THE HISTORY OF HUMAN RIGHTS

The history of the philosophical development of human rights is punctuated by a number of specific moral doctrines which, though not themselves full and adequate expressions of human rights, have nevertheless provided a number of philosophical prerequisites for the contemporary doctrine. These include a view of morality and justice as emanating from some pre-social domain, the identification of which provides the basis for distinguishing between 'true' and merely 'conventional' moral principles and beliefs. The essential prerequisites for a defence of human rights also include a conception of the individual as the bearer of certain 'natural' rights and a particular view of the inherent and equal moral worth of each rational individual.

Human rights rest upon moral universalism and the belief in the existence of a truly universal moral community comprising all human beings. Moral universalism posits the existence of rationally identifiable trans-cultural and trans-historical moral truths. The origins of moral universalism within Europe are typically associated with the writings of Aristotle and the Stoics. Thus, in his Nicomachean Ethics, Aristotle unambiguously expounds an argument in support of the existence of the natural moral order. This natural order ought to provide the basis for all truly rational systems of justice. An appeal to the natural order provides a set of comprehensive and potentially universal criteria for evaluating the legitimacy of actual 'man-made' legal systems. In distinguishing between 'natural justice' and 'legal justice', Aristotle writes, 'the natural is that which has the same validity everywhere and does not depend upon acceptance;'

1- (Nicomachean Ethics 189)
Thus, the criteria for determining a truly rational system of justice pre-exist social and historical conventions. 'Natural justice' pre-exists specific social and political configurations. The means for determining the form and content of natural justice is the exercise of reason free from the distorting effects of mere prejudice or desire.

This basic idea was similarly expressed by the Roman Stoics such as Cicero and Seneca, who argued that morality originated in the rational will of God and the existence of a cosmic city from which one could discern a natural, moral law whose authority transcended all local legal codes. The Stoics' argued that this ethically universal code imposed upon all of us a duty to obey the will of god. The stoics thereby posited the existence of a universal moral community effected through our shared relationship with god. The belief in the existence of a universal moral community was maintained in Europe by Christianity over the ensuing centuries. While some have discerned intimations towards the notion of rights, the Stoics, and Christian theologians, a concept of rights approximating that of the contemporary idea of human rights most clearly emerges during the 17th And 18th Centuries in Europe and the so-called doctrine of natural law.

The basis of the doctrine of natural law is the belief in the existence of a natural moral code based upon the identification of certain fundamental and objectively verifiable human goods. Our enjoyment of these basic goods is to be secured by our possession of equally fundamental and objectively verifiable natural rights. Natural law was deemed to pre-exist actual social and political systems. Natural rights were thereby similarly presented as rights individuals possessed independently of society or polity.
Natural rights were thereby presented as ultimately valid irrespective of whether they had achieved the recognition of any given political ruler or assembly. The quintessential exponent of this position was the 17th. Century philosopher John Locke and, in particular, the argument he outlined in his Two Treatises of Government (1688). At the centre of Locker's argument is the claim that individuals possess natural rights, independently of the political recognition granted them by the state. These natural rights are possessed independently of, and prior to, the formation of any political community. Locke argued that natural rights flowed from natural law.

Natural law originated from God. Accurately discerning the will of God provided us with an ultimately authoritative moral code. At root, each of us owes a duty of self-preservation to God. In order to successfully discharge this duty of self-preservation each individual had to be free from threats to life and liberty, whilst also requiring what Locke presented as the basic, positive means for self-preservation: personal property. Our duty of self-preservation to god entailed the necessary existence of basic natural property to life, liberty, and property, Locke proceeded to argue that the principal purpose of the investiture of political authority in a sovereign state was the provision and protection of individuals' basic natural rights. For Locke, the protection and promotion of individuals' natural rights was the sole justification for the creation of government. The natural rights to life, liberty and property set clear limits to the authority and jurisdiction of the State. States were presented as existing to serve the interests, the natural rights, of the people, and not of a Monarch or a ruling cadre. Locke went so far as to argue that individuals are morally justified in taking up arms
against their government should it systematically and deliberately fail in its duty to secure individuals possession of natural rights.

The Philosophical foundation of the rights of man is natural law and the history of rights of man is bound up with the history of natural law.\(^2\) That law is deduced not from any speculative void but from the general condition of making in society. According to St. Thomas Aquinas the order of the precepts of the natural law follows the order of natural inclinations, because, in man there is first of all an inclination to good in accordance with the nature which he has in common with all substances inasmuch as every substance seeks the preservation of its own being, according to its nature; and by reason of this inclination, whatever is a means of preserving human life, and the warding off its obstacles, belongs to the natural law.\(^3\)

In a different context Spinoza proclaimed the very same principle in his famous words "Every being strives to persevere in being."\(^4\) Secondly, according to St. Thomas Aquinas, there is in man an inclination to things that pertain to him more specially, acceding to that this nature which he has in common with other animals : and in virtue of this inclination, those things are said to belong to the natural law which nature has taught to all animals, such as sexual intercourse, the education of the offspring and so forth.\(^5\) And thirdly, there is in man an inclination to be good according to the nature of his reason which inclination prompts him to know the truth and to live in society.

---

2- Jacques, Maritain : Man and the State, 80-81
3- Summa Theologica, Part II, Section I, Question 91, Article 2 (Translated by the English Dominicans), Vol. 3.
4- Ethics, Pat III, Proposition No. 6
5- Summa Theological, Part III, Section I, Question 91,
The law of nature is both an expression of reality and a standard to measure the rightness and justice of positive law. The influence of natural law on the concept of natural justice and of the reasonable man of the common law, on the conflict law, the law of merchants and the law of quasicontact, with special reference to the common law of India has been traced with great learning by Sir Frederic Pollock in his essay on the "History of the law of the Nature."  

