science-or practice of its own theory: which is the science of state and law or the philosophy of law. In
looking for the factors leading to human rights they restrict themselves to the analysis of the domestic or foreign international political conditions. As regards human rights this concept necessarily bears the stamp of a practitioner.

Marx's objection to the theory of natural rights had more in common with those of Burke and Hegel than that of Bentham, although its thrust was revolutionary rather than conservative. The French revolutionary theory was not a silly mistake, though it might not tell as much about society as its proponents thought. Rather, it was a theory with limited application in time and space which had to be interpreted in the light of the political interests it was designed to defend. Thus the rights of man took on their most 'authentic' form 'among those who discovered them, the North Americans and the French', and they described the outlook not of all men, but only of bourgeois man.

Bourgeois man was the person participating in civil society in the sense that was opposed to political society. And he participated in civil society as an egoistic man 'separated from other man and from the community.' His right to liberty was a right to separateness, to be

independent of others, an 'isolated monad'. The practical application of this right to liberty lay in the right of private property, and, as powerfully argued by C.B. Malpherson, freedom in the liberal theory of rights is a function of possession. Locke is above all the champion of property, and having derived a right to property from natural law, he then removed all natural law limitations from it. Thus the idea of society based on a contract agreed by individuals guarding their moral possessions becomes the political theory of possessive individualism.

In Marxist thought, then, the theory of natural rights is the special language of a group defending a particular pattern of interests. It is a language that, in the 18th century might have been appropriate, and progressive in getting rid of feudal remanants, but its use outside the context is to be suspected as an attempt to make an unequal distribution of property acceptable to the least advantaged. certainly, it provides no objective standard, as it would in the theory of natural law, by which to judge the strength of any political claim. So, against the

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rationalism of the theory of natural rights, stands Marx's historicism; against its individualism stands a Hegelian insistence on the possibility of freedom only through community; and to its radicalism is added an insistence on a new revolution that would, in advancing the disadvantaged class, sweep away the debris of the old advantaged one.

It is, however, in connection with Communism that we hear most about rights in contemporary politics. Communists states are, or at least aspire to become, modern industrial societies. But they rejected liberal democracy root and branch. It is sometimes said that at least the economic and social rights of the Universal Declaration can be secured under Communism. Such a claim has been made a Communist spokesmen themselves. The important question is not whether the rights listed in the Declaration can be implemented in a Communist state? can people live together as fellows human beings in terms of the values and institution that these values and institutions require that certain members of the community have no moral status, are non-persons and are essential expendable. Is this assertion justified?

What about the notorious purge under Stalin and the liquidation of the Kulaks which he instigated? Surely these are cases of people being treated as expendable? Certainly they are, and no less an authority than the late Nikita Khrushchev admitted as much. He made
that plain in his famous speech denouncing Stalin and all his worked at the 20th Party Congress in 1956. But his point was that the terrible things done under Stalin were a betrayal of Communist values and institutions, not something required by them. Now there can be no doubt that, in the case of some of them, there is a violation of the human right to respect. But the charge normally made is that their human right to freedom is being violated. What is particularly impressive about them is that they have worked out their own critique of Communist values and institutions although they have themselves grown up in the setting of these same values and institutions. But granted their integrity and independence of mind, is it correct to say that their human right to freedom has been violated? No, because as we have seen, the human right to freedom can only be the right to be free from arbitrary coercion and interference. Now in terms of Communist values and institutions, the coercion and interference to which the dissidents are subjected is not arbitrary. There are good reasons for it. It is the duty of the Communist citizen loyally to follow the directives of the Communist Party in all political matters. To challenge the political leadership of the party is to proclaim oneself an enemy of Communism. That is what the dissidents have done, which is why they are in trouble. They have not, of course, done anything wrong in terms of the values and institutions of liberal democracy but a Communist
state is not a liberal democracy.

Communism does not allow its own values and institutions to be called in question. There is no place in a Communist state for dissidents. But Communism is not unique in this respect. Historically, neither Catholicism nor Protestantism tolerated heresy. It was something to be stamped out. In historical perspective, it is Communism which is in the main streams in this matter, liberal democracy is the exception. Now there are good reasons for contending that a tolerant society which permits internal criticism is better than an intolerant one which does not. But it does not follow from this that people cannot live together as fellow human beings in an intolerant society. Monolithic values and restrictive institutions are not necessarily incompatible with implementation of universal moral rights. Not everything which is wrong in human social life is a violation of human rights. There are other grounds for holding that the quality of life under Communism is inherently inferior to what it is, or at least can be under liberal democracy.

The socialist concept of rights is alternatively branded as being of the natural law or the positivist type, although in fact it is neither. A few analogous elements may be found in it, but basically it is a radically new and different theory. Its starting point as criticism of the main trends in rights and more emphatically against the duality which can be found in the constitutions of the states differentiating between human rights and citizens' rights is more important.

The socialist theory declares that there is no difference between the origins of the two types of rights - human rights and citizens' rights - because all right is derived from the state; at most their social preconditions may differ. Those fighting for bourgeois society under the slogan of enlightenment called human or eternal and inalienable rights those rights which protected the fundamental institutions of the capitalist social system based on private property and the freedom of enterprise. On the other hand the rights connected with the political system of the bourgeois society - equality before law, the political freedom - were regarded as citizens' rights.

The socialist doctrine denies the double origin of human rights both in respect of the social system based on private ownership and in respect of those based on social ownership of the means of production.
According to it, the property relations being the fundamental institution of society ultimately determine even the rights called human rights. The socialist speak of an uniform pattern of citizens' rights because they consider every positive right as being created by the state. The socialist concept does not regard the constitutional expression of the citizens' rights as being dependent on arbitrariness of the state because it considers citizens' rights to be determined itself by objective circumstances, and therefore it makes efforts to reveal the factors determining and influencing the state will.

However, may be for the sake of argument or because their opponents force them to it, Marxist and quasi-Marxists regimes have also taken to talking of human rights. For Marx himself the rights of man offered a typically insidious example of 'bourgeois formalism'. In so far as Marxists will speak of sacrosanct human rights, they will vest them not in the individual but in the proletariat as a class in the Marxist state or in the party. Rather than protecting the individual, human rights thus understood provide an unfailing excuse for ignoring and oppressing him.