CHAPTER – 2

INFORMATION ABOUT HUMAN RIGHTS
CHAPTER – 2
INFORMATION ABOUT HUMAN RIGHTS

2.1 Introduction

1. उपायाधिकरकणम्:–
वरणेवेष्टमार्गस्यस्वाधर्मपालनेतथा।
अभिसन्धिंववहायैवस्वतिंत्रा: सर्वमानवा:॥(1)

Meaning
Every human being has a right to select its own spiritual path. They are independent to follow their religion. Root of every Religion is Knowledge. Therefore, every human being has a right to acquire knowledge and because of human being they can take part in any religions of the world.

2. अथः-अधिकार:–
स्वप्राणर्कणेचैवस्वस्वत्वक्षणेतथा।
tदर्थसम्यगाजीवेस्वस्वुरधिकारिण:॥(2)

Meaning
Every human beings has a right to have life, wealth and livelihood. They have right to create their government for their welfare and decide welfare programme by the welfare government for the benefits of all human beings. This welfare government must provide minimum of Food, Clothes, Residence, Medicine and Education.

(1)(2) Human Right or Women Harassment (Ch. 2 Pg. No. 59)
GOD’s best creation, if any, is Human Being. GOD has increased goodness of this Cosmos by creating Human being. These human being possess more importance in this Cosmos than any other creations. This is because if any thing missing in other creations of this cosmos then is Intelligence. GOD has completed all missing things by creating human being and by giving power of intelligence GOD has made human being a Topmost creation in this cosmos and also honored excellence.

Human being is a social and intellegent animal as other animals created by GOD and due to intelligence human being possess right to acquire any other creation of GOD. Because of powerful important quality of intelligence human being is put on topmost honored place of this cosmos.

GOD has manifested human being by first creating Manu and Eve in this cosmos and the human being has right to acquire any thing or rights as man is a member of human society and this is why no one can not say NO to acquire the rights. Human being can acquire minimum available rights. Because these minumum available rights are gifted by the nature. Minimum rights include Life, Independece, equality and dignity. All these rights are called human rights of human being. These rights includes all other rights and these four things are prime in human rights as no one can negate by giving these rights.

When we talk of human rights then first we need to understand what is a right? What can be the meaning of rights? In simple language rights means one is bound to do something for other and other is rightful to take the benefit of that task. That means one has right to take and other is bound to give and this is called right. In the meaning of Law if we see what is rights then right is standard of act recognised by law or in other word we can say right is dependent of the basis of other’s act.

Austine giving definations of rights says that when one say anyone has right then other one is bound to do some act by law in one’s relation. Hence, in the opinon of Austine rights has inevitable relation to responsibility. (3)

(3) Jurisprudence (Ch.9 Pg. 199)
If we say more in respect to rights then rights and responsibility act as two sides of one coin because rights and responsibility are dependent of one another of which one side is apparent and other is related to one even if the other is non apparent.

Different powers are given to human being by the nature but some external facilities are required to properly experiment these powers in the benefit of society. Topmost purpose of State are to develop personality of human beings. Thus State are to give facilities to human being and these facilities provided by State are called rights.

Therefore, these rights are inevitable necessity and without these no human being can develop their personality and without these no human being can do social welfare work. Thus without rights one can not imagine existance of life of human being. Due to these reason all States give more and more rights to their people. According by Lasky “State is good or bad is determined by the type of rights they give to their people.”

राज्यसंबंधीअधिकार
अधिसमयामुख्यामतिष्ठानंतरेततः।
सच्चिदेशवेद शतादृश्च चात्मकार्यकार्यः॥
अधिकारसंस्थानाःप्रतिज्ञा माध्यमाध्यमस्त॥
अन्यायबन्धनात्माःपरमेषुचिपिष्टकात॥
शास्त्रियवेदांशुपश्रमस्ताश्चाविश्वास्थानः॥
अद्यकर्मकृत्यमादिगात्मान्यायात्मात्मार्थः॥
समत्वविवेकार्थमाह वैद्यविधियत॥
युक्तत्वक्षक्षणद्योग्यविधयात्मान्यमन्दित॥(5)

(4) Human Right and Duty( Ch.2 Pg.25-26 ) (5) Human Right or Women Harassment( Ch.2 Pg.60 )
1. Rights depending on non violence means to punish after providing statutory protection and saving from uncontrolled obstacles for the purpose of providing protection and long life to human being. Rights should provide protection from punishment in the situation of inappropriate punishment.

2. Meaning of Right to truth is not to punish the innocent human being before proving the law-breaking of human being.

3. Rights to prosperity relates to the rights pertaining to the wealth.

4. Rights to hygiene relates to the rights pertaining to the stopping of pollution.

5. Rights to Soul Protection relates to the rights pertaining to protect the unnecessary interference by the state in the independence of human being.

If it is said that in India protection of human being was there since vedic period then this sayings is not boastfulness. In ancient India administration of society and state were being done by religions. Religion means that which is to rely upon. Meaning of Social Welfare is omniscient which is the root of human rights.

Human beings marching slowly towards civilization since time immemorial. Rules and Regulations are established to accomplish the need of control of human society after the invention of Language and Verbal Communication. Human beings have realized after experience that the law of Jungle is not in the favour of human being. Different human civilization of the world has decided the rules and belief systems for the interaction between human to human. Ancient civilization and belief systems have appeared clearly in constitution law of every country.

It is appropriate to say that to discipline and to limit the human behavior whatever rules and sub rules are made is the LAW. Simple meaning of LAW is by the constitution of India according to which against the unlimited behavior of people CIVIL or CRIMINAL LAW is to be made in force.

2.2 Definitions of Law and its Meaning

The Very Purpose of State is to make good organization and welfare of people. But this purpose can only be achieved when people of state follow and apply
into life the simple rules. State creates rules to manage life of people and to implement this rules are necessary for people. If these rules are not implemented then punishment happens. Rules made by the state are called LAW.

Some of the definition of Law is like this...

1. As per Oxford Dictionary
   “Rule of behavior laid by authorities.”
2. As per Austine
   “Law is instruction of Saurian.”
3. As per Pound
   “Law is rules applied by recognized people and people court in the justice of administrations.”
4. As per Samand
   “Law is bundle of rules to which state authenticate it and apply in justice and administrations.”

One can say from above definitions of law that LAW is rules that created and accepted by state and by implementation of it State punishes accordingly.

2.3 Definition of Law

In the words of Thurman Arnold: “Obviously, law can never be defined. With equal obviousness, however, it should be said that the adherents of the legal institution must never give up the struggle to define law, because it is an essential part of the ideal that it is rational and capable of definition. Hence the verbal expenditure necessary in the upkeep of the ideal of ‘law’ is colossal and never ending. The legal scientist is compelled by the climate of opinion in which he finds himself to prove that an essentially irrational word is constantly approaching rationality.” (The symbols of Government, 1935, pp. 36-37) A similar view is expressed by Lord Lloyd: “Since much juristic ink has flowed in an endeavor to provide a universally acceptable definition of law, but with little sign of attaining that objective.” (Introduction to Jurisprudence, p. 42) R. Wollheim points out that much of the confusion in defining law has been due to the different types of purpose sought to be achieved.

27
Morris writes: “To a zoologist, a horse suggests the genus mammalian quadruped, to a traveller a means of transportation, to an average man the sports of kings, to certain nations an article of food.” Likewise, law has been variously defined by various individuals from different points of view and hence there could not be and is not any unanimity of opinion regarding the real nature of law and its definition. There is a lot of literature on the subject of law and in spite of that; different definitions of law have been given.

Various schools of law have defined law from different angles. Some have defined it on the basis of its nature. Some concentrate mainly on its sources. Some define it in terms of its effect on society. There are others who define law in terms of the end or purpose of law. A definition which does not cover various aspects of law is bound to be imperfect. Moreover, law is a social science and grows and develops with the growth and development of society. New developments in society create new problems and law is required to deal with those problems. In order to keep pace with society, the definition and scope of law must continue to change. The result is that a definition of law given at a particular time cannot remain valid for all times to come. A definition which is considered satisfactory today may be found narrow tomorrow. Prof. Keeton rightly points out that “to attempt to establish a single satisfactory definition of law is to seek to confine jurisprudence within a straitjacket from which it is continually striving to escape”. Prof. H. L. A. Hart writes: “Few questions concerning human society have been asked with such persistence and answered by serious thinkers in so many diverse, strained and even paradoxical ways as the question ‘What is law?’.” (The Concept of Law, p. 1) Pollock observes: “No tolerably prepared candidate in an English or American Law School will hesitate to define an estate in fee simple; on the other hand, the greater a lawyer’s opportunities for knowledge have been, and the more time he has given to the study of legal principles, the greater will be his hesitation in the face of apparently simple question ‘What is law?’.”

According to Justinian: “Law is the king of all mortal and immortal affairs, which ought to be the chief, the ruler and the leader of the noble and the base and thus
the standard of what is just and unjust, the commander to animals naturally social of what they should do, the forbider of what they should not do.” Ulpian defined law as “the art or science of what is equitable and good”. Cicero said that law is “the highest reason implanted in nature”. Pindar called law as “the king of all, both mortals and immortals”.

Demosthenes wrote: “Every law is a gift of God and a decision of sages.” Again, “this is law to which all men yield obedience for many reasons and especially because every law is a discovery and gift of God and at the same time a decision of wise men, a rightening of transgressions, both voluntary and involuntary, and the common covenant of a State, in accordance with which it beseeches all men in the State to lead their lives”.

Chrysiphus defined law as “the common law which is the right reason, moving through all things, and identical with Zeus, the Supreme Administrator of the universe”. According to Capito, “a lex is a general command of the people or the plebs on question by a magistrate”. Anaximenes writes: “Law is a definite proposition, in pursuance of a common agreement of a State intimating how everything should be done.” According to Hobbes: “Law is the speech of him who by right commands somewhat to be done or omitted.” Again, “law in general is not counsel but command; nor a command of any man to any man but only of him whose command is addressed to one formerly obliged to obey him and, as for civil law, it adept only the name of the highest person commanding which is persona civitatis, the highest person of the commonwealth.”

Blackstone writes: “Law in its most general and comprehensive sense signifies a rule of action and is applied indiscriminately to all kinds of actions, whether animate or inanimate, rational or irrational. Thus, we say the laws of gravitation, or optics or mechanics, as well as the laws of nature and of nations.

Hooker defines law as “any kind of rule or canon whereby actions are framed... that which reason in such sort defines to be good that it must be done”. Again, “of law there can be no less acknowledged than that her seat in the bosom of
God, her voice the harmony of the world, all things in Heaven and Earth does her homage, the very least as feeling her care and the greatest as not exempted from her power; both angels and men and creatures of what condition so ever; though each in different sort and manner, yet all with uniform consent, admiring her as the mother of their peace and joy”.

The view of Kant was that law is “the sum total of the conditions under which the personal wishes of one man can be combined with the personal wishes of another man in accordance with the general law of freedom”. Hegel defined law as “the abstract expression of the general will existing in and for it”.

Sir Henry Maine writes: “The word ‘law’ has come down to use in close association with two notions, the notion of order and the notion of force.”

Savigny says that law is “the rule whereby the invisible borderline is fixed within which the being and the activity of each individual obtain a secure and free space”. According to Vinogradoff, law is “a set of rules imposed and enforced by a society with regard to the distribution and exercise of powers over persons and things”.

According to Austin, “law is the aggregate of rules set by men as politically superior, or sovereign, to men as politically subject”. In other words, law is the command of the sovereign. It imposes a duty and is backed by a sanction. Command, duty and sanction are the three elements of law.

Kelsen defined law as the psychologized command. Though Kelsen defines law in terms of command, he uses that term differently from Austin. The sovereign of Austin does not come into the picture in the definition of law as given by Kelsen.

Duguit defines law as essentially and exclusively a social fact. The foundation of law is in the essential requirements of the community life. It can exist only when men live together. The sovereign is not above the law but bound by it. Law should be based on social realities. Duguit excluded the notion of ‘right’ from law.
Ihering defines law as “the form of the guarantee of the conditions of life of society, assured by State’s power of constraint”. Law is treated only as a means of social control. It is to serve social purpose. It is coercive in character. Obedience to law is secured by the State through external compulsion.

Ehrlich included in his definition of law all the norms which govern social life within a given society. Pound defines law as “a social institution to satisfy social wants”.

Justice Holmes says: “Law is a statement of the circumstances in which the public force will be brought to bear upon men through courts”. Again, “the prophecies of what the court will do in fact and nothing more pretentious, are what I mean by law. According to Gray: “The law of the State or of any organised body of men is composed of the rules which the courts – that is the judicial organs of that body – lay down for the determination of legal rights and duties.”

Cardozo writes: “A principle of rule of conduct so established as to justify a prediction with reasonable certainty that it will be enforced by the courts if its authority is challenged is a principle or rule of law.” Holland says: “More briefly, law is general rule of eternal human action enforced by a sovereign political authority. All other rules for the guidance of human action are laws merely by analogy: and propositions which are not rules for human action are laws by metaphor only.”

According to Bentham: “Law or the law, taken indefinitely, is an abstract or collective term, which when it means anything, can mean neither more nor less than the sum total of a number of individual laws taken together.” Salmond defines law as “the body of principles recognised and applied by the State in the administration of justice”.

According to the Paton, the term law may be defined from the point of view of the theologian, the historian, the sociologist, the philosopher, the political scientist or the lawyer. Law may be used in a metaphorical sense. Law may be defined firstly by
its basis in nature, reason, religion or ethics. Secondly, it may be defined by its source in customs, precedents or legislation. In the third place, it may be defined by its effect on the life of society. Fourthly, it may be defined by the method of its formal expression or authoritative application. In the fifth place, it may be defined by the ends that it seeks to achieve. Paton himself defines law in these words: “Law may be described in terms of a legal order tacitly or formally accepted by a community, and it consists of the body of rules which that community considers essential to its welfare and which it is willing to enforce by the creation of a specific mechanism for securing compliance. A mature system of law normally sets up that type of legal order known as the State, but we cannot say a priori that without the State no law can exist.”

According to Lord Moulton: “Law is the crystallized commonsense of the community.”

Prof. M. J. Sethna writes: “Law is its widest sense means and involves a uniformity of behaviour, a constancy of happenings or a course of events, rules of action, whether in the phenomena of nature or in the ways of rational human beings. In the synthetic sense, civil law is all that body of principles, decisions and enactments made, passed or approved by the legally constituted authorities or agencies in a State, for regulating rights, duties and liabilities (between the State and the citizens, as also the citizens inter se, and the citizens of the State in relation to members of foreign States), and enforced through the machinery of the judicial process, securing obedience to the sovereign authority in the State.”

From what has been stated above, it follows that law presupposes State. There may be law even without the State such as primitive law, but law in the modern sense of the term implies a State. The State makes or authorises to make, recognises or sanctions rules which are called law. For the rules to be effective there are sanctions behind them. Rules are made to serve some purpose. That purpose may be a social purpose or the personal ends of a despot.\(^{(6)}\)

\(^{(6)}\) Jurisprudence Ch. 2 Pg. 26 to 31
2.4 Meaning of Sources of Law

The term “sources of law” has been used in different series by different writers and different views have been expressed from time to time. Sometimes, the term is used in the sense of the sovereign or the State from which law derives its force or validity. Sometimes it is used to denote the causes of law or the matter of which law is composed. It is also used to point out the origin or the beginning which gave rise to the stream of law. G. K. Allen uses it in the sense of agencies through which the rules of conduct acquire the character of law by becoming definite, uniform and compulsory. Vinogradoff uses it as the process by which the rule of law may be evolved. Oppenheim uses it as the name for a historical fact out of which the rules of conduct come into existence and acquire legal force. According to Prof. Fuller, the problem of “sources” in the literature of jurisprudence relates to the question: “Where does the judge obtain the rules by which to decide cases? In this sense, among the sources of law will commonly be listed statutes, judicial precedents, custom, the opinion of experts, morally and equally.” (Anatomy of the Law, p. 69)

Holland: According to Holland, the expression, “sources of law” is sometimes employed to denote the quarter whence we obtain our knowledge of the law, e.g. whether from the statute book, the reports or esteemed treatises. Sometimes it is used to denote the ultimate authority which gives them the force of law, i.e. the State. Sometimes it is used to indicate the causes which have subsequently acquired that force viz., custom, religion and scientific discussion. Sometimes it is used to indicate the organs through which the State either grants legal recognition to rules previously unauthoritative or itself creates new law, viz., adjudication, enquiry and legislation.

Rupert Cross writes that the phrase “source of law” is used in several different senses. First, there is the literary source, the original documentary source of our information concerning the existence of a rule of law. In this sense, the law reports are a source of law, whereas a textbook on tort or contract, or a digest of cases falls into the category of legal literature. Next, there are the historical sources of law, the sources – original, mediate or immediate – from which rules of law derive their content is a matter of legal history. In this sense, the writings of Bracton and Coke and
the works of other great exponents of English law are sources of law, for the enunciate rules which are now embodied in judicial decisions and Acts of Parliament. In this sense too, Roman law and medieval customs are sources of English law, for parts of our law which are now immediately attributable to decisions in particular cases or specific statutory provisions can be treated to a rule of Roman law, and a great deal of the English land law originated in feudal custom. This sense of the phrase “source of law” can be extended to anything which accounts for the existence of a legal rule from the causal point of view. On the one hand, it may be applied to the Queen-in-Parliament and Her Majesty’s judges as the immediate authors of rules of law; on the other hand, it may be used to cover public opinion, moral principles and even those judicial idiosyncrasies which some American realists insist should be the true subject matter of a mature study of law. (Precedent in English Law, p. 146)

Natural Law: According to the school of natural law, law has a divine origin. Every law is the gift of God and the decision of sages. The Quran is the word of God. The Hadis contain the precepts of the prophet as inspired and suggested by God. According to the Hindus, the Vedas were inspired by God. The law of Lycurgus in Greece had a divine origin. Moses got the Commandments from Jehovah and Hammuradi got his code from the Sun God.

Austin: John Austin refers to three different meanings of the term “sources of law”. In the first place, the term refers to the immediate or direct author of the law which means the sovereign in the country. Secondly, the term refers to the historical document from which the body of law can be known, e.g. the Digest and Code of Justinian. In the third place, the term refers to the causes which have brought into existence the rules which later on acquire the force of law. Examples are customs, judicial decisions, equity, legislation etc.

The analytical school of Jurisprudence represented by Austin is attacked by the exponents of the historical school as represented by persons like Savigny, Sir Henry Maine, and Puchata etc. Their contention is that law is not made but is formed. The foundation of law lies in the common consciousness of the people which
manifests itself in the practices, usages and customs of the people. Customs and usages are the sources of law.

Sociological view: The sociological school of law protests against the orthodox conception of law according to which law emanates from a single authority in the State. According to this school law is taken from many sources and not from one, Enrlich writes: “At the present as well as any other time, the centre of gravity of legal development lies not in legislation, not in juristic science or judicial decisions, but in society itself.” Diguit writes that law is not derived from any single source and the basis of law is public service. There need not be any specific authority in a society which has the power of making laws.

Salmond: The view of Salmond was that the two main sources of law were formal and material. Material sources could be sub-divided into legal sources and historical sources. Legal sources were legislation, precedent, custom, agreement and professional opinion.

A formal source of law was defined by Salmond as that from which a rule of law derives its force and validity. The formal source of law was the will of the State as manifested in statutes or decisions of the courts. The authority of law proceeds from that. However, this approach depends upon the particular definition of law adopted by Salmond.

2.5 Source of Law

2.5.1 Material Sources: Legal and Historical

The material sources of law are those from which is derived that matter, though not the validity of the law. The matter of law may be drawn from all kinds of material sources.

According to Salmond, material sources of law are of two kinds, legal and historical. Legalsources are those sources which are the instruments or organs of the
States by which legal rules are created, e.g., legislation and custom. They are authoritative and are followed by law courts as of right. They are the gates through which new principles find admittance into the realm of law. Historical sources are sources where rules, subsequently turned into legal principles, were first to be found in an unauthoritative form. They are not allowed by the law courts as of right. They operate only mediatelly and indirectly. Both the Acts of Parliament and the works of Bentham are material sources of English law, but Acts of Parliament become law forthwith and automatically but what Bentham says may or may not become law. That depends upon its acceptance by the legislature or the judiciary. Likewise, the decisions of the Supreme Court of India are binding precedents for all courts in India, but the decisions of the Supreme Court of the United States are not binding in India. They may or may not be recognized and followed in Indian courts. In India, much of the early law is based on the precepts of religion. The codes of Manu and Brihaspati were almost entirely based on religious precepts. During the reign of Aurangzeb, most of the law had its origin in the Holy Koran.

In respect of its material origin, a rule of law has often a long history. Its immediate source may be a decision by a court of law, but that court may have based its decision on the writing of some lawyer, e.g., Pothier. Pothier himself may have taken the material from the edict of an urban practor. In such a case, the decision, the works of Pothier, the Code of Justinian and the edict of the urban practor are the material sources of the rule of law. However, there is a difference between them as a precedent is a legal source of law and others are merely historical sources. Precedent has its source not merely in fact but also in law. The others are its sources in fact and not in law.

Critics find fault with Salmond’s classification of sources of law into formal and material sources of law. Allen criticizes Salmond for his attaching little importance to historical sources. Keeton also criticizes Salmond’s classification of formal sources. According to him, in modern times, the only formal source of law is the State, but the State is an organization which enforces law. Therefore, it cannot be considered as a source of law in the technical sense.
While criticizing Salmond, Keeton writes that the meaning of the term “source of law” is the material out of which law is eventually fashioned through the activity of judges. He gives his own classification of the sources of law: the binding sources of law are those which are binding on the judge and he is not independent in their application. Those sources of law are legislation, judicial precedents and customary law. The persuasive sources of law are useful only when there are no binding sources of law on a particular point. Some of such sources are professional opinions and principles of morality or equity.

Salmond’s classification of sources of law into formal and material sources simply indicates the binding or persuasive nature of the source and therefore its criticism by Allen is not well-founded. However, taken as a whole, the classification of Salmond into format and material sources of law is not satisfactory and perhaps that is the reason why the editor of the twelfth edition of Salmond on Jurisprudence has omitted the classification into formal and material. The only classification now given in Salmond’s book is legal and historical sources. The editor starts by saying that sources of law can be classified as either legal or historical. The former are those sources which are recognized as such by the law itself. The latter are those sources which lack formal recognition by the law. The legal sources of law are authoritative, the historical are unauthoritative. The former are allowed by law courts as of right, the latter have no such right. They influence more or less extensively the course of legal development but they speak with no authority. Legal sources are the only gates through which new principles can find entrance into the law. Historical sources operate only mediately and indirectly. Every legal system contains rules of recognition determining the establishment of new law and the disappearance of old. It is a principle of English law that any principle involved in a judicial decision has the force of law. Similar legal recognition is extended to the law-producing effect of statute and immemorial customs. These rules establish the sources of the law. A source of law is any fact which in accordance with such basic rules determines the recognition and acceptance of any new rule as having the force of law.

Salmond points out that the line between legal and historical sources in English law is not crystal clear. There are sources lying well to each side of the line.
A statute is clearly a legal source which must be recognized and the writings of Bentham are without legal authority. No English court is bound to follow the decisions of the Privy Council which are at best of high persuasive value only. No decision of the High court of Justice is binding on other High court judges, on the Court of Appeal or on the House of Lords. The view of Salmond is that according to the basic rules of English law, certain statements of law are absolutely binding in some but not all contexts, others are not binding in any context but are of persuasive value and others yet lack even persuasive force. The distinction between legal and historical sources is useful as a starting point and must not be pressed too far.

All rules of law have historical sources. They have their origin somewhere although it may not be known to us. However, all of them do not have legal sources. The rule that a man may not ride a bicycle on the footpath may have its source in the by-laws of a Municipal Council and the rule that these by-laws have the force of law has its source in an Act of Parliament. The question arises from where comes the rule that Acts of Parliament have the force of law. The answer is that the source is historical only and not legal. The historians of constitutional law know its origin but lawyers must accept it as self-existent. It is the law because it is the law and for no other reason that it is possible for the law itself to take notice of. No statute can confer this power upon Parliament. Likewise, the rule that judicial decisions have the force of law is legally ultimate and underived. No statute lays it down. The doctrine of parliamentary sovereignty in England involved more than merely the usage and practice. It involved the acceptance of the view that Parliament’s word ought to be observed. It is not a mere hypothesis to be assumed for the sake of argument. Parliament is in fact supreme. These ultimate principles are the rules of law. (7)

2.5.2 Legal Sources of English Law

In general, law may be found to proceed from one or more of the following legal sources: from a written constitution, from legislation, from judicial precedent, from customs and from the writings of experts. English law proceeds chiefly from legislation and precedent.

(7) Jurisprudence Ch. 8 Pg. No. 169 to 174.
The *corpus juris* is divisible into two parts by reference to the source from which it proceeds. One part consists of enacted law, having its source in legislation. The other part consists of case law, having its source in judicial precedents. The first part consists of the statute law to be found in the book and the other volumes of enacted law. The second part consists of the common law which is to be found in the volumes of law reports. Legislation is the making of law by the formal and express declaration of new rules by some authority in the body politic which is recognized as adequate for that purpose. A precedent is the making of law by the recognition and application of new rules by the courts themselves in the administration of justice. Enacted law comes into the courts *ab extra*. Case law is developed within the courts themselves.

Salmond refers to two other legal sources in addition to legislation and precedent. Those are custom and agreement which are the sources of customary *law and agreement*.

Customary law is that which is constituted by those customs which fulfill the requirements laid down by law as the condition of their recognition as obligatory rules of conduct. Conventional law is that which is constituted by agreement as having the force of special law *inter partes*, in derogation of or in addition to the general law of the land.

By reference to their legal sources, there are four kinds of law

(i) Enacted law having its source in legislation
(ii) Case law having its source in precedent
(iii) Customary law having its source in custom
(iv) Conventional law having its source in agreement.

In addition to the above sources of law, *professional options* of eminent jurists may be called juristic law. Juristic writings and professional opinions have played a very important role in the revolution or law. In England, the trend was set by Bracton
and continued by such legal luminaries as Glanville, Chief Justice Coke and Blackstone. The works of Dicey and Cheshire are sources of private international law.

Lord Wright once paid a tribute to Pollock’s *Law of Torts in Nicholls v. Ely Beet Sugar Factory Ltd.* (1936) 1 Ch. 343.

In *Bradford v. Symondson*, the judgment turned almost entirely on the discussion of the books of leading text writers on insurance. In *Haynes v. Harwood*, the court followed a conclusion reached by Prof. Goodhart in an article written by him in the *Cambridge Law Journal*. Prof. Roscoe Pound explains the part played by textbooks in the development of American law in his book *The Formative Era of American Law*. His view is that doctrinal writing has had more influence in the United States than in England and even today that influence is continuing. The *American Restatement of the Law* is an example of cooperation between the bench, the profession and law teacher.

### 2.5.3 Sources of Law and Sources of Rights

The sources of law may also serve as sources of rights. By a source of law is meant some fact which is legally constitutive of right. It is the *de facto* antecedent of a legal right in the same way as source of law is *de facto* antecedent of a legal principle. Experience shows that to a large extent, the same classes of facts, which operate as sources of law also operate as sources of rights. Some facts create law but not rights. Some facts create rights and not law. Some facts create both law and rights at the same time. The decisions of inferior courts are not sources of law but they are nevertheless sources of right. Immemorial custom gives rise to rights and law at the same time in certain cases. An agreement operates as a source of right. It is not exclusively a title of rights but also operates as a source of law. (8)

---

(8) Jurisprudence Ch. 8 Pg. No. 176
2.6 Ultimate Legal Principles

Ultimate legal principles are those self-existing principles of which no legal origin is known though it may be possible to trace them to some historical source. All rules of law have historical sources but all of them do not have legal sources. If that were so, the search for tracing the origin of legal principles will continue *ad infinitum*. It is necessary that in every legal system there should be found certain ultimate principles from which all others are derived but which are self-existent.\(^{(9)}\)

2.7 Legal Rights

RIGHT: This word is used in various senses.

1. Sometimes it signifies a law, as when we say that natural right requires us to keep out promises, or that it commands restitution, or that it forbids murder. In our language it is seldom used in this sense. 2. It sometimes means that quality in our actions by which they are denominated just ones. This is usually denominated rectitude. 3. It is that quality in a person by which he can do certain actions, or possess certain things which belong to him by virtue of some title. In this sense, we use it when we say that a man has a right to his estate or a right to defend himself.

2. In this latter sense alone, will this word be here considered? Right is the correlative of duty, for, wherever one has a right due to him or her, some other must owe him or her duty.

3. Rights are perfect and imperfect. When the things which we have a right to possess or the actions we have a right to do, are or may be fixed and determinate, the right is a perfect one; but when the thing or the actions are vague and indeterminate, the right is an imperfect one. If a man demands his property, which is withheld from him, the right that supports his demand is a perfect one; because the thing demanded is, or may be fixed and determinate.

\(^{(9)}\) Jurisprudence Ch. No. 8 Pg. No. 177
4. But if poor men ask relief from those from whom he has reason to expect it, the right, which supports his petition, is an imperfect one; because the relief which he expects is a vague indeterminate thing.

5. Rights are also absolute and qualified. A man has an absolute right to recover property which belongs to him, an agent has a qualified right to recover such property, when it had been entrusted to his care, and which has been unlawfully taken out of his possession.

6. Rights might with propriety be also divided into natural and civil rights but as all the rights which man has received from nature have been modified and acquired anew from the civil law, it is more proper, when considering their object, to divide them into political and civil rights.

7. Political rights consist in the power to participate, directly or indirectly, in the establishment or management of government. These political rights are fixed by the constitution. Every citizen has the right of voting for public officers, and of being elected, these are the political rights which the humblest citizen possesses.

8. Civil rights are those which have no relation to the establishment support, or management of the government. These consist in the power of acquiring and enjoying property, of exercising the paternal and marital powers, and the like it will be observed that every one, unless deprived of them by a sentence of civil death, is in the enjoyment of his civil rights, which is not the case with political rights, for an alien, for example, has no political although in the full enjoyment of his civil rights.

9. These latter rights are divided into absolute and relative. The absolute rights of mankind may be reduced to three principal or primary articles; the right of personal security, which consists in a person’s legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation, the right of personal liberty, which consists in the power of locomotion, of changing situation, or removing one’s person to whatsoever place one’s inclination may direct, without any restraint, unless by due course of law, the right of property, which consists in the free use, enjoyment, and
disposal of all his acquisitions without any control or diminution save only by the laws of the land.

10. The relative rights are public or private, the first are those which subsist between the people and the government, as the right of protection on the part of the people, and the right of allegiance which is due by the people to the government, the second are the reciprocal rights of husband and wife, parent and child, guardian and ward, and master and servant.

11. Rights are also divided into legal and equitable. The former are those where the party has the legal title to a thing, and in that case, his remedy for an infringement of it, is by an action in a court of law. Although the person holding the legal title may have no actual interest, but hold only as trustee, the suit must be in his name, and not in general, in that of the cestui que trust.

In an abstract sense, justice, ethical correctness, or harmony with the RULES OF LAW or the principles of morals. In a concrete legal sense, a power, privilege, demand, or claim possessed by a particular person by virtue of law.

Each legal right that an individual possesses relates to a corresponding legal duty imposed on another. For example, when a person owns a home and property, he has the right to possess and enjoy it free from the interference of others, who are under a corresponding duty not to interfere with the owner’s rights by trespassing on the property or breaking into the home.

In Constitutional Law, rights are classified as natural, civil, and political. Natural rights are those that are believed to grow out of the nature of the individual human being and depend on her personality, such as the rights to life, liberty, privacy and the pursuit of happiness.

Civil Rights are those that belong to every citizen of the state, and are not connected with the organization or administration of government. They include the rights of property, marriage, protection by law, freedom to contract, trial by jury, and
the like. These rights are capable of being enforced or redresses in a civil action in a court.

Political rights entail the power to participate directly or indirectly in the establishment or administration of government, such as the right of citizenship, the right to vote, and the right to hold public office. (10)

Rights are legal social or ethical principal of freedom or elements that are rights are the fundamental normative rules about what is allowed of people or owed to people, according to some legal system. Social convention or ethical theory rights are of essential importance in such disciplines as law and ethics especially theories of justice and deontology.

Right are often considered fundamental to civilization being regarded as established pillars of society and culture and the history of social conflicts can be found in the history of each rights and its development according to the Stanford encyclopedia of philosophy “ Rights structure the form of governments, the concept of law, and the shape of morality as it is currently perceived” The connection between rights and struggle cannot be over stated rights are not as much granted or endowed as they are fought for and claimed and the essence of struggles past and ancient are encode in the spirit of current concepts of rights and their modern formulations. (11)

2.8 Definition of Rights

Legally guaranteed powers available to a legal entity in realization or defense of its just and lawful claims or interests (such an individual freedom) against. The whole world legal Rights (like law) affect every citizen whether or not the existence such rights is publicly known. (12)
2.9 The Oretical Distinction

2.9.1 Natural Rights versus Legal Rights

- **Natural Rights** are rights which are “Natural” in the sense of “not artificial, not man-made”, as in rights arriving from demonic logic, from human nature, or from the edicts of a God. They are Universal; that is, they apply to all people, and do not derive from the laws. Of any specific society. They exist necessarily, inhere in every individual, and cannot be taken away.

  For example, it has been argued that humans have a natural right to life. They are sometimes called moral rights or inalienable rights.

- **Legal Rights.** In contrast, are based on a society’s customs, laws, statutes or actions by legislatures. An example of a legal right is the right to vote of citizenship; it is often considered as the basis for having legal rights and has been defined as the “right to have rights.” Legal rights are sometimes called civil rights or statutory right and are culturally and politically relative since they depend on a specific societal context to have meaning. Some thinkers see rights in only one sense while others accept that both senses have a measure of validity.

  There has been considerable philosophical debate about these senses throughout history. For example, Jeremy Bentham believed that legal rights were the essence of rights, and he denied the existence of natural rights; whereas Thomas Aquinas held that rights purported by positive law but not grounded in natural law were not properly rights at all, but only a façade or pretense of rights.

2.9.2 Claim rights versus liberty rights

- **A Claim right** is a right which entails that another person has a duty to the right-holder. Somebody else must do or refrain from doing something to or for the claim holder, such as perform a service or supply a product for him or her; that is, he or she has a claim to that
service or product (another term is thing in action). In logic, this idea can be expressed as: “Person A has a claim that person B does something if and only if B has a duty to A to do that something.” Every claim-right entails that some other duty-bearer must do some duty for the claim to be satisfied. This duty can be to act or to refrain from acting. For example, many jurisdictions recognize broad claim rights to things like “life, liberty, and property”; these rights impose an obligation upon others not to assault or restrain a person, or use their property, without the claim-holder’s permission. Likewise, in jurisdictions where social welfare services are provided, citizens have legal claim rights to be provided with those services.

