WHY OF HUMAN RIGHTS?

Human beings are born with human rights. Human rights are inherent rights that human beings are bestowed upon them by nature. We may give any nomenclature, weather they are natural rights are fundamental rights. They are essential condition for the every existence of human beings. The state has to protect the right so that human may live with dignity as a human beings.

In Golaknath Vs State of Punjab\(^1\) the Supreme Court has rightly observed, ‘Fundamental rights are the modern name for what have been traditionally known as natural rights’

D.D. Basu defines human rights as “those minimal basic rights which every individual must have against the state or other public authority by virtue of his being a member of human family irrespective of any other consideration”\(^2\).

‘The object of human rights is to establish a Government of law and not of man’ a governmental system where the tyranny of majority does not oppress the minority. In short the object is to establish Rule of law and it would not be wrong to say that the Indian constitution in this respect goes much ahead than any other constitutions of the world. The object is not merely to provide security and equality of citizenship of the people living in this land and thereby helping the process of nation building, but also and not less important to provide certain standards of conduct. Citizenship,

\(^1\) AIR 1967 SC1443, 1656
Justice and fair play. They were intended to make all citizens and persons appreciate that the paramount law of the land has swept away privileges and has laid down the paramount perfect equality between one section of the community and another in the matter of all those rights which are essential for the material and move perfection of man.

Protection of Human Rights Act, 1993, defines human rights as “human rights means the rights relating to life, liberty, equality and dignity of the individuals guaranteed by the Constitution or embodied in the International Covenants and enforceable by the Courts in India”\(^3\).

Justice P.N. Bhagawati observed in case of **Menaka Gandhi v. Union of India**\(^4\) that “all those rights which are essential for the protection and maintenance of the dignity of individuals and create conditions in which every human being can develop his personality to the fullest extent may be termed as human rights”.

Second preambular paragraph of the United Nations Charter provides that the expression human rights denotes all those rights which are inherent in our nature and without which we cannot live as a human being. Second and third preambular paragraph of the United Nation Declaration on Human Rights, 1948, provides that human rights being eternal part of the nature of human being are essential for individuals to develop their personality.

There are two main approaches to explain the nature and meaning of human rights. First is philosophical approach that is also known as

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3- Protection of Human Right Act, 1993
4- AIR 1978 SC 597.
theoretical approach, second is known as pragmatic approach. The philosophical approach contains different theories. These are:

(i) **Natural Right Theory** – Which explains that human rights has three characteristic features (a) human rights are said to be recognized, (b) human rights are said to be inalienable, natural and inherent, and (c) all human beings are said to be essentially equal.⁵

(ii) **Legal Rights Theory** – According to the Legal right theory, rights are created by the State. They are neither absolute nor inherent. These rights such as right to life, liberty or property are artificially created by the law of land.⁶

(iii) **The Historical Rights Theory** – This theory maintains that the rights are the creation of historical process. A long standing custom in the course of time concretize in the specific form of rights. For example a person receives birthday gifts from his friends and relatives regularly for a long period develops legitimate expectations to receive it as a matter of rights.⁷

(iv) **The Social Welfare Theory** – This theory is also known as Social Expediency Theory. According to this theory the law, custom and natural rights are codified by social expediency. For example right to freedom of speech is not absolute but rather regulated in accordance with the requirements of social expediency.⁸

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⁶- ibid.
⁷- ibid.
⁸- ibid.
(v) **The Idealistic Theory of Rights** – The idealistic theory of rights is also known as Personality Theory of Rights. This theory insists inner development of men on the development of his full potentiality. According to this theory, rights of personality are supreme and absolute right. All other rights such as fundamental rights and other rights are derived from it.⁹

The pragmatic approach considers that every right has validity through some institutions. For example a room can not be defined without referring to its wall. In the same way human rights can not be defined without referring to institutional settings. The purpose of securing human rights as such are to provide protection to these rights against the abuse of power committed by origin of state, to establish institutions for the promotion of living conditions of human beings and for the development of their personality.

**Human Rights An Indian Perspective**- In India provisions of human right were in existence from the old period. The examples are available in Manu Smriti and Ramayana etc. in Mughal period the examples of the protection of human rights are also available. After the independence provisions are made in the Constitution in the form of fundamental rights and Directive Principles of State Policy to provide protection of human rights. Apart from these, National Commission for Women Act, 1990, Protection of Human Rights Act, 1993, Protection of Women from Domestic Violence Act, 2005. The Commission for the Protection of Child Rights Act, 2005, and the Prohibition of Child Marriage Act, 2006, are some other documents for providing safeguards to the human being.

