CHAPTER - III

CONCEPT AND DEVELOPMENT OF HUMAN RIGHTS

The concept of human rights is as old as human history and as broad as ‘social life’. Although the same is developed on the principles of inalienable rights of natural law, the term human rights has its origin in international law. The concept took centre stage in the post-World War era, especially when the Western States started recognizing the status of the individual as part of the international legal order. Same was the case with India. Though the concept of human rights gained legitimacy with the adoption of written constitution in 1950, its substance and spirit have come a long way through the historical path. In short, the history of human rights in India is as old as the history of human rights in rest of the world.

HUMAN RIGHTS: MEANING AND NATURE

While it is easy to point out its evolution and growth, it is quite a challenge to define a concept as complex as human rights. Yet there are common agreements on certain inalienable rights without which no man can lead a civilized life. Man, as a member of human society, has some rights in order to survive, sustain and nourish his best potential. To R.J. Vincent, “Human rights are those rights that everyone has by virtue of their very humanity. They are grounded in our appeal to human nature.” While David Selby counters such proposition, saying that “human rights pertain to all persons and are possessed by everybody in the world because they are human beings. They are not earned, bought or inherited, nor are they created by any contractual undertaking.” On the other hand, A.A. Said looks at human rights as those rights that “are concerned with the dignity of the individual-the level of self-esteem that secures personal identity and promote human community.”

From these three definitions, it is quite clear that all of them agree to certain common conditions such as human nature, human dignity and necessity of good society. Taking these features together, Jack C. Plano and Roy Olton have termed “these rights as indispensable for

1 Tapan Biswal, Human Rights Gender and Environment, Viva Books Private Limited, the University of California, 2006.
sustenance and evaluation of human life.”\textsuperscript{5} Another exponent of human rights, Davidson, offers rather a precise and more acceptable definition. He says that:

“The concept of human rights is closely connected with the protection of individuals from the exercise of state, government or authority in certain areas of their lives. It is also directed towards the creation of societal conditions by the state in which individuals are to develop their fullest potentials.”\textsuperscript{6}

The United Nations Charter for Human Rights defines human rights as “those rights, which are inherent in our nature and without which we cannot live as human beings.”\textsuperscript{7} Thus, human rights imply justice, equality and freedom from arbitrary and discriminatory treatment. These rights are imperative needs for the growth of human personality and are to be guaranteed irrespective of any differences. Broadly all categories of human rights can be put under four kinds:

1. the rights that are inherent to life (for example; right to life)
2. the rights that are fundamental to human life and its development (for example right to education)
3. the rights that can be availed only in appropriate social situations (for example right to property)
4. the rights that need to be included in every constitution as primary needs of a human being (for example the fundamental rights mentioned in Indian constitution)

All these definitions, however, make it clear that there are no common definitions of the concept, yet at the same all of them point out to certain commonly accepted principles.

\section*{CLASSIFICATION OF HUMAN RIGHTS}

There are those thinkers who have made attempts to classify the whole gamut of human rights. The most acceptable classification was proposed by Czech jurist Karel Vasak in 1979, who divided Human rights into three generations.

Historically, the categorisation of these rights can be understood in context of the cold war. The first generation rights were product of cultural mindset of the West, the second

\begin{itemize}
\item Tapan Biswal, \textit{Human Rights Gender and Environment}, Viva Books Private Limited, the University of California, 2006.
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generation rights found its proponents in the East and third generation rights had its backers in the Third World. These classifications led to the creation of the international human rights framework.

Man, due to his rational faculty and its attendant achievements has always looked upon himself as a unique entity in the scheme of the Nature’s creation. Because of his this capacity, the human rights acquired a status of inalienability which were extended to all, cutting, across all barriers of identities, based on caste, creed, religion, sex and nationality. Thus no agency can deprive any human being of their rights, since their freedoms serve as facilitators to enable an individual to realise his material and spiritual potential. So, no wonder, these rights found universal acceptance, in principle, in domestic and international sphere.

Rooted deep in the notions of human potential, his dignity and the collective destiny of the entire human race, the term human rights acquired generic overtones. So, though difficult to define precisely, nevertheless, these human rights became the entitlement of all people because of their being humans. One can’t be deprived of it without a grave blow to sense of justice.

The sanctity of these rights should thus never be violated in any circumstances. It would undermine the very concept of self-esteem and dignity in the absence of which the human self will virtually disintegrate.

So, all those rights which sustain human dignity and facilitate an individual’s potential in realising his self may be defined as human rights. Even when a precise definition of human dignity eludes all human attempts, it can be roughly understood to be linked with justice and good society.

The World Conference on Human Rights held in 1993 in Vienna, in its declaration, recognised this intrinsic worth of ideas of dignity and its worth in the context of human rights and placed the concept of human person at the centre of human rights discourse.

Thus human rights acquired the status of universal entitlement, accessible to all individuals and aimed at providing an enabling environment, whereby human beings can ensure their survival and self-fulfilment. Because of its irrefutable necessity, human rights came to be associated with the idea of natural rights and thus became inalienable.

Therefore, human rights can be perceived and enumerated. These rights are associated with the traditional concept of natural law. Rights being immunities, denote that there is
guarantee that certain things cannot or ought not to be done to a person against his will. According to this concept, human beings, by virtue of their humanity, ought to be protected. Given the importance of these ideas, these concepts came to be codified systematically as legal rights, amenable to constitutional remedy, in the face of any breach. They became immunities against any infringement of these rights by the all powerful state or any other centre of authority. Thus all state subjects became citizens, duly protected under law, against any arbitrary use of power by state or any agency. So an organised community is the first pre-requisite for practice of human rights. No rights can be invoked in a state, or country where there are no laws in force and no infrastructural back-up is available. Human rights, therefore, emanate from the ideas of human beings and the destiny of human role, as a whole, and the concept of a person in relation to an organised society. The needs for these rights stemmed from imperatives of protecting individual freedom from the awesome might that came to be invested in the state authorities.

The paradox of this situation is that growing awareness among the subjects about their rights, ended up in conferring on the state, this role of both as a protector of these rights against its own transgression and as an enabler and facilitator in the interest of peace, harmony and progress of the society or the humanity at large. With contemporary global laws, according due respect to human dignity and honour, the individual got empowered. The state’s role here was circumvented by bringing it under the ambit of international law. This becomes evident from a number of conventions adopted by the UN in the last five decades. States already stand sensitized to the human rights values and have pledged support to these rights. They have on their own drafted regional conventions to protect the rights. On national level, Laws concerning human rights are enshrined in the Constitutions of such countries. Non-governmental organisations are active at all levels to promote the cause of human rights in all its aspects.

At present, human rights have gained widespread legitimacy internationally. Legally, they are enforceable in courts of law. Morally they are essential as they embody the basic notions of human dignity, honour and freedoms. Politically these rights are getting reinforced because of growing awareness about individual rights and empowerment, when pitted against the awesome power of the state. However, one will not hesitate to admit that there is a

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confusion prevailing, as to its precise nature and scope and the mode of International Law in relation to the protection of these rights.

**HUMAN RIGHTS: THEORETICAL ASPECTS**

The study of history of human rights amply bears out that the concept and various ideas related to the rights, have been subject of focus of human attention, in all societies at one point of time or other, in one form or other, with varying degrees of urgency. At times, the debates over ideas concerning rights remained restricted to cloistered precincts of academic circles and sometime these issues spilled over on to the arena of active politics and occasionally these theoretical concepts achieved ultimately the status of living laws enforceable in the courts.

Thus, the canvas the history of human rights covers, is not only big but also very crowded, as all kinds of events and ideas and ideologies and subsequent critical approaches to these problems, as debated by the entire humanity, cutting across all restraints of historical periods and geographical boundaries, are jostling for attention here. At the first sight, marshalling this vast mass of facts regarding ideas and events presents a forbidding challenge but a coherent pattern begins to emerge once a reader recognizes the fact that all these events and debates point to one inescapable conclusion that the mankind by taking note of these issues has, consciously or unconsciously, at least, if nothing more, admitted to the relevance and importance of these rights to human existence, if not to their ultimate indispensability in case human beings have to not only ensure their survival, security and peaceful existence but also their uninterrupted march towards the collective goal of general being and happiness.