- A **liberty right** or privilege, in contrast, is simply a freedom or permission for the right-holder to do something, and there are no obligations on other parties to do or not do anything. This can be expressed in logic as: “Person A has a privilege to do something if and only if A has no duty not to do that something.” For example, if a person has a legal liberty right to free speech, that merely means that it is not legally forbidden for them to speak freely; it does not mean that anyone has to help enable their speech, or to listen to their speech, or even, per se, refrain from stopping them from speaking, though other rights, such as the claim right to be free from assault, may severely limit what others can do to stop them.

Liberty rights and claim rights are the inverse of one another: a person has a liberty right permitting him to do something only if there is no other person who has a claim right forbidding him from doing so. Likewise, if a person has a claim right against someone else, then that other person’s liberty is limited. For example, a person has a liberty right to walk down a sidewalk and can decide freely whether or not to do so, since there is no obligation either to do so or to refrain from doing so. But pedestrians may have an obligation not to walk on certain lands, such as other people’s private property, to which those other people have a claim right. So a person’s liberty right of
walking extends precisely to the point where another’s claim right limits his or her freedom.

2.9.3 Positive rights versus negative rights

In one sense, a right is a permission to do something or an entitlement to a specific service or treatment, these rights have been called positive rights. However, in another sense, rights may allow or require inaction, these are called negative rights: they permit or require doing nothing. For example, in some democracies e.g. the US, citizens have the positive right to vote and they have the negative right not to vote; people can choose not to vote in a given election. In other democracies e.g. Australia, however, citizens have a positive right to vote but they don’t have a negative right to not vote, since non-voting citizens can be fined. Accordingly

- **Positive rights** are permissions to do things, or entitlements to be done unto. One example of a positive right is the purported “right to welfare.”

- **Negative rights** are permissions not to do things, or entitlements to be left alone. Often the distinction is invoked by libertarians who think of a negative right as an entitlement to “non-interference” such as a right against being assaulted.

Though similarly named, positive and negative rights should not be confused with active rights (which encompass “privileges” and “powers”) and passive rights (which encompass “claims” and “immunities”).

2.9.4 Individual Rights versus Group Rights

The general concept of rights is that they are possessed by individuals in the sense that they are permissions and entitlements to do things which other persons, or which other persons, or which governments or authorities, can not infringe. This is the understanding of people such as the author Ayn Rand who argued that only individuals have rights, according to her philosophy known as Objectivism. However,
others have argued that there are situations in which a group of persons is thought to have rights, or group rights, accordingly.

- **Individual rights** are rights held by individual people regardless of their group membership or lack thereof.

Do groups have rights? Some argue that which soldiers or bound? In combat, the group becomes like an organism in itself and has rights which trump the rights of any individual soldier.

- **Group rights** have been argued to exist when a group is seen as more than a mere composite or assembly of separate individuals but an entity in its own right. In other words, it’s possible to see a group as a distinct being in and of itself; it’s akin to an enlarged individual which has a distinct will and power of action and can be thought of as having rights. For example, a platoon of soldiers in combat can be thought of as a distinct group, since individual members are willing to risk their lives for the survival of the group, and therefore the group can be conceived as having a “right” which is superior to that of any individual member; for example, a soldier who disobeys an officer can be punished, perhaps even killed, for a breach of obedience. But there is another sense of group rights in which people who are members of a group can be thought of as having specific individual rights because of their membership in a group. In this sense, the set of rights which individuals-as-group-members have an expanded because of their membership in a group. For example, workers who are members of a group such as labor union can be thought of as having expanded individual rights because of their membership in the labor union, such as the rights to specific working conditions or wages. As expected, there is sometimes considerable disagreement about what exactly is meant by the term “group” as well as by the term “group rights.”

There can be tension between individual and group rights. A classic instance in which group and individual rights clash in conflicts between unions and their members For example, individual members of a union may wish a wage higher than
the union-negotiated wage, but are prevented from making further requests; in a so-called closed shop which has a union security agreement, only the union has a right to decide matters for the individual union members such as wage rates. So, do the supposed “individual rights” of the workers prevail about the proper wage? Or do the “group rights” of the union regarding the proper wage prevail? Clearly this is a source of tension.

2.9.5 Other Senses

Other distinctions between rights draw more on historical association or family resemblance than on precise philosophical distinctions. These include the distinction between civil and political rights and economic, social and cultural rights, between which the articles of the universal Declaration of Human Rights are often divided. Another conceptions of rights groups them into three generations. These distinctions have much overlap with that between negative and positive rights, as well as between individual rights and group rights, but these groupings are not entirely coextensive.

2.9.6 Rights and Philosophy

In philosophy, meta-ethics is the branch of ethics that seeks to understand the nature of ethical properties, statements, attitudes, and judgments. Meta-ethics is one of the three branches of ethics generally recognized by philosophers, the others being normative ethics and applied ethics. While normative ethics addresses such questions as “What should one do?”, thus endorsing some ethical evaluations and rejecting others, meta-ethics addresses questions such as “what is goodness?” and “How can we tell what is good from what is bad?”, seeing to understand the nature of ethical properties and evaluations.

Rights ethics is an answer to the meta-ethical question of what normative ethics is concerned with (Meta ethics also includes a group of questions about ethics comes to be known, true etc. which is not directly addressed by rights ethics). Rights ethics holds that normative ethics is concerned with rights. Alternative Meta ethical theories are that ethics is concerned with one of
Rights ethics has had considerable influence on political and social thinking. The Universal Declaration of Human Rights gives some concrete examples of widely accepted rights. (13)

2.10 Legal Rights and Duties

The terms ‘Wrong’ and ‘duty’ are closely connected with rights and it is desirable to refer to them before discussing the important subject of legal rights.

2.10.1 Legal Wrong

According to Salmond “A wrong is simply a wrong act – an act contrary to the rule of right and justice. A synonym of it is injury, in its true and primary sense of injuria (that which is contrary to jus), though by a modern perversion of meaning this term has acquired the secondary sense of harm or damage whether rightful or wrongful and whether inflicted by human agency or not.”

According to Pollock “Wrong is in morals the contrary of right, Right action is that which moral rules prescribe or commend wrong action is that which they forbid. For legal purposes anything is wrong which is forbidden by law; there is wrong done whenever a legal duty is broken. A wrong may be described, in the largest sense, as anything done or omitted contrary to legal duty, considered in so far as it gives rise to liability. Hence the existence of duty, as it involves right, involves also the possibility of wrong; logically no more than the possibility, though we know too well that all

(13) www.siliconvalleytechlawfirm.com
rules are in fact sometimes broken. Duty, right and wrong are not separate or divisible heads of legal rules or of their subject-matter, but different legal aspects of the same rules and events. There may be duties and rights without any wrong; this happens whenever legal duties are justly and truly fulfilled. There cannot, of course, be a wrong without a duty already existing, but wrongs also create new duties and liabilities. Strictly speaking, therefore, there can be no such thing as a distinct law of wrongs. By the law of wrongs we can mean only the law of duties, or some class of duties, considered as exposed to infraction, and the special rules for awarding redress or punishment which come into play when infraction has taken place. There is not one law of rights or duties and another law of wrongs. Nevertheless there are some kinds of duties which are more conspicuous in the breach than in the observation. The natural end of a positive duty is performance. A thing has to be done, and when it is duty done the duty is, as we say, discharged, the man who was lawfully bound is lawfully free. We contemplate performance, not breach. Appointment to officers are made, or ought to be, in the expectation that the persons appointed will adequately fulfill their official duties.” (Jurisprudence and Legal Essays, pp. 37-38)

Wrongs are of two kinds, *legal* and *moral*. The essence of a legal wrong is that it is a violation of justice according to the law – not the manner in which the guilty are treated. It is a legal wrong if a debt is not paid within the period of limitation. A moral is an act which is morally or naturally wrong. It is contrary to the rule of natural justice. It is a moral wrong to disobey one’s parents. A legal wrong need not be a moral wrong and *vice versa*.

### 2.10.2 Duty

According to Salmond “A duty is an obligatory act that is to say, it is an act opposite of which would be a wrong. Duties and wrongs are correlatives. The commission of a wrong is the breach of a duty and the performance of a duty is the avoidance of wrong.”

Duties are of two kinds, *legal* and *moral*. A legal duty is an act the opposite of which is a legal wrong. It is an act recognized as a duty by law and treated as such for
the administration of justice. A moral or natural duty is an act the opposite of which is a moral or natural wrong. A duty may be moral but not legal, or legal but not moral, or both at once. In the case of England, there is a legal duty not to sell or have for sale adulterated milk knowingly. There is no legal duty in England to refrain from offensive curiosity about one’s neighbors even if its satisfaction does them harm. There is a moral duty but not a legal duty. There is both a legal and moral duty not to steal.

Duties may be positive or negative. When the law obliges us to do an act, the duty is called positive. When the law obliges us to forbear from doing an act, the duty is negative. If R has a right to a land, there is a corresponding duty on persons generally not to interfere with his exclusive use of the land. Such a duty is a negative duty. It is extinguished only if the right itself is extinguished. If S owes a sum of money to Y, the latter is under a duty to pay the amount due. This is a positive duty. In the case of positive duties, the performance of the duty extinguishes both duty and right but a negative duty can never be extinguished by fulfillment.

Duties can also be primary and secondary. Primary duties are those which exist per se and independently of any other duty. An example of a primary duty is to forbear from causing personal injury to another. A secondary duty is that which has no independent existence but exists only for the enforcement of other duties. An example of a secondary duty is the duty to pay a man damages for the injury already done to his person. It is also called a remedial, restitutory or sanctioning duty.

According to Salmond, if a law recognizes an act as a duty, it generally enforces its performance and punishes those who disregard the same. According to Keeton, a duty is an act or forbearance compelled by the State in respect of a right vested in another and the breach of which is a wrong. According to Hibbert, duties are imposed on persons and require acts and forbearances which are their object. Hibbert refers to absolute and relative duties. Absolute duties are owed only to the State. The breach of an absolute duty is generally a crime and the remedy is the punishment of the offender and not the payment of any compensation to the injured party. Relative duties are owed to a person other than the one imposing them. The breach of a relative
duty is called a civil injury and its remedy is compensation or restitution to the injured party.

According to Austin, some duties are absolute. Those duties do not have a corresponding right. Examples of absolute duties are self-regarding duties such as a duty not to commit suicide or become intoxicated, a duty to indeterminate persons or the public such as a duty not to commit a nuisance, a duty to one not a human being such as a duty towards God or animals and a duty to sovereign or State.

If we examine these four classes of duties critically, they are reduced to one category and that is the duties to the State. A duty not to commit suicide or nuisance is enforced by the State and can be included in the category of duties to the State. The result is that the corresponding right vests in the State. However, the view of Austin is that “a sovereign government in its collegiate or sovereign capacity has no legal rights against its own subjects” and therefore the duties towards the State are absolute duties. Dr. Allen, Markby and Hibbert support Austin. Allen writes: The State, no doubt, may have definite rights-interests in the strict sense, similar to those of the individual citizens – rights of a very different kind from the ‘right to punish’ or ‘right to command’ or the ‘right of sovereignty’. It may enter into contracts and other relationships which give birth to rights and duties in the ordinary legal sense. Where the State impose duties by virtue of its sovereign character. Allen denies that there are correlative rights in the State. To quote him: “A State, for example, compels children to go to school, or to be vaccinated, prohibits the sale of certain drugs or alcoholic liquors, or forbids the importation of animals which have not first been quarantined.” In such cases, the State has no corresponding right. Particularly, the duties enforced by criminal law are absolute duties. According to Hibbert “The distinction between absolute and relative duties is logical and convenient since it harmonises with the distinction between might and right.”

The view of Austin is criticized by Gray, Pollock and Salmond. According to Salmond “There can be no duty without a right any more than there can be a husband without a wife or a parent without a child.” The result is that rights and duties are always correlated and there is absolutely no scope for absolute duties. The view of
Pollock is that “there seems to be no valid reason against ascribing rights to the State in all cases where its officers are enjoined or authorized to take steps for causing the law to be observed and breakers of the law to be punished.”

2.11 Definition of Legal Rights

Many definitions of rights have been given by various writers and reference may be made to some of them. According to Hibbert, a right is “one person’s capacity of obliging others to do or forbear by means not of his own strength but by the strength of a third party. If such third party is God, the right is Divine. If such third party is the public generally acting through opinion, the right is moral. If such third party is the State acting directly or indirectly, the right is legal.”

According to Gray, a legal right is “that power which a man has to make a person or persons do or refrain from doing a certain act or certain acts, so far as the power arises from society imposing a legal duty upon a person or persons”. According to Salmond: “A right is an interest recognized and protected by a rule of right. It is any interest, respect for which is a duty, and the disregard of which is a wrong.” A legal right must obtain not merely legal protection, but also legal recognition. The interests of beasts are to some extent protected by law in as much as cruelty to animals is a criminal offence. But beasts are not for that reason possessed of legal rights. The only interest and the only right which the law recognizes in such a case is the interest and right of society as a whole in the welfare of the animals belongings to it. He who ill-treats a child violates a duty which he owes to the child and a right which is invested in him. But he who ill-treats a dog breaks no vinculum juris between him and it, though he disregards the obligations of humane conduct which he owes to the society or the State and the co-relative right which society or State possesses.

According to Vinogradoff: “We can hardly define a right better than by saying that it is the range of action assigned to a particular will within the social order established by law… A right, therefore, supposes a potential exercise of power in regard to things or persons. It enables the subject endowed with it to bring, with the approval of organized society, certain things or persons within the sphere of action of
his will. When a man claims something as his right, he claims it as his own or as due to him.”

According to Holland, a right is “a capacity residing in one man of controlling, with the assent and the assistance of the State, the actions of others”. Again, “that which gives validity to a legal right is, in every case, the force which is lent to it by the State. Anything else may be the occasion but is not the cause of its obligatory character. Sometimes it has reference to a tangible object. Sometimes it has no such reference. Thus on the one hand, the ownership of the land is power residing in the landowner, as its subject, exercised over the land, as its object, and available against all other men. So a father has a certain power, residing in himself as its subject, over no tangible object, and available only against his master to compel the payment of such wages as may be due to him.”

Holland explains the conception of legal rights by contrasting them with might and moral rights in these words “If a man by his own force or persuasion can carry wishes, either by his own acts, or by influencing the acts of others, he has the ‘might’ so to carry out his wishes.”

“If irrespective of having or not having this might, public opinion would view with approval, or at least with acquiescence, his so carrying out his wishes, and with disapproval any resistance made to his doing, then he has a ‘moral right’ so to carry out his wishes.”

“If irrespective of his having or not having, either the might or moral right on his side, the power of the State will protect him in so carrying out his wishes, and will compel such acts or forbearances on the part of other people as may be necessary in order that his wishes may be so carried out, then he has a ‘legal right’ so to carry out his wishes.”

If it is a question of might, all depends upon a man’s own powers of force or persuasion. If it is a question of moral right, all depends on the readiness of the public opinion to express itself upon his side. If it is a question of legal right, all depends
upon the readiness of the State to exert its force on his behalf. It is hence obvious that a moral and a legal right are so far from being identical that they may easily be opposed to one another. Moral rights have, in general, but a subjective support, legal rights have the objective support of the physical force of the State. The whole purpose of laws is to announce in what cases that objective support will be granted, and the manner in which it may be obtained. In other words, Law exists, as we stated previously, for the definition and protection of rights.

According to Justice Holmes, a legal right is “nothing but a permission to exercise certain natural powers and upon certain conditions to obtain protection, restitution or compensation by the aid of public force”. Legal right is the power of removing or enforcing legal limitations on conduct.

According to Martin “It is said that he had a right to go along the path across which the machinery was erected, for he was a workman employed in the dockyard and had liberty to use the water closet. But that is a fallacious argument. It is true that the plaintiff had permission to use the path. Permission involves leave and license, but it gives no right. If I avail myself of permission to cross a man’s land, I do so by virtue of a license, not of a right. It is an abuse of language to call it a right.”

According to Pollock: “Right is freedom allowed and power conferred by law.” According to Kirchmann, a right is “a physical power which through the commands of authority not only is morally strengthened but also can protect against a transgressor by the application of compulsion or evil”. According to Buckland, a legal right is an interest or an expectation guaranteed by law. According to T. H. Green: “Rights are powers which it is for general well-being that the individual should possess.” According to Kart, a right is “the authority to compel.” According to K. R. R. Shastri: “A right may be defined as an interest recognized and protected or guaranteed by the State since it is conducive to social well-being.”

According to Austin, law is a general command of the sovereign and duty is the liability to incur the evil of its sanction in case of non-compliance with the command. A person in whose favour or to whose benefits the command ensures is
said to be invested with a right. A person has a right if he can exact from another acts or forbearances. ‘A party has a right when another or others are bound or obliged by the law to do or forbear towards or in respect of him.” This definition does not make any reference to the element of interest involved in the conception of right. Mill pointed out that a prisoner may be said to have a right to be imprisoned because the jailor is bound by law to imprison him. To be imprisoned is no right. It is only a disability imposed by the sanction of law.

According to Austin, liberty is illusory if it is not protected by law and if law protects it, it amounts to a right. The difference between a right and liberty lies only in the emphasis laid on particular elements in the conception. In liberty, prominence is given to the absence of legal restraint and protection is secondary, but in the case of right it is just the other way. Right denotes protection and the absence of restraint. However, the same elements are comprised in both. For this reason, Austin came to the conclusion that rights and liberties were essentially the same. However, critics point out that Austin ignored the element of interest involved in liberty. What the law protects in liberty is not the interest involved in it but only the exercise of liberty. Rights and liberties are essentially different. Rights pertain to the sphere of obligations and liberties pertain to the sphere of free will. Rights refer to those things which others ought to do for me and liberties refer to those things which I may do for myself.

2.11.1 Theories about Legal Rights

There are many theories with regard to the nature of legal rights.

(1) Austin, Holland, Pollock, Vinogradoff and others are the exponents of the will theory. According to this theory, a right is an inherent attribute of the human will. The subject-matter of a right is derived from the exercise of a human will. The will theory was inspired and extended by the doctrine of natural rights. It is the function of law to confer certain powers or allow certain freedom to individuals in the form of legal rights. A legal right is a power conferred by law. According to Justice Holmes, a legal right is
“nothing but a permission to exercise certain natural powers and upon certain conditions to obtain protection, restitution or compensation by the aid of public force”. Again, “legal right is the power of removing or enforcing legal limitations on conduct”. According to Puchta, a legal right is a power over an object which by means of this right can be subjected to the will of the person enjoying the right. According to Holland, a legal right is “the capacity residing in one man of controlling with the assent and assistance of the State, the actions of others”.

(2) Another theory is known as the interest theory of rights. Ihering is the greatest advocate of this theory and many English and American writers have followed him. According to Ihering “A legal right is a legally protected interest.” Ihering does not put stress on the element of will in a legal right. On the other hand, he puts emphasis on the material element of interest. The basis of right is not will but interest. According to Buckland, a legal right is “an interest or an expectation granted by law”. According to Salmond, a legal right is “an interest recognized and directed by a rule of right”. Paton defines a legal right in terms of recognition and protection by the legal order. According to him, although enforceability by legal process is said to be a necessary condition of a legal right, yet there are three qualifications to the above statement. Law does not always enforce a right and the injured party is guaranteed merely damages. There are certain imperfect rights which are recognized by law only partially. A time-barred debt cannot be realized through the agency of courts as it is an imperfect right, but if the creditor comes to have the money in some way, he can adjust the same towards the debt and need not return the same. Likewise, a time-barred debt may be revived if the debtor acknowledges the same. In certain cases, the courts of justice do not have an adequate machinery to enforce their decisions. This is particularly so in the case of international law.

Allen tries to bring about reconciliation between he will theory and the interest theory. According to him, the essence of a legal right seems to be
not legally guaranteed power by itself or legally protected interest by itself, but the legally guaranteed power to realize an interest. A similar attempt at reconciliation is made by Jellinek also. According to him, a right is the will power of man applied to a utility or interest recognized and protected by a legal system. The human will does not operate in a vacuum and interests are the objects of human desire. An interest is a formal expression of the will of an individual or a group of individuals. A correct theory of legal rights must take into consideration both the elements of will and interest.

(3) According to Duguit, will is not an essential element in law or right. The real basis of law is social solidarity. The emphasis on will is anti-social as it shows that man is in conflict with his fellow-beings. Duguit rejects altogether the conception of legal rights. There is no conflict of interests between society and the individuals. The theory of subjective rights is merely “a metaphysical abstraction”. To quote him: “The right of the individual as a pure hypothesis, a metaphysical affirmation, is not a reality. It implies a social contract at the origin of society, a manifest contradiction. No one has any other right than always to do his duty.” Duguit goes to the extent of saying that the term ‘right’ should be removed from legal vocabulary.

The theory of Duguit has been criticized from many quarters. According to Dr. Jenks: “If one individual can in the name of the law and by the agency of the State; s officials bring down upon another who has committed a breach of a legal duty, the sanction attached to that duty, there exists in the first individual a power to enforce, with the aid of the State, a legal duty and to that power the jurist gives the name of legal right.” According to Laski, the denial of legal rights by Duguit is “terminological rather than actual”.

(4) According to the totaliarians, the whole concept of legal rights is wrong. The only real thing is the State and not much importance should be
attached to the individuals. The State is omnipotent and all-embracing and individual has no existence independent of the State. All rights belong to the State and the individual as such can claim nothing.

2.11.2 Essentials of Legal Rights

According to Salmond, every legal right has five essential elements:

(i) The first essential element is that there must be a person who is the owner of the right. He is the subject of the legal right. He is sometimes described as the person of inherence. The owner of a right need not be a determinate or fixed person. If an individual owes a duty towards society at large, an indeterminate body is the subject of inherence. In the case of a bequest to an unborn person, the owner of the right is an unborn child who is an unascertained person.

(ii) A legal right accrues against another person or persons who are under a corresponding duty to respect that right. Such a person is called the person of incidence or the subject of the duty. If A has a particular right against B, A is the person of inherence and B the subject of incidence.

(iii) Another essential element of a legal right is its content of substance. It may be an act which the subject of incidence is bound to do or it may be forbearance on his part.

(iv) Another essential element is the object of the right. This is the thing over which the right is exercised. This may also be called the subject-matter of the right.

(v) Another essential element of a legal right is the title to the right. Facts must show how the right vested in the owner of the right. That may be by purchase, gift, inheritance, assignment, prescription, etc.

A man buys a house from another. The buyer will be the person of inherence and the seller and the other persons generally the persons of incidence. The subject-matter of the right will be the house. The contents of
the right would lie in the fact that the seller and every other person should not disturb the peaceful possession and enjoyment of the house by the buyer. The title to the right is to be found in the fact of the sale of the house.

When a person purchases anything by paying the price for it, he is entitled to the undisputed right of use in the thing purchased by him. Other persons are bound by the co-relative duty. The owner has a right in the thing purchased is his legal right. He acquires the title of the right because the property in the object has been conveyed to him in the same manner as it was acquired by the former owner. Every right involves a threefold relation in which its owner stands. It is a right against some person or persons. It is a right over or to something which that act or omission relates. Every right involves a relation with its owner. An ownerless right is not recognized by law, although it is not a legal impossibility. Although ownerless rights are not recognized, the ownership of a right may be uncertain or contingent. Such an owner may be an indeterminate person. He may be an unborn person. He may perhaps never be born. Although every right has an owner, it need not have any certain or vested owner.

An object is as essential an element in the idea of right as the subject to whom the right belongs. A right being a legally protected interest, the object of the right is the thing in which the owner has his interest which he desires to keep or to obtain and which he is able to keep or obtain by means of the duty which the law imposes on other persons. As regards rights over material things, all civilized societies have a great mass of legal rules which are the most important legal rights.

There are rights in respect of one’s own person. Every person has a right not to be killed. The object of that right is his own life. One has a right not to be physically injured or assaulted. He has a right not to be coerced or deceived into acting contrary to his desires and interests. Likewise, one has a right to reputation, rights in respect of domestic relations, rights over immaterial property, rights to services etc. As regards the right of personal
service, the law which recognizes slavery makes it perfectly legal for another to buy and sell a human being in the same manner as he buys a horse or a steam engine. Where slavery is not recognized, the only right one can acquire over a human being is the temporary and limited right to the use of that person created by a voluntary agreement with that person. Such an agreement does not create a permanent and general right of ownership over the person.

2.11.3 Parties to a Legal Right

According to Austin, there are three parties to a legal right. The first party is the State or the sovereign which confers legal rights on certain individuals and which imposes corresponding duties on others. The second party is the person or persons on whom the right is conferred. The third party is the person or persons on whom the duty is imposed or to whom the law is set or directed.

2.11.4 Enforcement of Legal Rights

There are many methods of enforcing legal rights. If a party has suffered, the usual method is to award damages in civil cases. If it is found that damages are not an adequate remedy, an order can be made for the restitution of the thing itself. This is particularly so in the case of rare articles. In certain cases the court orders the specific performance of the contract itself. Sometimes, penalty is imposed in certain cases. The injured party is given the power to recover an amount which is more than the loss suffered. Sometimes, a legal right can be enforced by means of an injunction. When an injunction is issued, it is the duty of the person concerned to abstain from doing an act or contravening an act.

2.11.5 Extinction of Rights

There are many methods by which legal rights can be extinguished. Right is extinguished if the other party performs its duty. If there is a conflict
for the payment of debt and the same is paid by the debtor, the legal right is extinguished. Certain rights may be waived by the agreement of the parties. Sometimes, a legal right becomes extinguished when it becomes impossible to perform the same. A person contracts to render personal service to another. The legal right to personal service is extinguished if the promisor dies. A right may be extinguished if a law is passed by which Zamindaries are abolished. Likewise, a right is extinguished if the debt becomes time-barred. Law helps the vigilant and not the dormant. If a person does not bother about his rights, no court of law is going to help him. A right acquired by fraud or undue influence may be extinguished if the other party takes action at the right time.

2.11.6 Relation between legal right and legal liberty

Liberty or privilege denotes the absence of restraint. It is a legal freedom on the part of one person as against another to do a given act or a legal freedom not to do a given act.

The view of Austin is that “liberty and right are synonymous. The liberty of acting according to ones' will would be illusory if it were not protected from obstruction”. When law affords such protection, it is in fact conferring a right and so liberty and right are synonymous. In liberty, the prominent idea is the absence of restraint while protection for the enjoyment of that liberty is the secondary idea. ‘Right’ denotes the protection and connotes the absence of restraint.

It is true that liberty and rights are alike benefits conferred upon a person by law. However, there is a vital distinction between the two. Austin’s statement that liberty and right are synonymous is not correct. The term “liberty” implies that the law does not forbid a person from doing an act and arises out of the absence of duties imposed upon him. The term “right” implies that the law enjoins on another the duty of doing or forbearing from doing something for the benefit of the person entitled to the right.
Salmond writes: “Rights are what others are to do for me; liberties are what I may do for myself.” I am at liberty to carry on business as a shopkeeper. The law does not in consequence impose on another any duty in this respect. Therefore, I cannot complain if another person opens a rival business next door to me. I have not merely the liberty but the right of using my trade mark. If my rival sells goods with a trade mark in which I have proprietary rights. I have a legal remedy as he has infringed my right to the trade mark.

There is no suitable word to express the co-relative of liberty. As the co-relative of liberty would be the jural contradictory of right, Hohfeld has suggested that the word “no right” may be used as the co-relative of liberty.

2.11.7 Right and Power

A power “is an ability on the part of a person to produce a change in a given legal relation by doing or not doing a given act”. When I speak of a testamentary power, it means that I have the ability to make a will and thereby dispose of my property. A power of appointment enables a person to dispose of the property of another for his own benefit or that of others. A pledger’s power of re-entry on the land by a landlord when the lessee defaults in payment of rent are examples of legal powers. In the case power, there is no correlative duty imposed on another. In this respect, power differs from right and resembles liberty. The distinction between liberty and power consists in the fact that liberty is what one may do innocently without committing a wrong while power is what one may do effectively and validity.

2.11.8 Powers and Immunity

Exemption from the power of another is immunity. The correlative of immunity is disability. A foreign sovereign enjoys immunity from legal proceedings in our courts. We cannot institute legal proceedings against a foreign sovereign. Immunity stands to power in much the same relation as liberty is to right. Liberty
arises from the absence of a right in another and the absence of a duty in oneself. Immunity arises from the absence of a power in another and the absence of liability in oneself.

2.12 Relation between Rights and Duties

It is debatable question whether rights and duties are necessarily co-relative. According to one view, every right has a corresponding duty. Therefore, there can be no duty unless there is someone to whom it is due. There can be no right without a corresponding duty or a duty without a corresponding right, just as there cannot be a husband without a wife, or a father without a child. Every duty is a duty towards some person or persons in whom a corresponding right is vested. Likewise, every right is a right against some person or persons upon whom a co-relative duty is imposed. Every right or duty involves a *vinculum juris* or a bond of legal obligation by which two or more persons are bound together. There can be no duty unless there is someone to whom it is due. Likewise, there can be no right unless there is someone from whom it is claimed.

According to Holland, every right implies the active or passive forbearance by others of the wishes of the party having the right. The forbearance on the part of others is called a duty. ‘A moral duty is that which is demanded by the public opinion of society and a legal duty is that which is enforced by the power of the State.

According to Keeton, a duty is an act of forbearance which is enforced by the State in respect of a right vested in another and the breach of which is a wrong. Every right implies a co-relative duty and *vice versa*.

Paton writes: “We cannot have a right without a corresponding duty or a duty without a corresponding right. When we speak of a right, we really refer to a right-duty relationship between two persons and to suppose that one can exist without the other is just as meaningless as to suppose that a relationship can exist between father and son unless both father and son have existed.”
The view of Salmond is that rights and duties are co-relative. If there are duties towards the public, there are rights as well. There can be no duty unless there is some person to whom that duty is due. Every right or duty involves a bond of obligation.

In *Minerva Mills Ltd. Versus Union of India*, the Supreme Court observed. “There may be a rule which imposes an obligation on an individual or authority, and yet it may not be enforceable in a court of law, and therefore not give rise to a corresponding enforceable right in another person. But it would still be a legal rule because it prescribes a norm of conduct to be followed by such individual or authority. The law may provide a mechanism for enforcement of this obligation, but the existence of the obligation does not depend upon the creation of such mechanism. The obligation exists prior to and independent of, the mechanism of enforcement. A rule imposing an obligation would not therefore cease to be a rule of law because there is no regular judicial or quasi-judicial machinery to enforce its command. Such a rule would exist despite any problem relating to its enforcement.”

The other school is represented by Austin. According to him, duties are of two kinds: absolute duties and relative duties. Relative duty corresponds to a right. It is a duty to be fulfilled towards a determinate superior. All absolute duties are enforced criminally. They do not correspond with rights in the sovereign. There is an absolute duty in certain cases. Those are duties not regarding persons e.g., those owed to God and lower animals, duties owed to persons indefinitely, e.g. towards the community, self-regarding duties and duties owed to the sovereign. In case of an absolute duty, it is commanded that an act shall be done or forbidden towards or in respect of the party to whom the command is directed.

Duties towards the public at large or towards indetermined portions of the public have no co-relative rights. Their duty to refrain from committing a public nuisance has no co-relative rights. Where trustees held property on trust for religious purposes, even though there is no ascertained beneficiary, the trustees are under a duty not to use the property for a purpose other than that religious purpose. The question is to whom the duty is due.
According to Professor Hibbert: “The distinction between absolute and relative duties is logical and convenient, since it harmonises the distinction between might and right; for the State can only redress infringement of absolute duties by its own might, whereas persons invested with legal rights do not redress infringement by their own might but by appealing to the sovereign for protection of their rights which is quite a different method of redress.”

Critics point out that the absolute duties enumerated by Austin are not duties in the legal sense. If they are duties at all, they are not absolute. The duty towards God is not a legal duty if it is not embodied in some statute. If it is embodied in a statute, it is a duty towards the State and not towards God. Certain duties imposed on individuals towards animals are in essence the duties towards the State or the owner of the animal and not towards the animal itself. By duties towards persons indefinitely, Austin perhaps means duties towards the community in general. The general duty towards the community is nothing more than a bundle of duties towards each particular individual of the community and each individual has got a co-relative right. Self regarding duties are also duties towards the State because it is a part of the criminal law as an attempt to commit suicide.

According to Austin, the right-duty relationship between two individuals can exist only where there is a political superior to protect and enforce it. Without the political superior, there can be no right-duty relationship. If we regard the relationship between the State and the individual as the right-duty relationship, where is the political superior? In recognising any other political superior, Austin’s definition of the sovereign would be exploded. The sovereign has the power to change the law at any time. Therefore, the relationship between the State and the citizen cannot be termed as right-duty relationship. The sovereign commands and the duty of the citizen is to obey. The sovereign commands and the duty of the citizen is to obey. This power of the State cannot be called a co-relative legal duty against the citizen.

It is submitted that the view of Austin is not correct. It is true that the relationship between the State and the citizen is not on the same footing as the
relationship between a citizen and a citizen. It depends more on the nature of the State than on anything else. In democratic countries, a citizen has rights against the State. This is the condition under the Indian Constitution. A co-relative duty binds the State and the State is bound until it changes the law. Likewise, the State has rights against citizens. It is clear that Austin’s theory is not correct in modern times.

2.13 Rights of Beneficiary

The right of the beneficiary in trust property is an equitable right. The beneficiary is an equitable owner and the trustee is the legal owner. However, there is a difference of opinion whether the rights of the beneficiary are rights in _rem_ or rights in _personam_.

Historically, the right of a beneficiary was regarded to be a right in _personam_. The right was available against the trustee personally. However, things changed later on. The limitation of binding the trustee personally was removed and now the right of a beneficiary is considered to be of a proprietary nature. The beneficiary has a right in trust property against the whole world except in case of a _bona fide_ purchaser for value and without notice of the trust.

According to Maitland, Lngdell and Amos, the right of a beneficiary is a right in _personam_. A trust binds only a certain class of persons and not the world at a large. It was held in the case of _Burgess v. Wheate_ that the right of the beneficiary is a personal one and cannot pass to the Crown by escheat. In another case, it has been held that death duties are liable to be paid in England if the trustee lives in England although the property is situated outside England.