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Despite the above acts and documents the human rights violation is still continuing. The theme of the thesis is to highlight the problems and issues regarding the human rights. In the thesis it is tried to cover the problems and issues in respect of the violation of human rights by police, violation of human rights of prisoners, women, children and the relationship between human rights and environment. It is also tried to highlight the problem of enforcement of human rights at international and national level.

**Problems and Issues** — Police are the important organ of the society to maintain law and order and also to protect the rights of the person. But at present they are overburdened. They have to maintain law and order, to investigate the cases and also to spend maximum of its time for the protection of VIP’s. That is why if they investigate the matters they become brutal and the person arrested by him becomes the victim of their brutality. Custodial torture and fake encounter has become common phenomenon of police. Some times innocent persons are arrested and tortured. During the time of custodial torture the victim has no evidence to prove that the injuries on his body are caused by the police. These arrests, fake encounters are sometimes done by the police because of greediness, such as for the promotion and monetary benefits. Although judiciary has issued guidelines in *Joginder Kumar’s*\(^{10}\) case and *D.K. Basu’s*\(^{11}\) case, regarding arrest and torture of the persons, even then the violation of human rights is continuously being done by the police. That is why Law Commission of India, in its 113\(^{rd}\) report has suggested that Section 114B should be included it provides that if injuries are found on the

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body of the person in police custody, it shall be presumed that such injuries were caused by police officers in whose custody the victim was, Judiciary has also suggested that investigating unit of police should be separated from law and order maintaining units\textsuperscript{12}. The Second Administrative Reform Commission has also suggested that law and order maintaining unit of police should be separated from the investigating units. But still it has not been done.

**Human Rights and Prisoners**- Prisoners are the persons kept inside the four walls. They are not being provided proper facility like food, medicine and other basic needs inside the jail. Overcrowding in jail has become a major problem. Because of it those who are in the jail are deprived of their basic human rights. The conditions of women prisoners are not very good. They are not getting proper facilities. The pregnant women are not getting the facility of regular check up and medicine. Not only are these the inmates not being provided proper remunerations. The judiciary has issued directions in Sunil Barta’s\textsuperscript{13} case and had said that the prisoners should be provided with proper facilities. A person who is in the jail should not be deprived of his human rights because of being in jail. Even under trial are also human beings so they should be provided proper facilities. In Kerala Prison Reform Case\textsuperscript{14} first time it was decided by the Kerala High Court that hard labour envisaged in Section 53 of the Indian Penal Code contravenes the provision of Article 23 of the Constitution.

\textsuperscript{12} Prakash Chandra Singh v. Union of India (2006) 8 SCC 1.

\textsuperscript{13} Sunil Batra v. Delhi Administration (1980) 3 SCC 488.

\textsuperscript{14} AIR 1983 Ker 261
Apart from this the Court in Jolly George Vergeese’s\textsuperscript{15} case held that to keep a prisoner in the jail because of poverty and consequent inability to meet his contractual liability is violation of Article 21 of the Constitution. Apart from the above, the Courts have issued guidelines for speedy trial\textsuperscript{16}. Despite that the delay in trial is going on and innocent persons are undergoing the measurable condition of jails.

**Human Rights and Women in India** :- Women are the pillars of the society. But they are not getting proper respect form the society. Since there are provisions for the protection of human rights of the women but violations and exploitations of women are continued. It may be on domestic level or at work places. Apart from this discrimination against women is still continued which may be in employment or in political field. Judiciary from time to time tried to avoid these problems. In case of Vishaka vs. State of Rajasthan\textsuperscript{17} the Supreme Court has issued guidelines to prevent the sexual exploitation at work places. Similarly Court directed to provide compensation to the victim of sexual harassment\textsuperscript{18}. Though Supreme Court has refused to enhance the definition of rape and to include any form of intercourse into rape\textsuperscript{19}. In spite of above laws and judicial guidelines women are in need of more protections.

**Human Rights and Child**- Children are the Supreme assets

\textsuperscript{16} Abdul Rehman Antuley v. R.S.O. Nayak, AIR 1992 SC 1630.
\textsuperscript{17} AIR 1997 SC 3011.
\textsuperscript{18} Bodhisatwa Gautam v. Subhra Chakraborty, AIR 1996 SC 992.
\textsuperscript{19} Sakshi v. Union of India, AIR 2004 SC 3566.
of the nation but hardly they are being given proper respect. Very few of them are getting proper education and other basic needs. Child exploitation is a major problem of the society. It may be in the form of physical abuse of emotional abuse. A study of children pointed out that out of 4 children 3 are suffering from malnutrition. Apart from this child labour is also an issue which is needed to be discussed. Judiciary has issued various guidelines to avoid these problems but simply issuing guidelines are not sufficient. These guidelines and the enacted laws should be strictly implemented. Kerala High Court in Sathyavan Kottarakkra vs. State held that exploitation of children in any form such as mentally and physically is objectionable. Supreme Court has also held that children should not be employed in hazardous activities.