It is true that law of nature has incurred the charge of being fanciful and speculative and several of the theories advanced in support of natural law have been discredited. Mr. Max M. Laser son has rightly said that the doctrines of natural law must not be confused with natural law itself. The doctrines of natural law, like any other political and legal doctrines, may propound various arguments or theories in order to substantiate or justify natural law, but the overthrow of these theories cannot signify the overthrow of natural law itself, just as the overthrow of some theory of philosophy of law does not lead to the overthrow of law itself. 

The social nature of man, the generic traits of his physical and mental constitution, his sentiments of justice and the moral within, his instinct for individual and collective preservation, his desire for happiness, his sense of Human dignity, his consciousness of man's station and purpose in life, all these are not products of fancy but objective factors in the realm of existence. The law of nature is not, as the English utilitarians in their

6- Essays in Law, 31.
7- "Positivism and Natural Law and their Correlation in interpretation of ModernLegal Philosophies." Essays in Honour of Rosoe Pound, (1947)
ignorance of its history supposed, a synonym for arbitrary individual preference, but that on the contrary, it is a living embodiment of the collective reason of civilized mankind, and as such is adopted by the Common Law in substance though not always by name. "The sacred rights of mankind are not to be rummaged for among old parchments of musty records. They are written, as with a sunbeam, in the whole volume of human nature, by the hand of Divinity itself, and can never be obscured by moral power."10

Analyses of the historical predecessors of the contemporary theory of human rights typically accord a high degree of importance to Locke's contribution. Certainly, Locke provided the precedent of establishing legitimate political authority upon a rights foundation.

This is an undeniably essential component of human rights. However the philosophically adequate completion of theoretical basis of human rights requires an account of moral reasoning, that is both consistent with the concept of rights, but which does not necessarily require an appeal to the authority of some super-human entity in justifying human beings' claims to certain, fundamental rights. The 18th Century German philosopher, Immanuel Kant provides such an account.

Many of the central themes first expressed within Kant's moral philosophy remain highly prominent in contemporary philosophical justifications of human rights. Foremost amongst these are the ideals of equality and the moral autonomy of rational human beings. Kant bestows

9- Sir Frederic Pollock : The Expansion of the Common Law (1904) 128
10- The Passage quoted in The History of Freedom and other Essays by Lord Acton (1907), 587.
upon contemporary human rights theory the ideal of potentially universal community of rational individuals autonomously determining the moral principles for securing the conditions for equality and autonomy. Kant provides a means for justifying human rights as the basis for self-determination grounded within the authority of human reason. Kant's moral philosophy is based upon an appeal to the formal principles of ethics, rather than, for example an appeal to a concept of substantitive human goods.

For Kant, the determination of any such goods can only proceed from a correct determination of the formal properties of human reason and thus do not provide the ultimate means for determining the correct ends, or object, of human reason. Kant's moral philosophy beings with an attempt to correctly identify those principles of reasoning that can be applied equally to all rational persons, irrespective of their own specific desires or partial interests. In this way, kant attaches a condition of universality to the correct identification of moral principles. For him, the basis of moral reasoning must rest upon a condition that all rational individuals are bound to assent to. Doing the right thing is thus not determined by acting in pursuit of one's own interests or desires, but acting in accordance with a maxim which all rational individuals are bound to accept. Kant terms this the categorical imperative, which he formulates in the following terms, 'act only on that maxim through which you cant at the same time will that it should become a universal law.' (1948:84).

Kant argues that this basic condition of universality in determining the moral principles for governing human relations is a necessary expression of the moral autonomy and fundamental equality of all rational individuals. The categorical imperative is self-imposed by morally autonomous and formally equal rational persons. It provides the basis for
determining the scope and form of those laws which morally autonomous and equally rational individuals will institute in order to secure these very same conditions. For Kant, the capacity for the exercise of reason is the distinguishing characteristic of humanity and the basis for justifying human dignity.

As the distinguishing characteristic of humanity, formulating the principles of the exercise of reason must necessarily satisfy a test of universality; they must be capable of being universally recognized by all equally rational agents. Hence, Kant's formulation of the categorical imperative. Kant's moral philosophy is notoriously abstract and resists easy comprehension. Though often overlooked in accounts of the historical development of human rights, his contribution to human rights has been profound. Kant provides a formulation of fundamental moral principles that, though exceedingly formal and abstract, are based upon the twin ideals of equality and moral autonomy. Human rights are rights we give to ourselves, so to speak as autonomous and formally equal beings. For Kant, any such rights originate in the formal properties of human reason, and not the will of some super-human being.

The philosophical History of human rights

The philosophical ideas defended by the likes of Locke and Kant have come to be associated with the general Enlightenments project initiated during the 17th and 18th Centuries, the effects of which were to extend across the globe and over ensuing centuries. Ideals such as natural rights, moral autonomy, human dignity and equality provided a normative bedrock for attempts at re-constituting political systems, for overthrowing formerly despotic regimes and seeking to replace them with forms of
political authority capable of protecting and promoting these new emancipatory ideals. These ideals effected significant, even revolutionary, political upheavals throughout the 18th century entury, enshrined in such documents as the united states declaration of Independence and the French National Assembly's Declaration of the Rights of Man and Citizen. Similarly, the concept of individual rights continued to resound through the 19th Century exemplified by Mary Wollstencraft's Vindication of the Rights of Women and other political movements to extend political suffrage to sections of society who has been denied the possession of political and civil rights.