Another view is that the right of a beneficiary is a right in _rem_. The beneficiary is the owner of trust property. It is the duty of the trustee to hold the trust property for the benefit of the beneficiary. This is not only the view of Hohfeld but also of the House of Lords.
Paton points out that it is frequently contended that the right of the beneficiary is not a right in *rem* as it is not available against a *bona fide* purchaser for value and it is not merely a right in *personam* against the trustee. However, if we admit that a right is not in *rem* merely because it can be defeated by a particular class of purchaser, the same argument applies not only to the beneficiary but also the whole class of negotiable instruments. He asks the question whether a person has no right in *rem* to his money merely because another person who receives it for value and in good faith acquires the superior title although the same was originally taken from him by a thief.

The present view is that the right of a beneficiary is a right in *rem* and not in *personam*. However, the matter has not been finally concluded.\(^{(14)}\)

### 2.14 Types of Legal Rights:

1. Perfect and Imperfect Rights
2. Positive and Negative Rights
3. Real and Personal Rights
4. Right in *rem* and Right in *personam*
5. Proprietary and Personal Rights
6. Inheritable and uninhabitable Rights
7. Right in propria and Right in re aliena
8. Principal and necessary Rights
9. Legal and Equitable Rights
10. Primary and Secondary Rights
11. Public and Private Rights
12. Vested and contingent Rights
13. Servient and Dominant Rights
14. Municipal and International Rights
15. Rights at Rest and Rights in Motion
16. Ordinary and Fundamental Rights
17. Jus *ed rem*\(^{(15)}\)

\(^{(15)}\) Jurisprudent Ch. 13 Pg. No. 282 to 321
2.15 Categorization of Rights

Rights are grouped into four categories. Each category has a special function in the societal structure.

1) Civil Rights

These are civil in nature aimed at protecting Liberty, Physical and moral integrity of the person. Rights such as right to life, freedom from slavery, servitude, forced labour, freedom from torture, freedom from arbitrary arrest and detention, Right to fair trial, Right to privacy, Right to free speech, Right to worship etc. belong to the category. These rights are said to arise in the conflict between citizen and Government tyranny. These rights are formal assurance for the citizens against arbitrary Governmental to treatment. They are enforced by ensuring ‘Equality’ and due process of law.

2) Political Rights

Political rights provide a link between the Governments and governed. It legitimizes integrates and provide participation by linking the Government to the consent of governed. Rights such as freedom of opinion and expression right to peaceful assembly, right to associate, right to take part in the conduct of public affairs, rights to have access to public service are included in the group.

3) Economic and Social Rights

These rights assume positive duties on the part of Government. They assume that the Government should act to secure or provide such things that are for the well-being of its citizenry. Thus, right to work, free choice of employment, just and favourable conditions of work, right to join and form trade unions, right to strike, right to social security, right to rest and leisure, right to food, clothing, shelter, housing, medical, social services, right to education, etc. are included in this group.
4) Cultural Rights

These rights arise in response to a threat that in certain areas there should be no monopoly either by the Government, powerful or vested interests, freedom of thought, freedom to take part in cultural life, freedom of aesthetic experience, right to benefit from scientific progress, right to creative activity, to benefit from international contacts and cooperation in scientific and cultural fields, etc are included in this category.

They may be several rights, which may fall into two or more categories depending upon the premise against which it is held. Right to assemble and association may be both civil and political. So also freedom of thought creative activity may be cultural and civil. Some political rights such as right to vote, elect a government is included in economic, social and cultural covenant, 1966. Thus, the above categorization is not strict nor it is an exhausted list (16)

2.16 Concept of Duty

As discussed above, normally, duty is linked with ‘obligation’. The concept of duty arises from fulfillment of a requirement. Duties arise in several ways and means, such as moral duties, legal duties, parental duties, societal duties, and civil duties etc. However, from the point of view of law, duties arise from legal norms or requirements. They have to be discharged, the way it was prescribed. Accordingly, the actions constitute as right or wrong basing on the discharge of duty. If one acts contrary to a duty, it constitutes a wrong. (For example, a legal norm tells us not to speak ill of others which will affect their decency, if speaks ill of others, it constitutes as wrong.)

A duty imposes an obligation to respect the rights of others and the society. Hence, rights and duties are reciprocal. A right is demand and a duty is an expectation.

(16) “The Law relating to Human Rights” Ch. 1 Pg. 4
2.17 The different types of duties

Duties may be distinguished between (1) natural and acquired duties, (2) positive and negative duties, (3) perfect and imperfect duties and (4) prima facie and all things considered as duties

A) Natural and Acquired Duties

Natural duties bind all of us without any specification by any institution or body. Each one of us discharges these duties voluntarily. For example: not to harm others, not to tell lies, not to misuse the freedoms, duty to respect others, not to injure the innocent, not to beat children, to uphold truth and justice, etc.

Acquired duties are duties undertaken by individuals by virtue of something they have done, or as a particular relationship, which they might have with others. This means, certain duties are legal, and need to perform the acquired obligations basing on one’s willingness. If refused to perform after consented to discharge, it attracts legal consequences.

Another type of acquired duties results from special relationships that individuals undertake as groups, often referred to as responsibilities. For example, parents discharging their duties towards their children, doctors to patients, and lawyers to their clients. These duties assumed by individuals to exercise automatically by accepting to act in a specific role.

B) Positive and Negative Duties

According to another legal jurist John Rawls, positive duties require us to do good. On the other hand, negative duties impose restrictions on doing bad or refraining from acting. Helping the poor may be a positive duty, which may not have any obligation. However, not to tell lies or not to harm others is a negative duty, which imposes an obligation.
C) **Perfect and Imperfect Duties**

Perfect and Imperfect duties appear similar to that of the positive and negative duties. According to Prof. Immanuel Kant, a German philosopher, they are not similar. Perfect duties expect individuals to discharge the incurred obligations as per the goal that is set at all times without any deviation. Imperfect duties have no rigidity. Imperfect duties are duties that are never completed in its true spirit. The performance of these duties depends on circumstances. According to Kant, it is difficult to cultivate one’s own talent is an example for imperfect duty.

D) **Prima facie and all things considered duties**

According to W. D. Ross, people mostly discharge their duties to live up to their promises as goodwill. This means, many a times people perform their duties basing on the advantages and disadvantages. This being the primary concept of duty, Ross calls individuals to be rational in discharging their duties in a proper manner without harming the interests of others.

Human Rights have the above duty perceptions in its philosophy. To eradicate the present day maladies, and to improve the moral and ethical standards among individuals as beneficiaries and defenders of human rights, we have to discharge the duties advocated by human rights sincerely.

In this regard, the UN High Commissioner of Human Rights while celebrating the 50th anniversary of the adoption of the Universal Declaration of Human Rights in 1998 in the city of Valencia in Spain under the auspices of UNESCO adopted a Declaration on the Rights and Responsibility of Individuals, Groups and Organs of Society.

To Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms. It is also known as Valencia Declaration of Responsibilities and Human Duties.
The shifting of formal equality to substantial equality and the continuous violations of human rights by the actors (both the states and individuals) across the World, a number of Noble Laureates and scholars requested the UN to adopt a declaration highlighting the duties of mankind. In order to provide a legal base for the declaration, the General Assembly adopted a declaration on Responsibilities and duties of mankind in 1999.

The Principles of the Declaration summarized into different heads as follows:

**Rights and protections accorded to human rights defenders**

The Declaration provides specific protections to human rights defenders, including the rights:

- To seek the protection and realization of human rights at the national and international levels;
- To conduct human rights work individually and in association with others;
- To form associations and non-governmental organizations;
- To meet or assemble peacefully;
- To seek, obtain, receive and hold information relating to human rights;
- To develop and discuss new human rights ideas and principles and to advocate their acceptance;
- To submit to governmental bodies and agencies and organizations concerned with public affairs criticism, and proposals for improving their functioning, and to draw attention to any aspect of their work that may impede the realization of human rights;
- To make complaints about official policies and acts relating to human rights and to have such complaints reviewed;
- To offer and provide professionally qualified legal assistance or other advice and assistance in defense of human rights;
- To attend public hearings, proceedings and trials in order to assess their compliance with national law and international human rights obligations;
- To unhindered access to and communication with non-governmental and intergovernmental organizations;
- To benefit from an effective remedy;
- To the lawful exercise of the occupation or profession of human rights defender;
- To effective protection under national law in reacting against or opposing, through peaceful means, acts or omissions attributable to the State that result in violations of human rights;
- To solicit, receive and utilize resources for protecting human rights (including the receipt of funds from abroad).

2.18 The Duties of States

According to the Declaration, States have a general responsibility to implement and respect all the provisions of the Declarations. However, some of the provisions make particular reference to the role of States and indicate that each State has a responsibility and duty:

- To protect, promote and implement all human rights;
- To ensure that all persons under its jurisdiction are able to enjoy all social, economic, political and other rights and freedoms in practice;
- To adopt such legislative, administrative and other steps as may be necessary to ensure effective implementation of rights and freedoms;
- To provide an effective remedy for persons who claim to have been victims of a human rights violation;
- To conduct prompt and impartial investigations of alleged violations of human rights;
- To take all necessary measures to ensure the protection of everyone against any violence, threats, retaliation, adverse discrimination, pressure or any other arbitrary action as a consequence of his or her legitimate exercise of the rights referred to, in the Declaration;
- To promote public understanding of civil, political, economic, social and cultural rights;
- To ensure and support the creation of development of independent national institutions for the promotion and protection of human rights, such as Ombudsmen or Human Rights Commissions;
- To promote and facilitate the teaching of human rights at all levels of formal education and professional training.

The Responsibilities of Everyone

The Declaration emphasizes that everyone has duties towards others and within the community and encourages us, all to be human rights defenders. It is the duty of every one of us to promote human rights, to safeguard democracy and its institutions and not to violate the human rights of others. It further emphasizes the role of professionals and practitioners, especially that of Police officers, Lawyers and Judges as defenders of the Human Rights.

The Role of National Law

The resolution also imposes a responsibility on the states to implement these principles and promote them by adopting appropriate legislations. Accordingly, each country is responsible to enact appropriate legislation to incorporate the duties of the citizens. The Indian Constitution has already incorporated the duties through the 42nd Amendment Act in 1976, well in advance before the adoption of the Declaration.

The Valencia declaration is a significant one in the annals of human duties for the promotion of human rights and protection by all the actors. The Final Version of the Declaration is available at (tercercamilo@valenciatercercamilo.org and http://www.valenciatercercamilo.org)

Impact of Duty on the Society

Every individual has duties towards the society or state. According to the Universal Declaration of Human Rights, the duties of each person towards the State are:
- To obey the law and other legal commands of the state and its agencies in a country.
- To render the services in civil and military affairs whenever required by the state for its defense.
- To cooperate with the state and the community with respect to social security and welfare to the extent possible,
- To pay the taxes established by law for public purposes.
- To Protect the property and culture of the state,
- Not to discriminate or advocate anything on communal, linguistic and religious or any other ground that affect the liberty of other individuals.

The duties towards society are

- To respect the women, children, wounded, sick and elderly persons,
- Rendering charitable work through social service, education, religious activities, cultural activities etc.,
- To respect the rights and responsibilities of others,
- Not to make false allegations or complains against others,
- Not to misuse the laws and regulations,
- Not to discriminate or advocate anything on communal, linguistic and religious or any other ground that affects the liberty of other individuals,
- To follow and obey the moral and ethical values that belongs to each society.

There are innumerable duties that an individual has towards state and the society. The above stated few are only illustrative in nature. The strict adherence of the duties prescribed by each state and society alone contributes for the sustainable development. In the modern context, many people think of their rights without acknowledging that they have a duty to protect the rights of others. This degradation of duty perspective has brought in a number of upheavals in the contemporary area. If people are duty conscious, automatically the country and its institutions also follow the duties without any deviance. The sincere practice of duties and exercise of rights certainly will create a society or state that is tension and problem free.
2.19 Duty as a value

Actions of an individual are based on choices and behavior, duty being one of the main components of value system; it inculcates a number of values in individuals. As we have examined above the number of duties and rights, and their relationship, duty certainly constitute as a core value to regulate the moral, ethical, and social behavior of individuals. From ancient to modern times, a number of scriptures, statesmen, and religious texts of various faiths have advocated duty based value system, to regulate unnecessary temperaments of individuals and to promote a healthy society or state. Hence, discharge or our moral and legal duties alone could bring in harmony and helps to realize the guarantees of human rights fully in promoting life, liberty, and equality.

Accordingly reposing its faith on duties, the Universal Declaration of Human Rights through Article, 29 (2) clearly impose duties of public and moral character to be exercised by individuals before claiming their rights and freedoms for the promotion of a welfare state or society. The Article is restated below:

“In the exercise of his rights and freedoms, everyone shall be subject to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.”

The above brief discussion clearly signifies that duty constitute the first basic value of an individual to be exercised at all times without any deviation before expecting the rights to be protected or realized.

The above picture was developed by the Sathya Sai Institute to inculcate human values to youth. The aim of the picture is to develop the necessity of interdependence and to highlight the significance of duties that every individual possesses to themselves, to others and to society or country.
2.20 Relationship between Rights and Duties

The two phrases ‘rights’ and ‘duties’ co-exist with each other. In other words, the rights and duties are two sides of the same coin, to regulate the values and behavioral patterns of an individual. On one side, rights are important in developing the human personality and behavior. The duties on the other hand, direct the individual’s importance of their contribution for the promotion of social good. In a way duty targets at the realization of rights guaranteed by various laws and regulations both nationally and internationally. The same philosophy applies to states also to discharge their duties towards their citizens. The increasing number of violations by states in protecting the rights of the individuals across the World has led the United Nations and other organs of the world community including the civil societies to focus more on the ditties than on the rights in the contemporary era.

According to Prof Harold J Laski the inter relationship between rights and duties are as follows:

(a) One’s right implies the others’ duty

This means every rights of an individual automatically impose a duty on others. For example, the right to freedom to more freely or privacy impose a duty on others not to interfere with the right of movement or privacy of any body, except regulated by law.

(b) One’s right implies one’s duty to recognize similar rights of others

This implies that every exercise of right is subject to restrictions. For example, one has freedom of speech and expression. However, at the same time, everyone has to bear in mind that the exercise of free speech and expression in no way affects the rights of others or their life, liberty or dignity of others.

(c) One should exercise his rights for the promotion of social good
If any person tries to misuse the rights, which affect the rights of others or of the society or state, the Government has a duty to take appropriate legal action to prevent such acts. For example, if a person tries to abuse his right to freedom of speech and expression by indulging in spreading wrong aspects about a section of people or of a particular religion, the state can take legal action. Any such action by the state is justified.

(d) **As the State guarantees and protects the rights of everybody, one has a duty to support the State.**

State being a nucleus organ need to take care of the social and legal interests of all the individuals. It is normally expected by everyone as stated above, to support the state in all its legal endeavours.

The above discussion in this unit clearly brings out the significance and the types of rights that individuals possess in a society. It also focuses on the importance of duties and the inter-relationship that exist between the two.\(^{(17)}\)

### 2.21 Human Rights

First of all understand this word what is ‘Human’ and ‘Rights’. One cannot say “Human Rights” of course, without saying both “Human” and “Rights”. The assumption will be made, for now, that there is no need to define exhaustively what a human being is: we are, I suggest, rather well acquainted with such creatures. The importance of drawing attention to the “human” component of “human rights” is to introduce a care concept: that of a right holder, a right-holder, very simply, is the person who has the right in question, part of the distinctiveness of the human right idea is the belief that all human beings have, or hold, human right while this seems to follow rather obviously when one looks at the language, it is actually a bold and substantive moral claim, and one which, when first introduced went against the grain of history.

For the longest time, a person was considered a right-holder only if possessed of certain select characteristics, like being an able-bodied, land-owning adult male. The contemporary human rights idea, by contrast suggests that every human being, man or woman, rich or poor, adult as child, healthy or sick. We are all members of the human community, and so hold any and all of those rights referred to as “Human Rights”. It astonishes how often even human rights activists overlook this fundamental feature, often referred to as the “Universality” of the human rights idea. Overlooking universality is, of course, the very bread and butter of human rights violators, such as representative governments. Officials in such Governments often claim many things, for themselves rewards and resources, access and influence which they deny to their fellow citizens. They thus fail to grasp or respectfully the twin commitments to universality and to a form of equality inherent in the human right idea. Particularly vicious human rights violators like the Nazis often claim that those whose human rights they violate are not even human and so are not entitled to claim human rights. The first step on the road to mass human rights violations is, invariably to denigrate the very humanity of the person(s) targeted. The sad psychology seems always the same: denying the humanity of the hatred person(s) discloses both conscience and sensitivity, which normally present innocent people from being brutalized. Crude propaganda is sometimes used to cement such bizarre beliefs about the inhumanity of those targeted for persecution. One thing for instance of the Nazi “news-reels” depicting Jewish people either as Rodent-like vermin at the very bottom of the social scale, or else as fat-cat capitalists at the very top.\(^{(18)}\)

\(^{(18)}\) The connection between hate propaganda and the promotion of brutalities against a targeted group can also be seem very sadly in the more recent case of the Rwandan civil war of 1994. Most estimates place the death toll for that near genidal strike, somewhere between one-half and one full, million human beings. For more see G pruier, the Rwanda crisis: History of Genocide, New York: Columbia university press, 1995. For more on the Holocaust perpetrated by the Nazis against the Jews, and other groups during the Second World War see M. Gilbert, the Holocaust, and New York: Henry Hold, 1987 most estimates of the death toll from the Holocaust coalessee ground the figure of at least six million.
These are not the most consistent set of images, surely but the crucial point remains that the images, and such beliefs, are at odds with the core commitment to a base line level of equality for all present in the human rights idea. This nation that as human rights we all share a baseline level of equal moral worth in some significant respect is a thoroughly modern concept. It is morally moving yet surprisingly difficult to defend; it is inspiring yet constantly subject to critical challenge. This is not to suggest that the core commitment to elemental equality has no basis other than raw conviction or personal temperament: human rights advocates offer reasons to justify this commitment. It is, indeed, crucially important to justify it, otherwise the right violator will ask why he should treat as respected equals those he rejects, spurns, and ultimately abuses and brutalizes. What makes us think that we are all equally entitled to human rights? What makes us think that, just because we were born biologically human, we are entitled to rights, regardless of what further qualities we possess? A further discussion of this complex topic, which combines issues of rights holding with rights justification, must wait for a subsequent chapter.

Rights

We turn now onto the lamentsof rights in “human rights”. What is a right to begin with? The oxford English Dictionary (OED) offers a helpful introduction, suggesting a three-fold definition of a right:

1. “That which is morally or socially correct or Just, Fair treatment”
2. “A Justification or Fair claim”
3. “A thing one may legally or morally claim; the state of being entitled to a privilege or immunity or authority to act.”

We do well here in noting, for the time being, how the concepts of morality and justice in general, and of fairness in particular, are implied in each one of these OED definition of a right. Central, too, to these OED offering are references to being entitled to something to being able to claim something as one’s own or as one’s due. It is important to be mindful of a meaningful yet subtle distinction, namely, that between “right” and “A right”. The difference is that between adjective and noun
“right” is to “a right” what “black” is to “black car”. In general, “a right” has a more narrow and concrete reference than “right” does. After all, a correct answer to an Exam question is right but is not, presumably, something students have a right to ask their professor for during exam time. To have a right is to have something more specific and meaningful than abstract rightness on one’s side. It is to have a well-grounded and concrete claim on the actions of other people and on the shape of social institutions. In particular Governments, Just as we would much rather have a black car than mere blackness; we should much prefer to have a right over mere rightness.

There is considerable consensus amongst right is well defined, at least initially, as a justified claim or entitlement. A right is a justified claim on someone, or on some institution, for something which one is owed. In general, a right is a justified claim on other people, and social institutions, to a certain kind of treatment. From them, the right holder, in claiming a right, is asserting that he is entitled to be treated in certain ways by other people and by social institutions. The need for justifying rights is obvious: we cannot be required to jump up and obey on somebody else’s mere assertion. A right-holder must offer us sufficient reasons why we should treat him the rights theory, it is a topic to which we will return and it demands that we offer plausible answers to the following questions: what can we reasonable require of people in social and political life? What if anything is so valuable that we can obliges, perhaps even force, other people and social institutions to provide for us?

Initial definition of Human Right

A Human Right, then, is a general moral right that every human being has sometimes; it finds legal expression and protection, sometimes not. This legal variability does not undermine the existence and firmness of the moral right, and actually provides focus for contemporary human rights activism, where the goal is often to translate the pre-existing moral claim into an effective legal entitlement.

A Human Rights is a high-priority claim, or authoritative entitlement, justified by sufficient reasons, to a set of objects which are owed to each human person as a matter of minimally decent treatment such objects include vitally needed material
goods, personal freedoms, and secure protections. In general, the objects of human rights are those fundamental benefits which every human being can reasonably claim from other people, and from social institutions, as a matter of Justice. Failing to provide such benefits, or acting to talk away such benefits, courts as rights violation, the violation of human rights and a vicious and ugly phenomenon indeed; and it something we have overriding reasons to resist and, ultimately, to remedy.

2.22 Meaning of Human Rights

Every individual has dignity. The principles of human rights were drawn up by human beings as a way of ensuring that the dignity of everyone is properly and equally respected, that is to ensure that a human being will be able to fully develop and use human qualities such as intelligence, talent and conscience and satisfy his or her spiritual and other needs.

Dignity gives and individual a sense of value and worth the existence of human rights demonstrates that human beings are aware of each other’s worth. Human dignity is not an individual, exclusive and isolated sense. It is a part of our common humanity.

Human rights enable us to respect each other and line with each other. In other words, they are not only rights to be requested or demanded, but right, to be respected and be responsible for. The rights that apply to you also apply to others. Human rights are not merely a language of compassion, co-operation and communication, but a grammar of civilized society and an essential condition of a happy, peaceful and prosperous future.

The denial of human rights and fundamental freedom not only is an individual and personal tragedy, but also creates conditions of social and political unrest, sowing the seeds of violence and conflict within and between societies and nations.

Basically, human rights are the claims of the individual for such conditions as are essential for the fullest realization of the innate characteristics which nature has
bestowed him/her with as a human being. It implies that there are inherent and inalienable rights which are due to an individual by virtue of his/her being a human being and that they are necessary to ensure the dignity of every person as a human being irrespective of one's race, religion, nationality language, sex or any other factor.

All claims of the individual, for example, freedom to live as one wish to do whatever one wants to do, cannot be treated as human rights. Only those claims which are essential for the developments of one’s personality and recognized as such by the society constitute rights. But one has to recognize the fact that this idea is not the reality and that what is conceptually recognized as rights is often not legally enforced or enforceable. So one, one must distinguish between what is morally and universally accepted as rights and what constitute ‘legal rights’ established according to the law-creating process and judicially enforceable in a given society.

All people hold human rights equally, universally and forever.

Human rights are inalienable. You cannot lose these rights any more than you can cease being a human being. Human rights are indivisible; you cannot be denied a right because it is less important or non-essential. Human rights are interdependent. All human rights are part of a complementary frame work. For example, your ability to participate in your government is directly affected by your right to express yourself, to get an education, and even to obtain the necessities of life.

Another definition for human rights is those basic standards without which people cannot live in dignities. To violate someone’s Human rights is to treat that person as though she or he were not a human being. To advocate human rights is to demand that the human Dignity of all people be respected.

In claiming these human rights, everyone also accepts the responsibility not to infringe on the rights of others and to support those whose rights are abused or denied.

Human Rights are both inspirational and practical. Human Rights principles hold up the vision of free, just and peaceful world and set minimum standards for how
individuals and institutions everywhere should treat people. Human rights also empower people with a framework for action when those minimum standards are not met. For people still have human rights even if the law or those in power do not recognize or protect them.

One experience his/her human rights every day when one worships according to his/her belief, or chooses not to worship at all, when one debate and criticize government policies, when one joins a trade unions, when one travel to other parts of the country or overseas. Although we usually take these actions for granted people both here and in other countries do not enjoy all these liberties equally. Human rights violations also occur every day when a parent abuses a child, when family is homeless, when a school provides inadequate education, when women are paid less than men, or when one person steals from another.

All claims of the individual, for example, freedom to live as one wish to do, whatever one wants to do cannot be treated as human rights, Only those claims, which are essential for the developments of one’s personality and recognized as such by the society constitute rights. But one has to recognize the fact that this idea is not the reality and that what is conceptually recognize as rights is often not legally enforced or enforceable. So one, one must distinguish between what is morally and universally accepted as rights and what constitute ‘legal rights’ established according to the law creating process and judicially enforceable in a given society.

Rig Vedas has said “All human beings are equal and they are all brothers”

Human rights are the rights a person has simply because he or she is a human being.

(19)

2.23 Definition of Human Rights

Now we know this word but it is very difficult to give its definition. So many person trying to give the definition of Human Rights as follow:

(19) Rigveda
2.23.1 Richard Waferstrom defines human rights as “One ought to be able to claim as entitlements (i.e., as human rights) those minimal things without which it is impossible to develop one’s capabilities and to have life as human being. “That is human rights are moral entitlements possessed only by persons.”

2.23.2 Tiber Macham defines human rights as Universal and irrevocable elements in a scheme of justice. Accordingly, Justice is the primary moral virtue within human society and all rights are fundamental to justice.

2.23.3 Joel Fienberg defines human rights as moral rights held equally by all human beings, unconditionally and unalterably that is for Feinberg human rights are moral claims based on primary human needs.

2.23.4 Kant baier defines human rights as, those moral rights whose moral ground and generating factors are the same, namely being human in some relevant sense.

2.23.5 Cranston asserts that, human rights by definition is a universal moral rights, something which all people, everywhere at all times, ought to have, something of which no one may be deprived without grave affront to justice, something which is owing to every human being simply because one is human.

2.23.6 For D. D. Raphael, Human Rights constitute those very rights, which one has precisely because of being a human being.

2.23.7 Martin Golding defines human rights as act of claiming, performed on the level of the human community.

---

(20) Richard Waferstrom, “Rights, Human rights and racial discrimination”; meldon (Ed.) Human Rights, (Belmont, California, 1970), pg. 96 – 101  
(21) Tiber Machan, prima facie Natural (Human) Rights 1976, Journal of value inquiry no.2 119-131  
(22) Joel Fienberg “Social philosophy”, 1973, Prentice Hall, NJ, Pg.85  

87
2.23.8 D. D. Basu, defines, human rights as those minimal rights which every individual must have against the state or other public authority by virtue of his being a member of the human family, irrespective of any other consideration. (27)

Apart from the definitions provided by scholars, the UDHR, 1948, refers H. R. as inalienable rights of all members of the Human family. It is pertinent to note here the definition provided by protection of H. R. Act. 1993, of India. Section 2(d) defines Human Rights as the rights relating to life liberty, equality and dignity of the individual guaranteed by the constitution or embodied in the international conventions and enforceable by courts in India. That is so far as India is concerned; only enforceable rights, embodied in the constitution are human rights. This assumes that Human Rights are those rights bestowed by law or positively granted by state. This does not hold true because the contemporary thinking is it. Pre-exists law and are inherent in Human beings themselves.

However varies may be the terms of definitions, they generally focus upon the idea that human rights apply to all human beings because they are Human beings and thereby distinguishing human rights. From other Rights such as legal, contractual and conventional Rights.

2.24 Basic Pillar of Human Rights

2.24.1 Dignity

Dignity is another value that regulates the behavior of individuals. Dignity is a relative term with regulatory nature. It prescribes the norms and ethical standards need to be followed and adopted.

In the day to day inter-relationships, individuals are expected to behave with one another in a dignified and honest manner this concept dictates that every one of us has to exercise due caution and care in our relations without undermining the capacities of other persons. Further, it teaches us not to create a situation wherein

others are made to undergo either emotional, psychological, physical, tense situations, or to harm their personality.

Since dignity plays a vital role, in regulating the human relations and for the furtherance of human rights, (especially, the basic rights of liberty, equality, and freedom), the Universal Declaration of Human Rights (UDHR), in no uncertain terms declared that all individuals are equal in the eye of law. All are deserves to be treated with utmost respect without harming the dignity of others at all times. If people across the world follow the ethical norm of dignity without any deviance, the realization of right would be easy. This fundamental norm applies to individuals and States to follow with strict adherence. In the modern context though a number of conventions, covenants, and declarations have been adopted in the international arena, to promote human rights on the concept of dignity. The lack of adherence by individuals and nation-states brought in untold sorrow and miseries to mankind. The non-adherence to ethical values, especially, indecent behavior of individuals at times, posing a number of problems in the contemporary era. This in turn has an effect in the promotion and realization of human rights.

2.24.2 Liberty

Liberty is another concept which plays a vital role in the promotion of human rights. Liberty is an ancient concept. This concept has its roots in the political philosophy. A number of philosophers like, Hobbes, Locke, Rousseau, and many more have articulated Liberty in different contexts. In simple terms, liberty means human beings are free to regulate their relations, and are able to govern their relations, behave at their own will, and be responsible for their acts. The concept of liberty is centered on responsibility or duty. Basing on the acts performed by individuals, liberty can be enjoyed or achieved. If the acts are bad or performed with an intention to defray anybody or deprive them of their legal claims, they not only affect the rights of others, but also of their own in the long run. This in turn will have an effect on the realization of their rights.
The concept of liberty is the basics for the development of a right. According to Hobbes, every individual is empowered to enjoy their freedoms freely without the interference of any other person. In his social contract theory, he argued that the divine will of kings to regulate the relations and to restrict the freedoms of individuals is antithesis to liberty of individuals. The enlightenment of liberty by various political and legal philosophers, led to a number of political revolutions across the world. This in turn led to establish democratic societies on the basis of liberty of individuals to choose their leaders.

In the contemporary era, the excessive arguments for liberty, and its indiscriminate exercise without strict adherence to duty by individuals in their numerous acts, again resulted in bringing miseries to the world. In order to resolve the problems and to provide a problem free world, the UN took a number of legal steps for the promotion of human rights. The aim of these acts of UN is to regulate the behavior of the mankind and to guide them to discharge their duties to uplift the moral and ethical values. This in turn will help to restore liberty in its true sense and makes individuals to be happy for their legal and justified actions. Apart from the above, it is the duty of nation-states also to adhere to the principles of international law and human rights in their relations, respecting the concept of liberty of the other nations and their citizens. The strict adherence to liberty and practice of self-restraint alone would yield the desired results in protecting the rights of every citizen as guaranteed by law.

2.24.3 Equality

Equality is another important component of human rights. From ancient to modern times, people are fighting to achieve this in terms of its practical application to each situation. In general, equality proposes to bring all the people into one category, and apply the principles of law, and justice without any distinction, whatsoever it may be among the individuals. Equality is a relative concept which may be distinguished basing on a number of factors, and the enjoyment of rights on an equal footing. The aim of the Universal Declaration of Human Rights and the Constitutions of the various countries including India are to treat all the people on an
equal footing without any kind of discrimination. This may be referred to formal equality, wherein in the eyes of law all are equal.

Although, all people are numerically considered as equal in the eyes of law in providing the amenities or distribution of resources, all may not be considered or treated as equal in reality. This is because of the socio, economic, political and cultural conditions that prevail in each society. In order to uplift the people who are not equal on any ground specified above, they need to be given certain concessions and facilities to improve their status and to reach the equal status with that of others who are on a high pedestal.

To achieve the rigour of equality and to fill the gap especially on socio-economic and cultural grounds, the principles of international law of human rights provides for the necessary concessions to be extended, to people at the national level by states. This will result in to achieve the status of equality of all in the eye of law. Once they achieve the equal status in all respects, the concessions extended to specific group of people to uplift their status, may be withdrawn by the state. The same principle applies to states at the International level. Accordingly the developed states need to extend concessions to the developing states.\(^{(28)}\)

### 2.24.4 Life

Life is precious, sacred and prey it with divine potential and it is that a hymn I the Rigveda recites:

"Grant us a hundred autumns that we many see the many fold world, may we attain the long lives which have been ordained as from your." \(^{(29)}\)

Presentation of Human Rights life is of paramount importance, because if one’s life is lost, the status quo ante cannot be restored as resurrection is beyond the capacity of man.\(^{(30)}\)
An appropriate connotation of the term “Life” was given by Field J., where he distinguished human life from animal existence and defined the concept with all that body and mind and soul could promote happiness and fulfillment thus:

Be the term “life” something more is meant than more animal existence. The inhibitions against its deprivation extend to all those limbs and faculties by which life is enjoyed. (31)

The plenitude of possibilities and the fullness of faculties, if life is enriched propitious circumstances, persuaded our founding fathers and the United Nations to accord the highest priority to the right to life. (32)

2.25 Historical Background of Human Rights

The Human Rights as an ongoing attempt to define human dignity and worth and to create human rights culture in future of society

The basic principles of a human rights’ culture will survive only if people continue to see a point in it doing so. It needs to be constantly defended. I have a right to this. It is not just what I want or need. It is my right. There is responsibility to be met.

The concept of human rights tells a detailed story of the attempts made to define basic dignity and worth of the human beings and his or her most fundamental entitlement. The denial of human rights and fundamental freedoms not only is an individual and personal tragedy but also creates conditions of social and political unrest sowing the seeds of violence and conflict within and between Societies and Nations. Just to avoid these problems various international agencies including League of Nations, U.N.O. had stress for the protection of human rights permanently, although the idea of human rights predates the United Nations.

(31) B. L. Hansaria, “Right to life and liberty under the constitution Pg.25 (32) Krishan Iyer. J. Supra n. 1
It can be easily appreciated that human rights and fundamental freedoms allow us to develop fully and use our human qualities, our intelligence, our talents and our conscience and to satisfy our spiritual and other needs. They are based on mankind’s increasing demand for a life in which the inherent dignity and worth of each human being will receive respect and protection. In the language of United Nations Centre for human rights—“human rights could be generally defined and those rights which are inherent in our nature and without which we cannot live as human beings.: Shree D. D. Basu has considered about human rights in detail. According to him, “the expression human rights had its origin in international law relating to the deployment of the status of an individual in the international legal system, which was originally confined to the relation between sovereign states, who were regarded as the only person in international law. For all practical purposes, the genesis of human rights is not older than Second World War though the concept of individual having certain inalienable rights as against state had its origin in the dim post. Thus the concept of human rights, embodying the minimum rights of an individual versus his own State is as old as political philosophy.” Hence, D. D. Basu(33) defines human rights “are those minimum rights which every individual must have against state or other public authority by virtue of his being a member of human family, irrespective of any other consideration”.

D. D. Basu has also said that the concept of human rights is as old as the ancient doctrine of natural rights founded on natural law, the expression human is of recent origin. It is only natural rights which eventually led to the formation of human rights.