Semwal and Khosla (2000) highlighted two approaches to history of human rights.\(^9\) In one, the concept is evolved from deep moral ideas like justice and human dignity. This approach stresses on the notion that human rights are universal. Second approach focuses on the distinctiveness of the concept of human rights.\(^10\) Like in any other society, though issues concerning human rights did exist in ancient India, in its own particular way, the prevailing concept of rights, as we recognise and understand it today, is largely based on western concept. In the west, the discourse on human rights may be relatively modern creation, but the ideas that underpin it could be traced back at least as far as birth of Christianity, if not

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before. For convenience of understanding, the history of human rights can be divided into two parts, one deals with theoretical discourses involving various ideas like concept of citizen rights, rudimentary religious-ethical concepts, political theories like social contract, natural rights, socialism, while the other part deals with more practical aspects like political movements and events, directly or indirectly, related to these ideas on one hand and the more substantive issue of cataloguing, codification of human rights and laws related to it and creation of institutions and mechanisms to monitor, protect and implement these rights. O’Byrne has traced the ideas which go into making of this concept to three sources, namely the classical philosophers, the ancient religions and thinkers belonging to medieval and early modern era.\(^\text{11}\)

The ancient world had no concept of human rights although it accepted the need of rule of law. Confucius and Plato (427-348 BC) did dwell on human nature and issues of morality and ethics, but not on human rights as such. Plato evolved an early version of universalism in ethical standards, suggesting fair treatment to all. Aristotle (384-322 BC) deliberated on imperatives of human society and citizenship rights but not on human rights since the citizenship rights were never extended to slaves, women and foreigners. Greek stoics and Roman thinkers, Cicero (106-43 BC) and Seneca, believed in the spark of reason in human beings and on the strength of this human capacity were keen to view this universal community of wise men as world citizens. Religions also contributed to evolution of the idea of human rights. The Ten Commandments, which were originally intended to be applied as universally accepted yardsticks of moral and spiritual behaviour, also implied certain human rights. For example, the commandment that ‘Thou shall not steal’ suggests the right for individual to own private property.\(^\text{12}\)

Later on, Christianity proclaimed the equality of all men in front of God. This established universal laws and equality principles, but again not in terms of rights. When Aristotle said that the man ‘perfected by society is the best of all animals; he is the most terrible of all when he lives without law and without justice’, he was highlighting the fact that some semblance of rights and rule of law were indispensable and the best bet for a peaceful and conducive social life.\(^\text{13}\) He also strongly advocated equality when he wrote that the ‘only stable state is the one in which all men are equal before the law’\(^\text{14}\). Through his writings,

Aristotle was somewhat a precursor of Hobbes, who saw human societies degenerating into anarchy, violence and oppression, in absence of any provision for proper concepts of freedom, equality, justice for individuals, citizens to be more precise and rule of law. Still in Greco-Roman times, the stress was more on duties rather than rights. Thus going by these classical philosophers and religions, two points which got highlighted in these times were concept of citizenship and their universality.

In medieval and early modern times, the discussion centred around the issue of divine rights of the king. According to this doctrine, only kings had natural rights in accordance to the will of God. Rest of the mankind was subservient to the monarch and the only power the people had over their lives was that granted by the king. Thomas Hobbes (1588-1679) tried to set right this anomaly by tilting the scale in favour of the common man, by advancing his thesis of social contract. According to him, the humans are essentially prone to violence and greed in their natural state, they live in a state of anarchy. However, out of strong desire for self-preservation, an individual enters into a contract with the state, whereby he sacrifices his freedom in return for security. If the state is unable to live up to its contract, the people have the power to overthrow it. Thus, according to this contract, the legitimisation of the state derives from its ability to ensure security to its citizens. These were uncertain times in Europe. The parliamentarians were pushing for a government guided by people. It was John Locke (1632-1704) who working from within the contractarian tradition had sought more rights for citizens. He buttressed his claim by providing the underpinning of natural rights paradigm to the citizenship rights. He, thus, not only enlarged the scope of citizen rights but also cemented its cause by taking it out of the purview of the state’s intervention. Now the rights became pre-social and hence inalienable. The state’s interference in citizen’s rights became minimal. Thus Locke’s natural rights became three-fold: life, liberty and property. He is considered to be the founder of liberal tradition. Rather than rely upon an image of pre-social human beings as warlike, Locke claimed that in such a condition, human beings want to be peaceful, free and mercantile. He took it upon himself the task of attacking Hobbes’s defence of the legitimate rule of kings, while celebrating the establishment of the Bill of Rights.

In the modern period the case for individualism and civil rights was well established. It was now time to make a pitch for political rights. Jean-Jacques Rousseau (1712-1778), in

his famous thick book, *The Social Contract*, argued that the communities should also express the general will of the people. He believed that freedom could not be achieved through anonymous state but should be ensured by practising participatory democracy.

Charles-Louise Montesquieu (1684-1755), another thinker of time of French Enlightenment, worked on theory of separation of power. According to this theory, the three branches of the state, namely legislature, executive and judiciary should work independently of one another. Francoise-Marie Arouet Voltaire (1694-1778) sought abolition of torture and degrading punishments and attacked press censorship. Thus, if French Enlightenment thinkers laid the foundation stone of political rights of man, it was left to Immanuel Kant (1724-1804) to lay down the ground work for the modern understanding of human rights as ethical practice. He tried to repose his faith in the innate rational capacity of the man. He attempted to raise the human rights discourse to levels of universal ethical principles wherein not only all people are treated equally and all men act rationally, to best of their capacities but also wherein human being are not the means but the ends in themselves in all scheme of things. According to Kant, such a society has the potential to become a good community. Rousseau and Kant started a radical tradition that would take Locke’s liberal ideas further. It was Thomas Paine (1737-1809) who linked Locke’s philosophy of natural law with the political constitution of states in his work *Rights of Man*.

Giuseppe Mazzini (1805-1872), an ardent Italian republican, focused his attention not so much on rights of individual as on his duties. Even Paine advocated the rights of people to education and social welfare. These concepts seemed to be a prelude to the concept of welfare state. Marx denied existence of pre-social rights and individual civil rights of the liberals. He said rights are political and social and are achieved through historical development and struggle. In fact the conflict and debate over first and second generation rights among the UN members has its seeds in theoretical traditions of Marx and liberal western natural rights thinkers. According to the liberal western tradition represented by thinkers like Locke, law was used as a methodological tool to promote the cause of citizenship in light of role and responsibilities of an individual in the advent of the society. Locke was more keen to redefine the relationship between a citizen and a state than rights of all people. Locke thus used the idea of rights as a weapon to weaken the argument in favour of a strong state. Jeremy Bentham (1748-1832), a utilitarian, opposed any subscription to

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abstract concepts of universal principles and scoffed at the idea of natural rights.\textsuperscript{19} According to him, humans invent rights out of necessity. He said rights are seen to have emerged out of the quest for the greatest happiness of greatest number of people.

This concept of civil and political liberties and its attendant individualism was also challenged by Karl Marx. To quote Marx, “none of the so-called rights of man goes beyond egoistic man... an individual withdrawn behind his private interests and whims and separated from community”.\textsuperscript{20} According to him, each of the rights contained in the civil rights with reference to equality, liberty, security and property, addresses private individuals and not humanity as a species. He added that there are no pre-social rights, since we become people only in society.\textsuperscript{21} This brings to mind the oft-quoted example of a man caught up in a desert all alone. The issue of rights has no relevance in such a situation. Thus, Marx argued political freedom is meaningless without economic freedom. He claimed that the driving force behind history is the economic system, and all other spheres of life such as politics, law, religion and so on are dependent upon this base.\textsuperscript{22} Therefore, while the liberals generated the first generation rights such as civil and political rights, socialists generated the second generation rights. The conflict between the two was but natural. However, in practice, this intellectual debate over whether human rights are innate to individuals or developed through communities is irrelevant. But in so far as many more of the world’s cultural traditions emphasise collectivism than individualism, it is certainly worth bearing in mind. Over the years, among thinkers, activists and policy-makers, a clear segregation has been sought to be maintained between the first and second generation rights. It was USA which had argued for splitting the single list of rights in UN Declaration into two covenants.\textsuperscript{23} It was of the view that socio-economic rights are less genuine human rights with less binding duties. While George Bush had urged for making civil and political rights mandatory and wanted for socio-economic rights the status of a goal to be achieved, Bill Clinton took one step forward by conceding that while all rights are important, the second generation rights be implemented only incrementally.