The concept of rights had become a vehicle for effecting political change. Though one could argue that the conceptual prerequisites for the defence of human rights had long been in place, a full Declaration of the doctrine of human rights only finally occurred during the 20th Century and only in response to the most atrocious violations of human rights, exemplified by the Holocaust.

The Universal Declaration of Human rights (UDHR) was adopted by the UN General Assembly on 10th. December 1948 and was explicitly motivated to prevent the future occurrence of any similar atrocities. The Declaration itself goes far beyond any mere attempt to reassert all individuals' possession of the rights to life as a fundamental and inalienable human right. The UDHR consists of a preamble and 30 articles which separately identify such things as the rights not to be tortured\textsuperscript{11}, a right to asylum\textsuperscript{12}, a right to own property\textsuperscript{13}, and a right to an adequate standard

\textsuperscript{11} UDHR, Article-5
\textsuperscript{12} UDHR, Article-14
\textsuperscript{13} UDHR, Article-17
of living\textsuperscript{14} as being fundamental human rights. The UDHR has been further supplemented by such documents as the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) and the International Covenant of Economic, Social and Cultural Rights (1966).

The specific aspirations contained within these three documents have themselves been reinforced by innumerable other Declarations and Conventions. Taken together these various Declarations, Conventions and convenants comprise the contemporary human rights doctrine and embody both the belief in the existence of a universally valid moral order and a belief in all human beings possession of fundamental and equal moral status, enshrined within the concepts of human rights.

It is important to note, however, that the contemporary doctrine of human rights, whilst deeply indebted to the concept of natural rights, is not a mere expression of that concept but actually goes beyond it in some highly significant respects. James Nickel (1987: 8-10) identifies three specific ways in which the contemporary concept of human rights differs from, and goes beyond that of natural rights. First, he argues that contemporary human rights are far more concerned to view the realization of equality as requiring positive action by the state, via the provision of welfare assistance, for example. Advocates of natural rights, he argues, were far more inclined to view equality in formalistic terms, as principally requiring the state to refrain from 'interfering' in individuals' lives. Second, he argues that, whereas advocates of natural rights, tended to conceive of human beings as mere individuals, veritable' islands unto themselves', advocates of contemporary human rights are far more willing to recognize

\textsuperscript{14-} UDHR, Article-25
the importance of family and community in individuals' lives. Third, Nickel views contemporary human rights as being for more internationalists in scope and orientation than was typically found within arguments in support of natural rights. That is to say the protection and promotion of Human rights are increasingly seen as requiring international action and concern. The distinction drawn by Nickel between contemporary human rights and natural rights allow one to discern the development of the concept of human rights. First generation rights consist primarily of rights to security, property, and political participation these are most typically associated with the French and US Declarations. Second generation rights are construed as socioeconomic rights, rights to welfare, education, and leisure, for example. These rights largely originate within the UDHR. The final and third generations of rights are associated with such rights as a right to national self-determination, a clean environment, and the rights of indigenous minorities. This generation of rights really only takes hold during the last two decades of the 20th Century but represents a significant development within the doctrine of human rights generally.

State of West Bengal V. Subodh Gopal,\(^{15}\) The Supreme Court has held that (Article 19) enumerates certain freedoms under the caption "right to freedom" and deals with those great and basic rights which are recognized and guaranteed as the natural rights inherent in the stratus of citizen of an free country.

In the United State of America, reliance upon natural law on the part of vested interests inimical to the economic freedom of man was destined to

\(^{15}\) 1954 SCR 587, 596
prove a persistent feature in the 19th century. In the second half of the 19th century, the ideas of natural law and of natural rights were resorted to in an attempt to curb State interference with rights of private property and freedom of contract. The ideas of natural law and natural right were revived and endowed with fresh vigour for that purpose. By reference to natural rights of man, Courts in the United States often declared to be unconstitutional legislation for securing humane condition of work, for protecting the employment of women and children, for safeguarding the interests of consumers, and for controlling the powers of trusts and corporations.

This past history explains why natural rights have been regarded in some quarters with suspicion and why writers affirming the supremacy of a higher law over the Legislature of the Constitution have spoken with impatience of the damnosa haereditas of natural rights. This idea of natural law in defence of causes both paltry and iniquitous has caused many to reject it with impatience. A great practical reformer like Jeremy Bentham, a great judge like Mr. Justice Holmes and a great legal philosopher like Hans Kelsen—all believers in social progress-have treated the law of nature with little respect and have rejected it as fiction. Mr. Justice Holmes remarked: "The jurists who believe in natural law seem to me to be in that naive state of mind that accepts what has been familiar and accepted by them and their neighbours as something that must be accepted by all men everywhere." Professor Kelsen considers the typical function of the natural law school to have been the defence of established authority and institutions of

16- Haines : The Revival of Natural Law Concepts, 117-123.
17- Homes : Collected Legal Papers, 312
established governments, of private property, of slavery, of marriage.\textsuperscript{18}

Despite these attacks and the ebb and flow in its fortune, there has been a revival of the law of nature in the 20th century and there is no gainsaying the fact that the doctrine of the law of nature was the bulwark and the lever of the idea of the rights of man embodied in the International Bill of Human Rights with a view to make the recognition of these rights more effective and to proclaim to the world that no State should violate these rights.\textsuperscript{19} Whether we call these rights natural rights or not whether they flow from the law of nature or not, these are right which belong to man as a rational and moral being. "Man's only rights, in the last analysis in the right to be a man, to live as a human person. Specific human rights are all based on man's right to live a human life"\textsuperscript{20}. Harold Laski said\textsuperscript{21}:

Human beings have human rights inherent in them as a member of society; and the state, as the fundamental instrument of society, in the manner in which it seeks to secure the substance of those rights ....... Rights in this sense, are the groundwork of the State. They are the quality which gives to the exercise of its power a moral penumbra. And they are natural rights in the sense that they are necessary to good life."