Ex-chief Justice R. S. Pathak (34) has described about human rights in these words: “The human rights movement represents the historical journey travelled by man ever since the beginning of an institutionalized political and social order. It was a response to that order, when the importance of the development and expression of individual personality began to acquire material significance in relation to the community.

(33) Human Rights in Constitutional World Law, pp 2, 5.
In the repeated interaction between the individual and the State, the urge to recognize a charter of basic individual rights has expressed itself in a continuous struggle which has seen the reaffirmation and evolution of the rights of the individual against the power of established authority.

The concept of human rights, in its expanding comprehension, has now travelled to encompass what are called “third-generation” or “solidarity” rights. At the very beginning stands the rights of self-determination, a right regarded as belonging to peoples rather than individuals, and which India, with its emphasis on national integrity, has rightly identified as a right applicable only to peoples under foreign domination. Then, there is the right to sovereignty over the natural wealth and resources of the country and the right to the peoples of developing countries. Both rights are found in identical language in both covenants, and therefore may be regarded as civil and political rights as well as economic, cultural and social rights. The third-generation rights extend to the right to international peace, the right to a satisfactory environment favorable to development, and the rights of ethnic, religious and linguistic minorities.

It can no longer be doubted that the concept of human rights, at one time indulgently looked upon as the impracticable dream of natural law philosophers, has become in the course of these four decades an international reality. But problems remain in the application, implementation and protection of human rights. A not inconsiderable degree of intellectual confusion prevails among political scientists and international lawyers in adequately formulating the more fundamental problems, and in performing the necessarily intellectual tasks relating to establishing and maintaining appropriate constitutive processes and public order policies.

The principal difficulty lies in the non-availability of an adequate substantive definition of human rights. The definition provided by Richard Wasserstrom (35) reflecting the common general understanding of the concept that “one ought to be able to claim as entitlements (that is, as human rights) those minimal things without

which it is impossible to develop one’s capabilities and to live life as a human being “fails as an insufficient and simplistic definition. In that context referring to the doubt raised on whether economic, social and cultural rights can be classified as human rights, some commentators cite concerns” about definition imprecision, unenforceability, unmanageability of the concept as a whole, and the difficulty of achieving the full justifiability of the rights in question”. Similar problems arise in relation to the “third-generation” rights. Described as the rights of “problem”, their claim to be considered as human rights are doubted because, as Paul Siegal points out, they “cannot belong to any identifiable individuals”. Little effort has been made to create a comprehensive map of the totality of human rights and there has been no appreciable discussion of the detailed content of particular rights. The importance of precise definition cannot be under-estimated. For, as Bilder observes, “what we think human rights really are will inevitably influence not only our judgment as to which types of claims to recognize as human rights, but also our expectations and programs for implementation and compliance with these standards.”

Sometimes human rights are conceived in terms of natural law absolutes and buttressed by trans-empirical justifications, both theological and metaphysical. At other times, human rights are defined in terms of the demands made by individuals or groups at particular times within their particular communities. Human Rights may also often be confined to the particular rights which the ruling system of law in the state will protect. Human rights may, further, be defined solely by reference to a larger regional or global community context. The problem often arises because of difference in approach and perspective, for instance whether the concept of human rights is related to the Natural Law approach, the Historical approach, the Positivist approach or the Marxist approach.

---

(36) The Lawful Rights of Mankind, p. 165
(37) Rethinking International Human Rights, p. 174
In the Third World, the perspective applied to the concept and reality of human rights varies with prevailing local philosophy, culture, ideology and historical tradition. Understandably in the case of former colonies the emphasis will lie as much on civil and political rights and the “third-generation” rights, with a somewhat decisive inclination in favour of community interest, where in the context of community interest, where social and economic progress and development are regarded as of primary importance.

Credit must go to those commentators who have attempted to reconcile development with respect for human rights, especially when it cannot be doubted today that the enjoyment of human rights bears an essential connection with economic development, each being necessary to the other. Following the proposal suggested by the International Commission of Jurists, Sieghart treats of development as conceivable in two directions, the right to development is the right to participate in, and benefit from, the process of development intended by the state for all members of the community so that each individual may enjoy all his human rights, whether civil, political, economic, social or cultural. And a state which can demonstrate that it has fashioned such an environment for its citizens will be legitimately entitled to claim a right to development on the international plane, calling upon other states to assist it in the realization of its internal ethos. To find their place in the catalogue of human rights, Sieghart says

“The new ‘third generation’ rights must accord with formulations whereby they can be clearly seen to vest in individuals to be exercisable by them and to impose precise correlative duties on States”.

The human rights movement has progressed to a point where in its fundamental conception it treats of members of the human race as members of a global community and, therefore, broadly entitled to a common pattern of human rights. The pervasive presence of human rights in almost all the dimensions of daily life in most societies provides a cementing influence in the realization of the world recognizing the need in the current political climate for examining issues on a global
basis, the internationalization of human rights values can be accepted to proceed apace. The process may move slowly, but the beginning of the trend is unmistakable. We have growing evidence already of reference by domestic courts to international human rights norms when construing municipal legislation.

Eminent Judge V. M. Tarkunde has attributed about the human rights as follows:

The term human rights, in its normal usage, comprise the rights of the individual in all spheres of social life. They are exercisable by the individual against those who possess political and economic power and also against harmful social customs as untouchability in India, racialism in South Africa and inequality of women in all parts of the world. The recognition of rights in individuals also marks the recognition of certain social obligations on them. Since individual freedom can be experienced only in a moral society, the rights and duties of the individual are necessarily interconnected. Freedom and morality are the two essential components of a healthy Society.

The question of primacy between society and the individual is a perennial problem of social philosophy. If the question is considered chronologically against the backdrop of biological evolution, it is similar to the conundrum; which came first, the hen or the egg. Human beings have always been gregarious. It is well established by now that the origin of the new species was through a chance mutation in the composition of a genetic cell. This may indicate that a new species is born with the birth of an individual having a different gene than its parents. It is at the same time obvious that the further development of a new species appears to be both an individual and a social phenomenon. The science of biological evolution does not help in establishing the primacy of society over the individual or vice versa.

There is, however, a reason, logical rather than chronological, which justifies primacy of the individual over society. This is that the individual is a biological being, possessed of consciousness and pain, progress and regress. Society is not a biological
being and it is not possessed of a consciousness of its own. It cannot as an entity have any mental experience. Its happiness and its progress can be measured only in terms of the happiness and progress of the individuals, which compose it. It is in this sense that primacy belongs to the individual. The fact that the human individual is alone possessed of consciousness and not any combination of individuals such as society, a nation or a class, justifies the humanist principle that man (the human individual whether male or female) is the “measure of things”. The question of the comparative worth of social institutions, such as democracy versus dictatorship in politics or capitalism versus state ownership in the economic sphere, can only be decided by assessing its impact on the individuals who constitute a society or a nation.

Dr. Upendra Baxi \(^{(38)}\) has described human rights as follows:

“For the first time in recent history, we move from conceptions of rights as resources for individuals against state power to a conception of human rights as species rights as well. And it is natural to this conception that the rights stand addressed not just to states but to international organizations as well, whose major world-historical role, all said and done, is to enunciate new human futures through a reconstruction of human person whose loyalties are global or planetary. Transcendence of state sovereignty where it matters for mapping new trajectories for alternate human futures can only be achieved by retooling the notion of human person, the bearer not just of the benefits but also the burden of human rights and fundamental freedoms. It is for this reason that the preamble lays such powerful stress on the centrality of the human person.

Mr. M.C. Bhandare \(^{(39)}\) considered human rights as follows:

The urge for the protection of human rights emanated out of the gross violations preceding and during the two world wars of the century.

\(^{(38)}\) Human Rights in Changing World
\(^{(39)}\) The Rights to be human, 1987
The protection of human rights, one of the war aims of the allies in the Second World War, was translated into reality with the formation of the United Nations. It was realized that only international protection and promotion of human rights can achieve international peace and progress. Thus, in the Atlantic Charter of 14 August, 1941, subscribed to and endorsed by 47 nations, the president of the United Kingdom expressed the hope, “to see established a peace which will afford to all nations, the means of dwelling in safety within their own boundaries and which will afford assurance that all the men in all the lands may live out their lives in freedom from fear and want”.

Rose M. D. S. A. (40) Research Officers, Human Rights’ Office, Commonwealth Secretariat, London, explained “Human Rights as a parallel growth of public awareness world-wide of the meaning and significance of concept of human rights.” A sharpening global consciousness against inhumanity, which has in turn led to increased recognition by governments both of their internal accountability to the people they govern, and also of the need for international legitimization to confirm and supplement their political legitimacy at home. The key test of the entire human rights’ regime is not the existence of such mechanism, but their effectiveness. In particular, what really matters is the degree to which they harmonies with and are reflected in the domestic laws, regulations or administrative provisions and practices, which impact daily on the lives of millions of people, particularly those who may be regarded as the vulnerable, the weak, the oppressed or the exploited. Boven (41) has also expressed the same kind of expressions.

The American Jurist, Wesley Hohfeld, (42) while addressing the students of Yale Law School on ‘Human Rights’ hinted that ‘human rights as tailed in international politics, consisted of utopian stock-in-trade. He emphasized the different meanings of ‘Right’ and opined that it was doubtful whether the human rights, as declared in the charter of 10 December, 1948, were ‘Rights’ at all.

(40) Human Rights in Changing World
(41) Rose, M.D.S.A.CommonwealthRiots.
(42) People Matter, p. 33
Having said this at a time when the concept of human rights was conspicuously displayed on the fast-food counter of politics. Human rights’ in the current political and international vocabulary is a child of the theory of natural rights’. ‘Human Rights’ is nothing but ‘natural rights’ in a modern rhetorical garb.

Leonid F. Evmenov (43) described about human rights as follows:

“Human rights should not only be declared but be codified in legislation. Not only codified in legislation but realized according to the norms of national legislation and international human rights acts – that is the only objective condition under which humanism of any social shade can be revealed, from Mahatma Gandhi’s Ahinsa a to Lenin’s philanthropy.”

That is why to arrive at a choice less option it is necessary to achieve not only comprehensive nuclear disarmament, the wise unambitious solving of the nuclear energetic problems, or the protection of dying nature, the cradle of humankind and its civilization, but effective human and peoples’ rights’ protection.

Mikhail Gorbachev (44) put it very well; the modern world today needs global strategies of life and environment protection. It should be added that modern world stands in need of human and peoples’ rights protection. It is impossible to solve the one problem without confronting and solving the other.

Indeed, now-a-days it is impossible to attain nuclear disarmament and reasonable exploitation of nuclear energy, to set up a comprehensive system of international security and global strategy of life protection without working out the theoretical aspects of the problem, without sizing up the ways of its practical realization, and codifying by law and constitution the right to life as one of the fundamental human and people’ rights. Many western scholars (45) do not consider this
right to be a human right, alleging that taken in broad philosophic terms and interpreting it as a right common to all mankind, it is not codified in international acts on human rights worked out by the United Nations, particularly in the Universal Declaration of Human Rights and in the international covenants on Human Rights. It is impossible to set up a global strategy of life, protection without codifying in international acts and realizing the right of man and the peoples to political, social, economic and cultural choice, i.e. the human and peoples’ rights of self-determination.

Justice H. R. Khanna\(^{(46)}\) has described about human rights as follows:

“It is in an ambience imbued with the sanctity of human rights that Society is assured of the rule of law, an essential ingredient, and a postulate, of which is the existence of independent courts. It has been reiteration that equality before law and the equal protection of the laws are among the most vital human rights. It is basic to the effectiveness of these rights that the courts are independent. Independence of courts thus necessarily flows from the Charter of Human Rights”

Secretary-General of the International Commission of Jurists Sri Niall-Macdermo\(^{(47)}\) explained about human rights in following words:

Such knowledge as I have of human rights has been gained during the past 18 years as an activist, with no claims to any qualifications as an academic. Accordingly, I have chosen as my subject the role of Non-Governmental organizations in the promotion and defense of human rights, illustrating what I have to say by drawing on my experience as Secretary-General of the International Commission of Jurists.

Sri Govind Mukhoty\(^{(48)}\) described that human rights cannot be evaluated in isolation. They have been read in their social context. The theory of human rights incorporates following 3 maxims:

“The God, who gave us life, gave us liberty at the same time.”

-Thomas Jefferson

“Freedoms come from human beings, rather than from laws and institutions”.

-Clarence Darrow

“The history of liberty is the history of resistance History of the limitations of governmental powers”.

-Woodrow Wilson

Sri N. A. Palkiwala\(^{49}\) has described human rights as follows:

“The case for human rights is so strong that it almost argues itself. It is an instance of what lawyers call res ipsa loquitur – the thing speaks for itself. To attempt to define Human Rights definitively, would be merely to illustrate how the human mind tries, and tries in vain, to give a more precise definition than the subject-matter warrants. Human rights may be summed up In one ‘word—Liberty’. But Isaiah Berlin noted that there are more than 200 definitions of liberty; and, as Abraham Lincoln observed, the world had never had a good definition of Liberty.

Soli J. Sorabjee\(^{50}\) has opined about human rights, which is as follows:

“Protection of human rights of individuals, an abiding concern of every civilized state, assumes vital importance in the time of emergency when there is invariably vast concentration of power in the executive and considerable dilution of safeguard in which ensure protection of fundamental rights. Suspension of human rights is a concomitant feature of emergencies, there violation an inescapable consequence.”

\(^{49}\) Human Rights and Legal Responsibilities

\(^{50}\) Human Rights in Changing World, p. 321
E. S. Venkataramiah \(^{(51)}\) has expressed his views about human rights as follow:

“The concept of human rights is very much the product-of history and of human civilization and as such is subject to evolution and as change. Every person born in this world however is entitled to certain minimum rights which ought not to be curtailed in any manner. It is in this spirit, the United Nations General Assembly adopted about forty years ago, on 10 December, 1948, the Universal Declaration of Human Rights. Subsequently, it has enacted many conventions and protocols relating to human rights and placed them before the member-countries for their acceptance and implementation. A large number of States have ratified them. The year 1968, which came twenty years after the Universal Declaration of Human Rights was adopted, was declared by the United Nations General Assembly as the International year of human rights and the then Secretary-General of the United Nations Mr. U. Thant requested all the member-countries to take appropriate action to uphold the human rights. Now that forty years have passed since the adoption of the Universal Declaration of Human Rights, there is reason to take stock of the position and status of human rights the world over. In doing so, we find that the picture is not really rosy. In many countries of the world people continue to be denied even the basic freedoms.”

M. H. Beg \(^{(52)}\) former Chief Justice of India has defined human rights as follows:

“Human rights imply justice, equality and freedom from arbitrary and discriminatory treatment. These cannot be subordinated to the interests of the rulers. No one can be subjected to coercion for holding particular religious beliefs. The doctrine of national sovereignty cannot justify violation of human rights.”

As Paul Sieghart has stated, the distinction between human rights and other rights give rise to three consequences. The human rights are not acquired, nor can they be transferred, disposed of or extinguished by any act or event because those rights inhere universally in all human beings. The primary co-relation of duties in connection with human rights falls upon the state and their public authorities. Because of these two distinctions, says Sieghart, three between consequences follow. One is non-discrimination between individuals belonging to different groups; second is the rule of law whereby people are governed by law and not by men; and thirdly there are remedies available for the violation of human rights. If these three tests are applied, one must say that nation has come a long way towards the realization of human rights. But there is still a long distance to be covered, before we can say that we have done all that is possible.

Shree Shridath, S. Ramphal \(^{(53)}\) Secretary-General of Commonwealth Nations has described about human rights as follows:

“We have come a long way since 1948; but we have a long way to go before we translate the commitments implicit in the Universal Declaration into performance. The record to date is far too deficient both within nations and between them, and it is also deficient at a much more personal level in terms of relations between individuals. Furthering human development is a process in which everyone has a role to play: international organizations, but perhaps, most of all, people the world over. In the packing order of decision-making, people may seem the most lowly and ineffectual. In reality, it is people who represent our best hope for truly furthering human development and advancing the goal of the Universal Declaration.”

Shree P. P. Rao \(^{(54)}\) has defined human rights:

---

\(^{(53)}\) Commonwealth Reports

\(^{(54)}\) Human Rights in Changing World, p. 85
“The inherent dignity and inalienable rights of all members of human family recognizing them as the foundation of freedom, justice and peace in the world”

Dr. Justice Nagendra Singh\(^{(55)}\) of International Court of Justice has defined Human Rights as follows:

“Respect for the human personality and its absolute worth, regardless of colour, race, sex, the very foundation of human rights. These rights are essential for the adequate development of the human personality and for human happiness and progress. Human rights may therefore be said to be those fundamental rights to which every man or woman inhabiting any part of the world should be deemed entitled merely by virtue of having been born a human being.”

Basic to human rights is the concept of non-discrimination. But if we look into the pages of the history of mankind there has always existed and continues to existance a wide gap between precept and practice, between abstract principles and their application or implementation. Human rights have been no exception but this has not deterred humanity from repeating and reiterating the principles which govern human rights.

According to Sir Hersch Lauterpacht, a noted protagonist of human rights and one of the most eminent international law jurist of post-world war era, observed\(^{(56)}\) the protection of human personality and of its fundamental rights is the ultimate purpose of all law, national and international. “Indeed, characteristic features of the posi-world war international relations and represents a revolutionary development.”

\(^{(55)}\) Ibid, p. 268

\(^{(56)}\) Principles of International Law.
“The question of human rights if looked at somewhat unconventionally is, in fact, an admixture of political expediency and legal realism marked with humane traditions. In real sense they are not the rights of an individual not to be the society. However, there is nothing in itself to be derogatory in the notion of dependence. There is dependence at all the levels of human existence.”

Justice Fathima Beevi (57) has observed about human rights as follows:

“The concept of human rights has assumed importance globally during the past few decades and has international significance as every country is subject to international scrutiny by the world body which indicts member-states for violations, while there is increasingly widespread concern for universal respect and observance of human rights, gross violation of internationally recognized norms continue unabated in almost all parts of the world. The overall situation has been characterized by large scale breaches of civil and political rights, as well as economic, social and cultural rights. The rights to life, to an adequate standard of living, to freedom of expression, to protection from torture, arbitrary arrest and many of the common standards of achievements for all people and all nations are as far from realization now, as ever. The obligations set out in the course of international conventions and multilateral treaties for the promotion and protection of human rights and accepted by most of the governments are flouted by them with impunity.”

Justice R. N. Misra, (58) Former chair-person of National Human Rights’ Commission of India, has observed as follows:

“It is an obligation which all of us have to perform. Man, wherever he lives, whatever religion he professes, whatever food he takes, is a member of one family. All of us must learn to live like a member of one family. The whole world is one family. One then we will be able to develop the culture of Human Rights. In the absence of Human Rights,
Societies, individuals and families are disintegrating in the modern era. It is a challenge to human process. We should all be prepared and united to face the challenge of the indiscipline. I, therefore, call upon you all whether you are in a company, industry, factory, university to face this challenge and help the commission in meeting this challenge. Everyone must realize that what is prescribed by law is not for next man, or the man to follow, but for you.”

D. D. Raphoel\(^{(59)}\) has described human rights as follows:

“What are human rights? In a general sense they denote the rights of humans. However, in a more specific sense, human rights constitute those very rights which one has precisely because of being a human being. Pertinently the term human rights’ received wider acceptance in place of ‘the rights of men’in post-world war liberal terminology as it conveyed equal concern for the rights of both sexes. Moreover, the usage of the term ‘human rights’ also reveals their source: humanity, nature, being a person or human being.”

The genesis of the concept of human rights can be traced into the emergence of classical liberalism. Classical liberalism made a passionate defense of the principles like competitive individualism, private property and market ethics, etc. It cherished the realization of Individual’s liberty, his development and human progress through the functioning of the above principles. The ideas of the rule of law, limited government and individualism characterized the seventeenth and eighteenth century anti-nationalist school of political liberalism.

Dobbely\(^{(60)}\) has defined human rights “Just as legal rights have the law at their source and contractual right arise from contracts, humanity, human nature or some such aspects of all persons would seem to be the source of human rights.”

\(^{(59)}\) Political Theory and Rights of Man, 1967
\(^{(60)}\) Concept of Human Rights.
Human Rights are not merely ideals or aspirations, nor are they some rights granted to use by the existence of particular set of laws. They are claims made by virtue of the fact that we are human beings with an inalienable right to human dignity. Therefore, we cannot delegate the authority to a group of persons to define these rights. All individuals and all peoples have these rights to self-directed development. Mr. Lakayan (61) describes the human rights in the following words:

“Human rights remain with both a statement of reality and an ever expending set of objectives waiting to be actualized and their realization is possible only through a process of constant struggle. Thus, while recourse to law, or appealing to the state to enforce the law, or legislate new ones will and possibly must remain an important and even the primary strategy to transform the human condition, equally important is to evolve a social proxies, rooted in the need of the most oppressed communities, that seek to create the shared norms of civilized this a shared vision of how we want to live as a collectivity that can provide us the moral basis for evolving our own conduct.”

Justice Venkatchaliya, Chairperson (62) Human Rights Commission has defined “Human rights are rights in own nature and without which we cannot live as human beings.”

Professor Baidyanath Labh (63) of JammuUniversity in Budhist studies has considered human rights concept in Budhististic religious approach. Let us consider his view:

(61) Rethinking Human Rights, Lakayan.
(63) Human Rights and the Law.
“The notion of Human Rights has occupied dominant place in the international deliberations on peace and security for the human beings. The human rights concept has been predominantly western liberal concept which has come to be widely accepted by rest of the world. Thus, though Buddhism has got acquainted with this concept of human rights in imbibing the very ethos of the concept of human rights in the form of defense of human essence and dignity. It may properly be understood if we refer to the seminal norms and principles of Buddhism. The present article makes an attempt to look for the compatibility between the norms and doctrines of Buddhism and the notion of human rights.

From a sociological point of view, human rights concept ensures that an individual living in a Society will be guaranteed of his position. In this view, human rights emerge as a legal concept. However, for proper realization of human rights, it is essential that the society as a whole accept the basic norms of human rights and that one needs to address to the relevance of Buddhism does not believe in discrimination or inequality simply on the basis of one’s birth, caste or colour. It clearly says:

“No Jacca vasalo hoti, najacca hoti Brahmano Kammuna Vasalo hoti, Kammuna hoti Brahmano."

In other words, a person is neither a Sudra nor a Brahmana (low or high) simply by virtue of his birth, but only by virtue of his bad or good actions. Not only that, if a person feels false pride over his caste, wealth or origin and treats others as inferior to him, he insults the basic human dignity and consequently declines in his life:

“Jatittaddho dhanatthaddho, gottatthaddho cayonara/Sannatin arimannerti, tan parabhavato Mukha. (64)

(64) Human Rights in India, pp. 241-42.
The Buddha has taught to honour parents, brothers, sisters, children, other relatives and other persons in the society. If someone hurts anybody physically or even vocally, he may be treated as a person lacking the basic human qualities. Regard for human dignity is the basic social message of Buddhism. Every person is suggested to treat others just as he or she has love and attachment for himself or herself.

“Yath ahah tatha etc. yatha etc tatha aha/Aattanan upaman katvā, nahaneyyana ghataya.”

Buddhism as a philosophical position as well as a moral way of life, has been concerned with spiritual salvation whereas human rights aims a natural salvation, i.e. safety of the rights of equality, dignity and freedom at worldly level. However, Buddhism does not talk of imaginary idealism as misunderstood sometimes by some people. It is very much based on the experiences of day-to-day life. It advocates for observance of moral duties towards one another among people in the Society. It is a fact that each and every one cannot give up worldly life and become a recluse. The Buddha was well aware of this fact. Therefore, he prescribed a moral code of conduct for householders as well as for homeless recluses, which ensures safeguard of human dignity, of course. Buddhism lays more emphasis to the attainment of spiritual salvation. On the other hand, culture background of the western societies (where natural rights concept was given by the seventeenth eighteenth century classical liberals like Hobbes and Locke has been traditionally different from the social and cultural milieu in which Buddhism developed. Thus, Buddhism thought has comparatively a wider spectrum of the modern notion of human rights claims. Therefore, there may be a good scope of reconciliation between the two concepts emanating from altogether different historical backgrounds.

According to the Hindu religious views, Human Rights may be considered as follows:

“As the cow protects her own new born even at the risk of her own life, so one should enlarge one’s heart infinitely with compassion for all sentient beings.”
Let us have a view of the Christian religion over human rights. Holy Bible has preached as follows:

“Don’t do unto others what is hateful to you. The God will know. Do unto others as you would have them do unto you.”

Prophet Mohammad, who is the profounder of Muslim religion, had also advocated for human rights. Following quotation from Holy Quran will illustrate the concept of human rights as follows:

“All men are brothers and that non-Muslims should be treated with no less dignity and respect for their personality than Muslims. No discrimination against all persons whether black or white or whatsoever.”

Now we should consider about the concept of human rights as propounded by Justice V. R. Krishna Iyer. He has described “Human rights and fundamental freedoms are indivisible, the full realization of civil and political rights and cultural rights, it impossible. This process of realization calls for legal positivisation, not political polemics not diplomatic clap-trap but normative formulation. But what are human rights? I may discover that the Religion of Man is located in the Vedas, Buddhist Texts, and Bible, the Quran or the holy literature or other authentic teachers to uphold human divinity. Every human being is a divine being and has title to dignity, liberty, equality and other basic rights. We cannot understand or evaluate human rights divorced from the historical and social context. Idle ideals and empty assertions cut no ice. The status of human rights takes us to the life-style of a society. That is why the Indian constitutional approach is soaked in the social milieu and human conditions. India is plural Society and the concept of the human rights in such society has a different and unique position.” With regard to the position of human rights Searman has said “an article that the problem is old”. Today we tend to think in

\[(65)\] Law versus Justice
terms of ethnic origin or skin colour when we take of a plural society. But there are
other social divisions just a difficult to bridge even that most unitary of Societies, the
greek city state was a plural society, incorporating the right less slave as well as the
fully entitled citizen and the Roman world was a compiles plural society as any in the
history of mankind, but human rights are they as prevalent or as old established as the
plural society? That is another story. For most of mankind’s human rights have and
continue today to be, more conspicuous in the month of men than in their practice.
Vis-à-vis woe to the conquered and the oppressed, the true facts of life, than the lip
service paid by the Universal Declaration of Human Rights, Learned Justice Iyer
again said that “I am not here, however, to in tone a lament voice, heart and mind to
the entitlement of all men to political rights, civil liberties, and a fair share of social
and economic opportunity and advantage, prejudice, poverty, fear ambition and greed;
these are the root causes of oppression, deprivation and unfair discrimination which
must be overcome. These fundamental minorities in a democratic society are to be
won and protected. A constitutional safety value has to be designed to relieve men of
the pressures of excess of power. It is I hope helpful to take a look at the various
solutions to the constitutional problem attempted in the western world. The countries,
whose legal systems deprive from the Roman, built the necessary restraints into the
very exercise of executive or administrative power. This was the Roman way of
governing their world a plural society of immense complexity based on a rigid class
structure ranging from the privileged Roman citizen to the slave labour force which
had no civil rights at all. The western world of our time is making an honourable
endeavor to cope with the problem. There is no single blue-print, for success. But I
believe that modern experience shows that there is one essential feature of every
solution, a constitution mechanism strong enough to prevent absolute power from
lodging in any one group of Society or in any institution coupled with a plain
declaration of the rights and duties of man in Society. Their rights and duties are those
which are so fundamental that civilized man cannot survive without them; they are the
just natural of mankind the just genuine of all races.
Justice D. V. Madan (66) described an idea of human rights in an article. He said, “the concept of Human Rights is the result of man’s inhumanity to man”. The maxim of law is, “There is no right without a remedy”. The maxim of history has been. “There is no right without a wrong”. The story of Human Rights is thus the story of human wrongs. God divided the light from the darkness and the waters from the land. And man divided his fellow man into those who were considered to possess none. And he came to the conclusion that all men had certain rights which other man had no right to natural law and natural rights. These concepts were developed by the Greek and Roman.

Let us consider the view of Justice P. N. Bhagwati (67) on Human Rights, who is now Vice-Chairman of U. N. Human Rights Committee:

“Fundamental rights are of great importance for individual freedom, but these fundamental rights are a very minimal set or rights and therefore, human rights, which are derived from the inherent dignity of the human person and cover every aspect of life and not just a small number of preferred freedoms against the state, have tremendous significance. For the large number of people in a developing country like India, who are only solution for making fundamental rights meaningful would be restructure the social and economic order so that they may be too able to realize their economic rights. Human Rights Conference called by the United Nations General Assembly in 1968 declared that “since human rights and fundamental freedoms are indivisible, the full realization of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.”

(66) AIR 1988 Journal Section.
Protection of Human Rights’ Act, 1993 has defined the term “Human rights under section 2(D) as follows:

“Human rights mean the rights relating to life, liberty, equality and dignity of the individual guaranteed by the constitution or embodied in international covenants and enforced by courts in India.”

In my opinion, the concept of human rights has gradually evolved over the past several centuries. It is immaterial whether you call these rights as inherent rights, fundamental rights or by some other name. These rights by themselves have no fixed content as has been rightly remarked by Justice Mathew and most of them are empty vessels into which each generation has poured its content in the light of its experience. Human rights, as conceived in the last few decades of the twentieth century, are justifiable claims on behalf of all men to corporate action. They are owed to the individual by the State as well as by the organized social and economic groups which are the center of power and authority. The concept of human rights has a dynamic nature in reference to time and space.

Human rights have existed, in however, nascent a form, ever since man as a gregarious animal has lived in communities; family, clan, tribe, village, town or nation, and now in an independent, world community. The superstitious acceptance by the ignorant masses of their object poverty, of human miseries, hunger and disease, of callous discrimination and exploitation of man-by-man, and of the age-old apathy of the elite in power in large parts of this globe, has further complicated the problem of human rights. The U. N. Charter has provided a Constitutional basis on which the United Nations can bring about changes in the status of the individual vis-à-vis his own State. The United Nations have been deeply involved in the furtherance of the cause of human rights ever since its inception.

Human Rights could thus be defined to be the rights of an individual and the interest to be protected collectively both at international and national level by the coordinated efforts with the intervention of the States in pursuance of intended objectives collective wisdom is utilized for formulating basic policies on a uniform
pattern which are given recognition jointly so as to adopt and enforce them in the form of so-called human rights and in this process even if there is any conflict of interest among various nations but it occupies insignificant position and having least regard to national boundaries, common consensus is arrived at for the purpose of upliftment of mankind, in general and for improving the lot of downtrodden masses, in particular. In this context, it could be rightly said that a man is a human-being first and foremost irrespective of where he is born to live and it is indeed a welcome development. The basic problem that arises concerning human right relates to their proper enforcement and this aspect varies today from State to State. This is indeed so because the first initial step in the direction of enforcement of human rights is very much confined to the national frontiers of the state where the individual resides. It would be certainly justified to presume that so far as the basic job of drafting the human rights is concerned, this job has been successfully accomplished by the efforts of member states of United Nations Organization but the basic problem has been the effective enforcement of human rights so as to eradicate poverty and improve standard of living of mankind, in general and the worker, in particular.

It is apparent that any concept of human rights which can be acceptable to the modern liberal democratic societies must fulfill two basic assumptions. First, the rights must be equal in an effective manner. Second, there must be an obligation on others to accept each notion of natural rights does not meet these requirements. Writing primarily in the concept of classical political philosophies Hobbe’s and Locke’s views on natural rights, Macpherson (68) explains this failure in the following manner: “The inability of either doctrine to meet our requirement is due to the same basic postulate about the nature of man and society; and it is this postulate which makes it impossible that any extension or reshaping of their concepts of natural rights could produce a new acceptable theory of human rights. Both writers imputed to the nature of society a permanent conflict of interest between individuals. Hobbe’s men necessarily sought power over other. Locke’s national men sought unlimited property which he assumed must be at the expense of others’. Thus classical liberalism, which lies at the heart of natural right tradition, cannot be acceptable to modern liberal

(68) Political Theory of Possessive Individual.
democratic as it rested on the sanctification of bourgeois self-interest. As Macpherson concludes “The natural rights concepts of Hobbes and Locke are not now generally acceptable, and no extension of them can be made generally acceptable, because of their possessive individualist postulates. Although these natural rights were supposed to express the human essence, and …. Were claimed in the name of human freedom, they are not now regarded as a sufficient statement of human essence or freedom, even in the countries where they originated.

The liberal democratic concept of human rights in the second half of the twentieth century has come to mean defense of the rights of the human being against abuses of power committed by the organs of the state with the help of institutionalized means. It also involves the promotion of the establishment of human living conditions and the overall development of the human personality.

What are the main contentions of the twentieth century human rights theory? Briefly stated, they are among others; First, the validity of human rights is established by specific legislation. The inherent dignity of human being is not sufficient. Thus the whole concept has acquired a juridical character; second, within the bourgeois legal system the human rights issue receive an extended treatment by two branches of law, i.e. constitutional and International Law; third, the human rights are vested in all individuals and only in individuals, not in professional groups, Social groups, communities, tribes, races, classes, castes, nations or other entities. Furthermore, a human being enjoys his or her human rights both as an individual and a citizen; fourth, the human rights concept remains immutably valid wherever human beings lead a collective life.

The above concept of human rights has been gaining wider significance and acceptance in the western liberal democratic countries who have reached the stage of advanced capitalism. As discussed above, liberal democratic theory of human rights has not been accepted both by the socialist countries as well as the developing countries. The socialist theory, whose roots are essentially traced back to Marx, has argued against the individualism of human rights theory. Making a scathing attack on natural rights concept, Marx in ‘On the Jewish question’ considers it as the
ideological expression bourgeois egoism and social atomization. “The so-called rights of man… are nothing but … the rights of egoistic man, of man separated from other man therefore, go beyond egoistic man, as a member of civil society, that is, an individual withdrawn into him, and separated from the community. Marx goes on to extend his basic postulate by emphasizing the necessary connection between bourgeois society and the notion of human rights.

Writing in the Holy Family, Marx and Engel (69) stated: “The recognition of the rights of man by the modern State has no other meaning than the recognition of slavery by the ancient state has slavery as its natural basis, the modern state has as its natural basis, civil society and the man of civil society, i.e. the individual man linked with other men only by the ties of private interest and unconscious natural necessity, the slave of labour for gain and of his own as well as other men’s selfish needs.

It follows that the very notion of human rights, according to Marx and Engels (70), is linked to the competitive struggle that is the hallmark of the bourgeois society and is based on vision of society and the individual as inherently separate and antagonistic units.