\textsuperscript{22} Sadasivan G. Nair, “Fair Trial as a Human Right”, \textit{Indian Journal of Human Rights}, 2008.

Among the modern human rights thinkers, the works of John Rawls stands apart. His famous work, *A Theory of Justice*,24 is so influential that a perceptive commentator was tempted to say “no theory of human rights for domestic or international order in modern society can be advanced today without considering Rawls thesis”. Rawls made extensive use of the traditional social contract tradition and tried to construct his theory of justice. To Rawls, justice is the no. 1 defining feature of social institutions and holds the key to understanding of human rights. To him, rights and duties emanate from social institutions, founded on principles of justice. He pleaded for equal opportunities for all. Apart from equal opportunities, he also argues in favour of distributive justice with a clear bias in favour of disadvantaged sections of the society. Rawls idea of justice is founded on two principles that have wider ramifications for the civil liberties and democracy. The first principle is that “each person is to have an equal right to the most extensive total system of equal basic liberties compatible with similar system of liberty for all”, while the second principle is about distributive justice; “social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged, consistent with a lust saving principle and (b) attached to the positions and offices open to all under condition of fair equality of opportunity.”25 In fact, most of human rights today owe their philosophical foundation to the writings of numerous philosophers. Rawls identified ‘primary goods’, which include rights, liberties, power, wealth, opportunities and self-respect. In short, successive philosophers and thinkers have laid down the broad outlines of human rights that we see today.

**HUMAN RIGHTS: PRACTICAL ASPECTS**

Human rights as a subject has two aspects to it; one deals with abstract ideas which run through rich theoretical traditions in the history of human thought; and the other, directly impinging the lives of every person in the street, concerns formal positive laws related to citizenship, rights and duties of citizens as embedded in states.26 In this light, 1948 Universal Declaration of Human Rights can be looked at as a significant achievement in synthesis of these abstract ideas into practical legal instruments and thus allowing for the implementation of these principles into real, enforceable laws.

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25 Wayne P. Pomerleau, http://www.iep.utm.edu, Gonzaga University, USA.
Moreover, one of the defining features of our modern times in comparison to earlier
times was that in our times the focus shifted from justification of human rights to their
codification and implementation. But still the Universal Declaration of Human Rights in 1948 was not born in vacuum. There were series of acts, covenants and declarations which paved the way for it. These acts and covenants, which are generally traced back to the English Magna Carta of 1215, were product of various social and political changes. The Magna Carta was signed by King John to serve as a pact between the king and the unhappy barons. Nevertheless, the famous clause 39 of the Magna Carta stating that ‘no freeman shall be taken and imprisoned or exiled or in any way destroyed except by the lawful judgment of his peers and the law of the land’, was interpreted retrospectively so as to give expression to the idea of individual freedom. It was in no way any declaration seeking rights for all citizens. In Seventeenth-century England, the ‘immemorial rights of English men’ were successfully defended in the Petition of Rights (1628) and the Bill of Rights (1689). However, Bill of Rights of 1688-89 was only meant to end the royal absolutism in favour of the monarch’s accountability to Parliament. The rights it gave were to Parliament, not the people. Nevertheless, it set a tone for a trend where power was now being shared by more and more people through rule of law.

In democratic sense, the American Declaration of 1776-1789 and the French Declaration of the Rights of Man and the Citizen of 1789 were more substantial documents as these declarations attempted to protect the rights of individual citizens, according to a set of moral principles, which might be applied to all persons, whether citizens of those countries or not. According to these declarations, a man is worthy of being called man only if he fulfils these conditions: to be free, equal or has undisturbed enjoyment of his property, not to be oppressed by a tyrannical government and to be able to freely realise his potential. However, there is a distinction between the American and French Declaration. While the French declaration stressed on individual freedom, the American focused its attention on common good.

In all western countries, in ancient times, there were hardly any legal codes which recognised any concept of freedom for individuals. Most of the time, the tussle for rights

remained restricted to between the nobles and princes. The contracts thus arrived at between the kings and feudal assemblies were something akin to human rights. In 1188 AD, the Cortor, the feudal assembly of the Kingdom of Leon on the Iberian Peninsula, received from King Alfonso IX his confirmation of rights, including the rights of the accused to a regular trial and the rights of inviolability of life, honour, home and property. King Andrew II of Hungary (1222) granted, among other things, immunity to the nobles against any arbitrary arrest or conviction, without following the due process of law and judicial procedures.

In fact, medieval Europe witnessed immense devaluation of human rights due to prevalence of feudalism. The feudal lords did not let go any opportunity to exploit the social, political and economic rights of their subjects. Slavery and bonded labour were a norm rather than exception. Also in this period, series of religious wars were being waged to uphold principles of Christianity. Any breach on the part of the people on this count invited stringent punishments. The Church dominated the political affairs of the country. By marriage, husbands had the responsibility of safeguarding wives. By introduction of child marriage, girls lost their right to education by becoming early wives, and early widows. Their rights were tampered with by their fathers and brothers before marriage and by their husbands and in-laws after marriage. For most women in medieval time, their rights were eroded. The violation of all these rights paved the way for a series of revolutions in France and other parts of Europe in medieval times.

Human rights got a shot in the arm from emergence of humanitarian ideas during eighteenth and nineteenth century in Europe and other countries. The consensus among Great Britain, France and Russia for a military action against the Ottoman Empire in 1827 to reportedly put an end to the sufferings of the Greek people, under Turkish rule, is an example of humanitarian intervention. The action ultimately led to independence of Greece in 1830. Similarly, in 1860, several European powers took up military expeditions to bring to an end the massacre of Christians in Syria, and in 1886, in Crete, an intervention was undertaken to bring relief to the people there and also in the nineteenth century, to relieve the Christians facing persecution in the Balkan countries at the hands of Turkey, a humanitarian expedition was launched. The motivation behind these actions was to protect the religious rights of Christians.

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32 Papers relating to Infant Marriage and Enforced Widowhood in India, Selection from the records of the government of India in the home department, Vol. XXII, Government of India, Calcutta, 1886, pp.12, 14.
Based on the nineteenth century humanitarian laws, a number of multilateral treaties were signed covering various aspects of the conduct of hostilities and the protection of the rights of the victims of the war. At the initiative of Swiss authorities, in 1864, the Convention for the Amelioration of the Condition of War Wounded was signed in Geneva in 1864. This paved the way for what we know today as the International Committee of the Red Cross. Under this convention, it was stated that those wounded in war should be allowed to be taken out of the battlefield irrespective of the country they belong to. Those who are militarily incapacitated during the action and are taken in custody by the enemy camp should be sent home. These humanitarian laws were then further elaborated at the Congress of Brussels (1874) and at the Hague (1899, 1907).

Between 1949 and 1962, attention was focused in the UN on racial discrimination. As a result of this, the General Assembly adopted a number of resolutions to this end. It was in 1965, the General Assembly adopted a resolution on elimination of all kinds of racial discrimination. Finally, the convention came into force in 1969. According to it, the states agreed not to engage in any act or practice of racial discrimination and not to enact any law which is prejudicial to racial equality. Any propaganda to this end is to be considered an illegal activity and should be punished as per the law.

SOURCES OF INTERNATIONAL HUMAN RIGHTS LAW

The study of history of human rights teaches us that wars, power abuse, greed, deprivation and want, at its worst, not only dehumanise societies but also undermine the intrinsic value systems, which preserve and lend impetus to the forces of collective well-being and individual evolution. So all along the history of the rights, the twin challenges confronting the mankind were to first identify, recognise and define the fundamental ideas like liberty, equality, justice and fraternity, and then to catalogue and translate these ideas into inalienable international and national legal instruments, whereby these could become judicially enforceable laws.

The story does not end there. Now the next obvious step was to ensure that these human rights standards should not remain simply ‘law in books’, a beautiful promise or grandiloquent documents, but should also become ‘law in action’. For this, was needed the entire machinery of monitoring and implementing agencies which can oversee the codification and implementation of these laws. Thus various conventions, laws and rules

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34 https://www.icrc.org/eng/resources/international-review/review-888-150-humanitarian-action/review-888-all.pdf.
were evolved not only to convert these ideas into functional laws but also to develop an international vocabulary of human rights so that all information regarding any violation of human rights can be shared, catalogued and indexed.

