CHAPTER III

THEORETICAL BACKGROUND

Theoretical background shows how a research is based on or contributing to the existing theory. The present study is also based on certain theories, which have been developed by persons of legal authorities and economists. Theories, generally, talk about ideal situations or equilibrium conditions or the functional relationship between variables under certain assumptions. Theoretical background of human rights is absolutely necessary for the justification of any study on human rights. A look at the academic study of human rights shows that it has been dominated by lawyers/jurists.

All legal experts have unanimously opined that there should not be any human rights violation. But, there are differences of opinion as to how far human rights are legally enforceable. Legal positivists sometimes say that human rights are the only rights that are legally
enforceable, while others hold the view that it may be desirable that human
rights are legally enforceable but it is not necessary that they should be so.

3.1 Theories of Natural Rights

The first version of human rights theory assumed that God
was the source of human rights. It is the classical theory of ‘Natural
Rights’. Every human being had certain rights, which were derived from
nature and not from the government or its laws. It is argued that the
legitimacy of government rested on the respect that it accorded to these
rights. Foremost among the proponents of natural rights doctrine was John
Locke (1689). Locke argued that all individuals were endowed by nature
with the inherent rights to life. Liberty and property which were their own
and could not be removed or abrogated, by the state.

Locke also postulated that in order to avoid the uncertainties
of life in a state of nature, mankind had entered into a social contract or
voluntary association by which the exercise of their inalienable rights was
transferred to the ruler. Where the ruler of the state broke the social
contract by violating the natural rights of the individual, subjects were free
to remove the ruler and replace him or her with a government which was
prepared to respect those rights. (Kumar, A. 2002) King James II, by
violating the natural rights of his subjects, had forfeited his right to rule and
had legitimated the consequent change in government (the English
Glorious Revolution of 1688). From the Lockean view of natural rights,
two things are evident. First the individual is an autonomous being capable of exercising choice. Secondly the legitimacy of government depends not only upon the will of the people, but also upon the government’s willingness and ability to protect those individual natural rights.

While precepts of natural law may be traced back to classical times, it may be said that the modern school of natural law emerged in medieval times with the writings of the early Christian philosophers, foremost among whom was Saint Thomas Aquinas. The Thomistic view of natural law postulated that it was that part of God’s perfect law which could be divined through the application of human reason. Philosophy was the idea that each person’s station in life was determined by God. All people irrespective of status were subject to the authority of monarchs constrained by divine rules. All human beings were endowed with a unique individual identity which was separated from the state.

The next stage in the development of natural law, however, was to sever it from its theistic origins and to make it a product of enlightened secular rational thought. This task was undertaken by Dutch jurist Hugo de Groot, who is usually known by his Latin name, Grotius. He is generally acknowledged the father of international law. He argued that it was possible to rationalize the existence of natural law which was the basis of all positive or written law. (Rai 2004)
The next prominent person is Immanuel Kant, who developed his ideas from a more general appreciation of the non-empirical natural law and natural rights tradition. The basis of Kant’s theory was the categorical imperative, that is the absolute moral good which is identifiable in the exercise of the virtuous will by all rational individuals. In Kant’s theory, the categorical imperative operates on three levels; first, it, specified universal acts of duty on all individuals; second it provides systematic rules for determining these duties, and third, it specifies the relationship between freedoms and duties. Underlying the categorical imperative, however, is the idea that individuals are under a duty to develop their rational capacities and to employ them for the promotion of happiness in others. While the categorical imperative might be seen to be primarily duty-based, it has, as its correlative, a system of rights. Unlike the old natural law tradition, however, such rights are not prescribed, but flow from the consequences of the Kantian duty-based system. In a society of rational; self-determining human beings, Kant postulated that freedoms or rights would emerge as a consequence of the application of the categorical imperatives. Such rights may, therefore, be described as consequential and non-relational in that they do not depend upon each other for their existence or worth. Unfortunately, because of the non-relational nature of rights in Kant’s theory, it is particularly difficult to apply to concrete situations.
Natural Rights Theory has the merit of providing the basis for a system of law which is allegedly superior to the law of the state and to which appeal may be made if it appears that the latter is unjust, arbitrary or oppressive. It may even be argued that the early revolutionary constitutional documents were natural rights. (Kumar, A. 2002)

Although there has been something of a revival in the post-Second World War period, Natural Rights Theory fell into general disrepute during the nineteenth century. The major criticism directed at Natural Rights Theory was that it was not scientifically verifiable.