Human rights are thus viewed as instruments for carrying out adversary relations between competing, primarily atomistic individuals. Central to Marxism in its concern for human beings and the idea that man, stripped of ‘his human essence’ when he first fell into the class of the exploited, confronts the destruction of all humanity’ in him in a bourgeois society. The process of bourgeois exploitation, with its natural corollary ‘greed and the war between the greedy competition’ holds the entire society at the mercy of the market forces. It ‘estranges man from nature; from himself, his own active functioning from his universal, essence…. It makes his essence into a mere means for his existence … It estranges…. His spiritual, his human essence… it results in) the alienation of man from man’. Such kind of alienating, depersonalizing and dehumanizing impact of bourgeois system makes the whole context that Marx stated about communism that it is ‘the actual phase necessary for

the next stage of historical development in the process of human emancipation and recovery. Thus in a Communist Society, Marx argued in the critique of the Goha Program working class would enjoy the right to compensation for labour. In the early socialist stage the working class would contribute a quantity of labour and in return, would acquire a right to receive back a share of the social product exactly in proportion to its contribution in the production process. However, in the later phase of communism when subordination to the division of labour would be ended ‘only then come the narrow horizon of bourgeois right be crossed in its entirety and society inscribe on its banners’ from each according to his ability, to each according to his needs.

The liberal democratic theory of human has also invited criticism in the context of its application in the developing stages. Like the Marxist critique, one common theme in analysis of third world conceptions of human rights is the individualism of the human rights theory, its obsessive concern with the dignity of the individual, his worth, personal autonomy and property.’

Presenting a view from the periphery, Legesse (71) argues: If Africans were the sole authors of the Universal Declaration of Human Rights; they might have ranked the rights of communities above those of individual’s. What is true for Africa is also true for the Arab world. Writing of the predominantly Islamic societies Yaman (72) criticizes the western liberal democratic tradition as it, according to him, ‘is so overzealous in its defense of the individuals freedom, rights and dignity, that it overlooks the acts of some individuals in exercising

(71) Human rights in African political culture.
(72) Islamic law and contemporary issues.
individual centered and universalist philosophical premises of western liberal human rights concept. Legesse argues that ‘any system of ideas that claims to be universal must contain critical elements in its fabric that are avowedly of African, Latin American or Asian derivation’. In a similar vein, Cransion asks: How can the governments of those parts of Asia, Africa, and South America, where industrialization is hardly begun, be social rights … secured by fairly simple legislation. Since these rights are largely rights against government interference, the greatest effort will be directed towards restraining the government’s own executive arms. In essence, the western liberal democratic human rights concepts with its emphasis on the natural, inalienable and individualistic rights of human beings favour the empowerment of the state and its organs. The whole idea is that if the human beings are to be empowered to become able to enjoy the human rights, the state and its organs must be correspondingly disempowered. Such an idea if considered in the non-western context leads to an ‘acute’ and ‘real’ dilemma, especially if it gets too far fetched. As Upendra Baxi (73) argues “The notion of disempowerment makes sense. But should it be extended all the ways? Obviously not. Activists to ask that new laws may be made addressing the worst forms of violations of human rights in the civil society, usually associated with the most regressive forms of social behavior associated with a historic revival of religion, culture and ethnicity. Should there not be strict law and state action, for example, on sati, dowry, murders, sex-selective abortions through the abuse of amniocentesis techniques, nutritional sex discrimination which creates new forms of deferred female infanticide, child abuse, familial violence against women, atrocities against Dalits, exploitation be bounded, migrant and contract labour? The answer is yes. The difficulty with this answer is that it empowers the state. Baxi’s views held true for India as well as other developing countries where there has been wider agreement in favour of the acceptance of the inclusion of group or people’s rights along with the individualistic human rights. To quote Donnelly, (74)

(73) Development and right to development.
(74) Concept of human rights.
“Human Rights are held primarily by individual and they are exercised and claimed primarily in relation to Society, usually in the person of the state. People’s rights, though, are held by society (again in the form of state) and their operation. Such a concept of human rights which has become increasingly important in the ‘new states’ subscribe essentially to the populist general-will theory, whose roots are in Rousseau.”

It would appear to any discernible observer that the above third world concept of articulation between human rights and people’s rights may result into the marginalization of the sentinel character of human rights. However, one must understand that the unique social, economic and political structures of the developing countries make it imperative that a relatively autonomous ‘overdeveloped’ state has to play a pivotal role in maintaining human rights with the help of a relatively independent judiciary, while recognizing that the state is an instrument of the class domination, of disorganizing the sub-patterns, of fracturing their emergent unity, and disorienting the masses struggle for justice and rights. We have to retain state and its bourgeois legal system. “To renounce this …. Altogether is ….. to enfeeble the potential of controlling the privileges class deviance, which is far more difficult to combat than the deviance of the impoverished.

The solution of the above problem lies in the radical transformation of the society, state and economy which would be accompanied with a vision of counter-law, an alternate legality which will base itself on moralities, ideologies and practices, not merely different from but superior to those of the (existing bourgeois) state law. Until that is realized with the achievement of scientific socialism, the human rights movements in the developing states must not remain observed with the condemnation of state and its relatively autonomous legal system, of course, this does not mean that the repressive laws, agencies, ideology, actions, etc. of the state are not to be combated.
All of us belong to one family: mankind. Every member of our family has the same fundamental and equal rights. Each of us is entitled to have these rights respected and each of us has a responsibility to protect these rights for all others. Differences of race, sex, language and colour do not change these rights. Nor do differences of property, social origin, political ideas or religious beliefs. Every one regardless of who they are and what they do or think is born with human rights. It is worth mentioning here that the subject of human rights is of universal concept of human rights is that of the respect for human personality and its absolute worth regardless of colour, race, sex, religion or other considerations. These rights are essential for the full development of the human personality and for human happiness.

Woven into the warp and woof of human history, the concept of Human Rights has been a variable and dynamic one. It has in fact varied from generation to generation and evolved with the changing times and under the constantly shifting conditions. Even within the same Society, perception of what human rights are may vary from state to state. Human rights ought to be for all men and women, general and universal and not linked to any special positions.

What shall vary in different situations and at different points will be the extent of implementation and limitation of human rights and not the content or nature of the rights themselves. Human rights are rights both of individuals and of Society, of groups, of minorities and of majorities.

Javier Perez Culliar (75), a noble jurist said once “The recognition of inherent dignity and of equal and inalienable rights of all members of human family is the foundation of freedom, justice and peace in the world”.

Shree J. K. Mittal (76) has defined that human rights manifest in human nature and embrace the standard of life, liberty, equality and dignity of an individual.

---

(75) Speech in U. N. O. reported in Annual Report.
(76) Sovereignty of human right I. L. 1 Volume II, 1993, p. 16
The genesis of human rights is the up to like concept of natural rights traceable from the days of Greeks or even earlier”.

Dr. S. D. Sharma (77) the then President of India described about human rights as follows:

“It is important that, from very early times, thinkers and law-makers in our country had arrived at an extremely clear, specific and comprehensive understanding of the essential elements having a bearing on the life of the individual and his position in society, and also of the desirable relationship between the state and the individual. The most ancient literature that humanity possesses today --- the Rig Veda--- reveals the enlightened and refined treatment of key issues of important to human being – even in advanced stages of development of human Society.

Such an outlook of humanism, as well as of vigilance, regarding protection of human rights also accounted for the clarity with which Indian thinkers developed the concept of ‘Sarva Dharma Sambhav’ – providing the freedom of the individual to follow any of different streams of thought, expression, belief and religious preference. A magnificent expression of this approach comes to us from the great Mauryan Emperor Ashoka, whose stone edicts at Shahbazarhi, Kalst and Girnar bear the imprint of enlightened philosophy and good law. It is evident that such initiatives followed the realization that it was absolutely essential to recognize and enforce certain rights of the individual if a well-ordered society were to be brought into existence.

I would like to mention with emphasis that the linkage between axioms of law and the lives of individuals is a crucial internal element in organized society. It is this element which reflects how abstract ideas determine the actual lives of the people. The judiciary has thus a position of far-reaching significance in the context, particularly bearing in mind the fact that we follow the common law system.

(77) The democratic process. pp. 102-03.
It is a happy feature that human rights declared under the Universal Declaration are no longer the subject of guarantee only of individual nations but are guaranteed by the United Nations for all human beings. Appropriately the process appears to be evolving towards a mandate which may be called the ‘common law of mankind’ and of the world which Pr. Jawaharlal Nehru often spoke of one world which as he said “could no longer be split into isolated fragments”, because “Peace has been said to be indivisible, so it freedom, so is prosperity”.

Jawahar Lal Nehru said. (78)

“Hence appropriately the process appears to be evolving towards a mandate which may be called the common law of mankind and of the one world which could no longer be split into isolated fragments because peace has been said to be indivisible, so it freedom, so it prosperity.”

Security General U. N. O. Baoutrous Gali has highlighted the importance of them in meeting the needs of human rights developments. He has also described that human rights may be said to be rights that are inherent in people by virtue of being human beings, the rights that are absolutely essential for full and complete development of human personality. Generally, two categories of human rights are recognized namely civil and political rights and economic, cultural and social rights. However, third category has also come up but has as yet not been fully established that includes rights to development, right to common heritage of mankind, etc. These rights have been forcefully advocated by developing countries.

Hence, it may be concluded that human right is not a new issue. Human right has now been taken by all in a much broader sense. There are various aspects of human rights. Along with disarmament and development, human beings are essential part of the total and holistic peace and human dignity. We mean not only civil and political rights, but the right to live with all the basic, economic, social and cultural rights of fullness, freedom, including religious freedom.

(78) Selected Speech.
The human right signifies both rights and duties which are inter-linked. The term “Human Rights” means being argued as vital for a democratic society, but also an economic, social and cultural rights as well as the rights are essential component of sustainable development and therefore not possible without respect of human rights. Respect of human rights makes freedom meaningful. Human rights are meaningless in an environment of poverty and deprivation. Human rights are above politics. They are part and parcel of life in society and they concern humanity. Human rights necessarily signify human values in an absolute sense; but they have greater relevance to the real well-being of the individual if they are applied in the context of society. The human rights are sign and symbol of human development and peace. The whole fabric of society cannot run smoothly, and there could be many changes of crimes and disturbances in the society. The protection of human rights is a constant struggle which cannot be won unless every man and woman participates in it.

In real practice the human rights is the sum of all rights necessary to ensure our rights to be human and it is the duty of all peoples and governments to create the condition headed to exercise our right to be human.

Let us conclude few basic essentials to qualify a particular right to be human rights. These essentials may be counted as follows:

1. It is a right of individual or group of individuals.
2. It can only be executed in a Society for and against state by individual or groups.
3. These rights are inalienable and human beings are entitled to them by birth.
4. It is a permanent universal and legal concept in all spheres of life.
5. These rights are meant to uphold human dignity and equality and to set forth liberty and fraternity to all without any kind of discrimination to all needy.
6. These rights are minimum requirements for survival of mankind or human beings in Societies.
7. These rights are protected and enforced by the Authority of society or state at all levels.

In brief, “human rights comprise rights of individual or groups in a society in all spheres of life since inception up to the last, i.e. from birth to death. They may be exercised individually or collectively.” No specific set of rights can be created universally. These may differ from time to time and place to place, but their applicability is universal. Hence, human rights are “those minimum set of rights of a mankind available in all spheres of life to all individual or groups of Societies individually or collectively which is expected to be permanently inalienable since berth up to last of man or society for the purposes of survival or benefit of mankind, individual or society.”

2.26 SOURCES OF HUMAN RIGHTS

However useful the above approaches may be, the justificatory questions remains what are the sources, if any of human rights claims, what is their scope or content and how do they relate to one another? Such questions have been the concern of every scheme of jurisprudential thought, theological, natural law, positivist, historical, utilitarian, social science, realist etc. Each theory contributes insight. We examine here few of them which are more pertinent to the development of human rights.

2.26.1 RELIGION

Christianism/Judaism

The term human right is not found in traditional religious> Nonetheless, theology presents the basis for a human rights theory stemming from a law higher than State and whose source is the Supreme Being.
If one accepts the premises of Old Testament and Adam was created in the image of God, this implies that the divine stamp gives human beings a high value of worth. An appealing expression of this comes from the Talmud: A man may coin several coins with the same matrix and all will be similar, but the Kind of Kings the Almighty, has coined every man with the same matrix of Adam and is similar to the other. Therefore, every man ought to say the whole world has been created for me Sanhedrin.

Also it is said that a common father gives rise to common humanity and from this flows a universality of certain rights. Example: Bible prescribes various human rights concepts such as: limitation on slavery (Exodus 21:2): justice to the poor (Isaih 1:16-17); fair treatment to strangers (Leviticus: 23:22); racial equality (Amos 9:7); protection of labour (Deuteronomy 23:25-26).

Since rights stem from divine sources they are inalienable by moral authority. There is a positive aspect to divine order since obedience derives from one’s duty to God. Since duties are ordered by God, those duties accrue to the individual benefit and therefore it should not be violated by the State Bible has many examples where prophets have denounced their rulers because of departing from the divine law detriment to the individuals. Similar concepts are found in many religions, which give rights to revolt.

It appears that from the common fatherhood of man, equality of all human beings before him is pertinent. But equality is subject to various interpretations, which might have given some religions to justify slavery.

Islam

Scholars like Nadri (79) and Tabendeh (80) claim, that contemporary human rights doctrines merely give recognition to the 1400 year-old Islamic ideas. Islam has

---

laid down some universal fundamental rights for humanity as a whole, which are to be observed and respected under all circumstances… fundamental rights for every man by virtue of his status as a human being.\(^{(81)}\) Khalid Ishaque, argues that – Muslims are enjoined constantly to seek ways and means to assure to each other what in modern parlance we call human rights.

He formulates following fundamental rights contemplated in Quran:


In Islam, human rights are concerned with dignity of the individual, the level of self-esteem that secures personal identity and promotes human community.\(^{(83)}\) Islam recognizes freedom in the context of community of Islam recognizes freedom in the context of Community of Islam. “Individual possesses certain obligation towards God, fellow humans and nature, all of which are delineated by the Sharaiah. As a result of fulfilling these obligations, individuals gain certain rights and freedoms that are again out-lived by Divine law. The essential characteristic of human rights in Islam is that they constitute obligations connected with the Divine and derive their force from this connection.

**Hinduism**

In the Hindu Philosophical thought, the concept of ‘Dharma’ pervades throughout and law is considered as a branch of Dharma. According to Manu, Dharma is what is followed by those learnt in Vedas and what is approved by conscience of the virtuous that exempts from hatred are and inordinate affected.\(^{(84)}\)

\(^{(83)}\) Abdul Aziz Said, “Precepts and Practice of Human Rights in Islam”, Universal.\(^{(84)}\) Manusmriti II I.
Dharma signifies a sum of religious, moral, social and legal duties. Sages throughout have emphasized duties of in all walks of life. Duties of kings, priests, parents, warriors, peasants, servants. This doctrine of duty is the same as taught in Bhagavadgita 18, 45, 46 a person secures the highest perfection (emancipation) by being intent on carrying out the duties appropriate to him, a man, secures perfection by worshipping with the performance his peculiar duties appropriate to him. (85)

Since Dharma is all pervasive, the Hindu Jutice propounded the theory of supremacy of the law -- the sovereignty of law and not the sovereignty of king. In the Satapatha Brahman it is said “since law is the Kind of Kings, far more powerful and rigid that they, nothing can be mightier than the law by whose aid, as by that of the highest monarch, even the weak may prevail over the strong”, kings were not law makers by law enforcers. (86)

Thereby recognizing a higher law than the king made. This higher law was revealed law, related to sages who had communion with God, which has come to us in the form of Vedas. Thus the very concept that there is higher law, give citizens certain rights and as right to revolt or right to disobey if king’s law is unjust and king’s act are detrimental to people.

Since law was not separated from religion it is obvious that, Hindu Philosophy spoke of “righteousness” in terms of law and law in terms of righteousness. Certain virtues were necessary for good life. In fact “Sadacharas” behavior or usages of good men furnished a criterion for asserting nature of approved conduct. They were also treated as one of the sources of law. Hindu sages thus propounded the following freedoms and virtues:

1. Freedom from Violence (Ahimsa)
2. Freedom from Wants (Asatya)
3. Freedom from Exploitation (Aparigraha)
4. Freedom from Violation or Dishonor (Avyabhichara)

(5) Freedom from early Death and Diseases (Amritva and Arogya)

The five individual possessions or virtues are:

(a) Absence of Intolerance (Akrosha)
(b) Compassion for fellow being (Butadaya, Adreha)
(c) Knowledge (Indian Vidya)
(d) Freedom of Thought and Conscience (Satya Suntra)
(e) Despair (Pravrtti, Abheya, Dhriti) *(87)*

Hindu believes that soul is immortal and there is a chain of birth and rebirth and attaining salvation breaks the chain. Birth in human form is an opportunity for an individual to liberate himself from the bondage of birth and rebirth, till one attains moksha.

The Bhagavadgita, one of the most sacred texts, prescribes karma marg (action-path) as one of the ways to liberate oneself, which emphasizes on one’s duties appropriate to one’s person. Duties prescribed were towards God, towards fellow human beings.

As observed above, Religions usually prescribed various duties and obligations, which limits individual freedom. Religions seem to be attractive when human beings are visualized in God’s image for it gives rise to the concept of equality. But historically, concept of equality has been varied and subject to interpretations. We see justifications on slavery, women considered as half worth of man, and status of ‘high’ and ‘low’, prevailed in religions. These are opposed to the modern ideas of human rights. But the concept of human beings created in the image of God certainly endows men and women with a worth and dignity from which certain rights can flow.

2.26.2 Natural Law – The Autonomous Individual

In contemporary sense, human rights correspond to the nature of man and of human society, to his psychology and its sociology. This is evident in the language of the principal international instruments: Rights derive from the inherent dignity of the human person. Recognition… of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world. Respect, for and observance of human rights will help create conditions of stability and well being. Because of this reflection, many writers simply take human rights today as a reinstatement of much older doctrine of natural law, and remains one of the most powerful concepts to motivate juristic, social, political and philosophical thought. Modern States incorporate in their Constitutions of concept of natural (human) rights.

Conceptions of Natural Law

Natural Law thinking has occupied a pervasive role in the realms of ethics, politics and law from time of Greek civilization. At some periods its appeal may have been essentially religious or supernatural; in modern times it has formed an important weapon in political and legal ideology. Essentially, it has afforded a moral justification for existing, social and economic systems and their legal systems. By arguing that what “is” the law is based on higher law dictated by reason and so is also what the law “ought” to be, positive law is thought to acquire a sanctity that put it beyond question.

With 2500 years of history it is not surprising that the question what is natural law? provokes so many different answers. The expressions ‘natural law’ has continuity, does not mean that the concept has remained static. It has had different meanings and has served different purposes. There have been different doctrines of natural law, yet what has remained constant is an assertion that there are principles of natural law.

Views as to the content of these principles have sometimes diverged but the essence of natural law may be said to lie in the constant assertion that there are objective moral principles, which can be discovered by reason. These principles constitute the natural law. This is valid necessity because the rules governing correct human conduct are logically connected with immanent truths concerning human nature. Natural law is believed to be a rational foundation for moral judgment.

**Objective Moral Principles**

The central notion is that there exists an objective moral principle which depends on the essential nature of the universe and which can be discovered by natural reason, and that ordinary human law is only truly law in so far as it conforms to these principles. These principles of justice and morality constitute the natural law, which is valid of necessity, because the rules for human conduct are logically connected with truths concerning human nature. This connection enables us to ascertain the principles of natural law by reason and common sense. *(92)*

**“Is” and “Ought”**

One of the principle obstacles which natural law must surmount centers about the problem where moral propositions can be derived from propositions of fact, whether an “Ought” can be deducted from an “Is”.*(93)* A leading contemporary natural lawyer, Finnis, denies the natural law attempts to “make this illicit transition.” Bridging the gap between “is” and “ought” remains a critical problem. Of course, it is understandable why natural lawyer should wish to derive normative proposition from factual statement. Factual statements (Water boils at 100°C for e.g.) are verifiable; moral judgments (capital punishment is the right punishment for murder), cannot be proved; in the same way, if at all we differ, we may differ over the latter but not over the former. So, if moral proposition could be deducted from factual statements, we

(93) Supra note 41, page 80.*
would be able to set up moral truths, which focused by natural lawyers on the questions of how to get from “is” to “ought” without making an unacceptable logical inference. (94)

One way in which natural law seeks to do this is by arguing that if it is a natural law for men to act in a particular way (this it is argued can be discovered by observation of his behavior patterns) then he ought morally to act in this way. (95) For e. g. it is a natural law for making mankind to reproduce itself, therefore mankind ought to do so and it would be contrary to this natural law for human beings not to produce children.

Another way to justify the view that therefore immanent norms and value in the nature of things is to consider nature teleological. To Aristotle and his followers' natural process tended towards pre-determined ends like acorns grew into oaks, et. In doing this, they fulfilled their natural functions. Man, too according to this view had its own proper function which could be discovered by reason and thought.

DEVELOPMENT OF NATURAL LAW

I. The Greeks, Romans and Stoics

It begins with the Greeks discovery of idea of nature, by opposing what belonged to people naturally – by virtue of their instincts or their creativity in harmony with instinct, or their final purpose – to the Convention that they happen to have established. (96) The Greeks construed that an ideal world constructed on rational principles from a theory of nature, could be set alongside the real one, permitting criticism of the mundane and not mere conformity to what was customary, and that it meant, what was general, common to all societies because common to all natures, could be set apart from what was particular, relative, to the several societies of the world. (97) The substance being the denial of absoluteness of the State and of its unconditional claim to obedience, the assertion of the value and of the freedom of the

individual as against the State. The anguished defense, which Sophocles put in the
month of the Antigone has often and justly quoted in this connection: She may have
transgressed Creons decree, but she did not overstep the law of Zeus not the eternal
precepts of justice. This in issue is the assertion of the claim of the individual to be
governed by a state of conduct superior to the arbitrary decree of the earthly authority.

Politically, only the citizens of the city – State less than fifty per cent of Athens
population were the beneficiaries of natural law, in their defense of such inequalities.
Plato and Aristotle introduced numerous definitions of equality, which were key
elements (perhaps even today); equal respect for all citizens (isotomia) equality before
law (isonomia), equality in political power (isokratia), and in suffrage (isopsaphia)
and equality of civil rights (isopoliteria). The natural law principles were believed to
be norms of various social relations.

This concept of equality was broadened by Stoic and Roman thought. The
Stoics in writings of Seneca accepted “that virtue can be attained both by slave and
the free, and that slavery affects the body only, while the mind is of necessity the
slaves own and cannot be given in bondage. the same thought also contained in
the works of Roman Jurists, Cicero and Ulpian. Ulpian taught that whatever may be
the position of slave in civil law this is not so by natural law, for by it all men are
equal. This equality of rights remain incomplete unless their recognition is supported
by twin sanction of law of nature and law of nations, or equality of men is imperfect
unless apprehended as part of an international order. It is here it may be noted the
idea of equality moves to universal system of laws, and it is in this sense that Seneca
insisted that all men are akin by nature which are formed them of same elements and
placed them in the same world for the same ends. To the same effect Marcus Aurelius
elaborated, the common possession of reason is synonymous with the necessity of a
common law that common law makes fellow citizens of all men. Cicero described
these rules of natural law as of universal applicable, unchanging and everlasting one
eternal and unchangeable law valid for all nations for all times This single definition
because all have received the gift of right reason.

---

(99) Ibid, p. 81.
(100) Supra note 45, p. 10.
(101) Supra note 48, p. 83.
(102) Ibid, p. 94.
(103) Ibid, p. 94.
(104) Supra note 41, p. 21.
Thus with Stoics, Greeks and Romans, it was natural law, as lying behind and above all positive law, which was the transcending authority delimiting the earthy power of State in relation to the individual.

II. The Middle Ages

There is striking continuity of thought between Stoics and the most representative literature of middle ages, in the affirmation of the principles of the higher law – which is the law of nature – as source of the rights of freedoms and of Government by consent. Reproducing the Central Roman idea St. Thomas Aquinas defined Natural law as “the participation in the eternal law of the mind of rational creature.” this, then, according to

Aquinas, is subject to higher law, which determines relations of individual and State. From this concept there flowed certain rights, which included right to Government by consent, the right to freedom from taxation without representation and right to freedom from arbitrary physical constraints. This law of nature, continued to be invoked as authority for the subjection of rulers to the principles of justice, for the sanctity of human personality and for the right of the individuals to defend himself against the abuses of absolutism by rebellion and by tyrannicide if need be.

III. 17th Century

In the 17th Century the further impetus to natural law doctrine was given by Grotius and Pufendorf, who detached natural law from religion laying the groundwork for the secular, rationalistic version of modern natural law. In his effort to present abuse of political power by religious zealots, Grotius developed a non-empirical ‘scientific’ method to justify rationally the provision of the positive law. His

model confirmed to the axiomatic character of geometry in that, a set of deducible propositions yielded the self-evident foundations of a universal immutable order. Thus natural laws are held to be ‘so unalterable that God Himself (could) not change it, yet it could be known through faculty of human reason.’(111) Grotius defined Natural law in ‘De Jure Belli Ae Pacis’ as ‘a dictate of right reason’, which points out that an act according to it ‘is’ or ‘is not’ in conformity with national nature has in it a quality of moral baseness or moral necessity(112) It should be noted here that Grotius is held as father of modern international law. He showed law of nations as embodying both laws, which had as their source the will of man (as distinguish from immutable principles), and laws derived from the principle of the law of the nature. This theory has immense importance for the status of legitimacy of human rights as part of the system of international law.

Natural law to Natural Rights

Natural law theory led to Natural rights theory. The chief exponent of this was John Locke, who taught that natural law can be understood as protective of the subjective interest and rights of individual persons.(113) In ‘Second Treatise of Civil Government’ he writes ‘an order of universe such as an all powerful and wise God created with the intention of enabling man to exist there is in... this order is reasonable, and man is by nature endowed with enough freedom to become a man in conformity with his law.’(114) This law in shape of reason, obliges every man to preserve his life and limits his liberty and possession, and to be active in rendering the same service to others. It wills peace and preservation of all mankind. For every man his original liberty as meaning only by reference to this law.(115) It is in this connection between man’s liberty and law, between liberty and obligation that the idea of natural right emerges This liberty is natural to man, to which man is obliged by his law cannot fail, to a natural right of man, to which man is obliged by his law cannot fail, to a natural right of man, a birthright. It is a right without which a the law

---

of nature and obligation which it imposes would have no meaning. The natural right of man then, is a right of freedom, a right to freedom; freedom of will and liberty of acting according to a law of nature, freedom from any other power/authority any other will on earth, freedom from all constraint and all violence, freedom to preserve by one’s own efforts, one’s life, one’s health, one’s liberty and one’s property.\(^{(116)}\)

Through this he established that individual possess by nature, the right to life, liberty and property. He argued that the mechanism of social contract (the implicit voluntary social union of all individuals) justifies the role of the society as preserver of the individual’s natural rights as well as the institution Government, as executors of such rights in society.

### IV. 18\(^{th}\) Century

In the lineage and development of human rights, in 18\(^{th}\) Century, views of Immanuel Kant and Jean Rousseau figure prominently.\(^{(117)}\) Kant followed same tradition of rationalism as Grotius and Locke in its appeal to a formal, non-empirical system of reason and its support of the freewill of rational individual as upheld through liberal ideas of American and French Revolution. He sought to establish his theory through ‘a priori’ principles: unconditional, universal and imperative maxims. He saw absolute moral good to be the virtuous will of rational individual formalized by the categorical imperative – a term he used on three levels to specify the moral law governing the actions of this will. On the first level is specific acts of duty, on second level, rules to define these duties and on third level he specified formulas of freedom and responsibility as distinct from law of physical necessity, accordingly, persons were regarded as inherently free to choose moral law.\(^{(118)}\) His social order was union of rational, self-determining beings, the moral laws that would bend them could not be based on pragmatism or considerations of pure consequence, but rather would be logical and a priori, as would the moral acts or duties specified by those laws. It was this view that leads to the claim that natural rights are self evident.\(^{(119)}\)

For Rousseau on the other hand, human right was ultimately grounded in the ‘general will’ of society, externalized in the sovereign. Rights were considered private and originating in society not nature. For him individual rights would predominate only when people obeyed the laws of society – the issue of ‘general will’. He linked sovereignty with ‘General will’ and rights of individuals to a collective general will (in rebuttal to Locke).\(^{(120)}\)

This contrasting positions of Kant and Rousseau exhibit development of two human rights principles of freedom and equality. Right of individual and Society (This dichotomy between rights of individuals and society, led to serious dialectical tension, eventually leading reformulating in Political terms as individualism (Liberalism) versus collectivism (Marxist Socialism).

V. 19\(^{th}\) Century

In 19\(^{th}\) Century there was breach to the doctrine of natural rights, the reason being attributed to the failure of French Revolution and new social forces that were rapidly transforming the society; the triumphs of science, growth of capitalism, conflicts between working and commercial classes etc. While Hegel held that natural right ‘far from being moral standard, was really a characteristic of more primitive level of morality and politics making personal individuality of peoples of nations’. Bentham the utilitarian reformer argued ‘individual natural rights’ had force only if recognized by conventional law, otherwise they would be merely rhetorical, unless reinforced by law, and they are pointless.\(^{(121)}\) Liberalist Mill based human rights on a dynamic theory of individualism, holding at first that such rights are best respected when individuals are left alone (Lessez Faire) and later postulating ‘a social welfare’ function of Government to replace the non-interference function. Major contribution of 19\(^{th}\) Century was Socialism, which is discussed later.

\(^{(120)}\) Ibid, p. 14  \(^{(121)}\) Ibid, p. 16
VI. Twentieth Century Revival of Natural Law

From the middle of 19th Century to the beginning of 20th Century the theory of natural law, was at low ebb, largely due to historical-evolutionary interpretation and by legal positivism. The 20th century however witnessed a revival of natural law thinking. Some of the major contributors are briefly discussed below.

Rudolf Stammler (1856-1938) Stammler was convinced that human beings bring to the cognitive perception of phenomenon certain a peiori categories and forms of understanding which have not obtained through the observation of the reality. He taught that there exist in the human mind pure forms of thinking enabling men to understand the notion of law apart from and independently of, the concrete and variable manifestation in which law has made its appearance in history. For Stammler ‘law is the inviolable and autocratic collective will.’ Since it is expression of collective will, once law is established it is binding irrespective of citizens' inclination to follow them.

Stammler distinguishes between ‘concept of law’ and ‘idea of law’. Idea of law is the realization of justice. And justice postulates that all legal efforts be directed towards the goal of attaining the most perfect harmony of social life. Such harmony is to be brought about by adjusting individual desires to the desire of community.

Del Vecchio (1878-1970) The Italian legal philosopher says ‘Natural law is … the criterion which permits us to evaluate Positive law and to measure its intrinsic justice.’ He derives natural law from the nature of man as rational being. Respect for the autonomy of the human personality is to him the basis of justice. Every human being many demand from his fellow men, that he should not be treated as a mere instrument or object.

The absolute value of person, equal liberty of all men, the right of each of the associates to be an active participant in legislation, liberty at conscience and … the true substance of … “juris naturalis scientia”.
Dev Vecohio holds that State can extend its regulatory powers over all aspects of human social life, and it is its highest function to promote the well being of society. Every act of State has for its basis the general will. Yet he recognizes the right to resistance against the commands of power in extreme cases in which these commands come into irreconcilable conflict with most primordial and elementary requirements of natural law and justice.

**Gustav Radbruch (1878-1949)**

This German philosopher revised his earlier philosophy after the fall of Germany in Second World War. He expresses that there exist certain absolute postulates, which the law must fulfill in order to deserve its name. Law, he declared, requires some recognition of individual freedom and a complete denial of individual rights by the State in absolutely a false law.

His earlier view was that in case of conflict between justice and legal certainty, the positive law must prevail. After fall of Germany, he agreed that legal positivism had left Germany defenseless against the abuse of Nazi regime and that it was necessary to recognize situation where a totally unjust law must give way to justice. His revised formula reads as follows ‘preference should be given to the rule of positive law, supported as it is by due enactment and a state power, even when the rule is unjust and contrary to the general welfare, unless the violation of justice reaches intolerable degree that the rule becomes in effect ‘lawless law’ and must therefore field to justice.

**Jean Dabin (b. 1889)**

According to Jean Dabin, law of nature is deduced from the nature of man as it reveals itself in the basic inclination of that nature under the control of reason. As human nature is identical in people everywhere, the precepts of natural law, universal in spite of historical, geographical, cultural, and other such variations, One of the precepts of natural law is concerned with the good of society, which is the purpose of
State and Law. The ends of legal regulation are justice and public good, and public
good embraces the totality of human values.

Dabin’s theory of justice contemplates three different forms of justice. Commutative justice, aimed at proper adjustment of relations of private individuals, particularly by means of legal remedies designed to award damages is contract and tort eases, restore stolen or lost property etc. Distributive justice determines what is due from collectivity to its members it governs the legislative distribution of rights, powers, honors and rewards. Legal justice is the virtue most necessary to the public good precisely because its object is the public good.

**Leon Duguit (1859-1928)**

This French Jurist’s theory on natural law has strong overtures of sociology, diametrically opposed to other natural law doctrine. Duguit repudiates any natural or inalienable rights of Individuals. His theory is: every individual has a certain task to perform in the society, and his obligation to perform this function may be enforced by law. The only right, which any man might be said to possess under this theory, is often said that of Locke stood on its head’.

For Duguit, the function of law is realization of social solidarity. The fact of social solidarity is not disputed and in truth cannot be disputed; it is a fact of observation, which cannot be the object of controversy Solidarity is a permanent fact, always identical in itself, the irreducible constitutive element of every social group.\(^{(122)}\) Duguit perceived social solidarity as a fundamental fact of human coexistence.

\(^{(122)}\) Duguit, “Objective Law”, 20 Col. L. Rev, (1920), 817 at 830
Lon Fuller (b. 1902)

For Fuller, law is a collaborative effort to satisfy, or aid satisfying the common needs of man. According to Fuller, the integrity of law is determined permanently by the process, which it uses in order to accomplish its goals. The morality that makes a law possible requires the satisfaction of eight conditions, which may be summarized as follows: (1) these must be rules formed to guide particular actions; (2) these rules must be made known to the public, or at least to all those to whom they are addressed; (3) the rules should, in most instances be prospective rather than retroactive; (4) they should be clear and comprehensible; (5) they should not be inconsistent with one another; (6) they should not require the impossible; (7) they should be reasonably stable; (8) there should be congruence between the rules as announced and their actual administration. Fuller says these eight canons were the procedural versions of natural law. A failure to satisfy any one of the above, Fuller says is something that it is not properly called a legal system at all, except perhaps in the Pickwick ion sense in which a void contract can still be said to be one kind of contract.