Hence, there arose a need to discuss the birth and codification of these laws and yardsticks evolved to detect and measure their violations.

**International treaties**

Treaties are the most important sources of international human rights law. Presently, a number of multilateral treaties relating to human rights are in force, which are legally binding to those States, which are party to them. The most important amongst them is the United Nations Charter itself, which is binding on all the States in the world and establishes at least general obligations to respect and promote human rights.\(^{35}\)

In addition to the Charter, a number of other multilateral human rights treaties have been concluded under the auspices of the United Nations and its specialized agencies, which create obligations on the contracting parties. Regional treaties on human rights such as European Convention on Human Rights, American Convention on Human Rights and African Charter on Human and people’s Rights are also legally binding on the contracting States and they therefore are the sources of International human rights law.

**International Customs**

Certain international human rights have acquired the status of customary International Law by their widespread practice by States and they, therefore, are binding on all the States, without regard to whether they have expressly consented for the same. The 1987 Restatement (Third) of the Foreign Relations Law of the United States\(^ {36}\) takes the position that customary International Law protects at least certain basic human rights. Section 702 of the Restatement provides, “A State violates International Law if, as a matter of State Policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights.” Although the above list might not be exhaustive or others may disagree to the

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above list of human rights, as to have acquired the status of customary rule of international law, there seems to be widespread agreement that a number of rights are at present included, within customary international law and consequently, they are the source of international law. A study to prepare a list of those human rights which have acquired the status of international customary law, would be of immense help to the International Court of Justice, States and to their courts, as they would have a greater clarity about the same.

**Other International Instruments**

A great number of International declarations, resolutions and recommendations relating to human rights have been adopted under the auspices of the United Nations, which have established broadly recognized standards, in connection with human rights issues, despite the fact that they are not legally binding on the States. The most important of these is the Universal Declaration of Human Rights of 1948, which possesses a moral or political force that may be useful in persuading government officials to observe human rights standards. Some of the rights referred therein have acquired the character of customary rule of International Law. Declarations adopted by the Tehran Conference (1968) and the Vienna Conference (1993) also serve as the source of commitment by the international community.

**Judicial Decisions**

Decisions of the various judicial bodies are relevant in the determination of the rules on human rights issues. Although action by the International Court of Justice in the area has been limited, there is no doubt that cases could fall within its competency. European Court of Human Rights-a regional court since the lawless case decided in 1960 has adjudicated many disputes successfully. The increasing case load prompted a lengthy debate which resulted into the creation of a new European Court of Human Rights on November 1, 1998. Although a few cases have been brought before the Inter-American Court of Human Rights, case law under the American convention is as yet in its infancy. Decisions of the municipal courts on human rights issues have contributed immensely to the development of International human rights law. In addition to the judicial decisions, opinions of the arbitral bodies whose function

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38 http://shodhganga.inflibnet.ac.in/bitstream/10603/23693/7/07__chapter-%203_.pdf.
Economics of Rights: Concept of Trade-Offs

The sharing of resources to meet the socio-economic aspirations of humanity at large has given rise to issues of responsibility to generate wealth for achieving above-mentioned goals. Despite the opposition, various kinds of trade-offs and costs are being suggested, which means a country in need of investment will have to compromise with its universal rights to liberty and equality in lieu of quicker development. Mainly, three types of trade-off have been suggested. They are need trade-off, the equality trade-off and the liberty trade-off. The need trade-off suggests that a high level of poverty is essential to raise investment to increase productivity which will benefit the poorer section. The proponents of the equality trade-off say equality is a luxury of the rich nations and if any country desires it, it must have high degree of inequality. An investment is responsible for accelerated growth, inequality is considered beneficial to the poor in the long run.

Similarly, liberty trade-off backers argue that stress on human rights will negatively impinge upon development. Since economic and political development require active mobilization of people, it becomes difficult if the state allows opposition to its programmes. Thus suspension of freedom of expression and use of extra-judicial methods are justified by the state. In nutshell, these views only support the rich at the cost of the poor.

Adherence to human rights involves costs. The constraints of resources may impair implementation of rights in toto. Three types of costs have been identified: conflict costs, costs of using weaker means and implementation costs. The losses to other norms from recognizing and implementing a right are called conflict costs.

The human rights, as we know, have been divided into two types of rights, negative and positive. The negative rights require the government not to tamper with the rights of an individual whereas the latter require the government to act to provide for a good. There is a cost attached to such actions when no other option is possible and the cost projection is substantially high. This kind of action is called using weaker means. Implementation costs are those costs incurred to implement rights. There are two ways of making rights cheaper either to eliminate some rights or to reduce several dimension of a particular right. The

Universal Declaration of Rights recognizes this aspect of affordability regarding rights when it mentioned that resources of each state must be kept in mind while implementing economic, social and cultural rights.

**A Critical Look**

The ultimate touchstone of human rights success lies in concrete benefits that the mankind can reap from its practice. Here role of intellectual debates over various ideas and philosophies related to the rights is important to the extent it helps in stating the concept, clarifying it and enriching it before it finds expression in the form of practical laws. Human rights as a discipline has been witness to many such theoretical debates which raise issues about various aspects of human rights, their rational basis and their practical utility. So this kind of critical look at the subject helps one absorbing the essence of the ideas and discussions in question without getting bogged down in pure cerebral discourses.

There are three important properties of human rights which have given birth to various debates. These properties are universality, inalienability or incontrovertibility and subjectivity. Universalism has come under criticism from those who suggest that universality has tried to rely too much on meaningless abstract notion of natural law as well as from those who argue that the concept of universality, as being propounded, is ignorant of cultural differences. Similarly, the claim that rights are incontrovertible, forces us to find a hierarchy of human rights, to avoid any potential conflict, when one is confronted with the conflict between the two rights. My right as a tree cutter might come in conflict with somebody’s right to a healthy environment. If the rights of both the parties can’t be upheld, then importance of one right over the other has to be determined. The issue of incontrovertible human rights has also brought in question the argument of those who claim that rights always require reciprocal duties. If somebody is unable to perform his duty, does it mean his rights stand negated? Similarly to claim that rights are subjective and grounded in individuals has brought to the fore the thorny issues of human rationality and western bias towards the same. By agency here means those who are active, thinking beings. This reliance upon human rationality and agency, more specifically the capacity to reason, has raised questions about human rights of those who are not able to think, for example children with imbeciles and those lying in coma or what about animals? Similarly, when one studies the implementation of human rights at the international level, one finds that the decisions taken at the UN, in the context of human rights, are more due to political muscle and influence, rather than any
ethical principles. The failure on the part of various signatories to the Universal Declaration of Human Rights\textsuperscript{43} to arrive at a consensus over setting up of permanent international criminal court points towards prevailing differences among the member states. Here the issues related to sovereignty of nation-state take the centre stage.

The issue of natural rights is important so far it forbids the states and governments to assume control over these rights. Ken Booth makes the break with essentialism by suggesting that ‘we should have human rights not because we are human, but to make us human.’ “To make the claim that certain rights exist before the formation of human societies, that they are right and true in abstraction from people, that they are grounded in some higher spiritual or moral authority, is to invite criticism. In fact, the alleged universality of rights is less to do with their intent than with their implementation. The UN should take care that the universality of human rights is not turned into a weapon for western cultural hegemony, for ‘attempting to replicate the United States in other part of the world’.”\textsuperscript{44}

In the same way, Kant’s abstract issues of ethical principles may not find so much favour with many practical human rights practitioners but nobody can take away the credit from Kant for introducing the elements of ethics in the human rights discourse. Unlike citizenship rights which are allowed by the state and thus granted from above, human rights, by contrast, come from below, from a universal set of principles. So these rights attach equal worth to all human beings for all times in all places. Thus, in principle, rights are not subject to the whims of any political machinery. Baruch Spinoza once upheld the right of the strongest as absolute truth. There is a school of thought known as realists in human rights area who believe that interstate system is controlled through balance of power. These thinkers, in matters of human rights or for that matter international laws, are sceptical at best and dismissive at best. Forsythe points out that according to realists, the primary concern for rationally acting states is the maintenance of security through the calculation of power relations – the task of upholding individual rights is best left to charitable organizations.\textsuperscript{45}

The move to set up a permanent international criminal court is one such case which highlights the power play at work. One of the problems being encountered in setting up this court is the model to be adopted. Geoffrey Robertson has divided the main arguments in three

\textsuperscript{43} http://unesdoc.unesco.org/images/0011/001143/114357eo.pdf.


camps. The first comprises Canada and Germany who want the court to have strong prosecutorial powers and they want it to act independently of the Security Council. The second group led by United States, China and France will back a court only if it is controlled by the Security Council. Third comes the group comprising India, Asia and Middle Eastern countries, which oppose the establishment of the court.