**Human Rights and Environment :-** Right to clean environment is a fundamental right. Every person has right to live in clean environment. But right to development is a right which sometime affects the environment. Both of these are the third generation human rights. But sometime one is sacrificed for the other. For example, development destroys the environment. Construction of big dams affects most of the people of that area. Similarly right to environment versus right to livelihood is also an issue. The persons living in the jungle cannot survive if they are debarred to cut and sell the woods. Although the concept of sustainable development, precautionary principle, polluter pays principles are trying to maintain the balance between environment, livelihood and development.

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21- AIR 1997 Ker 133.
Judiciary has also from time to time issued directions for cleaning the environment\textsuperscript{23}. Supreme Court has also tried to balance between the environment and development. The Court observed that both development and environment must go hand to hand\textsuperscript{24}.

**Human Rights and Enforcement**- Human Rights which is inherent right of every human being is facing the problem of enforcement. The main organs to govern the Human Rights are National Human Rights Commission and State Human Rights Commission. But problem is that these are simply recommendatory body. They have to send their report to government or to Courts. Apart from these some of the rights which are human rights but given in Part-IV of the Constitution, i.e., the Directive Principles of State Policy. So they cannot be enforced by the Court of Law. The time has come that the National Human Rights Commission and State Human Rights Commission should be given power of enforcement of Human rights.

There is on the face of the earth no other country that has the problem that India has of chronic starvation and slow death - a process of dehumanization. The solution must, therefore, be original. In trying to find it, we must discover the causes of the tremendous tragedy.\textsuperscript{25} 'It means the leveling down of the few rich in whose hand is concentrated the bulk of the nation's wealth on the one hand, and the leveling up of the semi-starved, naked millions of the other. A non-violent system of government is clearly


\textsuperscript{24} Indian Council for Enviro-Legal Action v. Union of India, JT (1996) 4 SC 263.

\textsuperscript{25} M.K. Gandhi, Young India : Oct. 31, 1924.
an impossibility so long as the wide gulf between the rich and the hungry millions persists. The contrast between the palaces of New Delhi and the miserable hovels of the poor labouring class nearby, cannot last one day in a free India in which the poor will enjoy the same power as the richest in the land. A violent and bloody revolution is a certainty one day, unless there is a voluntary abdication of riches and the power that riches give and sharing them for the common good.26

The high noon of India Humanist jurisprudence arrives only when the nation's cadres, including the judicial, manifest a deep concern for man, through total commitment to the people, and produce home-spun legislative social justice. Not as spiritual vapour or vague hortation or high-sounding theory but as working programmes of material and moral provision for social survival, life-saving circumstances and shared enjoyment of the good things of society at least at the creature level below which life is benumbed. That is the service of law to life. Jawaharlal Nehru said in the Constituent Assembly:

'The service of India means the service of the millions who suffer. It means the ending of poverty and ignorance and disease and inequality of opportunity. The ambition of the greatest man of our generation has been to wipe every tear from every eye. That may be beyond us, but as long as there are tears and suffering so long our work will not be over.

The perspective that present is admissible only if the ideas of fraternity equality, dignity and the worth of the human person, constitutionally espoused, receive juridical hospitality and juridical legality.

All talk of trespass into pavements, obstruction of pedestrian traffic and the beautification of cities obfuscates human relativity. The clean broad walks, spick-and-span streets, lovely lawns, pretty parks and city beautiful. But there is what I may call patriotic priority or fundamental nationalism to ignore which is to bastardise national reconstruction. First take care of those who suffer most. Nehru warned the Constituent Assembly:

'If we cannot solve this problem soon, all our paper constitutions will become useless and purposeless. . . If India goes down, all will go down; if India thrives, all will thrive; and if India lives, all will live . . .'