Filmer Northrop (b. 1893)

According to Northrop, the positive law enacted by state should be tested with respect to its conformity with the living law or people or culture. Only a positive law, which meets the social and legal needs of the people and is, in general, accepted and acted upon by them, can function as an effective legal system.

The laws of different nations are not uniform but pluralistic and widely divergent. The criterion of virtue and sin for culture and culture man, according to him is the truth or falsity of the philosophy of nature and natural man underlying a culture. This philosophy of nature and natural man with natural law, which in his view includes the introspected or sensed raw data antecedent to all theory and all culture given in anyone’s experience in any culture.

(125) Ibid, p. 254
Northrop is of the opinion that natural law of modern world cannot be based either on Aristotleion.Thomistic conception of this law or on the natural rights philosophy of Locke and Jefferson. It must be grounded on the conception of nature and natural man supplied by modern physics, biology and other natural sciences. He insists on building an effective international law to secure the survival of mankind, based on scientific foundation the natural law provides. Only a true universal law can mitigate and alleviate the hostility and tensions endangered by living pluralism of present world. \(^{(126)}\)

Thus as can be seen, in the present century, the philosophers do not wear the same metaphysical dress as early expounders did. They adopt a qualified approach in that they identify the values which have eternal aspects. The much revived natural rights thought can be viewed as attempts to work out principles which might reconcile the ‘is’ and ‘ought’. There is large variety of presentations but all appear to conclude that a minimum absolute or core postulate of any just system of rights must include some recognition of the value of individual freedom or autonomy.

Even most positivist philosophers seen now to have conceded that unless the idea of moral non-legal right is admitted, no account of justice as a district segment of morality can be given. Prof. Hart, while defending positivism, has evolved the initial dimensions of a rights theory. Starting with the modest ‘a priori’ proposition that survival is the central indisputable element which gives empirical good sense to the theory of Natural law, he argues “If there are any moral rights at all, it follows that there is atleast one natural right, the equal rights of all men to be free.”\(^{(127)}\) By this he means that ‘any human being capable of choice (1) has the right to forbearance on the part of all others from the use of coercion or restrain against him save to hinder coercion or restrain; and (2) is at liberty to do any action which is not coercing or restraining or designed to injure other persons. He has two reasons for this: (1) This right is one which all men have if they are capable of choice, they have qua men and only if they are members of some society or stand in some special relation to each

other. (2) This right is not created or conferred by man’s voluntary action, other moral rights are.\(^{(128)}\)

Hart sees this right to be ‘free’ as one, which is logically presupposed when other types of rights are invoked. That is without the presupposition of the right of freedom, the important segment of our moral scheme would have to be relinquished and various political rights and responsibilities could not exist. The other Natural core theories appear in works of philosophers John Rawls and Alan Gewirth. Both build on Kants intuitions that the central focus of morality is personhood, namely the capacity to take responsibility as a free and rational agent for one’s systems of ends. Another way of putting it is that rights flow from the autonomy of the individual in choosing his or her ends.\(^{(129)}\) Some others natural law theories of that by John Rawls, Edmund Cahn, Laswell and Chen, are dealt later in the chapter, under ‘Modern Theories’.

\[2.26.3\] POSITIVISM – THE AUTHORITY OF STATE

The philosophy of legal positivism came to dominate legal theory during most of the Nineteenth century. It represented a reaction against the ‘a priori’ methods adopted by the preceding Natural law thinkers. The prevailing Natural law theories share a common feature of turning away relation of actual law in order to discover in nature or principles of universal validity. Actual laws were then explained or condemned according to these canons. Natural law failed to satisfy the ‘critical spirit’ in the age of scientific learning.

The term positivism has many meanings. The tabulation by Professor Hari \(^{(130)}\) is as follows:

1. Law as commands (Austin and Bentham)
2. The analysis of legal concepts is (a) worth pursuing (b) distinct from sociological and historical enquiries (c) distinct from critical evaluation
3. Decision can be deducted logically from predetermined rules without recourse to social aims, policy or morality

4. Moral judgments cannot be established or defended by rational arguments, evidence or proof.

5. The law is actually laid down. It has to be kept separate from the law that ought to be.

The first and fifth meanings are more relevant to our understanding in the light of human rights. According to Austin ‘law is command’. The laws of a society are the general commands of the sovereign – the supreme political authority --- to govern the conduct of the society’s members. The sovereign is that individual or determinate group of individuals (a) towards whom the bulk of the society has a habit of obedience and (b) who is in turn not habitually obedient to anyone. A command of the sovereign (a law) imposes an obligation or duty on the persons who are directed to act or not to act in a certain way.\(^{(131)}\)

According to Austin, ‘If command is ’ that the party to whom it is directed is liable to evil from the other, in case he does comply ‘Commands’ are orders backed by threats. It is in the virtue of threatened evils, sanctions that expressions of desire not only constitute commands but also impose an obligation or duty to act in the prescribed way.

Because International Law lacked the main ingredient of sanction, he puts International law under the positive morality and not law. That is the rules of International law are not law but merely rules of positive morality set or imposed by opinion. In this sense the Human Rights Declaration, Covenants all become mere moral postulates and not law.

According to Austin, the Sovereign must be illimitable, indivisible and continuous. Austin defines Sovereignty as if a determinate human superior not in the habit of obedience to a like superior, receives habitual obedience from the bulk of a given society, that determinate superior is sovereign in that society and the

\(^{(131)}\)Golding Martin, “Philosophy of Law”, (Prentice Hall, New Jersey, 1975), p
society (including the superior) is a society political and independent. ‘This places supremacy of national sovereignty, which in turn produces the view that individual has no status in International law, or individuals are not the subject of International law.’ The fifth meaning is that law is as it is actually laid down, it had to be kept separate from the laws ought to be.

Much Refinement to the positivist philosophy is done by an influential moral philosopher Prof. H.L.A. Hart. Hart argues that Austin’s analysis confuses having an obligation to do something with being obliged (forced) to do it. When a Gunman sticks a gun on my back and says ‘handover your wallet’ he has issued an order backed by threat, I might describe this situation by saying that I was obliged – had no choice but to handover my wallet, but I would hardly say that I had an obligation to do so. Hart also points out that whether someone has an obligation on particular occasion is independent of the likelihood of his incurring the threatened evil on the particular occasion. The connection between sanctions of coercion and obligation therefore is not to be explained by the law makers' use of force, threatened or actual. For this still leaves us at the level of being obliged rather than having an obligation. What are required instead, according to Hart, are rules that confer authority or power on persons to prescribe behavior and to visit breaches of the prescriptions with the appropriate evils.\(^{(132)}\)

The rules he says may be primary and secondary. Under primary rules human beings are required to do or abstain from certain actions whether they wish or not. Secondary rules provide that human beings may by doing or saying certain things may introduce new rules of primary type, extinguish or modify old rules. Primary rules impose duties. Secondary rules confer powers, public or private. Primary rules concern actions improving physical movement of changes. Secondary rules provide for operations, which lead not merely to physical movement or change but to the creation or variation of duties or obligations,\(^{(133)}\) the union of primary and secondary rules constitutes the core of Legal system.


Hart finds two major differences between municipal law and international law. One is that the subjects of international law are primarily States and disparity in strength between them for exceeds that between individuals and society. The second difference is, whereas Courts have criteria in municipal order to identify law there are no criteria to International Law.

Hart finds the authority for the rules of law in the background of legal standards that have been recognized and accepted by the community for that Government. This legitimizes the decisions of the Government and gives them the warp and woof of obligation that the naked commands of classical positivism lacked. (134)

Yet, when Harts theory is applied to bad laws (e.g. Nazi purification laws) Hart does not say ‘This is law’ but, rather ‘but it is too iniquitous to obey.’ (135) In short he argues for concept of law, which allows the invalidity of law to be distinguished from its morality. This is the basic difference.

2.26.4 THE SOCIOLOGICAL APPROACH

The beginning of 20th century saw rapid development in natural and social sciences, which increased the understanding about people and their cultures, their interest. The notion that importance of the society should be considered in the light of the individuals and vice versa were the concern of some moral legal philosophers. The approached made from this view is called sociological approach, or what has been called as the sociological school of jurisprudence.

The sociological school tends to move away from both ‘a priori’ theories and analytical types of jurisprudence.

(134) Meron, Op cit p. 81
This approach so far as human rights are concerned, it directs attention to the questions of institutional development aimed at classifying behavioural dimension of law and society, focuses on the problems of public policy and identifies the empirical components of human rights in the context of social process.

This approach was mainly built on Williams Jane’s pragmatic principle that ‘the essence of good is simply to satisfy a demand’. This approach also was related to 20th century society’s increase in wants beyond civil and political liberties – such as help for unemployed, handicapped, privilege for minorities etc.

The first serious attempt to apply the scientific method to social phenomenon was made by Auguste Comte (1789-1857) who invented the term sociology. Further impetus to the development was given by Darwinian evolutionary theory and enabled it to be linked with the ideology of Lessaiz faire in economic and social affair. Thus for Hebert Spencer (1820-1903) evolution was the key to the understanding of human progress and legal and social development. Jhering (1818-1989) placed greater emphases on the function of laws as an instrument for serving the needs of human society. He identified that in a society there is a conflict between social interests of man and each individual’s selfish interest. To reconcile this conflict, state employs coercion. Law was looked as a form of coercion organized by the State.

Rudolf Ihering (1818-1898)

According to Ihering ‘law is but a part of human conduct, and it is the instrument for serving the needs of society’. Its further purpose is to protect the interest of society. He stressed that law does not exist for the individuals as an end in himself but serves his interest with the good of society in view. Man as a social animal, whether as member of State, Church etc., stands on superior plane to man simply as animal. Example: Property is both a social and individual institution, which justifies expropriation and limitation of the individual’s rights.

In order to reconcile the individual with the society, it is necessary to balance various interests, which he grouped into three categories. Individual, State and Social the reconciliation is to be accomplished by what he calls ‘principles of the levers of
social motion’ which are four. The principles of reward and coercion which seek to identify selfish interest of individual with some larger social interest. And the principles of Duty and Love – which direct men towards social ends. Ihering’s analysis is that laws are only one type of means of achieving an end, namely social control. There is distinction between Society and State; laws are a feature of the latter. And laws must be treated from the angle of purpose namely social control He insisted on interdependence of all factors that are there in society including.

(i) Extra legal conditions – those under the control of nature, such as climate, fertility of soil
(ii) Mixed legal conditions – those in which law does not play a prominent role such as self-preservation, reproduction, commerce and labour
(iii) Purely legal condition – those conditions which are purely secured by legal regulation such as taxes or raising revenue.

His analysis led him to define ‘law is the sum of the conditions of social life in the widest sense of the term as secured by the power of State through the means of external compulsion.

Rescoe Pound (1870-1964):

Nineteenth Century witnessed increase in recognition of individual rights more so at common law, Pound, therefore felt that in order to achieve the purpose of legal order there has to be –

(a) Recognition of certain interests, individual public and social.
(b) A definition of limits within which such interests will be legally recognized and given effect to and
(c) The securing of those interests within the limits as defined.

Pound’s guiding principles was one of ‘Social Engineering’; Pound likened the task of the lawyer to engineering, an analogy which he used repeatedly. The aim of social engineering is to build as efficient a structure of society as possible, which
requires the satisfaction of the maximum wants with the minimum of fraction as waste.\(^{(136)}\) It involves the balancing of competing interests. For this purpose interests were defined as claims or want or desires which men assert de facto, about, which the law must do something if organized societies are to endure. It is the task of jurist to assist the Courts by classifying and expatiating on the interests protected by law.

The interests whom Pound catalogued are, Individual, Public, and Social.

I. **Individual’s Interests**

These are claims or demands or desires, which are looked from the standpoint of individual life. They concern:

1. **Personality**: This includes physical person (a) freedom of will (b) honor and reputation (c) privacy and (d) belief and opinion
2. **Domestic Relations**: These include interests of (a) parents (b) children (c) husband and (d) wife
3. **Interests of Substances**: These include interests of (a) property (b) freedom of industry and contract (c) promised advantages (d) advantageous relations with others (e) freedom of association and (f) continuity of employment.

II. **Public Interests**

These are claims or demands or desires asserted by individuals looked at from the standpoint of political life.

1. **Interests of State as a juristic person**: These include interests such as (a) integrity; freedom of action and honor of the State’s personality and (b) claims of the politically organized society as a corporation to property acquired and held for corporate purposes.

\(^{(136)}\) Pound, “Interpretation of Legal History”, p. 150
2. Interests of the State as guardian of social interests – these overlap the next category, namely social interests.

III. Social Interests

These are claims or demands or desires thought of in terms of social life. These include:

1. Social interest in the general security embracing those branches of law, which relate to (a) general safety (b) general health (c) peace and order (d) security of acquisitions (e) security of transactions

2. Social Interest in the Security of Social Institution – comprising domestic institutions, religious, political and economic institutions. Divorce legislation may be adduced as an example of the conflict between social interests in the security of the institution of marriage and the individual interest of unhappy spouses


This covers variety of laws, for example, those dealing with prostitution, drunkenness and gambling.

4. Social Interests in the Conservation of Social Resources covers, (a) Conservation of natural resources: (b) Conservation of human resources.

5. Social interests in general progress covers aspects such as, (a) Economic progress; (b) Political progress.

6. Social interests in individual’s life. This involve, (a) Self assertion; (b) opportunity and (c) conditions of life.
Having listed the interests, Pound considers the means in which they are secured. These consist of the device of legal person and the attribution of claims, duties, liberties, powers and immunities. There is also the remedial machinery behind them, which aims sometimes at punishments, sometimes at redress and sometimes at prevention.\(^{(137)}\)

Pound’s social engineering is criticized on various grounds. However for students of Human Rights, he enlarges our understanding of the scope of human rights and their co-relations with demands. His identification of interests involved takes into account the realities of social process, he shows us how to focus on rights in terms of what people are concerned about and what they want.

What is useful is the survey of interests, which demand satisfaction. It sharpens perception of values involved and the policies necessary to achieve them.

### 2.26.5 MARXISM

Marxist theory is based on the assumption that economic production and social relationships constituted by it determine the coming into existence as well as disappearance of the State and Law. Neither phenomenon is an essential element of human society, they exist only under definite economic conditions, namely, when the means of production are at exclusive disposition of a minority of individuals who use or misuse this privilege for the purpose of exploiting the overwhelming majority. This implies the division of society into two classes, the class of the exploiting owners and the class of exploited workers, the bourgeoisie and the proletariat. The State together with its law is coercive machinery for the maintenance of exploitation of one class by the other, an instrument of the class exploiters through the State and its Law, becomes the dominant class.

\(^{(137)}\) Dias, “Jurisprudence” (Aditya, New Delhi, 1994) pp. 431-434
The State then is ‘power’ established for the purpose of keeping the conflict between dominant and the dominated classes within the bounds of ‘order’. This order is law. Law then is a system of norms that is genetically and functionally related to the activity of the State and whose functions are determined by the class relations and the level of civilized development of society in which it operates.\(^{(138)}\)

Since the ultimate goal is the realization of Communism and law is an instrument whose aim is to teach citizens, it imposes observance of social duties. This is because in Communism there would be no class, if there are no class conflicts or conflict between interest of Government and people there should be no rights. Yet they have it through the State, the people grant themselves certain rights not as a matter of expediency by self interested right ruling class but as a product of collective will of the people.\(^{(139)}\) Rights then are conferred in the limited sense, in order to encourage him to be loyal, hardworking, well disciplined and a virtuous citizen.\(^{(140)}\)

Then individual rights inherent in the state of nature, prior to the State do not exist. Only legal rights are granted by the State to a limited extend exist to fulfill the obligation of the State.

**Marxism: Man as a species being**

Marxist theory is also concerned with the nature of human beings however, the view of men and women is not of individuals with rights developed from either divine or inherent nature, but of men and women as specie beings. Their theory mainly rests on the Marxist interpretation of Society and Law.


According to natural law doctrine reason or justice is imminent in nature as creation of God, and especially in the nature of man (as the image of God) man is by very nature good, i.e. just, and since justice means freedom, man is by his very nature very free. (141) But evils in the society cannot be denied. These evils have their ‘seats outside of man’ like its symbol the serpent in the Garden of Eden. These evils are forces of production in a capitalist society.

These forces of production dominate man instead of being dominated by him, and man in the process becomes a slave and he is not free.

And just as natural law doctrine, in order to reconcile man’s freedom, is deduced from is nature, his actual situation is more or less contrary to natural freedom, which distinguishes two natures; a nature before the fall of man and a nature after the fall of man, a pre and post-lapsarian nature. Marx distinguishes between nature of man before and after the division of society into classes. Like reality of society, the reality of man also has two layers, an external, the existing reality and an internal the true reality and the essence of man, his idea. (142)

In capitalism when man is a slave in economic relationship there is conflict between the external reality and internal reality, his freedom, a conflict between what man ‘is’ and what he ‘ought’ to be, a self-alienation man. It is through communism that man will ‘return to himself’, the existing reality will coincide with his true existence, in man, will again be what ought to be i.e. Communism is the dissolution of the conflict between existence and essence, between necessity and freedom.

Freedom, which is the essence of internal substratum of society, hidden by the existing reality of capitalist society, will again also become the external reality. That is the State, which existed prior to the coming of political State, a State with freedom and justice where no private but only collective property existed will be reestablished. That is with the passing of ownership of means of production into the hands of a Community the individual will have true freedom.

Marxism sees a person’s essence as the potential to use one’s abilities to the fullest and to satisfy one’s needs.\(^{(143)}\) since in capitalist society production is controlled by few, such society cannot satisfy those individual needs. Only through communism, these needs can be met.

IV. MODERN THEORIES

A. THEORIES BASED ON THE VALUE OF UTILITY

The utilitarian theory played a prominent role in the nineteenth and twentieth century philosophy and political theory. The utilitarian’s approach to the problem of rights is through values such as equality, happiness, liberty, dignity, respect which concern man’s behavior are studied not at metaphysical concept but are accepted and acted upon. The utilitarian theories, seek to define notion of rights in terms of tendencies to promote certain end, e.g. common good.

Jeremy Bentham, the exponent of the classical utilitarian adopted the maxim “The greatest happiness of the greatest number” to popularize his philosophy.

‘By the principle of utility he meant that principle which approves or disapproves of every action whatsoever, according to the tendency which it appears to have to augment of diminish the happiness of the party whose interest is in question; to, what is the same thing in other words, to promote or to oppose that happiness’.

The happiness of an individual is increased if there is an addition to the sum total of his pleasures greater than any addition to the sum total of his pains. The interest of the community comprises of all interest of the individuals. Therefore the happiness of the community will be increased if the total of all the pleasures of all its members is increased to a greater extent than their pains. Bentham lists fourteen pleasures and twelve pains as a comprehensive account of happiness-relevant

\(^{(143)}\) Marx—“The Economic and Philosophic Manuscripts of 1944”, at 133 (D. Struch, Ed. 1964)
consequences. In assessing the rightness of an action, value of each particular lot to pleasure or pain is measured by referring to seven criteria; intensity, duration, certainty, propensity, fecundity, purity and extent.

According to Bentham, the principle of utility should be the sole proper basis for morality and legislation. Both the rightness of every act we do in private life and the rightness of public measures of all kinds should be tested by his ‘felicific calculi. To him, the majority opinion of the community regarding what is right or wrong is not a criterion to approve or condemn; only the test of utility can decide.

Bentham’s principle of utility has some psychological assumptions. He believes that all that men desire are pleasures and the avoidance of pains, and those men, are motivated to do whatever they do by their desires.

Nature has placed mankind under the governance of two sovereign masters, pain and pleasure. It is for them alone to point out what we ought to do, as well as to determine what we shall do. On the one hand the standard of right and wrong, on the other chain of causes and effects, are fastened to their throne. They govern us in all we do, in all we say, in all we think, every effort we can make to throw off our subjection, will serve to demonstrate and confirm it. In words a man may pretend to abjure their empire; but in reality he will remain subject to it. The principle of utility recognizes this subjection and assumes it for the foundation of that system, the object of which is to rear the fabric of felicity by the hands of reason and law, systems which attempt to question it deal in sounds instead of sense, in caprice instead of reason, in darkness instead of light.

Thus Bentham believed that every human decision was motivated by some calculation of a pleasure and pain. Hence both Governments and the limits of Governments were to be judged not by references to individual rights but in terms of their tendency to promote the greater happiness of greatest number.
Bentham’s happiness principle enjoyed enormous popularity during the 19th Century, and most referrers spoke in terms of utilitarian … Yet his theory met lots of criticisms. Some of the objections raised against utilitarianism are;

1. That the calculus provided is impracticable. Because, no person can know all the consequences of his acts and it would be foolish to try to assess them
2. The pleasure and pains of different people are not intra-commensurable. How to weigh the enjoyment of one who likes late night parties as against that of his neighbors, that is how to balance the satisfaction of majority against the distress caused to minority
3. Principle of utility is unworthy. Satisfaction of all human desires cannot be the only test of what is right and wrong. There are higher values like worth of individual and human dignity
4. Human desires and satisfaction are capable of manipulation. They can be manipulated by measures such as education, indoctrination, advertisement etc. By Advertisement a man can be brought to desire things which he would not have desired otherwise.
5. Utilitarians are not clear on whose interests are in questions. Interest of a national community? Whether interests of unborn are included?

Some of the criticisms leveled against Bentham’s theory was refined by the Economic analysts.

The Economic analysis of law is an attempt to offer a sophisticated scientific alternative to utilitarianism. One of the main problems with utilitarianism is lack of a method for calculating the effect of decision or policy on the total happiness of the relevant populations; it offers no reliable technique for measuring change in the level of satisfaction of one individual relative to a change in the level of satisfaction of other. How do you compare one person’s happiness with another’s? Problems like this led the Economists to make utility arguments more rigorous. *(144)*

The utility calculus is objected because it does not provide an answer to how advantages to some can be measured against the disadvantages to others. But this is not so according to economic analysis; for all that happens to us can be reduced to things we will pay to have or pay to be without, the solvent of a hypothetical market. Should my neighbor be prevented from having noisy parties, which disturb me? He pays ‘X’ pounds for the privilege, if there was a market in noisy parties: I would pay ‘Y’ pounds to be left in peace. If X is greater than Y, satisfactions are maximized by allowing him to go ahead. That is the ‘efficient’ solution. Where Bentham spoke of the greatest happiness of the greatest number the economic analyst speaks of overall efficiency. (145)

The economic analysis of law was first applied to specific areas of law such as anti trust legislation and the law of nuisance. Later it has been directed towards the legal system as a whole. Richard Posner in his Economic Analysis of Law makes one of the most systematic applications of this approach. His theory is concerned with efficiency, meaning the maximizing of satisfactions as defined by the economic criteria.

According to Posner, common law can be explained in terms, and argued that common law rules were the result of arguments, which are in reality economic in nature. He says ‘The common law method is to allocate responsibilities between people engaged in interacting activities in such a way as to maximize the joint value or, what amounts to the same thing minimize the joint costs of activities. It may do this by redefining a property right, by devising a new rule of liability or by recognizing a contract right’ (146) His argument was the common law judges have decided the cases to maximize social wealth. Economic analysis holds, that social wealth maximization is a worthy goal so that judicial decision should try to maximize wealth, by assigning rights to those who would purchase. It argues that lawsuits should be decided to increase social wealth.

For Posner wealth maximization is a value in itself. The economist when speaking normatively tends to define the good, the right, or the just as the maximization of welfare in a sense indistinguishable from the utilitarian concept of utility or happiness’. For Posner, ‘wealth maximization is value because society that takes wealth maximization to be its central standard for political decision will develop other attractive features. In particular it will honor individual rights, encourage and reward a variety of virtues, and give point and effect to the impulses of people to create benefits to each other.’

Posner claims that wealth maximization will respect individual rights. A society that sets out to maximize social wealth will require assignment of rights to property, labour and so forth.

He argues that wealth maximization is of instrumental value, because a society that maximizes wealth will recognize rights, such as right to their own bodies; right to direct their own labour as they wish etc.

However, it is criticized, that a society is not a better society just because it specifies that certain people are entitled to certain things. Witness South Africa. Everything depends on which rights the society recognizes. It does not provide that wealth maximization leads to recognition of certain individual right, what can be said is that these are the rights that a system of wealth maximization would recognize.

B. Theories based on Justice

Men have talked about justice for as long as they have talked about law. The scope of justice is, however, wider. Three sorts should be distinguished. Justice may be:

1. Claimed to something inherent in law; or
2. Law may be contrasted with justice; or
3. Justice may be a measure for testing law.


(148) For more criterion see Dworkin’s “is wealth a value”, at ibid.
If law is a system of rules, then some aspects of ‘procedures’ and of ‘formal’ justice may be inherent in it. If a rule stipulates that all motorists exceeding a speed limit shall be fined but those exacting fines (is Administrative authorities or police) take no steps to find out whether people have fulfilled the condition of rule then both procedural justice is violated and the rule becomes empty formula, which does not deserve the designation “legal”. If during a period of political turbulence a revolutionary court selects victims for execution on an ad hoc basis, without announcing any universally applicable criteria, it violates formal justice, and may be said that it is not operating under any system of law.

If the revolutionary Court announces that all who voted for an ousted regime to be shot and takes all steps in each case to find out whether or not a person had so voted, it meets the requirements of both procedural and formal justice. It may be ‘law’ for all purposes yet it may not appeal to one’s sense of justice. Here ‘law’ is distinguished from ‘justice’ in the second of the three distinctions referred. It is the case that legal rules however good in themselves may nonetheless lead to injustice. It is because the feature of some of the situations in which individuals confront the law are so unique that they cannot be captured by any rule but can be captured by the ‘sense of justice’, If we can frame such a rule but existing legal rules do not include it, then we are making a point falling under the distinctions: we are saying that existing rules are unjust and should be replaced by new rules. We are then using justice as measure for law.

When a Court applies rules according to its terms; justifies is decision by reference to accepted standards of legal reasoning, it may do justice according to law. But still the outcome may be unjust because rules and other standards are themselves unjust. When justice is used as the measure of the law, the assumption is that law could be made to conform to justice; ‘justice’ in this context stands for a substantive moral criterion sometimes called ’distributive justice’ or more recently ‘social justice’. The law ought to distribute rights and duties in a certain way, and if does not it is unjust. Thus the object of justice is proper distribution of social goods.
In this sense, the most celebrated of the recent theories is that advanced by Professor John Rawls (b. 1921) of Harvard University.

For Rawls, the principles of justice provide a way to assigning right and duties in the basic institutions of Society. Those principles define the appropriate distribution of the benefits and burden of social co-operation.

What are the rights of justice? To define them, Rawls imagines a group of men and women who come together to form a social contract. He calls this situation the Original Position. It consists of people, each representing a social class. They are placed behind a ‘veil of ignorance’. They have only general information of human psychology and the laws of science. They do not know to which social class they are going to belong or even at what stage of development their society stands. In this situation by unanimous agreement they choose the principles, which will regulate the society they belong to. In making their choice, they are guided only by rational self-interest. Each knows that he has a plan of life (his own conceptions of good), therefore they agree to social principles, which will give them best chance of achieving each of his life plan. While choosing these principles there are no special interests taken into account, they are objectively just.

The principles, which the people in this Original Position choose are:

**First Principle**

“Each person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all”

**Second Principle**

Social and Economic inequalities are to be arranged to that they are both:

(a) To the greatest benefit of the least advantaged, consistent with the just savings principle and
(b) Attached to offices and positions open to all under conditions of fair
equality of opportunity.\(^{(149)}\)

Rawls does not specify the ‘system of equal basic liberties’. He indicates that
it includes political liberties (right to vote, to be eligible for public office, freedom of
speech and assembly, liberty of conscience, and freedom of thought freedom of the
person); the right to hold personal property, and freedom from arbitrary arrest and
seizure. By their first principle people would choose equality in things, and they give
‘lexical priority’ over the second principle; that is, they agree that the equal liberties
are not sacrificed for gain in respect of income, wealth or power (the matters dealt
with in the second principle). This they do so because men are rational, they know by
doing so they have the best chance of obtaining for themselves the primary social
goods and pursue their ends. Primary social goods being liberties, opportunity, power
and self respect.

The first clause of second principle allows for social and economic
inequalities, only if they are for the benefit of the least advantaged. This is his famous
‘difference principle’ the principle in the original position would choose this because
they do not know whether they would be favoured or disfavoured by any inequality,
in the worst case, they could be, ‘least advantaged’.

The rest of second principle make reference to two things which qualify the
call for arrangements to be so ordered as to confer maximum benefit on the least
advantaged. First, he refers to ‘just savings principle’ the people in the original
position would know (knowing human psychology) that they have some concern for
at least next generation, so they will agree that all social assets should not be
squandered. Second, they will not debar any office, and equality of opportunity would
be fair.

Rawl’s theory envisages a four stage unfolding of just institutions.

\(^{(149)}\) John Rawls, “Theory of Justice”, p. 302
The first stage is the original position, in which two lexically ordered principles of justice are chosen. The second stage is a constitutional Convention, where they choose a Constitution, where the two principles are embodies. The third stage is that of legislation, where laws must comply with two principles of justice and the Constitution. The fourth stage relates to application of laws by judges and other officials.

**Edmund Cahn’s theory of justice**

Edmund Cahn’s theory of justice no longer enjoys the influence it once had. But it has a particular appeal to students of human rights.

His theory is that the problem of justice should be approached from its negative rather than its positive side. He prefers to place the emphasis on the sense of injustice because it forms a part of human biological endowment, where injustices are easily identifiable from justice. Injustice is alive with movement and warmth producing outraging and anger. Therefore, justice is essentially a process of remedying or preventing whatever would arouse the sense of injustice.

How does the sense of injustice manifest itself? First and perhaps most important of all feelings of injustice are precipitated in a group of human beings by the creation of inequalities which the members of the group regard as arbitrary and devoid of justification. ‘The sense of justice revolts against whatever is unequal by caprice’.\(^{(150)}\) The inequalities resulting from the law must make sense; the law becomes unjust when it discriminates between indistinguishable.

The sense of injustice also makes certain other demands, such as demand for recognition of merit and human dignity, for impartial and conscientious adjudication, for maintenance of a proper balance between freedom and order, and for fulfillment of common expectations.\(^{(151)}\)


\(^{(151)}\)Ibid, pp 20-22
Common expectations, according to Cahn, assert consistently and continuity of legal operation by law makers and Judges. It also asserts to the law to respond to new social needs. Therefore, he says “The sense of justice warns against either standing still or leaping forward, it calls for movement in an intelligible design”. If one goes through the annual reports of any human rights non-Government organization such as Amnesty International or International League of Human Rights, we find that the approach is from ‘sense of injustice’ be it disappearance in Argentina, repression of religion in Soviet Union or current human rights abuse, have found positive response from the public. Therefore, Cahn’s theory of “sense of injustice” is useful insight for the students of Human Rights law.

C. Theories Based on Human Dignity

The ‘dignity of the human person’ and ‘human dignity’ are phrases that have come to be used as an expression of a basic value accepted in a broad sense by all peoples. ‘Human Dignity’ appears in the Preamble of the Charter of UN. The term dignity is also included in the Article I of UN Declaration of Human Rights. The Helsinki Accords in Principles VII affirm that the participating States will promote the effective exercise of human rights and freedoms “all of which derive from the inherent dignity of the human person. References to ‘human dignity’ are also found in various Resolutions and Declarations of international bodies.

Though there is no explicit definition of dignity, one lexical meaning of ‘dignity’, is intrinsic worth of human person. Scholars suggest that worth of every person should mean that individuals are not to be perceived or treated merely as objects of the will of others. The idea that human rights are derived from the dignity of the person is neither trueistic nor natural. It has two corollaries. The first corollary is the idea that basic rights are not given by authority and therefore may not be taken away; the second is that they are rights of person; every person. That is Human dignity is private, individual and autonomous.

\(^{(153)}\) Ibid.
But there are others who hold that ‘dignity’ is a collective one. It is public collective and prescribed by social norms.\textsuperscript{(154)} Dignity is thus defined as the ‘particular cultural understanding of the inner moral worth of the human person and his or her proper political relation with society’. Dignity is something that is granted at birth or an incorporation into the community as a concomitant of one’s particular ascribed status, or that accumulates and is earned during the life of an adult who adheres to his or her society’s values, customs and norms; the adult that is, who accepts normative cultural constraint on his or her particular behavior.\textsuperscript{(155)}

**Theories Based on Dignity as propounded by Mc. Dougal, Laswell and Chen**

Their approach to the law represents a theory of values rather than a mere description of social facts. Their value system proceeds from the assumption that a value is a ‘desired event’.\textsuperscript{(156)} Men want power (defined as participation in making of important decisions), power is “unmistakably a value in the sense that it is desired or likely to be desired.” The other value categories or ‘preferred events’ gratifying the desires of men are wealth, that is control over goods and services, well being or bodily and psychic integrity, enlightenment, or the finding and dissemination of knowledge, skill or the acquiring of dexterities and development of talents, affection, or the cultivation of friendship and intimate relations; rectitude or moral responsibility and integrity; and respect or recognition of merit without discrimination on grounds irrelevant to capacity. This list for the authors is representative and not exhaustive.\textsuperscript{(157)}

For Lasswell and Mc Dougal, Law is a form of power value and described as “the sum of the power decisions in a community”. It is essential to the legal process that a formally sanctioned authority to make decisions with an effective control ensuring the execution of these decisions.\textsuperscript{(158)} This combination of formal authority and effective control produces a flow of decisions whose purpose is to promote

community values in conformity with the expectation of the community, that is law is viewed as process of decision making in a community as a whole and not as mere body or rules.\(^{(159)}\)

The authors postulate that the members of the community should participate in the distribution and enjoyment of values, or differently expressed, that it must be the aim of legal legislation and adjudication to foster the widest postulates sharing of values among men. The ultimate goal of legal control the authors envisage is a world community in which democratic distribution of values is encouraged, all available resources are utilized to the maximum degree and the protection of human dignity is regarded as paramount object of social policy.