The concept of natural rights was opposed by conservatives because it was too egalitarian and subversive. Some radicals opposed it endorsed too much inequality of wealth. But, Edmund Burke did not reject the concept of natural rights completely. He recognised the natural rights to life, liberty, freedom of conscience, the fruits of one’s labour and property and equal justice under the law. Though Burke subscribed to Natural Law Theory, he opposed the universalisation of the natural rights concept for its failure to take into account the national and cultural diversity. It was David Hume who first raised the dichotomy between naturalist and positivist schools of jurisprudence. Later Hume’s view was given human face by Jeremy Bentham, who belongs to the school of positivism known as utilitarianism. Bentham rejected the
concept of natural rights more thoroughly than Burke did. Bentham sought to establish law on a rational basis. He argued: “Right is with me the child of law; from real laws come real rights, but from imaginary law, from “laws of nature”, come imaginary rights. Natural rights is simple nonsense: natural and imprescriptible rights, rhetorical nonsense upon stilts”. (Kumar, A. 2002 p.17)

The central view of utilitarianism was that human existence was dominated by pleasure and pain, and that by increasing the former and diminishing the latter, the lot of mankind would be improved. The aim of utility, therefore, was to increase the overall stock of human pleasure which could be calculated on a mathematical basis. The ultimate test of utility, therefore, was the implementation of rules which gave the greatest happiness to the greatest number of people – the maximization of happiness. The main achievement of Hume and Bentham was to make law an autonomous field to scientific study separate and distinct from natural law inputs, and to pave the way for the more systematic approach (Gupta, 2004).

According to positivists natural rights were vague, and so they could not be objectively evaluated and disputes over natural rights were, therefore, likely to be settled by violence. Even natural law theorists believed that children were not equal in rights to adults, and in practice,
they did not accept equal rights for women, blacks, the poor and others. Bentham was convinced that the theory of natural rights could not give a clear account of the limits of rights. But he believed that the principle of utility, could. For Bentham natural rights were only legally enforceable rights. (Rai 2004)

During the French Revolution, many supported the view that the concept of natural rights was anarchic. A group of philosophers known as the ideologues sought to set aside the concept of ‘Rights of Man’. Karl Marx argued that the rights of man were the rights of egoistic man, separated from the community. This conception of rights ignored the fundamental importance of labour, production and wealth to human well-being. However, when the Covenant of the League of Nations was adopted in 1919 at the end of the First World War, it made no mention of the rights of man. It took the horrors of Nazism to revive the concept of rights of man as human rights (Freeman 2002).

Human rights are connected not only with the protection of individuals, but also with the way they are directed by the state in which individuals may develop to their fullest potential. This description may reveal what human rights are intended to achieve in a teleological sense, but it does not reveal which human rights exist or what they are. As far as the protection of human rights is concerned, one should ask whether
economic, social and cultural rights are true rights or simply aspirational targets. If they are the latter, then no human being can legitimately claim that his or her government is under an absolute, indefeasible obligation to accord those rights to him or her through a programme of progressive implementation. They are merely claims to a better life to which a government may give effect if economic conditions become more favourable at some undetermined future date. If they are true rights the government is under a positive obligation to accord them through the appropriate implementation mechanisms. It may be evident that two very broad categories of enquiry about human rights are implicit. The first, often referred to as analytical jurisprudence, raises questions about the nature and origin of rights and how it is possible to know that we have any rights at all. The second category of enquiry, is sometimes called normative jurisprudence. It poses questions about the specificities of rights which individuals are acknowledged to possess and how such rights standing in relation to each other. International human rights theorists have tended to fall into one of two very broad schools of analytical jurisprudence, the natural and positive law schools. It is in the field of normative jurisprudence that international theorists have been more active, but in the absence of second analytical foundations, normative enquiry has assumed an air of unreality. It should not be thought, however, the domestic jurists are irrelevant to our inquiry into the analytical and
normative aspects of human rights. There are two reasons for this. First the protection of human rights is primarily a matter for domestic law. Second, the majority of human rights instruments create institutions to supervise the system of which they are part. (Kumar, A. 2000)