Highlighting these issues do not aim at downplaying the role of the UN in human rights arena. There is an urgent need to try all options available to us to improve our human rights records. There is no denying the fact that human rights are a universal need. We, as human beings, have the responsibility not only to prolong and better our existence individually and collectively but also to carry the onus of protecting this planet which we share with all the other animate and inanimate objects as our common but only abode.

**PROMOTION AND PROTECTION OF HUMAN RIGHTS BY UNITED NATIONS**

The United Nations charter is a leapfrog in the field of evolution and respect for human rights. The signing of the Charter also marks the formal recognition that human rights are a matter of international concern. The appalling atrocities inflicted by the Nazis on Jews and other communities during world war-II gave impetus to a strong movement for the global protection of fundamental human rights. The Charter was strongly influenced by the same. With shock and horror over atrocities inflicted by Nazis and Fascist leaders on Jews, the international community got down to making rights of individuals a global concern. “Human rights found mention for the first time in any international treaty (not counting the treaties for the protection of minorities concluded after the First World War, which related to the rights of special groups but not to human rights in general)–because the drafters of the Charter were mindful of the facts of war and its causes, that is to say, to the role of dictatorship in causing these wars”. With the signing of the United Nation Charter which incorporates several provisions concerning human rights has done much to stimulate the large amount of international human rights which are respected today. The provisions concerning human rights run throughout the UN Charter “like a golden thread”. The credit for this goes to the continued lobbying by non-governmental organizations at the San Francisco Conference. The delegates of some of the

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States favoured even stronger provisions concerning human rights. A futile attempt was made to include International Bill of Human Rights in the UN Charter.\textsuperscript{49}

Promotion and encouragement of respect for and observance of human rights and fundamental freedoms is one of the purposes of the United Nations. The Charter of United Nations mentions the term, ‘promotion’ of human rights seven times, but makes no reference to “protection” of “human rights”. A question arises as to how this purpose is achieved by the United Nations? It is to be noted that the role and scope of UN action in promoting and protecting human rights have tremendously increased in the last fifty eight years.

The term promotion of human rights may mean setting of international standard of human rights, education and dissemination.\textsuperscript{50} The prime responsibility for the promotion of human rights under the UN Charter rests with the General Assembly, along with the Economic and Social Council and subsidiary bodies that set standards. Holding conferences and seminars, to spread the word about human rights values, found in these international documents, are also included.

The term “protection of human rights”, which may mean implementation and enforcement action, does not find place in the UN Charter. Among the United Nations agencies only the Security Council and the International Court of Justice are empowered with enforcement action; only they have a competence to pass a binding resolution or issue a binding judgment. The Security Council can threaten or vote sanctions in relation to its own previous actions or that of the Court. Enforcement is thus the authoritative application of human rights. All other actions beyond promotion but short of enforcement may be considered as implementation efforts. Implementation thus includes passing non-binding resolution about specific problems. When an agency of the UN approves a resolution, calling on a specific state to take specific human rights action, it is considered to generate political pressure on the target and thus an effort at protection, not just promotion. The United Nations in the past has been able to promote and protect human rights by a number of ways some of these are as follows:-

a. Human Rights Consciousness

The first and the most important role which the United Nations has played is that it has made the people and the States conscious about the human rights and fundamental


freedoms. It has set a pace in establishing minimum standards of acceptable behaviour by States. The proclamation of the Universal Declaration of Human Rights containing the universal code of human rights may be regarded as the first step towards the promotion and protection of human rights.

b. Codification of the Law of Human Rights

The United Nations has codified the different rights and freedoms by making treaties for all sections of the people such as women, children, migrant workers, refugees and stateless persons. In addition to the above, the prohibition on the commission of inhuman acts such as genocide, apartheid, racial discrimination and torture have been brought within the international rule of law.

c. Monitoring of Human Rights

Treaty bodies, Special Rapporteurs and Working Groups of the Commission on Human Rights have procedure and mechanism to monitor compliance with conventions and investigate allegations of human rights abuses. A number of expert committees have been established under particular treaties. They are not subsidiary organs of the United Nations, but are autonomous. The committees are termed UN Treaty Organs. Their resolutions on specific cases carry a moral weight that few Governments are willing to defy. In the past, UN Human Rights monitors have been sent to many countries including El Salvador and Cambodia. Human Rights monitors have also worked as part of peace-keeping operations in Haiti, Rwanda, Guatemala and the former Yugoslavia.

d. Procedure for Individual’s Complaints

A number of human rights treaties permit individuals to make petition before the appropriate international bodies. For instance, the Optional Protocol to the International covenant on Civil and Political Rights, the International Convention on the Elimination of all Form of Racial Discrimination and Convention Against Torture, have permitted individuals to make petitions against their States that have accepted relevant international legal procedures. Also, under procedures established by the Commission on Human Rights, the Commission, its Sub-Commission on the Promotion and Protection of Human Rights (earlier known as Sub-Commission on

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Prevention of Discrimination and Protection of Minorities) and their Working Groups, hear numerous complaints annually submitted by individuals as well as by non-governmental organizations (NGOs). The Commission on Human Rights is empowered to take cognizance of human rights situations anywhere in the world and also examine information from individuals, NGOs and other sources. The Economic and Social Council in 1970 adopted Resolution 1503 entitled ‘Procedure for Dealing with Communications Relating to Violations of Human Rights and Fundamental Freedoms, commonly known as ‘1503 Resolution’ wherein individuals and non-governmental organizations (NGOs) were allowed to make a communication to the Commission concerning “situations” which appear to reveal a consistent pattern of gross and reliably attested violations of human rights. A communication i.e., a complaint is sent to the Office of the UN High Commissioner for Human Rights in Geneva. The Commission has focused the 1503 procedure mainly on civil and political rights using rapporteurs and working Groups in specific countries and specific problems. It is to be noted that individual petitions help to provide some check on governmental violations of human rights by giving international organizations a source of information.  

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e. Compilation of Information on the Violations of Human Rights

The original mandate of the Commission on Human Rights to examine situations where massive violations of rights appears to be taking place has been complemented by a new function, i.e., compiling information on the incidence of certain kinds of violations, or violation in a specific country. This task is performed by Special Rapporteurs/Representatives or Working Groups. They gather facts, keep contacts with local groups and government authorities, conduct on-site visits when Governments permit, and make recommendations on how human rights institution might be strengthened.

f. Examination of Human Rights Situations

The Commission on Human Rights may ask the Secretary-General to intervene or send an expert to examine a Human Rights situation in any State with a view to prevent flagrant violations. Such tasks may be performed by the Secretary-General himself in the exercise of his good offices and may establish the UN’s legitimate concern to curb abuses. The Secretary-General or his special representative and the

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High Commissioner of Human Rights, confidentially raise human rights concerns with member States, including items such as the release of prisoners, commutation of death sentences and other issues.

g. Coordination of Human Rights Activities

The post of High Commissioner for Human Rights was created in 1993 with the intention of strengthening the coordination and impact of UN Human Rights activities. He is charged with promoting and protecting the effective enjoyment of human rights by all and maintains a permanent dialogue with the member States.

h. By Providing Advisory Services

Seeking to improve their human rights performance, the Centre for Human Rights provides advisory services to governments. Assistance may be given to draft a constitution, to improve electoral laws, establish or upgrade human rights institution, prepare new criminal codes, or overhaul the judiciary.