The supreme value of democracy is the dignity and worth of the individual; hence a democratic society is a commonwealth where there is full opportunity to mature talent into socially creative skill, free from discrimination on grounds of religion; culture or class.\(^{(160)}\)

Why ‘human dignity’ is considered as paramount objective of social policy or why is it a super value? The authors offer this explanation:

“Our recommended postulate of human dignity is much easier to accept and to explicate today than ever before. The contemporary image of man as capable of respecting himself and others, and of constructively participating’ in the shaping and sharing of all human dignity values, is the culmination of many different trends in thought, secular as well as religious with origin extending far back into antiquity and coming down through the centuries with vast cultural and geographic reach. The postulate of human dignity can no longer be regarded eccentric doctrine of lonely philosophers and peculiar sects. This postulate as we have defined it in terms of demands for the greater production and wider sharing of all values and preference for persuasion over coercion, has been incorporated, as our study of constitutive process

\(^{(159)}\) Ibid \(^{(160)}\) Meron Op. cit. at 97
Demonstrates, with many varying degrees of completeness and precision into a great cluster of global prescriptions, both conservational and customary, and into the constitutional and legislative codes of different national communities.”

Thus, as we can notice, they are not clear as to why human dignity is super value. However, the authors show that a value such as ‘dignity’ – a value that most people agree can be a springboard for structuring a rights system.

**Gewirth on Human Dignity**

As seen earlier, the dignity of human person and ‘human dignity’ are phrases that have come to be used as an expression of a basic value accepted in a broad sense by all peoples. Many international Covenants, Declarations, Conventions use the expressions.

According to Gewirth, the sense of dignity, in which humans are said to have equal dignity is not same as we say of a person, that he behaves without dignity or he lacks dignity. The kind of dignity in which all humans are said to be equal is characteristic that belongs permanently and inherently to every human as such.

‘A has human rights’. ‘A has inherent dignity’ are often used on same plateau. A has inherent dignity is often taken to mean that by virtue of natural law, the human person has the right to be respected is the subject of rights, and possess rights. If these are equivalent then the attribution of dignity adds nothing to the attribution of rights. Therefore it is essential to consider whether attribution of inherent dignity can have status independent of and logically prior to the attribution of rights.

Gewirth finds the independent variable. The independent variable of all morality then is human action. This independent variable cuts across the distinctions between secular and religious moralities, between egalitarian and elitist moralities, between deontological and moralities and so forth. Thus he sees that all moral precepts are concerned with how persons ought to act toward one another. Like Kant’s, ‘act is such a way that the maxim of your action can be universal law’:
Bentham’s ‘to act so as to maximize utility’; Nietzsche’s, ‘to act in accord with the ideals of the superman’; Marx’s ‘to act in accordance with the interest of the Proletariat’, and Kierkegaards ‘to act as God Commands, and so forth’.

All actions then according to Gewirth have two generic features. One is voluntariness or freedom, in that the agents control or can control their behavior and the other generic feature is purposiveness or intentionality in that the agents aim to attain some end or goal which constitute their reason for acting. This goal may consist in either in action itself or in something to be achieved by action.

After logically arguing as to what it means by saying “I do X for end or purpose E”, in various steps, Gewirth concludes that it may be ultimately expressed as a general moral principle.

“Act in accord with the generic rights of your recipients as well as of yourself” which he calls as Principle of Generic Consistency (PGC).

The summary of his arguments are firstly, ‘that every agent logically must accept that he has rights to freedom and well being as the necessary conditions of his action, as conditions that he must have, for if he denies that he has these rights, then he must accept that the other persons may remove or interfere with his freedom and well being, so that he may not have them but this would contradict his belief that he must have them. Secondly that the agent must accept all other prospective purposive agents have the same rights to freedom and well being as he claims for himself. Thus since all humans as actual, prospective or potential agents, the rights in questions belong equally to all humans. Thus the arguments fulfill the specification for human rights: Subjects and Respondents are all humans equally that the objects of rights are the necessary goods of human actions and justifying basis of rights is a valid moral principle.

As seen, human action had generic features of voluntariness and purposiveness. By virtue of voluntariness of his actions the agent has a kind of autonomy or freedom. And by virtue of his actions purposiveness he regards his goals
as good, as worth attaining. This element of worth is involved in every concept and context of human purposive action. Such action is not merely an unordered set of episodes to events. Rather, it is ordered by its orientation to a goal, which gives its value, its point.

The goal or end worth for the agent as something to be reflectively chosen, aimed at, and achieved. The worth he attributes to his ends pertains \textit{a fortiori} to himself. They are his ends, and they are worth attaining because he is worth sustaining and fulfilling, so that he has a justified sense of self-esteem, of his own worth. He purposes his ends not as an uncontrolled reflex response to stimuli, but because he has chosen them after reflection as alternatives. Every agent is capable of this unlike other natural entities; who are subject to external forces of nature, he can and does make his own decisions on the basis of his own reflective understanding. By virtue of these characteristic of his action, the agent has worth or dignity. The argument mean that every agent has worth or dignity because of his capacity for controlling his behavior and acting for the ends he reflectively choices.

Thus, dialectically every person should have freedom and well-being (necessary goods) as a person who has dignity or worth. Assertorically that every agent has dignity, his status as agent should be maintained and protected. For dignity is an attribute or characteristic that, of itself deserves respects and makes mandatory the support of the being that has it. This mandatories or ‘ought’ moreover is strict; it is co-relative to an entitlement on the part of the agent who has dignity. In this way dignity entails rights.

D. Theories Based on Equality of Respect and Concern

Dworkings thesis is similar to the rights in the natural law traditions. He distinguishes, between two kinds of rights. One, ‘the background rights’ which are rights of abstract kind held against the decisions taken by the society as whole and two, institutional rights held against decisions made by specific institution. Legal rights are institutional rights to decisions in Courts.
Intuitions about justice presuppose a fundamental right namely ‘the right to equality’, which he calls rights to equal concern and respect.

Dworkin’s right to equal concern and respect proceeds from the postulate of political morality. “Government must treat those whom it governs with concern that is as human beings who are capable of suffering and frustration, and with respect, that is human beings who are capable of forming and acting on intelligent conceptions of law their lives should be lived”. Government must not only treat people with concern and respect but with equal concern and respect. It must not distribute goods or opportunities in equally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not distribute goods or opportunities in equally on the ground that some citizens are entitled to more because they are worthy of more concern. It must not constrain liberty on the ground that one citizen’s conception of the good life of one group is nobler or superior to another.”

For the above postulates taken together, Dworkin calls it the liberal conception of equality. It is a conception of equality and not of liberty as a license.

Citizens governed under this conception of equality, each have a ‘right to equal concern and respect’. There are two different rights that are comprehended by that abstract right. One, the right to equal treatment – e.g. equal treatment in the distribution of voting power—one man must be given one vote, in spite of the fact that different distribution of votes might work for the general benefit. Two, the right to treatment as equal – this is the right to equal concern and respect in the political decisions made as to how the goods and opportunities are distributed.

Suppose the question is raised whether an economic policy that injures long-term bondholders is in the general interest. Those who will be injured have a right that their prospective loss is taken into account in deciding whether the general interest is served by policy. They may not simply be ignored in that calculation. But when their interests is taken into account it may nevertheless be outweighed by the interests of others who will gain from the policy and in that case their right to equal concern and respect, so defined, would provide no objection. In the case of economic policy,
therefore, we might wish to say that those who will be injured if inflation is permitted have a right to treatment as equals in the decision whether that policy would serve the general interest, but no right to equal treatment that would outlaw the policy even if it passed that test. (161)

Dworkins proposes the right to treatment s an equal to be taken as fundamental under the liberal conception of equality.

Dworkins believes that right to liberty is too vague. However, he says that certain liberty such as freedom of speech, freedom of worship, rights of association and personal and sexual relations do require special protection against the Government interference. (162) This is not because these preferred liberties have some special or inherent value, because of procedural hindrances, these rights may face. The hindrance is that if these liberties were left to utilitarian calculation, that is the calculation of general interest, the balance would be tipped in favour of restrictions.

Why is there such an impediment? Dworkins says that if a vote were truly utilitarian then all voters would desire the liberties for themselves and liberties would protect under a utilitarian calculation. But a vote on these liberties would not be truly utilitarian nor would it afford equal concern about and respect for liberties solely by reflecting personal wants or satisfactions of individuals and affording equal concerns to others. This is because external preferences such as prejudice and discrimination against other individuals deriving from the failure to generally treat other persons as equals would enter into the picture. These external preferences would corrupt utilitarianism by causing the individual to vote against assigning liberties to others. (163)

Accordingly, the liberties that must be protected against such external preferences and must be given a preferred status, by doing so we can protect ‘the fundamental rights of citizens to equal concern and respect’

(161) Dworkin, Taking Rights Seriously, p. 27  (162) Meron, op. cit. p. 97  (163) Meron, op. cit. p. 97
Dworkin’s arguments are attractive because he minimizes the tension between liberty and equality. His theory seems to retain both the benefits of rights theory without the need for an ontological commitment, and the benefits of utilitarian theory without the need to sacrifice basic individual rights.

V. DEFINITIONS OF HUMAN RIGHTS

From the discussions made above, it is apparent that it is difficult to conceptualise human rights. Yet many scholars have attempted to define it in various terms, some of them are as follows:

(i) Richard Wasserstrom defines human rights as ‘one ought to be able to claim as entitlements (i.e. as human rights) those minimal things without which it is impossible to develop one’s capabilities and to have life as human being’\(^{(164)}\) that are human rights are moral entitlements possessed only by persons.

(ii) Tiber Macham defines human rights as universal and irrevocable elements in a scheme of justice. Accordingly, justice is the primary moral virtue within human society and all rights are fundamental to justice\(^{(165)}\).

(iii) Joel Feinberg defines human rights as moral rights held equally by all human beings, unconditionally and unalterably.\(^{(166)}\) That is for Feinberg human rights are moral claims based on primary human needs.

(iv) Kant Baier defines human rights as those moral rights whose moral ground and generating factors are the same, namely being human in some relevant sense\(^{(167)}\).


171
Cranson asserts that, human rights by definition is a universal moral right, something which all people, everywhere at all times ought to have, something of which no one may be deprived without grave affront to justice, something which is owning to every human being simply because one is human.\(^{(168)}\)

### 2.27 Concept of Human Rights

Human rights in simple language may be categorized as the fundamental rights to which every man or woman living in any part of the world is entitled by virtue of having been born as a human being, the rights that are required for the full and complete development of human personality. Human rights are derived from the dignity and words inherent in human person. The Courts in India have been recognizing and enforcing the human rights as natural rights of mankind or as Constitutional mandates or as rights to an Indian in an independent policy.\(^{(169)}\)

Generally speaking, human rights are regarded as those fundamental and inalienable rights, which are essential for life as a human being. There is, however, no consensus to what these rights should be. Human rights may be interpreted as ‘being different according to the particular economic, social and cultural society in which they are best defined. Human rights have so far escaped a universally acceptable definition, presenting a problem to international regularization.\(^{(170)}\)

Human rights represent claims which individuals or groups make on the society. They include the right to freedom from torture, the rights to life, inhuman treatment, freedom from slavery and forced labour, the right of liberty and security, freedom of movement and choice of residence, right to fair trial, right to privacy, freedom of thought, conscience and religion, freedom of opinion and expression, the right to marry and form a family, the right to participate in one’s government either

---

\(^{(168)}\) M. Cranston, “What are Human Rights”, 1973, National Academy, Delhi, p. 7
\(^{(170)}\) Rebecca, M. M. Wallae, International Law, 195
directly or indirectly or through freely elected representatives, the right to nationality and equality before the law. These rights cannot be compromised universally. These rights are natural because they were derived from nature and could not be legally alienated by the ruler.

(i) **Meaning of the term**

The definition of the term still alluded all to India, the Protection of Human Rights Act, 1991 defines human right as:

“Human rights” means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India(171)

The United States defined human rights in a policy document in 1978 and said: “Freedom from arbitrary arrest and imprisonment torture, unfair trial, cruel and unusual punishment and invasion of privacy. Right to food, shelter, health care and education and freedom of thought, speech assembly, religion, press, movement and participation in Government.(172)

Louis Henkin, a professor and Western Scholar defined human rights as “Claims asserted and recognized as of rights … against society as represented by government and its official.”(173) in another definition, an International Legal Scholar, E. Donald Elliot, stated that human rights is “an opportunity guaranteed by the State to its citizens to enjoy the societal benefits and values existing in the given society. (174)

The concept of human rights falls within the framework of constitutional law and International law. For this purpose, it has been identified to “defend by institutionalized State and at the same time to promote the establishment of human living conditions and the Multi-dimensional development of human personality”.

(171)Sec. 2(d), Protection of Human Right Act, 1993
(174) E. Donald Elliot, The Evolutionary Tradition to Jurisprudence, 25 (1985)
(ii) Natural rights as human rights

The appeal to equate natural rights with human rights is ordained in Vedas. The philosophy envisaged in Rig Veda commands that all human beings are equal and that conduct is just which is based on the principles of equality.\(^{175}\) Vedic ethics idealized an equality of treatment. Atharva Veda ordains that all human beings are equal and that conduct is moral which is based on the principles of equality.

The philosophy of human rights appears to have its existence in the domain of natural law.\(^ {176}\) According to the philosophy of natural law jurists, the natural law denotes natural justice, an instrument which can harmonize the whole mankind and bestow happiness essential for good living of a society. To the Greek philosophers, the Sophists, Socrates, Plato and Aristotle, natural law is both a way of living as well as thinking; their philosophy has been that natural law enables a man to realize good life that is living according to virtue. Aristotle argues that the philosophy of human rights derives its strength from the principles of natural law. Sophists also focused on ethical and moral values to prepare the young men of Athens to be efficient citizens. Grotious has a strong conviction that natural law is binding one overrules all other laws. They believe that natural law predicate men to recognize divine will in human affairs. Man availing himself of natural law automatically participates in the wisdom of God. Grotious observes that by the inclusion of natural law in a legal system, it becomes the link between the minds of the men and the mind of God Christ himself said “Thou shalt lose thy neighbour as thyself. All things, therefore, whatsoever you would that man should do to you, do you also to them.”\(^ {177}\)

Similarly, St. Thomas Aquinas (1225-1274), the first eminent theologian, in his famous work Summa Theological considered law as a means to end and therefore stresses that man ought to follow the divine law as embodied in Ten Commandments which is repository of all divine revealed wisdom contained in the scriptures. He believes that percepts of natural law teach us to live honourably, to injure no one, and to give every man his due.

\(^{175}\)M. G. Chitkara, Human Rights: Commitment and Betrayal, xix (1990) at page 2.
\(^{176}\)D. Entreves, National Law: 78
\(^{177}\)S. N. Dhyani, Fundamentals of Jurisprudence 67
The natural law contents in Hungo Grotious, Thomas Hobbes, John Locke, Rousseau and Immanuel Kant strongly propagate the existence of human rights securing of life, property and happiness and subjects by the social institutions. Thus the principle of natural law hammers out a charter of human rights to be protected as the basis of survival of human being. The crux of the natural law philosophy is that it makes the life, liberty and property the cardinal rights of man, which greatly dominates and influence the future course of the development of human right philosophy the world over.

2.28 A Recognition of rights for all human beings

The human rights are the modern name for what had been traditionally known as natural rights in India, Greece, Rome and elsewhere. Notwithstanding all the polemics of natural law jurists, the condition of man all over the world remained greatly unchanged. He was still in the shackles though he had known of the “natural rights of man” through the philosophy of natural law.

The situation changed with the dawn of Renaissance: the intellectual revival which inundated Europe with new idea of all the spheres of human live. It opened a new vista in the era of human life. The result was that even the king in England was forced to sign Magna Carta (the great charter of human rights) said to be the first mile-stone on the road to the liberties of people of England in 1215 A.D. The philosophy of human rights was added and strengthened specifically after the introduction of Magna Carta. The Magna Carta was followed by the Petition of Rights, 1627 and the Bill of Rights, 1639. The Bill of Rights may be said to be the third charter of human rights which assured the natural law rights to the people.

Events in England profoundly affected France and other countries of the Continent with the result that France Declaration of the Rights of Man came into existence in 1789 with the prime objective to resist oppression on man. Declaration not only set out a number of human rights. But clothes them in political philosophy with the words “the main aim of all political associations is the protection of natural
and imprescriptible rights of man... liberty, property, security and resistance to oppression. (178)

In American Continent, the Charter of New Plymouth of 1620 expressed the principles of human rights. Similarly, the Declaration of Independence in the United States of America firmly resolved to hold the truth of existence of human rights to be self-evident declaring that all men are created equal; that they are endowed by the creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute a new government laying its foundation on such principles, and organizing its powers in such forms as to them shall seem most likely to affect their safety and happiness but when a long train of abuses and usurpations, pursuing invariable the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government and to provide new guards for their future security. (179) It is in this spirit that Western nations too are making due and cry for protection and promotion of human rights. (180)

The outbreak of Second World War brought a strong conviction of urgent need to safeguard the political and civil rights of individual everywhere and to provide for economic and social security and determination to safeguard such rights. The appalling atrocities during the War led to strong movement for the international protection of fundamental human rights. The Charter of the United Nations, the legal child of World War, represents a significant advancement so far faith in and respect for human rights is concerned. It contains a numerous referenced to human rights. The rights of individual were made an international concern. Human rights are mentioned for the first time in an international treaty (not counting the treaties for the protection of minorities concluded after the First World War, which related to the rights of social groups but not to human rights in general) because the drafters of the Charter were looking behind the facts of war to its causes, that is to say, to the existence of conditions which makes the wars possible. (181)

(178) Chaffe, Documents Fundamental Human Rights, 239 (1951)
(179) T. S. Batra, Human Rights: A Critique, at 31
(180) D. Entreves, National Law at 13
(181) See General Assembly Resolution 200 A (XXI), December, 1903
The present day journey of human rights had started after the Second World War and first cohesive effort by the International Community for the promotion and protection of human rights was their agreeing to the Charter of the United Nations in 1945, basically aimed at saving this world from the scourge of war which had brought untold sorrow to the human kind and re-affirming faith in fundamental human rights, in the dignity and worth of human persons, in the drafting of various human rights instruments, such as, Universal Declaration of Human Rights, International covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, etc. and setting up of institutions like Commission on Human Rights, etc.

The provisions concerning the human rights run throughout the U.N. Charter “like a golden thread”. There are as many as seven references – in the Preamble; among purposes of the U.N. (Art. 13), among the responsibilities of the General Assembly [Art.13(2)]; among the objectives of the International Economic Co-operation [Art. 55©]; among the functions of the ECOSOC [Art. 62(2)]; as a responsibility of one of the Commissions of ECOSOC [Art. 68]; and among the objectives of the Trusteeship system [Art. 76(c)].

A pledge to co-operate in promoting at least implies a negative obligation not so to act as to undermine human rights. When the member countries felt that they have greatly weakened the contents of Charter clauses, so an attempt was made by drawing up in 1948 the “Universal Declaration of Human Rights and Fundamental Freedoms”. This was the First step in formulation of an International Bill of human rights.\(^{(182)}\)

3. The International Bill of Human Rights

The International Bill of the Human Rights comprises of the following:

(1) The Universal Declaration of Human Rights, 1948
(2) The International Covenant on Civil and Political Rights, 1966

On the recommendation of the Third Committee, the General Assembly unanimously adopted the two International covenants, namely, the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights on December 16, 1966. While the Covenant on Civil and Political Rights, 1966 was adopted by 106 votes to nil, the International Covenant on Economic, Social and Cultural Rights was adopted by 105 votes to nil. The General Assembly also adopted an Optional Protocol to the International Covenant on Civil and Political Rights, 1966, by 66 votes to 2 with 38 abstentions. After 23 years, i.e. in December, 1989, the General Assembly adopted yet another Protocol i.e., Second Optional Protocol to the International Covenant on Civil and Political Rights, on December 15, 1989.

2.29 Generation of Human Rights

Louis B. Sohn has classified human rights in the following three categories. (183)

1. The Human Rights of First Generation;
2. The Human Rights of Second Generation;
3. The Human Rights of Third Generation.

---

2.29.1 The Human Rights of First Generation

The human rights of first generation are civil and political rights of the individuals. The various civil and political rights are conferred through different Constitutions and also by the International Covenant on Civil and Political Rights of 1966. However these rights are not new rights. They have been recognized since very long periods. These rights have developed from the time of Greek city states and over the period have found expression in different national charters. They have been concretized in the form of Magna Carta of 1215; The American Declaration of Independence, 1776, and the French Declaration of the Rights of Man and the Citizen of 1789.

The right to life, liberty, security, free speech, assembly and worship etc are some of the civil rights. Right to free elections and representative institutions are examples of political rights which provide legitimation, integration and participation by linking the ruler to the consent of the ruled. These rights are human rights arising out of the conflict between rights are considered to be American and French Revolutions. These rights came as formal assurance against the oppression and arbitrary governmental tyranny. Moses Moskowitz calls the human freedom and liberty as “the fruits of struggle against the authority of state”.\(^{(184)}\)

The human rights of first generation reflect long established human values and as such are incorporated not only in almost every Constitution of various States but also in the International Covenant on civil and Political Rights, 1966; in the European Convention on Human Rights and Fundamental Freedom, 1950, and in American and African instruments of, 1969 and 1981, respectively.

As the civil and political rights are incorporated indifferent national, regional and international instruments, they represent an overwhelming consensus of international community and further have given rise to rules of international customary law of general application. Louis Sohn has suggested that “the consensus on virtually all provisions of the covenant on civil and political rights is so widespread that they can be considered as part of the law of mankind, a *jus cojens* for all."\(^{(185)}\)


\(^{(185)}\) Ibid.
2.29.2 The Human Rights of Second Generation

These rights are the economic, social and cultural rights. Rights to education, health, freedom from want, fear or terror are examples of economic and social rights. These rights require that the Government should act to secure these to the people. Freedoms of thought, of communication, and of cultural and aesthetic experience are examples of cultural rights. These rights are claimed in response to threat of mass manipulation.

These rights are incorporated in the *International Covenant on Economic Social and Cultural Rights, 1966*. The main source for the origin of these rights is considered to be the Russian Revolution of 1917 and the Paris Peace Conference of 1919. The Russian Revolution is significant in recognizing economic rights. The Paris Peace Conference is more significant for the establishment of the International Labour Organization. The International Labour Organisation has laid emphasis on the concept of social justice by proclaiming that “peace can be established only if it is based upon social justice”; and that “the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own countries”.

The real credit for giving expression to economic and social rights goes to the American President Roosevelt. He, for the first time expressed his hope for an instrument dealing with the economic and social rights. In his message to the Congress of January 6, 1941; President Roosevelt referred to the four essential freedoms viz., freedom of speech and expression, freedom of every person to worship God in his own way, freedom from want and freedom from fear to which he looked forward as the foundation of a future world. “Freedom from want” formed the basis on which the concepts of economic and social rights were formulated. President Roosevelt in his another message to Congress in 1944 made the concept of “freedom from want” clear. He contemplated that “true individual freedom cannot exist without

---


economic security and independence” and that “people who are hungry and out of job are the stuff of which dictatorships are made”, thus economic truths have become accepted as self-evident. He was of the view that economic problems in the present day world have acquired alarming magnitude, therefore, he advocated for drastic economic and social reforms. In his opinion, “true individual freedom cannot exist without economic security and independence”. (188) these pronouncements had exercised their full impact upon the United Nations when it began to address itself to the human rights issue. (189)

2.29.3 The Human Rights of Third Generation

These are collective rights. According to Louis B. Sohn, individuals are also members of communities – family, religious communities, social or professional communities or racial communities (groups) or political community, the state. It is not surprising, therefore, that international law not only recognizes inalienable rights of individuals, but also recognizes certain collective rights exercised jointly by individuals who are grouped into larger communities including people and nations. (190) The right to self-determination, right to development, right to peace and right to solidarity are examples of third generation human rights.

According to Karel Vesak, the third generation of human right refers to the fraternity or brotherhood. This category of rights is based on the sense of solidarity, which is essential for the realization of the major concern of the international community such as peace, development and environment. (191)

The human rights of third generation infuse the human dimension into areas where it has all too often been missing having been left to the state or states and these rights can be realized only “through the concerted efforts of all the actors on the social scene; the individual, the state, the public and private bodies and the international community.” \(^{(192)}\) these are the rights which belong to people as group; they emphasize that human needs are best fulfilled within a collectivity.

2.30 The Indian Perspective on Human Rights

The vast literature that has grown in the West around the concept of rights is in itself an indication that the concept bad to be defended and philosophically justified. In the long history of the Indian civilization, the freedom of thought and speech the freedom of one’s life in the light of one's beliefs, the freedom of association, the freedom of public debate between the contending philosophical schools were taken to the natural foundations of human relationships, it was always taken for granted, and consequently there is hardly any literature on the idea of rights. When the word ‘Adhikar’ was used to convey a similar sense, it always had a much deeper meaning. However, the freedom of the individual in the western societies was secured after a long and bitter struggle against the Church and the State; in India, those freedoms were seen as the very substance of human existence, therefore, in view of the fact that the West possessed rich literature to its defense and the same is absent in India, it would be wrong to conclude that the idea of freedom is chiefly Western one.\(^{(193)}\)

The foundations of human rights may be established in two different frameworks of perceiving man and the world; one is that of the modern Western political thought and the philosophy of law and the other of ‘Dharma’ and its method that characterizes the journey of Indian civilization. Keeping this in view, the Western, philosophy had its own way of perceiving man, society and their relationship from which is deducted the foundation of human rights, but nevertheless, the Indian philosophy characterizes the foundation in the ancient conception of

\(^{(192)}\) Ibid.\(^{(193)}\) Human rights Manual Department of foreign Affairs and Trade, Australian Govt. Publication Service, Canberra, 1993, p. 119
Dharma and Danda which regulated the governance of State and its citizens. The concept of Sanatan Dharma which laid down these foundations in ancient civilization is 2,000 years older than Western Christianity with a central theocratic doctrine. It laid down the foundation of a sane society in ancient Indian civilization encompassing a moral code, righteousness and responsibilities. It was certainly wider and broader than the concept of religion, a, used in the Western historiography.

It was on the basis of those existing principles that detailed rules were laid down for the guidance of the king. It was his duty to uphold the law and he was as much subject to law as any other person (equality before law and, equal protection of law can be deduced from that practice). One of his chief duties was administration of justice according to the laws of religious texts, local customs and usages and written cotes. It was obligatory for him to enforce not only the sacred laws of the existing tests but; also the customary laws (rights and claims) of the subject. This was possibly the human rights enforcement situation in its embryonic stage. The guiding principles laid down for the kings were, however taken mainly from the species of Dharmic texts like the Vedas and the Vedanta under the genus Sanatan Dharma which enshrines “Truth is one” and “God resides in every human being”. Besides Vedas, Upanishads, Mahabharata and Bhagavat Gita also furnished philosophic foundations for subsequent social developments, thereby enriching the doctrine of human rights. Upanishads, emphasizing the individual self and its truth say that “there is nothing higher than the person. Mahabharata also emphasizes the point that “without ethical and moral principles, there is no true happiness and a society cannot hold together; the principles such as truth, self-control, asceticism, generosity, nonviolence, constancy in virtue should serve as the means of one’s success”.

Bhagavat Gita being a part of Mahabharata preaches us to meet the obligations and duties of life, always keeping in view the spiritual background of human existence which is the manifestation of an ultimate and the infinite. It is evident that the subsequent scriptures emphasizing on the individual, and the guiding principles of his success, from the base from which the essence of the modern conception of human rights can be deduced.
However, even at the individual level, there were some significant contributions by the religious prophets with regard to the basis of human rights, Mahavir, the founder of Jainism said that the foundation of human freedom in its deepest sense, it truth known as Adhersed, which demonstrates the idea of the relative pluralism and many sides of truth. This attitude towards truth gives a profound implication for various aspects of human life personal and social. During Chandra Gupta Maurya’s regime Kautilya in his Artha Shastra, which depicted the political, social and economics codes of conduct, laid down certain principles of the law of punishment as the foundation of social existence. These principles then became the basis of the law against, inter alia, illegal arrests and detention, custodial death, ill treatment of woman such as rape, inequality of gender, corrupt judicial system, etc. The legendary king Ashok in the post Kalinga regime had shown the seeds of a humanitarian society, which, in its operational concept was not sharply asymmetrical from Western version of a welfare state; the law of piety being its lei motif Asoka’s policy of tolerance bears a close resemblance to the concept of civil liberties. He desired that all animate beings should have security self control, peace of mind and joyousness; inhuman treatment or torture of prisoners was prohibited in Asoka’s administration.

Thus, the influence of ancient Indian Dharma with its universalistic and humanistic strains, the contribution of Hindu scriptures and noted scholars and kings, tends to underscore the historical reality that the concept of rights is neither gift from the West nor typical Western monopoly of wisdom; its origins are as much rooted in ancient Hindu civilization. This may explain its contemporary universal appeal which, of course has been facilitated in the era of the global domination of the West since the colonial era. What is being contested within this historical narration is the appropriation of the idea of human rights as an essentially Western contribution to human civilization, as is often implicit in the Western discourse on this subject. This tends to underrate its truly universal heritage, and the possible contributions of other civilizations like that of India, described here, as the contemporary universal appeal of human rights.
However, one cannot possibly ignore the violation of human rights in ancient India which mainly stems from the; then social “stratification. Social life was largely stratified into the four major divisions: the Brahmins (priestly class); the Kshatriyas (rulers and warriors class); the Baisyas (trading class); and the Sudras (labourer and unskilled workers other than agriculturists,). The rights and duties of the aforesaid classes were determined according to their assigned duty. According to Raimundo Panikar, the Indian framework of right: was essentially derived from Swadharma, i.e., the Dharma inherent in every human being which maintains cohesion and strengthens reality. The Brahmins, due to their hegemony over the caste-system, denied the rights to the lower caste, the untouchables, and other deprived sections of the society, so there was violation of their right and dignity. But in general the ancient Indian society, so there was violation of their right and dignity. But in general the ancient Indian society was peaceful within the moral codes of conduct of the society provided by religion which in due course of time hegemonies all sections of society within its rules of the game.

In the medieval period, however, the three Basic elements of the ancient Indian tradition: universalism and humanism in its philosophical thought, the struggle against caste discrimination and religious tolerance received a fresh relevance and impetus from Islam following the Muslim conquest during the tenth century A. D. Emphasizing the greatness of this religion. Abdul Aziz says in Islam as in other religious traditions, human rights are concerned with the dignity of the individual, the level of self-esteem that secures personal identity and promotes human community. He further argues that it also established a social order designed to enlarge freedom, justice and opportunity for the perfectibility of human beings keeping an eye on the overall social, political and economic development of the society. However, “the operational ramifications of the Islamic norms can be gleaned from the Mughal history of India. Though the Mughal Government could be typically characterized as centralized despotism, its judicial.\textsuperscript{194} Akbar’s (1526-1605) great regard for rights, justice and secularism could be cited as an example in this regard. In his religious policy din-e-Ilahi (Devine religion) He tried to preach the ideas of secularism (respect for all religions) and religious movements like Bhakti (Hindu) and Sufi (Islamic)\textsuperscript{194}ibid
made remarkable contributions towards eliminating the irreligious practices of the contemporary society. These movements tried to revive the ancient humanist tradition and preached the sacred principles of humanism and universalism denouncing the narrow sectarianism prevalent in both the religions – Hindu and Muslim. Further efforts were also made in the modern era by Britishers to break and politicize the amity of these two religions on the basis of their famous principle ‘divide and rule’ by bringing into practice certain measures like the introduction of English education, the merit system for recruitment and a system of discriminatory representation, and communal representation at a later stage. However, some Indian leaders being influenced by English education started a movement for Renaissance and Reformation. Raja Ram Mohan Roy, one of those loaders, demanded the abolition of Sati system, female infanticide, caste system and also initiated a movement for widow remarriage and female education. Mere, once again the attention centered around the human being rather than god; which was somewhat a new approach to human reason and human dignity. Further, establishment of Brahmo Samaj (1828) and Arya Samaj (1875) tend support to this cause.

For the political freedom of India the formation of the Indian National Congress (1885) also gave a new vista for the name of human rights which was being violated by the British rule in India.

Influenced by the reformist movements in different parts of the world for the cause of freedom, the Nehru Report of 1928, the first commitment to civil liberties, and the Karachi Resolution of 1930, the most important commitment to individual and group rights, were prepared. These were included in the Constitution of free Indiaas Fundamental Rights in Part III and as Directive Principle of State Policy in Part IV respectively.

To conclude, however, the Indian perception of human rights does not emanate from the theory of a priori or natural rights doctrine of the West, rather it has its own base in ancient Indian culture and civilization. “The Indian vision of right emphasizes not only the individual but also the total person, a person whose interdependent rights and duties are determined by his/her position within a
hierarchical network of relationship. The impact of Islamic religion, renaissance and reforms movements. British colonialism and the nationalist ideology played a vital role in the formation and practice of human rights in India.

The Western and the Indian conceptions of rights also differ in their attitude towards the relationship between rights and duties unlike its Western counterpart, traditional Indian thought emphasizes the duly especially towards one group and society. Thus, the support for observance of rights and duties is conditioned by ancient tradition and belief.

From the above analysis it can be derived that the Indian intellectual generally accept the view that rights are not over and above the State; rather they are gift from the State itself. To them rights of an individual must be balanced with the interest of the society as a whole. The good of each as they argue, must contribute to the good of all.

During the struggle against colonial rule, Indian nationalist movement emphasized upon political right as a reaction against the repressive and exploitative character of the British, rule; but the nationalist ideology also emphasized on social and economic rights. a; evident from their inclusion in the Constitution of India formulated by the leaders of the national movement.

Even though the Indian nationalist leaders adopted the Western framework of political right, they rejected the Lockean theory of a priori or natural Rights. They considered rights as the gift from the State hence are not absolute and their enjoyment is conditioned by a number of factors-social, economic and political. The rights of different groups and society are counter-balanced by the rights of the State and its obligation to the weaker sections of the society.

The economics rights of the people are limited only by considerations of economics development and national security, which take proceed cover the

\[195\] Ibid
individual’s economic rights and consume a lion’s share of the annual budget of the countries. This is so because Indian leaders perhaps follow and practice the principle of ‘Nation before community’ or ‘society over the individuals’ ‘When the low priority given to economic rights can be justified security, in the final analysis, priorities are determined by the ideological commitment of the leadership which, in turn depends upon the distribution of political and economic power within the system. Hence, political and economic underdevelopment to a large extent, and not ideology, seems to be the greatest hurdle in the quest for the realization of human rights in India.\textsuperscript{(196)}

2.31 Indian Culture & Human Rights

Human rights are what make us human. They are the principles by which we create the sacred home for human dignity. The concept of Human Rights is not entirely western in origin. It is a crystallization of values that are the common heritage of mankind. As Mary Ann Glendon points out, the Universal Declaration of Human Rights did not suddenly drop from heaven engraved on tablets but rather was a milestone on a path on which humanity had already been travelling for centuries. In fact, the language of human rights is a product of the European Enlightenment. But the concepts of human rights are as old as the Indian Culture as believed by the people of India. The political thinkers and philosophers have expressed concern over securing human rights and fundamental freedoms for all human beings everywhere since the very early times of Vedic age. Philosophy of human rights had already occupied a place of prime importance in ancient Brahmanical society.