3.2 Anti-Utilitarian Theories

The central criticism of utilitarianism is that it sets as its priority the well being of the majority. Little thought is given to minorities or individuals within a state. The preferences of individuals are not represented by the majority and who may, in consequence, be severely disadvantaged, deprived of their rights. Take, for example, the issue of homosexuality. The majority of people within a state might find the practice of homosexuality so abhorrent or abominable that they would to prohibit it by legislation. Clearly, in a pluralistic, democratic state such a position would be untenable because of the tendency to a tyranny of the majority inherent in utilitarian focus.

Two of the most notable critics of utilitarianism are Dworkin and Nozick. To them, the minimal state is not only based on certain moral precepts but is itself one of those moral precepts. The other moral basis of the minimal state is that human beings have the right not to be killed, assaulted, robbed or defrauded and the right to acquire, retain and dispose of property to others. Wrongdoing, therefore, corresponds only to
violation of these rights. In Dworkin’s view, rights are defined as political ‘trumps’ held by individuals ‘when, for some reason, a collective is not a sufficient justification for denying them what they wish as individuals, to have or to do, or not a sufficient justification for imposing some loss or injury upon them.

In Dworkin’s view human rights are derived from the fundamental right. Everybody is entitled to treatment as an equal. This in turn is derived from the central tenet of liberalism that everybody must be treated as an equal and with equal respect and concern. One can take issue with Dworkin’s theory of rights at a number of levels. But it is none the less useful because it attempts to reconcile societal goals with individual preferences and establish a hierarchical order of rights.

Consideration of anti-utilitarian jurists cannot be deemed complete without a brief examination of Rawls Theory of Justice. In his work, he argues that justice is a way of distributing the rights, duties benefits and burdens among individuals within society. He further posits, as distinct from utilitarians, that every person is inviolable and that even the welfare of society cannot displace this inviolability.

Like Nozick, but starkly with different results, Rawls started with the familiar social contract theory in which all persons are in an original position of equality as regards the distribution of freedom and
power. Each, however, is endowed with a “veil of ignorance” about his or her own personal qualities and attributes. The first principle will be that everyone has an equal right to the most extensive total system of equal basic liberties compatible with the same system for others. The second principle is that social and economic inequalities are to be eliminated, so that they are to be the greatest benefit to the least advantaged.

Unlike Dworkin, who does not concede a general right to liberty, Rawls argues to the contrary. Liberty is the pre-eminent right and that all other rights are subsidiary to it. This principle states that an equal distribution of resources is to be preferred unless it can be demonstrated that an unequal distribution would make both the advantaged and disadvantaged better off. Again it may be argued that Rawls’ theory is acceptable in so far as it applies to liberal democratic societies, but that its application to other forms of political organization make it unrealistic. (Freeman 2002)

3.3 Legal Realism

The explosion of regulatory activity in the USA following President Roosevelt’s economic ‘New Deal’ lead to a number of American jurists to consider new methods of attempting to explain the functions of law within a complex, highly regulated industrial society. In this task they were aided by the input of social scientific perspectives particularly that of
the then relatively modern discipline of Sociology. Foremost among the legal realists were Karl Llewellyn and Roscoe Pound. Within this framework, rights might emerge as the end-product of such a process of interaction, thereby reflecting the prevailing moral values of society at any given time. In this sense, the realists provided a kind of ‘snapshot’ of rights as a temporary manifestation of an ongoing process. But Pound did identify a mechanism by which individual rights might be prioritized. As Shestack points out, this lack of ‘goal identification’ renders Pound’s approach deficient in assisting normative enquiry. None the less, a contemporary development within the realist school perhaps addresses some of the criticisms directed at Pound. This is the Yale School of International Law whose proponent is Myres McDougal. He and his colleagues have developed a value-explicit and policy-orientated approach to human rights based on the ‘super-value’ of the protection of human dignity. Like other legal realists, McDougal, Lasswell and Chen argue that demands for the satisfaction of human rights derive from a broad based international sharing of values. (Ray 1997)