Article 33 of the Constitution which states that Parliament may, by law determine to what extent the Fundamental Rights, in their application to members of the Armed Forces of forces charged with the maintenance of public order be restricted or abrogated so as to ensure the proper discharge

\textsuperscript{18} Kelsen : General Theory of Law and State, 413-418
\textsuperscript{19} Lauterpacht : International Law and Human Rights 112-113
\textsuperscript{20} Thomas P. Neill : Weapons for Peace quoted in Rommen, The Natural Law, 243
\textsuperscript{21} Harold Laski : Grammar of Politics, (1925), 39-40.
of their duties and the maintenance of discipline among them, would show that no natural rights are recognised by our Constitution, as otherwise, the limitation on the exercise of the Fundamental Rights by Parliament would be unwarranted.

**Basheshar Nath V. Commissioner of Income Tax, Delhi,** 22 The Supreme Court speaks up through S.K. Das. J. said:

"There are, in any opinion, clear indications in Part III of the Constitution itself that the doctrine of "natural rights" had played no part in the formulation of the provisions therein. Take Articles 33, 34 and 35 which give Parliament power to modify the rights conferred by Part III. If they were natural rights the Constitution could not have given power to Parliament to modify them."

Natural rights as such are enforceable by Courts without the backing of positive law or that they are not liable to be limited in certain circumstances.

That all natural rights are liable to be limited or even taken away for common good is itself a principle recognized by all writers on natural law. "However, even though man's natural rights are commonly termed absolute and inviolable, they are limited by the requirements of the universal Order to which they are subordinated. Specifically, the natural rights of man are limited intrinsically by the end for which he has received them as well as extrinsically by the equal rights of other men, by his duties towards others."

22- (1959) Supp 1 SCR 528, 605
exercise of the Fundamental Rights by military personnel or the police charges with the duty of maintaining the peace, that does not mean that there are no natural rights, or, that by and large, the Fundamental Rights are not recognition of the natural rights.

Fundamental Rights like natural rights are liable to be limited for the common good of the society. John Locke himself did not understand that natural rights were absolute and nowhere did he say so. In other words, because Parliament can restrict the exercise of or even take away the Fundamental Rights of the military personnel or the police charged with the duty of maintaining peace by law, it does not follow that Fundamental Rights, by and large, are not a recognition of the basic human rights or that those rights are not liable to be limited by positive law for common good. Natural law cannot supplant positive law; positive law must provide the practical solution in the choice of one measure rather than another in a given situation. Sir Frederick Pollock said that natural justice has no means of fixing any rule to terms defined in number or measure, nor of choosing one practical solution out of two or more which are in themselves equally plausible. Positive law, whether enacted or customary, must come to our aid in such matters, It would be no great feat for natural reason to tell us that a rule of the road is desirable; but it could never have told us whether to drive to the right hand or to the left, and in fact custom has settled this differently in different countries, and even, in some parts of Europe, in different provinces of one State.24

Because non-citizens are not granted all the Fundamental Rights, these rights, by and large, are not a recognition of the human or natural

24- Pollock : The Expansion of the Common Law, (1904), 128.
rights. The fact that Constitution does not recognize them or enforce them as Fundamental Rights for non-citizens is not an argument against the existence of these rights. It only shows that our Constitution has chosen to withhold recognition of these rights as fundamental rights for them for reasons of State Policy. The argument that Fundamental Rights can be suspended in an emergency and, therefore, they do not stem from natural rights suffers from the same fallacy namely the natural rights have no limits or are available as immutable attributes of human person without regard to the requirement of the social order or the common good.

There are many human rights which are strictly inalienable since they are grounded on the very nature of man which no man can part with or lose. Although this may be correct in a general sense, this does not mean that these rights are free from any limitation. Every law, and particularly, natural law, is based on the fundamental postulate of Aristotle that man is a political animal and that his nature demands life in society. As no human being is an island, and can exist by himself, no human rights, which has no intrinsic relation to the common good of the society can exist. Some of the rights like the right to life and to the pursuit of happiness are of such a nature that the common good would be jeopardised if the body politic would take away the possession that men naturally have of them without justifying reason. They are to a certain extent, inalienable. Other like the right of free speech or of association are of such a nature that the common good would be jeopardised if the body politic could not restrict or even take away both the possession and the exercise of them. They cannot be said to be inalienable. And, even absolutely inalienable rights are liable to limitation both as regards their possession and as regards their exercise.
They are subject to conditions and limitations dictated in each case by justice, or by consideration of the safety of the realm or the common good of the society. No society has ever admitted that in a just war it could not sacrifice individual welfare for its own existence. And as Holmes said, if conscripts are necessary for its army, it seizes them and marches them, with bayonets in their rear to death.\textsuperscript{25} If a criminal can be condemned to die, it is because by his crime he has deprived himself of the possibility of justly asserting this right. He has morally cut himself off from the human community as regard this right.\textsuperscript{26}

Human rights are only prima facie rights to indicted that the claim of any one of them may be overruled in special circumstances. The most fundamental of the preexisting rights- the right to life- is sacrificed without scruple in a war.