The Indian thinkers are of the view that it is not justified to limit the origin of the concept of human rights to only western civilization. What the West has discovered today in the field of human rights has been an accepted principle of India’s rich legacy of historical tradition and culture since time immemorial which is evidenced by the declarations made in the Vedas. The Atharvaveda declares that just as no spoke of a wheel is superior to others. Equality of all human beings and the duty of each individual to strive for the happiness of every other individual as also the

equal right to food, water and other natural resources are found incorporated in these declarations.

It may not be out of place to mention here that although the term ‘Human Rights’ is of twentieth century origin, yet people in India believe that it is as old as the history of human civilization and is known to them as ‘Natural Rights’ or ‘Rights of Man’. Conceptually, the moral values of dharma [righteousness], Artha [wealth], Kama [desire] and moksha [salvation] were designed to create harmonious social order by striking a balance between inner and outer as well as spiritual and material aspects of life had greater jurisprudential value than the positive law. This aspect of moral value and humanitarian tradition was implied in Vedas, puranas, Mahabharata, Bhagwat Gita and other religious scriptures and aimed to free people from traces of conflicts, exploitation and miseries. Even the “Rulers” enacted Laws in subordination to such natural tenets. It was believed that Laws must aim at helping mankind in enjoying liberty and fundamental freedom and of dignified living free from the omnipotent police state or dictators. Vedic India practiced the strong tradition that sarve vabantu sukhinoh: sarve shantu nirmayah: serve vadrane parshyantu maa kashchchit dukhah bhag vabet! [Let everyone be happy; let everyone be free from all evils; let nobody suffer from grief] and the principle of vasudheva kutumbakam [all are of one human family]. The modern utopia of a global village is more or less akin to this concept.

A careful examination of the ancient Indian constitutional and legal system would show that it had established a duty-based society; its postulate was not only the duty of individual towards society but also the duty of rulers towards both individuals and society. The concept of absolutist, monarchies had always been rejected. Instead, there was faith in the supremacy of Dharma (law) and spirit. The doctrine that the king can do no wrong was not accepted. However, the king as head of the state was held in high esteem and people were asked to obey him as God so that he might command the respect and obedience of the people. Dharmashastras impressed upon the king to look upon the people as God (Praja Vishnu) and regard them with love and reverence. The basic philosophy that for the good of the greater number the interests of individuals or smaller groups should be subordinated and sacrificed to the extent
necessary was deep embodied in and formed the foundation of Dharma. This aspect is evident from the verse in Udyogaparva of (Virduraniti Ch. 37-17) which reads:

“Sacrifice the interest of individual for the sake of the family. Sacrifice the interest of the family for the sake of the village. Sacrifice the interest of the village, for the sake of the country and lastly for the sake of securing Moksha (eternal bliss) of the Atma reject the world”. This was the idea kept before the individual in society.

The duties in the modern welfare state are, first to legislate for the purpose of ensuring social, economic and political justice, second, to provide essential services to the society through its departs or instrumentalities, by way of implementing the politics and programs as directed by the constitution and thirdly, law, to regulate and control the activities of individuals on every relevant sphere to sub-serve common good and fourthly, the ensuring of justice as between individual and individual and between individual and state through the judicial ring of the state.

An analysis of the ancient Indian policy would show all the responsibilities, except the first which stood determined in the form of Dharma, Law (as explained later) evolved and developed by the people meant to secure the happiness of the people as a whole, as also the welfare and full blossoming of the individuals had been conceived at the earliest period known to human history, and the instrumentality of the state was created and the king, as its head, was entrusted with the duty and responsibility of its implementation. In other words, the Dharma (law) constituted the blue print or master plan for the all around development of the individual and different sections of the society. It, therefore, favorably compares with modern public law and constitutional law. The duty of the ancient Indian state was not only to enforce obedience to the law against individuals but also to conform to the law in all its action for the purpose of ensuring the welfare and happiness of the people. This can very well be described as seeds of modern public constitutional law. Dharma is mostly misunderstood as religion. There is no prefix to the word Dharma in any of the smritis of Dharmanashtas. It is by using a prefix to the word that it gets a restricted meaning as religion. But the fact remains that the Sanskrit word Dharma is a word of the widest import. There is no corresponding word in any other language. The
Mahabharata contains a discussion of this topic as Bhishmah Pitamah explains following a question put by Yudhisthira about the meaning and scope of dharma. It is most difficult to define Dharma. Dharma has been explained to be that which helps the uplift of man. Therefore, that which ensures welfare (of living being) is surely Dharma.

Webster Dictionary defines Dharma as such: “Dharma – Civil and Criminal Law, the body of cosmic principles by which all things exist. Nature: (1) essential function; It is the nature of stone to be hard, of fire to burn and of a tiger to be fierce, just it is the nature of king to punish and to protect, (2) Natural Law (3) Justice. “Hence, such Dharma can be called “Every type of welfare of the individuals and the society.” It can be classified as follows:

(1) Rules purely personal in nature as Achar
(2) Rules which were to be enforced and observed by the state as civil and criminal laws
(3) Jawahar Dharma and Constitutional Law Rajdharma.

The question of discussion of Achar (conduct) is certainly the others two will be discussed as ordinary law (Vayahar Dharma) and constitutional Law (Raj Dharma). How, when and who propounded Dharma is not known. But certainly it is not the work of individuals. The fact remains Dharma embodies duties and obligations rights, duties and liabilities of individuals and state. It can be regarded as a product of collective wisdom of the ancient Indian society meant for welfare of the people and accepted as such as by the people. As observed by Fuller, the strength of law in the ultimate analysis lies in the public acceptance. Five fundamental rules of Dharma for observance by individuals were made on the basis for the Indian philosophy and the Indian policy, which was based on the principles of (1) Dharma (2) Artha (Material, wealth required for enjoying life) and finally (3) Karma desired to enjoy life call together as Trivargh. The first controls the second and third. The five rules stated by Manu are as follows: “Ahinsa (non-violence), Satya (truthfulness), Asteya (not coveting the property of the others), Shoucham (purity of minds and body) and Indriyanigraha (control of sense) are, for the number, the common dharma.
The goal of policy (Rajniti) is the fulfillment of Dharma, Artha and elaborate discussion of the function of the state.

Under the ancient Indian system we find that the importance of doctrine of separation of power had been accepted and involved. As far as law was concerned the fundamental principles of law were to be found in the Vedas and corporate provision and division of law was incorporated in the smritis. Sometimes custom was treated as law even if it was not consistent with the fundamental principles of Dharma. The ancient Dharmashastras declared that Dharma, which includes the law, was vested on the king. According to Rajdharma, the king had the power only to ensure the law. Dharmashastras did not confer or recognize any legislative power in the law. This is the most important and distinguishing aspect of the concept of kingship in India.

“The, Hindu conception of kingship was, it would be seen as the arm of Dharma, the unchanging law, the upholder of social order and a limb of the social organism. The king had not the fight of changing the laws.”

Katyayana recognized the power to issue a Rajshasan and declare any usage to country to Shruti or Smriti, invalid. It reads: “The king could declare a usage invalid if it contravened the superior source of law and on such declaration usage stood overruled by royal command.”

The king had the power to issue royal edict (Rajshasan). This was similar to making rules for enforcement of law, power that, the king could use for supplementing the law without violating the superior sources of law. Analysing this situation Robert Lingat observes: “Because the entire larger sphere was reserved for Dharma and legislative activity of the king was limited very seriously but, there did remain a vast field in which it might operate. The majority of the topics, which come within what we could call administrative law fall under royal authority.”

Sukraniti gives several illustrations as to the type of royal edicts which a king was competent to issue. Publicity as a necessary condition to bringing Rajshasan into forces was also laid down by Sukraniti 625.628:
“Rajshasan should be proclaimed to the subject by the beating of drums. It should be written down and displayed wherever four roads meet. It should contain a declaration that branches of the order Rajshasan would entail punishment of heavy fines.”

The Shruti, the Smrities, the puranas and customs or usages were the principal sources of law, but there can be specific situation in respect of which there was no provision in any of these four sources of law and therefore, the creation of new provisions of law was inevitable. To deal with such cases, the procedure for the declaration of new laws was prescribed.

Fundamentals of social justice and various provisions of welfare state had been recognized in the ancient Indian legal system. There was, right to freedom, liberty, equality and fraternity. Freedom and liberty were laid down, as part of law governing association and it was the duty of the king to enforce contracts.

“The king should ensure observance of the contracts settled among associations of heretics' believers in the Vedas (Naigamas) guilds of merchant corporations, (pugas) troops of soldiers, assemblages of Kinsmen and other such association”

The restriction, which could be imposed on the right to form association, was to be such as was necessary in public interest and in particular in the interest of the state.

(i) The king was to prevent them (association), from undertaking acts, which were injurious to the interest of the king (state).
(ii) He shall also prevent them from bearing arms unlawfully and also from making mutual attacks.
(iii) He shall also take appropriate action against association opposed to the dictates of morality.
The charter of equality has been incorporated in the Vedas, the first and the highest authority among the sources of law. The Vedas define, equality of all in the following words:

No one is superior or inferior. All should strive for the interest of all and should progress collectively.

Again in Atharvaveda, Samjaanaskuta, the right to each individual in respect of natural resources, was declared thus: all have equal rights to articles of food and water. The yoke of the chariot of life is placed equally on the shoulders of all. All live together with harmony supporting one another like the spokes of the chariot connecting its rim and hub.

“The king should protect and support all his subjects without any discrimination in the same manner as the earth supports all living beings.”

Kautilya beautifully sums up the entire concept of welfare state: “The happiness of the king lies in the happiness of his subjects; in their welfare, his welfare whatever pleases himself the king shall not consider as good; whatever pleases his subjects the king shall consider as good. “He disapproved the theory of absolutism of king and subordinated him to the law and duties. Arthshastra not only affirmed and elaborated the civil and legal rights first formulated by Manu but also added a number of economic rights. He categorically ordained that “the king shall provide the orphan, the aged, the infirm, the afflicted and helpless with maintenance; he shall also provide subsistence to the helpless expectant mothers and also to the children they give birth to.” It is revealed that society in Vedic period was well structured, highly organized and committed to human rights.

Buddhism forms an important part of non-Brahmin or non-Sanskritic traditions that stood up for the down trodden in society. Buddha himself debunked the Brahmanical claims to any spiritual superiority on the basis of birth. During the Buddhist period, interest in man, in his image, and man’s affairs on this earth, unlike interest in gods and goddesses and good life in heaven after death, his earth being a
Buddha’s story is known to everybody. Human sufferings made Prince Gautam Siddhartha restless and he left all luxuries and comforts of the King’s palace in search of remedies for all human miseries and sufferings on earth. The basic tenets of Buddhism are non-violence, non-hatred, and friendliness to all. Emperor Ashoka who became a devoted follower of Buddha took to the non-violent and humanist philosophy of Buddhism. Also, he became a great champion of freedom and tolerance. He pleaded for universal tolerance. One of the most significant contributions of Buddhism was the introduction and spread of secular education – education for all. Organised universities came to be established under the direct influence of Buddhism.

Buddha (567 BC-480 BC) rejected the infallibility of the Vedas as well as Brahman, without which no opposition to Brahmin-upanishidic domination was possible. His Nirvana (liberation from the cycle to life and death) was to be attained in this very world, and it could be attained by anyone, should he or she follow the right conduct. He came out strongly against elaborate Brahmanical rituals and rites involving animal sacrifices on the grounds of non-violence and compassion to all beings. The important philosophical contribution made by Buddhism that should inspire any human right activist for years come.

Along with Buddhism, Jainism constituted another parallel non-Sanskrit tradition that carried forward this all human beings it acknowledged an existence of rights not only of the downtrodden but also plants and animals. Every creature has life and they are all similar in their sensitivity to pain and pleasure. Jainism defined ‘sin’ as a violence to, and enroachment on, others’ right to life. This may have been the first time in human history that a right to life was laid down as a human right. Likewise, a violation of this right by someone else was considered violence and indeed a sin. What is important is that Jainism extended this right not only to all individuals but also to animals and indeed to all living species.
Another important contribution made by the Jain tradition in the search for truth was evolving a philosophical system known as Syad Ved. The term Syad means perhaps. Syad Vad argued that truth cannot be perceived in totality by anyone and so one should always provide enough space for the possibility of a different understanding and interpretation of truth.

Long before the advent of Buddhism, Indian society had been exposed to another philosophical system called Lokayata, which offered a different and a very radical interpretation of reality. It was a system which persistently rejected the conception of a creator or anything existing prior to matter in one or another form. It however kept company with simply religious beliefs, rites and even cult in daily life.

The Lokayata school of thought was founded by Charvak, who denounced categorically the karma, Punarjanma, Moksha and varna System. Some of the Stutras from Lokayat a darshan clearly show their humanist and rationalist nature: “the body, the face and all limbs of all people being similar, how can there be any distinctions of Varna and caste? Such distinctions are unscientific and cannot be defended.” Lokayata rejected the superiority of ritualistic Brahmanical function over others: “Agriculture, Cattle breeding, trade, state service etc. are occupations of the wise. They should be followed. But those who smear their bodies with ashes and perform Agnihotra and other religious rites are devoid of intelligence and manhood.” Lokayata also provided a humanitarian, as against an otherworldly, interpretation of Moksha (liberation from this World): “Real bondage lies in servitude. Real Moksha lies in freedom.” The driving impulse of the lokayat was social and not philosophical which is evidenced in various ways. Many of their Sutras were directed against Brahmanical domination embedded in the concept of Chaturvarna.

There were many other non-Vedic sects – like the Nath, Yoga, and Siddha who, too, like the Buddhists, found the key to all religious mysteries in the human body itself. The position of the Nath-panthi siddhas and jogis belonged to the low castes, opposed caste-based inequalities, denounced the religion espoused by the Brahmins and did not favour image worship. Another important feature of these sects was that Women played a significant part in these sects, particularly in Tantra.
No discussion of human rights and their roots in Indian tradition can be complete without a reference to King Ashoka. His significant contribution lay in translating the philosophy of tolerance into an attitude to be adopted by all. Ashoka is perhaps the first ruler who developed a totally anti-war perspective. Wars have been fought between rulers throughout history, and generally glorified by the victors. Ashoka stands out in history as someone who gave up not only war but also the attitude of war. He equated war not with triumph and glory but with misery and human sufferings. Ashoka looked at war not from the perspective of the vanquished and showed a keen sensitivity towards the all round destruction and suffering brought about by war. His attitude to war has been described in his 13th major rock edict. This rock edict is easily the oldest anti-war statement and should actually be treated as one of the oldest and a very important human rights in the document.

King Ashoka in Kalinga Edict II inscribes: “All men are my children, and, just I desire for my children that they may enjoy every kind of prosperity and happiness bith in this world and in the next, so also as I desire the same for all men.” In fact after the famous Kalinga was Ashoka worked day and night for the protection of human rights. His chief concern was the happiness of his subjects. It is however, unfortunate that human rights jurisprudence witnessed downfall with the decline of Mauryan Empire.

Gupta period is called as the most glorious epoch in the history of ancient India, which has been compared with the “Elizabethan period of British history” by the historians. It was an age of glory and greatness in every branch of national life. Hieuen Tsang says that administration in Chandragupta period was founded on benign principles. There was no forced labour, crimes were rare, and king personally supervised the whole administration. Harsha Vardhana was the last Emperor of Hindu India. His reign marks the culmination of Hindu culture. He never forgot that the aim of the government was the welfare of the governed. He had made provision to provide free food and drinking water to the poor and stationed physicians with medicines in free of cost for them. He devoted his whole life to promote the welfare of his people. After him the whole India was split up and the society started to degenerate. The philosophy of human rights lost sight.
2.32 Evolution of Human Rights

The belief that everyone, by virtue of her or his humanity, is entitled to certain human rights is fairly new. Its roots, however, lie in earlier tradition and documents of many cultures; it took the catalyst of World War – II to propel human rights onto the global stage and into the global conscience.

Throughout much of history, people acquired rights and responsibilities through their membership in a group – a family, indigenous nation, religion, class, community, or state. Most societies have had traditions similar to the ‘golden rule’ of “do unto others as you would have them do unto you.” The Hindu Vedas, the Babylonian Code of Hammurabi, the Bible, the Quaran (Koran) and the Analects of Confucius are five of the oldest written sources which address questions of people’s duties, rights and responsibilities. In addition, the Inca and Aztec codes of conduct and justice and an Iroquois Constitution were Native American sources that existed well before the 18th century. In fact, all societies, whether in oral or written tradition, have had systems of propriety and justice as well as ways of tending to the health and welfare of their members.

The nature has bestowed man with two related characteristics – first as an individual and then as a social being. Living in a group organized community is natural to him. To understand human rights, one must look through their history, which will take us back to the day when man first started living in groups. It was natural that many instances prevailed over what was right; those who held power dominated the weak.

With the passage of time, these rights or established customs or understandings including the relations between the ruler and the ruled were brought together in different forms in various parts of the world.

They found expression in the concept of natural law and became the symbol of people's movement against absolute despotism, and the corner stone of constitutional democracy everywhere. The Magna Carta in England (1215), the American declaration of Independence, the French Declarations on the Rights of Man (1789), the Bolschevik Revolutions in Russia could be cited as important landmarks in the development of the concept of human rights.

Magna Carta yielded certain concessions only to the feudal lords, though did set limitations to arbitrary rule and laid the foundation for the Rule of law. The American Declaration followed by constitutional amendments contained fairly exhaustive guarantees for the rights of man. While the American and French declarations set the seal on the basic principles of equality before the law, freedom of thought, human dignity and democratic government, the countries undergoing rapid industrialization were experiencing the need more for social justice and economic security. The Bolschevik Revolution in Russia (1917) went a step further. It emphasized that economic and social rights were as important as the civil and political rights.

In Europe and North America, the concept of natural right was secularized, rationalized and democratized. By the end of the 18th century there emerged a concept what was called ‘the rights of Man’. This concept covered substantially what is now known as civil and political rights. Beginning the mid-nineteenth century, the developments that followed, sometime accompanied by violence within the industrial-capital economy of Europe and North America took a new direction.

While countries in Europe and North America, with rapid industrialization, were moving towards larger freedoms both political and economic, the people of the rest of the world were more or less experiencing the sufferings and humiliations of colonialism and imperialism. It was natural that interaction and comparison between people of the two groups generate wider awareness and demand for human rights among the people under colonial rule. For them, a declaration of great historical significance was the clarion call made at the turn of the country in India, by Bal
Gangadhar Tilak: ‘Swaraj is my birth right and I shall have it’. (Swaraj means complete self government and independence).

2.33 Universalization of Human Rights

As a result of convergence of several historical factors, a concept of human rights was emerged by the middle of the present century. This development found expression in the Charter of the United Nations – which proclaimed ‘universal respect for, and observance of human rights and fundamental freedom for all without distinctions, as to race, sex, language or religion. The Charter made promotion of these rights as one of its basic purposes and obligated member states ‘to take joint and separate action in co-operation with the United Nations for the achievement of this purpose’. Thus human rights were being universalized and internationalized. UN charter has laid down principles of a general nature. Human rights are not defined or specified in this Charter.

There arises necessity to define human rights and fundamental freedoms so that the objectives of the Charter could be pursued and an international system, for promotion and protection of human rights could be instituted. Hence, in December 1948, the UN General Assembly proclaimed the Universal Declarations of Human Rights. It defines specific rights – civil and political as well as economic, social and cultural equality and freedom from discrimination as a principal and recurrent them. The Universal Declaration was not conceived as law, but as a ‘common standard of achievement’ for all propel and all nations.

The Declaration carries no legal sanction to compel states to meet the obligation of ensuring observance and implementation of human rights enshrined in the Declaration. To seek such a legal framework and to convert the norms set in the Declaration into legally binding obligations, efforts were directed beginning 1947. After 20 years of preparatory work, the General Assembly promulgated International Covenants in December 1966, comprising there instruments as follows:

(i) International Covenants on Economic, social and Cultural rights;
(ii) International Covenants on Civil and Political rights, and

(iii) Optional Protocol (on individual petition) to the Covenants on Civil and Political rights.

The covenants have assumed a prime place in international law as the instruments that influence and the same time judge the disregard of States and by which the conditions of individual rights in particular countries are to be assessed.

2.34 Rights and Duties

Man is a social animal. An individual can achieve full development of his personality by proper association with all other human beings. So his rights are not conterminous with his free desires, but can only exist in so far as they do not impinge upon the rights of the rest of the community. Thus, rights imply duties. In other words, duties can be described as the ‘rights’ of the community against the individual.

Many civilizations have sought to bring about and promote social order and harmony not by setting forth the right of the members of the community, but framing rules of social behavior in terms of duties. But today, the growth of modern state system has changed the lives of human beings almost everywhere. Therefore, an approach to realization of rights through emphasis on duties could prove to be counter-productive.

A person cannot enjoy one’s rights if one is not performing one’s duties towards others.

2.35 Theories of Human Rights

The study of human rights occupies a very important place, in the discussion of politics and political theory. Internationally human rights occupy a very high place among the theorists. The most outstanding theories of human rights are given below:

(i) The Theory of Natural rights;
The Legal theory of Rights;

The Social Welfare theory of Rights;

The idealist theory of Rights;

The historical theory of Rights.

2.35.1 The Theory of Natural Rights

The theory was advocated by the authors of the Social Contract Theory like Hobbes, Locke and Rousseau. They say that man had natural rights even before society and state were born. According to Locke,\(^{(202)}\) nature has made all men free and rational, and has given him rights like right to life and liberty. Herbert Spencer,\(^{(203)}\) who also thinks along the same lines, believes that the process of evolution shows that all men have the fundamental right to equal freedom, which enables them to do what they will. Such a right comes from nature, and not from any human agency like State.

The theory was in the limelight in the 17\(^{th}\) and 18\(^{th}\) centuries; its basis was essentially non-juristic. Rights are natural. Every human being enjoys them and finds them indispensable for his very existence.

The theory can be back to ancient Greece and Rome. The stoic philosophers of Greece spoke about natural rights and their writings influenced Rome. The Romans believed that all human being were subject to certain common principles of life as created by nature, and hence, these principles, which Roman thinkers called natural law, were applicable to people living within the Roman Empire. This natural law bound people of all races together in Rome.

The concept of natural law, suffered a set-back in the middle ages, as the Church thinkers spoke on terms of law of God and of the Church. The English political thinkers, John Locke in the 17th century took up the concept again and made it important. While dealing with his social contract, Locke spoke of natural rights. The


\(^{(203)}\)Ibid
Declarations made by the American and the French revolutionaries echoed the ideas of Locke.

The American proclaimed that ‘all men are by nature equally free and independent and have certain inherent rights.” Similarly, the French National Assembly breathed the same spirit pertaining to natural rights as given by the great American leaders like Jefferson. The French Assembly spoke in terms of ‘the natural, inalienable and sacred rights of man.’ Rousseau also spoke of natural rights. He said that though man surrendered some of his natural rights, he continued to enjoy the remaining rights.

In England, Thomas Paine spoke of the principle of natural rights without connecting it with the Social Contract Theory. According to Paine, the rights to ‘liberty, property, security and resistance to oppression’ are based on natural rights.

It is proper to interpret that natural rights stand for those rights which work for man’s good and create opportunities for his development. As far as theory says that natural rights are necessary for man’s ethical and moral development, it is very valuable.

2.35.2 The Legal Theory of Rights

According to the Legal Theory of Rights, the state is the source of rights. Rights have not been gifted by nature, and are not in man’s nature itself. They are created by the State whose membership brings rights to man. So, rights can be regarded as artificial creations. Rights merge from the state, and are maintained by the State. The state makes laws, and laws create rights. The individual owes every right to the State, and he has no right against the State. Thus, the legal theory is against the theory of natural rights.

According to the theory, Rights spring from the State. The State defines what rights are and what not rights are and the state provides the list of basic or fundamental rights. The State makes laws to uphold rights, and also sets up a
machinery to enforce law and uphold rights. The State can change rights and their contents as it can change laws.

Pluralists strongly criticized the theory. They give great importance to various associations, and say that the membership of the state alone does not confer rights on the individual. According to them, the individual owes much to the various social groups for enjoying different rights, and it is incorrect to regard the state alone as the source of all rights.

2.35.3 The Socialist Welfare Theory of Rights

According to the Social Welfare theory, rights are created by society, and are aimed at realizing social welfare. Conditions which make the individual and society happy are rights, and these should have precedence over customs, usages, traditions, and natural rights. This theory looks at rights solely through the angle of social welfare.

The theory has the great merit of upholding the principle of social welfare. Utilities that supported the theory made a practical approach to rights, and advocate legislation in different fields to uphold rights.

2.35.4 The idealist Theory of Rights

The Idealist or personality Theory Rights says human being needs congenial external conditions for the development of his personality. Green, the idealist thinker of England says that rights are powers necessary to the fulfillment of man’s vocation as a moral being. Krause, Henrici and Wilde said that without rights man cannot become his best self.

It is implied that rights arise in a society, and the rights of the individual should be in harmony with those of others. Rights are to be linked with the individual good and the common good of all. The theory links with moral development of man, and looks rights essentially from the ethical point of view. The opportunities or rights
are to be enjoyed by the individual and society. Hence, they are to be understood in a social context. As the individual wants to develop his personality, others in society also have a similar aim.

According to the idealists like Kant and Green, conditions for the individual’s ethical and moral development are created by the State. But extreme idealists like Hegel subordinate the individual to the state, and except the individual to surrender himself completely to the state.

2.35.5 The Historical theory of Rights

As per the Historical Theory of Rights, rights are the result of historical evolution. In ancient times, rights were based on customs and usages. But in the modern state, rights are recognized and supported by law. In the course of ages, human beings in society evolved certain usages, traditions and customs for the common good, and these unwritten forms became the basis of law, which gave rights to the individuals in actual written form. To the primitive man custom was unwritten law.

A custom which people go on following generation after generation becomes a customary right, and this provides a basis of law. The theory says that several rights rose as a result of historical evolution. When the state was evolved, human beings must have had certain customs and traditions hardened by time and these provided an evolution. Law creates certain rights, and they do not have history as a source of their origin.

All products of history or custom cannot be regarded as rights or continued as rights. For example, in some countries in ancient times, buying and selling slaves was a custom or ‘right’ of the slave-dealer. So, we can see that long standing customs can come in the way of rights instead of becoming rights themselves.
2.36 General conditions underlying the ideal of Human Rights

2.36.1 The Contract theory

It would be a grave mistake to attempt to trace back the origins of human rights to social systems which were not familiar with its basic condition governing the existence of human rights, namely, the idea of freedom and equality. It is not possible to project a new institution upon social relations which have been superseded, and to which it does not correspond. In order for human rights to appear as the general rule in society, and for them to be felt both as a need and as a reality. It was indispensable for they are to be basic social changes in the relations of production (more precisely, in the relations of ownership) within the previous social system – feudalism. Everyone’s rights had to be recognized as being, in principle, equal with regard to ownership and the acquisition and enjoyment of property.

The right of property had previously been regarded as a natural right or in other words as a fundamental and inalienable right of man, first by Aquinas, then later more explicitly by Grotius, who set this right outside the universe of natural rights. Grotius had asserted that the right to property had been ‘introduced by human will’ and so that we should not be offended. He invited us to understand and to consider our property as corresponding to natural law.

Two major ideas emerged from this line of reasoning, but both subsequently splintered off from this origin were: the ideas of freedom and equality. The idea of freedom was that of free ownership of the free possession of property and to this was later added the idea of free enterprise, with all other corollaries of freedom.

As for the idea of equality, it too owes its origin, to the appearance of a new type of ownership. It signified equality for all as regards the right to acquire property. But considering more closely its true origin turns out to be connected with the political ideas of the state in the modern sense of the term. It also concerned equality in respect of participation in political life. Consequently, equality was a political idea
and a political right, whereas freedom possessed an economic character, at least so far as its origins were concerned.

According to modern political philosophy, every individual should possess equal rights in the life of the State. Subsequently, the notion of equality was made to apply to the whole of man, too all of man’s abilities and all of his rights. However, an important difference was to remain between freedom and equality-bound up with ownership, freedom was considered to be a right which the State would not restrict because it was an absolute right. This was not true of equality as it was regarded as a political right and, as such, it could be restricted by the State.

2.36.2 Origins at the level of Positive law

The origins of human rights, in respect of positive law, are traced back to documents, which appeared in recent centuries. According to this point of view human rights are contracts concluded by the State with the population and, first of all, with the mobility. These contracts are seen as preserving certain rights for men while preventing the State from interfering in the exercise of those rights. The legal force of these rights is seen as being founded (contrary to the conception of the theory of the contract founded on natural law) on the will of the State, or better still, in the circumstances of the period, on their recognition by the Kind.

The fact that human rights on agreements with a similar objective in view have been given the form of Charters, bills or petitions and, where appropriate, Declarations, has led to these documents being placed on the same theoretical footing, although they were produced at different periods and for different purposes. In particular, in the specialized literature, a whole discussion is to be found on the common or different nature of the Magna Carta, the petition of rights and Bill of Rights as well as of the Declaration of Virginia and the Bills, which followed it, and the French Declaration of 1789.

In Central Europe, George Jellineck’s book on the declaration of human rights (1904) caused a turmoil by subscribing to the view that the documents, i.e. Magna
Carta, the petition of Rights and the Bills of Rights as well as the Declaration of Virginia and the Bills which followed it and the French Declaration of 1789 – followed on from each other and were consequently directly related to each other. Moreover, he was not the only one who expressed that opinion.

Jellinek found it necessary to observe, in the second edition of his book that in United States the Bill of Rights has represented the culminating point, whereas the French Declaration was the starting point, which in itself constitutes a radical difference. Jellinek indirectly acknowledges, at the level of the history of civilization and of philosophy, as well as from the social point of view, the importance of the Declaration adopted by the Constituent Assembly of 1789. The starting point of human rights in the modern sense of the term is clearly to be found both in the ‘Declaration of the Rights of man and of the Citizen, voted during the French Revolution, and in the social conditions underlying it.

2.36.3 Conceptions based on “Natural Law”

According to the most traditional conception of human rights, at the time that men passed from the primitive state to the social state they concluded a contract between themselves, and by this contract they renounced part of their natural rights, which they has enjoyed in their free state, while preserving certain basic rights: the right to life, freedom and equality. The rights thus preserved constituted eternal and inalienable rights that every social and State system was obliged to respect.

As for the origin of these rights, there are various differences to be found in the way in which the conception founded on natural law is set forth. The theory of the social contract is the product of the school of natural law which made its appearance in the 15th and 16th centuries. According to this school, human rights are bound up with man’s basic nature from which they derive, and for which reason they constitute human rights.

According to another conception, which goes back to Locke, the starting point was tolerance in respect of their religions, or in other words, rights to profess and
religion. Again, what is involved is a conception referring to natural law. Furthermore, this idea set the scene for the creation of the United States of America, considering that freedom of religion played an important role in this connection.

There exist other conceptions of human rights, for instance that according to which human rights originated in human understanding. Conceptions of this kind were already subscribed to the middle Ages. Virtually all the feudal varieties of the natural law theory belong to this type of thinking, and the same is true of the Kantian theory of law, founded on reason. This theory, like all others is forced to start off from certain promises established a priori and from which it is possible to deduce human rights.

2.36.4 The Rights of Man and of the Citizens

The French Declaration of the Rights of Man and of the Citizen of 1789 and other documents which appeared subsequently, made a distinction between the rights of man and on the other rights of the citizen. Man in these texts appears as a being that is imagined to exist outside society, who is assumed to exist prior to society. As for the citizen, he is subject to the State’s authority. On this account, the rights of man are natural and inalienable rights, while the rights of the citizen are positive rights, rights granted by the positive law.

In the course of social, political and ideological development, this hierarch in respect of the appearance and existence of the rights of man and of the citizen has, to certain extend, and became blurred. As the distinction between the rights of man and the rights of the citizen has disappeared, the two categories have merged. In so far as certain traces of this distinction have remained, it has assumed new forms and has come to appear as a criterion for differentiating between branches of law. All rights as a whole, which are recognized by constitutions, are thus considered as belonging to the category of the rights of the citizen, whether the rights of man are those covered by international law.
Like this, the problem of human rights has been entirely reduced to the question of the simple relationship between two branches of law, a relationship in which constitutional law seems to be subordinate to international law.

2.37 Constitutional Law

In national systems human rights re-appear in the form of citizen’s rights in constitutional law. It is in the constitutions that human rights are established. For example, the French Constitution of 1791, the text of which is preceded by the Declaration of the Rights of man and of the citizen of 1789. The constitutions, which followed no longer, provide a general formulation of these rights in their preambles, but integrate them unto the actual text as basic rights upon which the State is founded. These rights determine the relations between the State and the citizen and define the domain in which the State does not intercede.

At the same time, human rights become affected by a specific bias in constitutional law in that they acquire a particular character, linked up with the State’s internal structure. The various constitutions, strange to say, omit-to define the effect of the rights listed. They do not explicitly state which of these rights have a direct effect on the basic of Constitutional law, and which ones necessitates special laws in order for them to be put into effect. Consequently, fundamental rights are provisions binding solely upon the legislature and are of no benefit to citizens except by this indirect channel.

In the socialist countries, there are different views as to the place that the citizen’s fundamental rights should occupy in the constitution, whether they should be formulated ahead of constitutional law or on the contrary, be included in the actual text of the constitution.

In constitutional law, there is a mixture of human rights and citizen’s rights. It falls to theory to re-establish the notion of human rights and to set them back in their place. In practice, constitutions contain a hierarchical system of citizen’s rights, which
constitutes the starting point of the system of human rights as it has been formulated by international law.

An outline of the events in the History of Human Rights is shown below. It is to be noted that, the scale used for listing is not consistent:

2.38 Conclusion

Thus we have seen the detailed information about Human Rights in our thesis until now, in which, we have seen the meaning, concepts and definitions of Human Rights. With inclusion of information about since when the idea of Human Rights is developed we have also stated that since when the law is being existed and when the rights started becoming established as ‘Human Rights’. We have also discussed about the correlation between Duties and Rights. Also we have stated about Human Rights and Indian Culture and show information about how this human rights are included in Indian constitution.

Whichever Rights are given in Indian Constitution will be discussed in the ensuing portion of this thesis in detail.