The above points go to prove that the United Nation has been performing a variety of functions successfully to promote and protect human rights and it has promoted global culture of human rights through education and awareness. Human rights which were regarded as a matter of domestic jurisdiction of the States, have acquired the international character. It is appropriate to call them as international human rights because firstly, human rights is increasingly a well established issue area of international politics; secondly, States are increasingly obligated to respect human rights norms, and thirdly, individuals have increasingly obtained legal personality, in the form of partial subjectivity, with regard to human rights matters. However, it has to be conceded that the impact of the UN activities on international human rights issues has been indirect and it has long term effect. All of its promotion efforts and most of its protection attempts entail considerable time to have an impact. The result is that human rights continue to be widely violated around the globe. Fundamental rights of individual’s life, liberty and physical security, right to health, housing and work as well as cultural rights continue to be threatened by the forces of repression, ethnic hatred and exploitation. Torture, cruel and inhuman punishment for seemingly minor crimes to spousal and child abuse have led to the disruption of societies, resulting in ethnic,

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religious and other conflicts. In the face of these challenges, the United Nations has to be more active. It has to intervene in cases of massive human rights violations. It has to work with the cooperation of the member States to strengthen the commitments of promoting and protecting Human rights.

The Economic and Social Council (ECOSOC), a principal organ of the United Nations was most directly concerned with the question of human rights. The Council under Article 68 of the UN Charter was empowered to set up panels for the promotion of these rights and such other bodies as may be required for the performance of its functions. Accordingly, it appointed a Commission on Human Rights which was approved by the General Assembly on February 12, 1946. The Commission meets annually in Geneva for six weeks beginning in March. The Commission reports to ECOSOC which, in turn, reports to the General Assembly.

A proposal for the creation of the post of the United Nations High Commissioner for Human Rights was approved by the Economic and Social Council in 1967. However, it was not established by the General Assembly at that time. The Assembly on December 20, 1993 created the post of the UN High Commissioner for Human Rights in order to promote and protect the effective enjoyment of all civil, political, economic, social and cultural rights by all.

GLOBAL IMPLEMENTATION AND MONITORING OF HUMAN RIGHTS

There cannot be an international protection of human rights unless there is strong and effective machinery for its implementation. Implementation is the key to making the system of international protection of human rights effective. But the protection of human rights in international level is a difficult problem because of a variety of reasons. Firstly, the International Court of Justice is open to States only. It implies that individual has no access to the Court. Thus, it has always refused to entertain the petitions and requests which have often been addressed to it by individuals. Secondly, the jurisdiction of the International Court of Justice depends upon the consent of the States involved, and this has been done by few States to disputes involving human rights. Thirdly, even if the International Court in a few cases is able to render judgments against the State, which violates human rights, there is no

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60 Umeshwar Prasad Varma, Law Legislature and Judiciary, Mittal Publications, New Delhi, 1996.
international police to enforce the decisions of the Court. No doubt, the Security Council has been empowered to enforce the decisions of the Court against a party to a case, which has failed to perform the obligations under a judgment of the Court, if the matter is brought before it by the aggrieved party. But it is regarded as a political body and its recommendations are sometimes motivated by political considerations. If the barrier of veto is not crossed, the Council becomes incompetent to take any decision against the State which has failed to comply the decision of the Court. Fourthly, although the International Law of Human Rights has fostered a growing political and legal support for the protection of human rights, many States still regards that enforcement of human rights as an intervention act. Consequently, implementation of International Human Right Law, depends largely on voluntary compliance by the State if it decides that violations of human rights by a state is likely to endanger international peace and security.\textsuperscript{61}

The above limitations on the implementation of human rights at international level makes it clear that the most effective way to implement human rights vests within the legal systems of the different States. Domestic law of a State is required to provide an effective system of remedies for violation of international human rights obligations.\textsuperscript{62} International Human Rights Law has not become that strong so as to enforce and implement human rights violations committed by a State. However, a variety of international bodies have been monitoring and dealing with the cases of violations of human rights. A number of committees, working groups and special rapporteurs have been set up to monitor the violations of human rights. Monitoring mechanism may broadly be divided into two categories:\textsuperscript{63}

A. Conventional Mechanism

There are six main human rights treaties, under which committees have been set up to perform the task of monitoring State’s compliance of their obligations. The same are as follows:

1. Human Rights Committee (HRC) under the International Covenant on Civil and Political Rights (ICCPR).

\textsuperscript{62} S. M. N. Raina, \textit{Law, Judges and Justice}, Dialogue, New Delhi, 1986


4. Committee Against Torture (CAT) under the Convention against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.


The above Committees monitor the State’s obligations through a dialogue with the representatives of each of the State’s on the basis of a detailed report i.e. an initial report followed by periodic reports at an interval of approximately four to five years. The main outcome of this process is a record of the resulting dialogue. The Committee prepare a summary of the key points, which results in an opportunity for the individual member or the Committee as a whole, to appraise the extent to which the State party appears to be in compliance or otherwise. Some of these Committees such as HRC, CEDAW, CAT and CRD deal with complaints from individuals alleging violations of their rights under the treaty concerned and some of these committees deal with inter-State complaints such as HRC, CAT and CRD. The Convention on the Protection of the Rights of All Migrant Workers and Members of their Families also provides for the setting up of a Committee to hear and consider communications from the individuals of the State party who claim that their rights have been violated.

B. Extra-Conventional Mechanism

In addition to treaty mechanism, the most important procedures designed to protect human rights have been established within the United Nations Commission on Human Rights and it’s Sub-Commission on the Protection of Human Rights (earlier named as Sub-Commission on Prevention of Discrimination and Protection of Minorities). The ad hoc nature of the special procedures of the Commission on Human Rights allows for a more
flexible response to serious human rights violations than the treaty bodies. Experts, designated either as Special Rapporteurs, Representatives or independent experts act in their personal capacity. When a group is sent which is known as working group, they examine, monitor and send report to the Commission either on human rights situations in specific countries and territories or on global phenomena that cause serious human rights violation worldwide.

The activities of the rapporteurs and groups include seeking and receiving information, asking governments to comment on information concerning legislation or official practices and forwarding to government for clarification alleging about urgent cases that fall within their mandates. The annual report of each rapporteur or group contains information on all of the above activities, as well as summaries of correspondence, details of meetings with sources of information and governments and general analysis and recommendations.

Resolution 1503 (XLVIII) adopted by the Economic and Social Council in 1970 allows individuals and non-governmental agencies such as non-governmental organizations to make petitions to the Human Rights Commission and its Sub-Commission on Prevention of Discrimination and Protection of Minorities on “situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights” and fundamental freedoms. The Sub-Commission was authorized to appoint a working group consisting of not more than five of its members for a period not exceeding ten days immediately before the sessions of the Sub-Commission to consider all communications, including replies of Governments thereon.

The above monitoring mechanisms show that some of them relate to general situations in a country and others to individual complaints. Some are concerned with the whole field of human rights, others with specific types of violations. Their procedure also varies depending upon their mandate. It is to be noted that the various monitoring procedures adopted by the Commission on Human Rights have not been very successful in curbing the human rights violations which have been taking place in different parts of the World, may be due to its inherent weaknesses and also because these protection efforts transcend a relatively

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small span of time, compared with the hundreds of years in which man has assumed that what a government does in its territory is of no concern to an outsider. It would not be therefore inappropriate to state that while UN regime is a strong promotional one but it has a weak monitoring procedure.

**Human Rights and Domestic Jurisdiction**

It may be stated that presently there is a general agreement that human rights are a matter of international concern and appropriately a part of the international legal system. The promotion and protection of human rights and respect of human rights has become a fundamental task of the United Nations. It has been one of the purposes for the establishment of the United Nations. Thus, the protection of human rights no longer remains a subject of domestic jurisdiction. Henkin has rightly stated:

“If human rights were always a matter of domestic jurisdiction and never a proper subject of external attention in any form, provisions of the UN Charter, the Universal Declaration of the Human Rights, the various International covenants and conventions and countless activities, resolutions and actions of the UN and other international bodies would be ultra-vires.”

The United Nations may not ‘intervene in matters which are essentially within the domestic jurisdiction of any State’ as per the provisions of Article 2 Para 7 of the UN Charter. However, if human rights are outraged grievously, so as to create conditions which threaten international peace and security, the Security Council may take action against such States under Chapter VII. It is to be noted that Article 2, Para 7 has been rarely utilized by the United Nations. If a State is charged with violating specific human rights, the organs of the United Nations take up the matter for the discussion, recommendations, investigations and publications. Although such measures have not been found effective, sometimes they do exert pressure on the States. They also educate and help in creating conditions in the States for the protection of human rights. The fact is that the various activities of the United Nations and other international agencies go to prove that the protection of human rights at present is no longer a matter of domestic concern.