A prima facie right is one whose claim has prima facie justification. i.e., is justified unless there are stronger counter-claims in the particulars situation in which it is made, the burden of proof resting always on the counter-claims. To say that natural rights or human rights are prima facie rights is to say that there are cases in which it is perfectly just to disallow their claim. Unless we have definite assurance as to the limits within which this may occur, we may have no way of telling whether we are better off with these prima facie rights than we would be without it. "Considerations of justice allow us to make exceptions to a natural right in special circumstances as the same consideration would require us to uphold it in general."\textsuperscript{27}

\textsuperscript{25} Common Law 43.
\textsuperscript{26} Jacues, maritain : Man and State, 102
\textsuperscript{27} Justice and Equality by Gregory Vilastos in Social Justice, (Richard B. Brandt ed.)
Owing to the complexity of social relations, rights founded on one set of relations may conflict with rights founded on other relations. It is obvious that human reason has become aware not only of the rights of man as a human and civic person but also of his social and economic rights, for instance, the right of a worker to a just wage that is sufficient to secure his family's living, or the right to employment relief or unemployment insurance, sick benefits, social security and other just amenities, in short, all those moral rights which are envisaged in Part IV of the Constitution. But there was natural tendency to inflate and make absolute, unrestricted in every respect, the familiar fundamental rights, at the expense of other rights which should counter-balance them. The economic and social rights of man were never recognised in actual fact without having had to struggle against and overcome the bitter opposition of the fundamental rights. This was the story of the right to a just wage and similar rights in the face of right to free mutual agreement and right to private ownership.

To determine what is finally right involves a balancing of different claims. From an ethical point of view it may be submitted that particular rights are subject to modification in a given situation by the claims arising out of other rights or of the body of rights as a whole. Since no single right whether natural or not is absolute, claims based on any one right may be subject to qualifications in accordance with claims based on other rights or the requirement of the total order or way of life, namely, the principal of the common good. It is significant to note the article 29(2) of the Declaration of Human Rights provides:

"In the exercise of his rights and freedoms, everyone shall be subject only 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."

While the full significance of Human rights may only be finally dawning on be finally downing on some people, the concept itself has a history spanning over two thousand years.

The development of the concept of human rights is punctuated by the emergence and assimilation of various philosophical and moral ideals and appears to culminate, at least to our eyes, in the establishment of a highly complex set of legal and political documents and institution, whose express purpose is the protection and promotion of the fundamental rights of all human beings everywhere. Few should underestimate the importance of this particular current of human history.

**Evolution from Natural Rights to Fundamental Rights.**

The story of evolution of natural rights into Fundamental Rights, enforceable in a court of a law against the Sovereign himself as a long one, for which there is little room in this work on a law. A reference to the landmarks, however, would be useful to clarify the essential principal underlying the concept of ‘Fundamental Right’.

**Magna Carta: 1215**

Though the Constitution of England has never been codified in the form of one organic instrument, so far as individual rights are concerned,
they have been asserted, from time to time, in the form of declarations of the inviolable rights and liberties of the subject against the most despotic monarchical authority. In the words of Blackstone, these rights were founded on nature and reason, so they are coeval with form of government.”

The doctrine of natural rights thus passed into the realm of practical reality when an absolute monarch himself (King John) was made to acknowledgement that there were certain rights of the subject which could not be violated even by a Sovereign in whom all power was legally vested.

**Petition of Right: 1628**

The movement continued through the repeated confirmation of the Megna Carta and the petition of Right, 1628, and culminated in the Bill of Rights, 1689 which statue the declaration which the people made the Prince and Princess of Orange to subscribe at their accession in 1688. The contribution of this instrument towards the development of Fundamental Rights will be evident when we look at its concluding words:

It may be declared and enacted, that all the singular the rights and liberties asserted and claimed in the said declaration or the true ancient and indubitable rights and liberties of the people of kingdom.

**The Act of Settlement: 1701**

The Act of settlement, which followed, had for its title “An Act declaring the Rights and Liberties of the Subject…”, which were asserted as” the birth –right of the people of England”

Together with these Charters of liberties, we should advert to the views of contemporary political thinkers, such as the Dissenters and the
Levellers, rising against Stuart absolutism. Though from the early times natural law was considered to be a norm for right conduct as well as the source of certain basic rights, the latter aspect was more emphasised by revolutionary leaders like Eliot, Pym and Hampden, to assert that there were certain Fundamental Rights, such as the freedom of person and property, which could not be arbitrarily interfered with by any political authority. The theory of natural rights of the individual was thus used to checkmate the theory of Divine Right of Kings.

**John Locke: 1690**

The doctrine of natural rights received further impetus at the hands of the great protagonists of the theory of Social Contract in the 17th and 18th centuries, particularly Locke and Rousseau, who sought to trace the genesis of political Society and government in an agreement into which individuals entered to form a collective society to ensure their general interests and objects, but at the same time without interfering with their ‘natural rights’ which already belonged to them as human beings.