3.4 Economic View on Human Rights

3.4.1 Adam Smith

Adam Smith believed in the doctrine of ‘Natural Law’ in economic affairs. He regarded every person as the best judge of his self interest who should be left to pursue it to his own advantage. In furthering
his own self interest he would also further the common good. In pursuance of this, each individual was led by an “invisible hand” which guided market mechanism. It is not to the benevolence of the baker but to his self-interest that we owe our bread, said Smith. Since every individual, if left free, will maximise his own wealth, therefore all individuals if left free will maximise aggregate wealth. Smith was naturally opposed to any government intervention in industry and commerce. He was a staunch free trader and advocated the policy of laissez-faire in economic affairs. The “invisible hand” – the automatic equilibrating mechanism of the perfectly competitive market tends to maximise national wealth. There will be no place for abuses, violations and exploitation. All are guided by market forces (Jhingan, 1990).

3.4.2 Marxism

The first person who talked about exploitation of labourers or violation of workers’ right is Karl Marx. He, arguing from a scientific basis, claimed that the alleged law of nature was both idealistic and historical. Hence, the claim by seventeenth and eighteenth century bourgeois revolutionaries to the effect that rights were both inalienable and imprescriptible was unsustainable and indefensible. Rights, Marx argued, were simply bourgeois concept and a product of bourgeois-capitalist society.
In Marxist theory, the essence of an individual is that of a social being who uses his or her abilities to satisfy his or her needs. The true potential of human beings, in Marxist doctrine, can only be realized if they are enabled to return to their true nature as social beings. This however, can only be achieved in a truly communist society where all means of production are held in common and there is an absence of class conflict. As such, these rights can only be social and economic, since they are directed towards the reduction of the means of production to common control. The need for rights disappears, since each individual will be in a free and spontaneous relationship with all other individuals. The Marxian analysis is the gravest and the most penetrating examination of the process of capitalist development. It had the greatest influence in shaping policies in the Soviet Union, China, and other communist countries. Marx contributed to the theory of economic development in three respects, namely, in broad respect of providing an economic interpretation of history, in the narrower respect of specifying the motivating forces of capitalist development, and in the final respect of suggesting an alternative path of planned economic development. The materialistic interpretation of history attempts to show that all historical events are the result of a continuous economic struggle between different classes and groups in society. The main cause of this struggle is the conflict between the mode of production and the relation of production. The mode of production
refers to a particular arrangement of production in a society, that determines the entire social, political and religious way of living. The relation of production relate to the class structure of a society. (Jhingan 1990)

The motivating forces of capitalist development are profit and private benefits. Entrepreneurs are interested only in maximising their profit by lengthening the working hours or by replacing workers by capital. Utilisation of more and more capital gives more profit to them. Therefore, capitalists try to maximise profit by capital accumulation. Capital accumulation, generally, leads to replacement of labour by machine. It results in an increase in unemployed persons i.e., reserve army. Due to the presence of reserve army, labours are not given their due share in the total output. Thus, capitalism leads to exploitation of labour. Continuous exploitation of labour finally ends in the revolution of proletariats. It is the fall of capitalism or market economy. Hence, Marx suggested a planned economy, where everything is planned by a central planning agency. To him, a communistic form of society is better for greater economic growth, stability and happiness. (Freeman 2002)

3.5 Summary

The foregone analysis of different theories and views developed by very important jurists and economists shows that though there are differences of opinion in defining the term ‘Human Rights’, all
are uniform in emphasising the fact that there should not be any human rights violation and human rights violations cause significant damage to the whole economy by reducing individuals welfare and happiness. Hence, the present study is carried out to estimate the exact cost of human rights violation and to substantiate the existing theories.