Why did he say so? Because poverty is explosive and exponential. Those at the bottom of the ladder must be the first charge on the nation's resources. Therefore, pavement dwellers, slum dwellers and agrestic indigents are the cynosure of Social Justice which is the basic mandate of the Constitution. The ill starved people first, the five star hotels afterwards. No pavement dweller loves to wade in filthy water, no slum dweller wishes the suffocating sting of his surroundings, no women will abandon her sense of shame and ease in public if she can get some privacy somewhere. We brutalise people from elitist heights and, to add insult to injury, we abuse them for theft and defecation in public. Therefore, a revolution in perspective is an urgent imperative. To reject this approach is to be heathen to humankind, to be alien to inner to self and to be philistine to our own culture.

The first in the agenda- the top imperative of the preamble- is human dignity plus equality plus social justice. No city is beautiful- it is terribly ugly- if 40% of its denizens are driven into desperate conditions. First rehabilitate the pavement population. Then, restore pedestrian walks.
Then parks and pools and so on. The title of the pavement dweller to minimal material conditions is the Constitution's Preamble. The state cannot out rage the value-set of the constitution under which it exercises authority. No Constitution, no State.

If large swarms of humans who are a considerable part of the nation's political sovereign are to be condemned as trespassers and public nuisance by the few who hold the wealth of the national to the detriment of the community, the invitation for a violent revolution is obvious for those who can see the writing on the wall, Is a child in its innocence and a girl in her virginity and a youth in his naïveté to be branded trespassers for no fault? Every patrician then is a trespasser on this planet. Our value system which governs our legal system must change. Indeed, in the constellation of values enshrined in the Constitution, the nation envisions a different social order in which justice, social economic and political, shall inform all the institution of the national life.27

The new nationalism-one might almost say, the reincarnation of patriotism - commands law-persons to develop arts of transformation of the social order without popular convulsions and paralysing legalisms. Creative craftsmanship finds expression here. If the wails of the young, the whispers of the old and the withering health of the masses will not move us into forensic compassion and action, armed with constitutional fundamentals, our laws' labours are lost. Fundamental rights are not the rich man's missile to the directive principles of State policy are not electoral opium; they are for the people, and their deliverance. The tools are there, the tasks are there,

27- Article 38 constitution of India.
the transformation is feasible, given the will of law. The old legal order sounds the requiem of the rule of life of daridra narayana. This blue bold perspective must go.

**Relation between Natural Rights and Human Rights** As a written constitution has evolved from the concept of natural Law as a higher law, so the Fundamental Rights be said to have sprung from the doctrine of natural rights. In *Golaknath Vs State of Punjab*\(^{28}\) as the Indian Supreme courts has observed that “Fundamental, rights are the modern name for what have been traditionally know as natural rights”.

The doctrine of natural rights is itself an offshoot of the doctrine of natural law. Since natural law consists of rules founded on the primary instincts of man as modified by his inborn perception of what is right or wrong. It follows that natural rights constitute the primary rights and obligations of men to one another as soon as they begin to live in society, i.e., in association with others. And since the rules of natural law are of universal application, natural rights also inhere in every human being. In all ages and in all climes\(^ {29}\).

The political implication of the theory of natural rights is that these rights being inherent in man, existed prior to the birth of the state itself and cannot, therefore, be violated by the state, Paradoxically, however, the growth of the state itself necessarily put limitation on the natural rights of every individual in the interests of there collective existence. In a ‘state of nature’. The earliest state of society envisaged by political thinkers such as Hobbes or Rousseau, right was co-related with might. In the sense that

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28- AIR 1967 SC 1643
29- Preamble of Universal Declaration, 1948 (Para. 8)
every man had a right to do everything within his power. The growth of political society narrowed down the ambit of such rights in so far as social existence postulates that the rights of each individual should be limited by the collective interests of society in which he lives.

Just as natural law stands above the law of the land, so natural rights are thought to be of a higher sanctity than legal rights which are actually prescribed by the legal sovereign for the time being, because natural rights exist independent of the law of the land and are not prescribed by any human authority.

Though there has been an unending controversy as to whether rights are anterior to political society or are created by the latter, philosophers agree on the point that there are certain basic and inalienable rights which are inherent in free and civilized human beings. A political society is necessary not to create them but to secure them. For instance, a right to habeas corpus in England was not created by the Habeas Corpus Acts, but existed even prior to the enactment of those statutes. Civilised men derive such rights from a higher law, which was called ‘natural law’ at the dawn of civilisation, and which later came to be embodied in the form of written instrument constituting the ‘fundamental law’ of the land.

When natural rights or human rights guaranteed and entrenched by a written constitution, these rights are called ‘Fundamental Rights’, because they are guaranteed by the fundamental law.

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30. American Declaration of independence, 1976 Preamble to the Universal declaration