Of this group of political thinkers, John Locke, made the most systematic contribution. His two treatises of government, published in 1690, wielded a great influence on the American colonists in preparing the declaration of independent and the written constitutions. Shorn of details, Locke’s theory was that, in the original state of nature, man was government by the law of nature, but for the sake of better safety, he joined in a political society by means of a ‘social compact’ for the mutual preservation of life, liberty and property. The government, so set up by a compact, was naturally one of limited powers and was bound to the community by the guarantee that the peoples’ natural rights would be
preserved. The legislature was thus limited by natural law; and a law made by the legislature contrary to the law of nature or violative of the natural rights, of the individual was invalid. Some of these natural rights, for instance, were ‘equality’—"men being by nature all free, equal and independent"—, liberty and property. The distinct contribution of Locke to the philosophy of Fundamental Rights, thus, was that he did not rest with the assertion of the natural rights against royal arbitrariness; he held them as against the Legislature as well, even though the ‘supreme power in the Commonwealth’ might belong to the Legislature.

**Rousseau: 1762**

Though full of contradictions in his philosophy of Social Contract, it was Rousseau who gave a kinetic impetus to the doctrine by emphasising that the sole justification of the State, which derives its authority from the people, was to guarantee the natural rights of man, of freedom and equality. These were ‘natural’ rights inasmuch as they inhere in man in the ‘state of nature’:

"Man is born free and everywhere he is in chains."

**Blackstone: 1765**

It is striking that this concept of natural rights as binding on any political authority crept into the thoughts of a legalist like Blackstone who, writing in 1765, made a distinction between absolute and relative ‘rights of persons.

---

29- Rousseau, Social Contact, 1762
By absolute rights of individuals, Blakstone meant—

"those which are so in their primary and strictest sense; such as would belong to their persons merely in a state of nature; and which every man is entitled to enjoy, whether out of society or in it”.

These are to be distinguished from relative rights which are incidental to individuals only as members of society. It is the duty of the political society to protect these absolute rights and, therefore, the State or any authority therein cannot interfere with or encroach upon these natural rights except in so far as that is essential for the free maintenance or proper enjoyment of such rights as members of a collective society.

Credit must, therefore, go to Blackstone for importing the doctrine of natural rights from the realm of political philosophy into the realm of jurisprudence. Of course, he was also asserting that “the power of parliament is absolute and without control” and that “what parliament doth, no authority upon earth can undo”; but he had, at the same time, the belief that the ‘absolute rights’ of man were and would be safeguarded by the laws made by Parliament so long as ‘the constitution of England’ ‘does not perish’.

Lock’s theory of Social Contract was materially fruitful in the Compact which the Pilgrim Fathers entered into when they landed from their ship named Mayflower at Plymouth in 1620.

The significance of this Compact lies in the fact that when the colonial revolt started in 1763, the colonists pointed to this Compact as the contract between the colonists and the King by which he was deemed to assure protection of their natural rights.
Virginia Bill of Right: 1776

The Bill of Rights adopted in the State Constitution of Virginia in 1776 was the first declaration of rights in a written Constitution “as the basis and foundation of government”. The impress of the doctrine of ‘natural rights’ is to be found in the Preamble of this Declaration:

“All men are by nature equally free and independent and have certain inherent natural rights of which when they enter society, they cannot by any compact deprive or divest their posterity....”

As Ritchie points out, this Bill of Rights served “as the model for many similar declarations adopted after American independence had been secured”. That it inspired the makers of the Bill of Rights appended to the national Constitution by the first Ten Amendments would be evident if we find that amongst the rights asserted by the Virginia Bill of Rights are-

Equality of men; freedom of the press; freedom of religion; right not to be taxed without consent or not to be deprived of liberty except by the law of the land; right against general warrants, cruel punishments, self-incrimination.

American Declaration of Independence: 1776

The theory of natural rights entered into the realm of constitutional realism with two revolutionary documents, namely, the American Declaration of Independence and the French Declaration of Rights of Man, which asserted that there were certain inalienable rights, and it was the duty of the State and its organs to maintain these rights.
The aggression of the omnipotent British Parliament against the American colonists could be met only by holding up the shield of the inviolable natural rights of man, which constituted a limitation on any form of government, monarchical or parliamentary.

The Declaration of American Independence, drafted by Jefferson in 1776, said-

"We hold these truths to be self-evident; that all men are created equal; that they are endowed by their creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness..."

Though it was not a part of written Constitution, it asserted "certain inalienable rights", as against any government in power, adding that-

"to secure these rights government are instituted among men, deriving their just powers from the consent of the governed."

Inspired by the American Declaration of Independence, the French National Assembly in 1789 formulated the Declaration of the Rights of Man:

**French declaration of Rights of Man: 1791**

"The representatives of the people of France formed into a National Assembly considering that ignorance, neglect, or contempt of human rights, are the sole causes of public misfortunes and corruptions of Government, have resolved to set forth in a solemn declaration, these natural, imprescriptible, and inalienable rights, that this declaration being constantly present to the minds of the members of the body social, they may be ever kept attentive to their rights and their duties; that the acts of the legislative
and executive powers of Government, being every moment compared with the end of political institutions, may be more respected; and also, that the future claims of the citizens, being directed by simple and incontestable principles, may always tend to the maintenance of the constitution, and the general happiness.

For these reasons the national assembly both recognize and declare in the presence of the Supreme Being, and with the hope of his blessing and favour the following sacred rights of men and citizens...

The end of all political associations is the preservation of the natural and imprescriptibly rights of man; and these rights are Liberty, Property, Security, and Resistance of Oppression.”