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Even though human rights have become a matter of international concern, it does not mean that a State has a right to intervene in another State, if the latter is guilty of cruelties, and persecution of its nationals, in such a way as to deny their fundamental human rights and to shock the conscience of mankind.\(^{71}\)

Justification of intervention on humanitarian ground is given by some authors because cruel treatment by a State against its nationals is regarded as a violation of the international law of human rights. It is to be noted that intervention in violation of human rights in a State cannot be justified due to its element of Sovereignty.

**Human Rights ‘Hot Line’**

The United Nations High Commissioner for Human Rights, set up, in 1994 a Human Rights Hot Line, a 24 hour facsimile line that will allow the Office of the High Commissioner for Human Rights in Geneva to respond rapidly to human rights emergencies.\(^{72}\) This Hot Line is for the victims of human rights violations, their relatives and NGO’s. The Hot Line is valuable to those wishing to establish urgent, potentially life-saving contact with the Special Procedures Branch of the office of the High Commissioner for Human Rights.

Behind the development of the entire web of human rights laws, lies a trail of various international treaties, customs, instruments and documents which have contributed towards codification of these laws. There are hosts of conventions on genocide, refugees, women, stateless persons, covenants on civil, political, economic and cultural rights, racial discrimination, protection from torture, religious discrimination, child rights and rights of migrant labour, which have contributed towards the rich mass of human rights laws. Apart from the Universal Declaration of Human Rights, there is a Bill of International Rights which comprises two covenants on civil, political rights and social-economic and cultural rights and two optional protocols related to issues of individual complaint channel against nation-state and death penalty.

It is through these agencies the UN is ensuring the education, promotion, protection and implementation of these laws. This includes policy-making organs of the UN General Assembly, the Security Council, the Social and Economic Council, the Commission on Human Rights, the Commission on the Status of Women and the Commission on Crime Prevention and Criminal Justice. Also part of the machinery are bodies established by human

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rights treaties, reporting, communications, and investigating procedures established by policy-making organs and treaty-based bodies. The parts of UN Secretariat like UN High Commissioner for Human Rights, Division for the Advancement of Women and the Centre for International Crime and Prevention have are also part of this machinery.

THE INDIAN CONSTITUTION AND HUMAN RIGHTS

Fundamental human rights in the sense of civil liberties with their modern attribute and overtone are a development more or less parallel to the growth of constitutional government and parliamentary institutions from the time of British rule in India. The impetus of their development obviously came out of resistance to foreign rule when the British resorted to arbitrary acts such as brutal assaults on unarmed poor Indians. Nationalist movement and the birth of the Indian National Congress were the direct results. The freedom movement was largely directed against racial discrimination and to securing basic human rights for all the people irrespective of race, colour, creed, sex, place of birth in the matter of access to public places, offices and services.

The history of national struggle for basic human rights can be traced back to the formation of the Indian National Congress which endeavoured to formulate the spectrum of human rights back in 1895, when an unknown author drafted the Constitution of India Bill. However, the first formal document came into existence in 1928, with the Report of Motilal Nehru. The rights enumerated by the Motilal Nehru Report; free elementary education, living wages, protection of motherhood, welfare of children were a precursor of the fundamental Rights and Directive Principles of State Policy, which were enshrined in the Indian Constitution 22 years later. Most important pronouncement on human rights came in the pages of Objectives Resolution moved by Jawahar Lal Nehru in 1946. In the Objective Resolution, it was pledged to draw up a Constitution for the country wherein it shall be guaranteed and secured to all the country all rights, wherein adequate safeguards would be provided for the minorities, backward and tribal areas and depressed and other classes”. The Resolution also reflected the anxiety of the founding fathers to incorporate and implement the basic principles enunciated in the Universal Declaration of Human Rights. The Assembly incorporated in the Constitution of India the substance of most of these rights. The two parts—the Fundamental Rights and the Directive Principles of the Constitution of India between them covered almost the entire field of the Universal Declaration of Human Rights. In short,
the Objective Resolution forms the basis for the incorporation of various provisions of the Constitution.

The Preamble and Human Rights

The Preamble to the Constitution is of supreme importance and the Constitution should be read and interpreted in the light of the grand and noble vision expressed in the preamble. The Preamble of the Constitution declares:

“We the people of India, having solemnly resolved to constitute India into a sovereign, socialist, secular, democratic republic and to secure to all citizens: Justice, social, economic and political; Liberty of thoughts, expression, belief, faith and worship; Equality of status and of opportunity; and to promote among them all; Fraternity assuring the dignity of the individual and the unity and integrity of the nation.”

In short, the Preamble concisely sets out quintessence of human rights, which represents the aspirations of the people, who have established the Constitution.

Fundamental Rights and Human Rights

A unique feature of the Indian Constitution is that a large part of human rights are named as Fundamental Rights, and the right to enforce Fundamental Rights itself has been made a Fundamental Right. The Fundamental Rights in the Indian Constitution constitute the Magna Carta of individual liberty and human rights. The Fundamental Rights under Articles 14-31 of the Constitution of India provides individual rights based on right to equality, right to freedom, right against exploitation, right to freedom of religion, right to cultural and educational rights. These are negative rights which are made enforceable against the state, if violated. These rights can be summed up in different categories:

Right to Equality (Art. 14-18)

Right to equality is the cornerstone of human rights in Indian Constitution. While Article 14 states that “the state shall not deny to any person equality before the law and equal protection of the laws within the territory of India,” the Article 15 goes to much more specific details that “the state shall not discriminate against any citizen on grounds of religion, race, caste, sex, place of birth or any of them be subject to any disability, liability, restriction or condition with regard to (a) access to shops, public restaurants, hotels and places of public entertainment. “Whereas, Article 16 states that “there shall be equal opportunity for all
citizens in matters relating to employment or appointment to any office under the state.”

Article 17 and 18 directs the state to abolish untouchability and titles respectively.

Right to Freedom (Art. 19-22)

The rights to freedom under articles 19-22, are the soul of the human rights in India. Significantly, Article 19 states that “all citizens shall have the right to freedom of speech and expression; to assemble peacefully and without arms: to form associations or unions; to move freely throughout the territory of India; to reside and settle in any part of the territory of India; and to practice any profession or to carry on any occupation, trade or business.” Whereas, Article 20 says that “no person shall be convicted of any offence except for violation of a law at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.” However, the most important article of human freedom is stated in Article 21, which says that “no person shall be deprived of his life or personal liberty except according to the procedure established by law.” Article 22 of the Indian Constitution lays down the right of a person arrested under ordinary situation. Without being told the reasons for his/her arrest, no citizen of India can be arrested in normal circumstances. And if he/she gets arrested, the person has the right to defend himself by a lawyer of his choice.

Right against Exploitation (Art. 23-24)

The Constitution under Articles 23-24, enumerates a list of rights that prohibits exploitation, human trafficking and similar such exploitations. Article 23 prohibits traffic in human beings and beggar and other forms of forced labour. Our Constitution used a comprehensive expression “traffic in human beings”, which includes a prohibition not only of slavery but also of traffic in women or children or crippled, for immoral or other purposes. Article 24 of the Constitution prohibits the employment of children below 14 years of age in any factory or mine or in any other hazardous employment. Thus forced labour is prohibited and children have been protected as a matter of fundamental rights.

Right to Freedom of Religion (Art. 25-28)

The Part III of the Constitution under Articles 25-28 prescribe for certain religious freedoms for citizens. They include in Article 25, freedom of conscience of free pursuit of
profession, practice and propagation of religion, in Article 26, freedom to manage religious affairs, in Article 27, freedom to payment of taxes for promotion of any particular religion and in Article 28, freedom of attendance at religious instructions or religious worship in certain educational institutions. In short, these are vital rights of religious minorities in India.

Cultural and Educational Rights (Art. 29-30)

Article 29 and 30 of the Constitution guarantees certain cultural and educational rights to the minority sections. While Article 29 guarantees the right of any section of the citizens residing in any part of the country having a distinct language, script or culture of its own, and to conserve the same, Article 30 provides that ‘all minorities, whether based on religion or language, shall have the right to establish and administer educational institutions of their choice”, In short, these are important rights, as far the protection of human rights of minority groups in a majoritarian society as India.