**Thomas Paine: 1791-92**

The philosophy underlying this doctrine of inalienable rights, superior to the civil rights, may best be explained in the words of a contemporary political thinker, Thomas Paine:

“...all men are born equal and with equal Natural Rights.”

**The Bill of Right in the American Constitution: 1789**

A most striking feature of the Federal Constitution of the U.S.A., however, was that no Bill of Rights was appended to the original Constitution as framed by the Convention of 1787 and brought into force in

30- Thomas Paine “Right of Man” 1791-92
1789, even though the Constitution contained certain specific limitations on legislative power, such as the prohibition of bill of attainder and ex post facto law.

There was, in fact, a proposal in the Convention that a Bill of Rights should be inserted in the Constitution; but it was defeated. Consequently, the Constitution of 1789 contained no guarantee of those ‘inalienable rights’ which were envisaged by the Declaration of Independence, such as the freedom of speech, assembly and religion.

But as soon as the Federal Constitution was adopted, the absence of a Bill of Rights was felt by some of the leaders, of whom Jefferson was the spokesman, and some States demanded the incorporation of a Bill of Rights as a condition for their ratification of the Constitution. Jefferson pointed out the fallacy of the assumption that representatives of the people could not be arbitrary and that a representative Legislature required no constitutional limitations on its power. So said Jefferson:

“...a Bill of Rights is what the people are entitled to against every government on earth, general or particular.”

He also met the usual arguments against the adoption of a Bill of Rights thus:

“The Declaration of Rights is, like all other human blessing alloyed with some inconveniences and not accomplishing fully its objects, But the good in this instance vastly overweight and evil.... Experience proves the inefficacy of a Bill Rights. True But though it is not absolutely efficacious under all circumstances, it is of great potency always and rarely inefficacious.... There is a remarkable difference between the characters of
the inconveniences of the Declaration are that it may cramp Government in its useful exertions. But the evil of this is shortlived, moderate and reparable. The inconveniences of the want of a Declaration are permanent, afflicting and irreparable. They are in constant progression from bad to worse. The executive, in our governments, is not the sole, it is scarcely the principal, object of my jealousy. The tyranny of the legislatures is the most formidable dread at present and will be for many years."

Natural Rights Transformed in to Fundamental rights operating as Constitutional Limitation:

The unmistakable direction in which the Americans took a step in advance of the French people in importing the concept of the inalienable natural rights of man into the world of constitutionalism is that they did not stop at reciting these rights in an ornamental Preamble to the Constitution, but adopted them as a part of the Constitution which could serve as a legal limitation on the powers of each of the organs set up by the Constitution like any other mandatory part of that organic instrument and would be enforceable by the courts to invalidate legislative and executive acts that might transgress these inalienable rights.

Another reason behind the adoption of the Bill of Rights was that if there was a justiciable guarantee of individual rights in a written Constitution, the Judiciary would protect the individuals against their violation by the Legislature and the Executive. Judicial review thus became an inseparable concomitant of Fundamental Rights. In the words of Madison:
“If they are incorporated into a Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of these rights; they will be an impenetrable bulwark against every assumption of power in the Legislative or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.”

**Adoption of first Ten Amendments (1791) as the “Bill of Right”**

When, therefore, the States, as a condition for their ratification of the Federal Constitution, insisted on the inclusion of a Bill of Rights, the demand was readily conceded and in the very first Congress, Madison proposed amendments to the text of the Constitution which ultimately led to the Bill of Rights, incorporated in the First Ten Amendments of the Constitution which took place simultaneously in 1791, that is, two years after the Constitution had been brought into force. It should also be noted that, even after the adoption of the Bill of Rights in the Constitution, the doctrine of natural law and natural rights has wielded a potent force in the United States in safeguarding individuals rights and in expanding the Constitution in the behalf. Thus, in United States v. Cruikshank[^31^], it was said that the right of the people to assemble peaceably existed long before the adoption of the Constitution of the United States, and was derived “from those laws whose authority is acknowledged by civilized man throughout the world.” Similarly, it has been said, often and often, that the ‘Due Process’ Clause in the 14th Amendment embodies the ‘fundamental

[^31^] (1875) 92-U.S. 542
conceptions of justice’ or a ‘demand for civilized standards which are not defined by the specifically enumerated guarantees of the Bill of Rights’, or ‘a fundamental fairness essential to the very concept of justice’, ‘the very substance of individual rights of life, liberty, property The due process clause has thus come to be treated as an expression of faith that: “Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.”

**Fundamental Right as a Lamination on Power**

The concept of ‘a perpetual charter of inestimable human liberties’ which would serve as a limitation on any governmental power so that it might not be used tyrannically against the individuals subject to its authority. Once this was established, it became the duty of the Courts ‘to enforce’ these “limitations and restraints” against authority.

Another most noticeable feature of the history of Fundamental Rights in the U.S.A. is that, though the Bill of Rights was, in its terms, addressed to the Federal Legislature or Government, by the use of the words ‘Congress shall make no law’, the Supreme Court has eventually come to realise that there is no reason why, in principle, the Bill of Rights in the Federal Constitution should not be binding on the States as well. By judicial exposition thus, the First Ten Amendments have been held to be applicable to the States. This conclusion has been reached through the medium of the 14th Amendment (which is applicable to the States), holding that the ‘Due Process’ Clause in that Amendment includes the rights embodied in the First Ten Amendments.
Post War Constitution Indian

There have indeed been some people, mostly British, who have questioned the utility of having a Bill of Rights that is to say, a declaration of fundamental right in a constitution, but today, that view must be said to have been rejected by the history of the world because, if it was utterly useless or futile, almost every written Constitution made since the Constitution of the United States, and more particularly those made since the Constitution of the United States, and more particularly those made since the two World Wars, would not have adopted such declarations.

Even a representative Legislature is liable to be arbitrary, and it was such painful experience of the American colonists at the hands of the British parliament itself, that led the Americans to adopt a Bill of Rights in their State Constitutions and eventually in the Federal Constitution. The treatment received by the Indians from the British Parliament was not dissimilar, and we find that, even a Britisher, who was otherwise a staunch advocate of British institution, acknowledged that in the matter of adoption of Bill of Rights, "the Indian reaction" like the American reaction is, in large measure, a product of the British rule.

In 1885, when Dicey said that "the habeas Corpus Acts declare no principle and define no rights, but they are for practical purpose worth a hundred constitutional articles guaranteeing individual liberty", and that a mere declaration of individual rights in an instrument may be meaningless if there were no adequate remedies by which they might be enforced, he was indeed uttering a profound truth. However, the makers of new constitution in the world since then have assumed that a guarantee of Fundamental Rights in a written Constitution is a better safeguard for liberty than leaving the matter to the courts to apply the common law to particular cases,
especially because, as we have seen at the outset, the common law does not set any limitation on the Legislature, as does a Bill of Rights in a written Constitution.

The model of the American Bill of Rights was followed by so many of the states formed after the First World War that the Simon Commission’s pleading against a Bill of Rights in 1934 was nothing but pleading against history. So said the Commission.32

“We are aware that such provisions have been inserted in many Constitutions, notably in those of the European States formed after the War. Experience, however, has not shown them to be of any great practical value. Abstract declaration are useless unless there exist the will and means to make them effective.”

The dilemma which the Joint Parliamentary Committee Presented, in order to support the view of the Simon Commission, like all dilemmas, contained an inherent logical fallacy. The Committee said-

Either the declaration if right is of so abstract a nature that it has no legal effect of any kind, or its legal effect will be to impose an embarrassing restriction on the powers of the legislature and to create a grave risk that a large number of laws may be declared invalid by the courts because of inconsistency with one or other of the rights so declared.”

Fortunately, the founding fathers of the Indian Constitution were not beguiled by that dilemma and preferred to follow the famous words of Jefferson:

32- Report of Simon Commission 1930
“The inconveniences of the declaration are that it may cramp government in its useful exertions. But the evil of this is short-lived, moderate and reparable. The inconveniences of the want of a declaration are permanent, affective irreparable......”

The reason is that the freedom fighter in Indian, like the American colonists, had learnt from their experience under an imperialistic regime that even a representative assembly of men might be arbitrary and hostile to the cherished rights of men. They could not, therefore, ‘implicitly believe the representatives of the people’, for, “uncontrolled and unrestricted power might lead to an authoritarian State”. The Indian Constitution, therefore.33

“... Preserves the natural right against State encroachment and constitution the higher judiciary of the State as the sentinel of the said rights....”

A demand for the guarantee of Fundamental Right was thus made as early as the Constitution of India Bill, 1895. drafted so soon after the birth of the Indian National Congress in 1885. The urge for incorporating a guarantee of Fundamental Right in the Indian Constitution was later accentuated by the need for establishing ‘a sense of security’ amongst the different minority groups, religious, linguistic and social.

This object was developed ever since in different Congress proceedings, and led to the Report of the Committee on Fundamental Rights of the Constituent Assembly and the framing of Part III of the Draft constitution in the light thereof.

33- Golak nath Vs State of Punjab AIR 1967 SC 1643
Today, it is hardly necessary to explain the need for incorporating Fundamental Rights inasmuch as, inspired with the same object as in India, all the new State of the Commonwealth, which have been formed out of the British Empire after the Second World War, have adopted a Bill of Rights in their respective Constitutions and most of these Constitutions, curiously, were drafted with the assistance of British experts.

**Furtherance of Demand for Fundamental Rights by the United Nation**

The urge for embodying guarantees of individual rights in Constitution has been further accentuated by the proclamation of universal human rights by the United nations, adopting the Universal Declaration of Human Rights in 1948 a standard to which the member nation must conform in order to maintain their international prestige in this age of ‘one world’- as also by the adoption of the International Covenant on Civil and Political Rights in 1966. It is now realised that “the recognition of the inherent dignity of the equal and inalienable rights of all members of the Human family is foundation of freedom, Justice and peace in the world”.

It is true that the Declaration does not say that these rights must be protected by the member states by adopting written Constitution. In fact. The Government of the United Kingdom believes that the object can be achieved without a constitutional guarantee to be individual right specified in the Declaration. It is interesting to note that Great Britain herself submitted a Draft international Bill of Human Rights in 1947, which provided that “every state in, by international law, under an obligation to ensure” the effective protection of the freedoms enumerated in the Bill, in a note appended thereto it was said-
“Some countries, Like the United Kingdom, have no rigid constitution and, as a matter of internal law, it is not possible to surround any provision with any special constitutional guarantee No enactment can be given a greater authority than an Act of Parliament, and one Act of Parliament can repeal any other Act of Parliament. Therefore, the legal provision which safeguard human right can only have as their special safeguard the solemn international obligations undertaken in the Bill, together with i.e. firm foundation which these principles have in the deepest convictions of Parliament and the people”.

We thus conclude our story of the evolution of natural rights as an ethical slandered at the down of civilised society in to fundamental rights secured by the highest law of a land and enforced by the Courts of law.