Right to Constitutional Remedies (Art. 32)

Chapter III of the Indian Constitution pertaining to Fundamental Rights has a measure of judicial protection and sanctity in the matter of enforcement of these rights. Under Article 32, every person has been given a right to move to the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III. Clause 2 of this Article empowers the Supreme Court to issue directions, or writs, including writs in the nature of habeas corpus, mandamus, prohibition, *quo warranto*, and certiorari. This right cannot be suspended except when a proclamation of emergency is in force.

**Directive Principles of State Policy**

The Part IV of the Constitution popularly known as the Directive Principles of State Policy provides a long list of human civil and economic rights for the people of India. They form the bedrock of human rights in India. The main purpose of this charter of positive rights is to ensure social, political and economic justice to all by laying down basic principles of governance. These principles are intended to be kept in mind both by the legislatures in enacting laws and by the executive authorities in enforcing laws. Although these principles are not enforceable by any Court yet they are fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws for the general welfare of their men, women and children.
These rights are:

a. Providing adequate means of livelihood.\(^{73}\)
b. Equal pay for equal work for both men and women.\(^{74}\)
c. Adequate protection of the health and strength of workers, men and women.\(^{75}\)
d. Equal Justice and free legal aid.\(^{76}\)
e. Living wage, conditions of work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities.\(^{77}\)
f. Free and compulsory education for children.\(^{78}\)
g. Increasing the level of nutrition, the standard of living and improving public health.\(^{79}\)
h. Prohibiting the slaughter of cows and calves and other milk and draught cattle.\(^{80}\)

A closer analysis of the Fundamental Rights and the Directive Principles makes it amply clear that between these, almost the entire field of the Universal Declaration of Human Rights are covered. Besides, the Indian Constitution, through these two parts (Part III and IV) has made a novel attempt to balance enforceable rights and non-enforceable rights, allowing them to complement each other on the fundamental governance of the country. Finally, both these rights are inter-related and indispensable for each to flourish.

The Directive Principles drew their inspiration from the Covenant on Economic, Social and Cultural Rights. Article 2 (1) of the covenant directs all states to take all possible measures, including legislative, to improve the living standard of the people in general. In fact, the Directive Principles provided guidelines in enacting legislation, which proved to be standard-setting for such measures as labour welfare. The governments passed many Acts giving meaning to the Directive Principles, for example, the Plantation Labour Act, 1951, the Mines Act 1952, the Employees Provident Fund Act 1952, the Maternity Benefits Act, 1961, the Apprentices Act 1961 and the Equal Remuneration Act 1976\(^{81}\).

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\(^{73}\) Article 39(a), The Constitution of India.
\(^{74}\) Article 39(d), The Constitution of India.
\(^{75}\) Article 39(e), The Constitution of India.
\(^{76}\) Article 39(a), The Constitution of India.
\(^{77}\) Article 43, The Constitution of India.
\(^{78}\) Article 45, The Constitution of India.
\(^{79}\) Article 47, The Constitution of India.
\(^{80}\) Article 48, The Constitution of India.
The Contract Labour Act 1970 provides for employment of contract labour in certain conditions and recommends its abolition in some cases.\(^{82}\) In Catering Cleaners of Southern Railway v. Union of India\(^{83}\) and Munna Khan v. Union of India\(^{84}\), the apex court ordered the government to abolish the contract labour system. Similarly, the Child Labour Act 1986 prohibits the employment of children in dangerous occupations. The Act provides for imprisonment up to three months to one year to the violator. Bonded labour was legally proscribed by the Bonded Labour System Act 1976. Unfortunately, only workers from organized sectors have taken advantage of these laws.

The unorganized sector which forms the major chunk of national income, is still neglected and this has been challenged in the courts, where it is contended that it violates the Directive Principles of State Policy.\(^{85}\) The reorientation of policies and programmes is the need of the hour to further the cause of the labour force in the unorganized sector. In November, 1995, the Government of India notified the Legal Service Authority Act under which the state would provide free legal aid to the poorest sections of the society. According to this legislation, any person with an annual income less than Rs 9,000 and if the case is in front of the Supreme Court with annual income less than Rs 12,000, is entitled to the legal aid. The main problem with these laws is that punishment mentioned in these legislations is too meagre to deter violations. Soft penalties in cases of white-collar crimes have encouraged the educated elite and the rich people to commit these crimes again and again at the cost of the country at large.

**Fundamental Duties**

The founding fathers of our Constitution have made a special provision for fundamental duties for every citizen. The concept of duty goes hand in hand with the notion of rights. This is equally important not only for individual growth but also for a social progress. Under Part IVA of the Constitution, there is a list of duties prescribed as guidelines for the citizens of the country. According to it, it shall be the duty of every citizen of India:

- To abide by the Constitution and respect its ideals and institutions, the National Flag and the National anthem.


\(^{83}\) (1987) 1 SCC 7000.

\(^{84}\) JT 1988 (3) SC 26.

To cherish and follow the noble ideals which inspired our national struggle for freedom.

To uphold and protect the sovereignty, unity and integrity of India.

To defend the country and render national service when called upon to do so.

To promote harmony and the spirit of common brotherhood amongst all the people of India transcending religious, linguistic and regional or sectional diversities, to renounce practices derogatory to the dignity of women.

To value and preserve the rich heritage of our composite culture.

To protect and improve the natural environment including forests, lakes, rivers and wild life and to have compassion for living creatures.

To develop the scientific temper, humanism and the spirit of inquiry and reform.

To safeguard public property and to abjure violence.

To strive towards excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of endeavour and achievement.

Nation building is a two way process. It is as much the duty of those at helm of affairs to ensure that they discharge their duties in best possible way as it is the duty of every citizen to act with best of intent and efforts towards the goals of self-amelioration and national good. There is no such thing as unfettered freedom. Liberty always comes with the burden of responsibility in equal measure.

In the human rights arena, the concept of duty has been the focus of attention among its practitioners. Much of the literature, especially on citizenship rights, suggests that there can be no rights without corresponding duties. In matters of debates, it is often argued that why human beings enjoy the rights and not the animals is because human beings can perform corresponding duties. This point of view has led to a little bit of contradiction. It flies into the face of our understanding that human rights laws are absolute and that these rights are not relativised against corresponding duties. This means that anybody who fails to live up to his duties is not entitled to his rights. This contradicts the philosophy as the human rights are considered to be inalienable.

However, the duties have been divided into two groups, i.e. positive and negative duties. These are duties meant to be performed as an act. It might be agreed that for a citizen to enjoy the health rights, it is important for him to pay his health insurance premium first. Citizenship rights rely on both these duties whereas human rights do not involve positive
duties. It presupposes negative duties. The negative duties flow from rights. It could be understood by an example that in a given situation, one’s right to freedom is relativised according to how one performs his or her duty to respect freedom of others.

If one fails to respect rights of other, one would not have his or her rights taken away. That means the relationship between rights and duties is a complex one. According to Locke, the duties that we talk of in relation to our rights are the negative duties. Paine, on the contrary, advocates that rights have corresponding positive duties involving action rather than Locke’s inaction. He said all have a duty to contribute towards society so that everyone can enjoy his natural rights fully. In Paine’s view, such notions help in building up a system of social justice.

This debate brought to the fore the issue of indivisibility of the rights. The UN has always advocated for a holistic approach underscoring the interdependent nature of these rights, stating that full realisation of civil and political rights is meaningless without corresponding socio-economic and cultural rights. It is said freedom is equally oppressive if one is hungry and has no wherewithal to sustain oneself.

There are some Asian countries like China, Indonesia and Iran which have argued for Asian concept of human rights whereby they claim that socio-economic rights should take precedence over the first generation civil and political rights. Taking serious objection to it, the USA argued that cultural relativism should not be used as a refuge for repression. Describing it as a sad development, Dalai Lama observed that ‘it is the inherent nature of human beings to yearn for freedom, dignity and peace’.

Inspite of so many legal and constitutional safeguards available in the country, there are numerous cases of human rights violations taking place all around. In order to further understand the gravity and extent of these violations, it is important to understand the various Dimensions of Human Rights violations in India, which have been explained in the next chapter.