

The Concept of Human Rights: National and International Perspectives

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Abstract

A comparative analysis of human rights in different countries and regions of the world by author in this article reveals that the concept of rights has a diverse meaning, understanding, history and practices. The Western liberal democracies, where the idea of constitutional rights first originated, assigned priority to civil and political rights and ignored to acknowledge the importance of economic, social and cultural rights. Whereas the erstwhile socialist States of Eastern Europe assigned primacy to the second generation / positive rights (i.e., economic and social rights) and ignored to acknowledge the value of civil and political rights.

This new thinking on human rights is reflected in the constitutions drafted after the Second World War in general and in the constitutional development in some European countries (e.g., Switzerland and Finland), and in Canada and South Africa in the last two decades in particular. By analyzing different constitutions, the author has tried to examine various perceptions of human rights in different countries.

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Introduction

One of the perennial issues of politics has been the problem of striking a right balance between the rights of the individual and the authority of the State. While authority or sovereignty of the State is essential to maintain order and stability in the nation State (which is benevolent to its each and all individual citizens), the rights of the individuals are essential for enabling them to develop their personality and to lead a happy and prosperous life enjoying their human rights. "Rights" and "authority" are not opposed to each other. In other words, human rights complement the authority of the State. In fact, they shape each other's nature, importance and the content. Thus human rights can find better protection in an orderly and stable political system.

The relationship that exists between individuals and their governments, at a given point of time, determines the very nature and content of human rights. Also, the type of political system a country has determines the extent of human rights protection available. Therefore, most modern political systems are generally labelled as democratic or authoritarian depending on the degree and kind of human rights guaranteed to the citizens. In an ideal democratic political system, the individual's personal liberties and restraints, or rights and duties would be so organized that the rights and duties of others are not jeopardized. In other words, in such a political system, every individual should enjoy the maximum freedoms to do as he pleased, compatible with the rights of others to do the same. In authoritarian political system, the individual political rights are compromised, allegedly to serve the collective or social human rights of the nation.

There are many reasons why governments are created by human beings. Social and political theorists and politicians have answered

this perennial issue. Among the many useful functions that governments serve in modern times many of them are concerned directly or indirectly with promoting and protecting human rights of the individuals. Governments serve many functions, such as community and nation building, protecting property and other rights, promoting economic efficiency and growth, promoting other public goods like public parks, roads, light houses, etc., protecting environment, ensuring national defense and advancing social justice. Modern governments promote social justice by redistributing wealth and other resources between citizens. Some states like India have established a huge corpus of protective discrimination laws.

In the liberal tradition, a statement of Sir Hersch Lauterpatch, a noted protagonist of human rights and one of the most eminent international lawyers of the 20th century, rightly captures the spirit of modern laws and functions of the states. He had observed in 1947: ***“The protection of human personality and of its fundamental rights is the ultimate purpose of all law, national and international”***. (Lauterpatch, 1975, 74) Similarly, Adlai Stevenson of the USA once had remarked, ***“human rights are at the core of everything we do and try to do”***. (Humphrey, 1989, 11)

Above two statements – made by a jurist and a statesman – candidly reveal that the concept of human rights has acquired a significant place in human life in democratic nations. Due to this ultimate goal a large part of our time is devoted, in the ultimate analysis, to the promotion and protection of human rights. Moreover, it needs to be recalled that both the classical as well as contemporary political theories have affirmed and reaffirmed the significant principle that it is the “individual” for whom the state (or for that matter, any social or legal order) exists, and not vice versa. In sum, human rights have emerged as the most powerful concept of our age. In his opening statement to the World Conference on Human Rights at Vienna on 14 June 1993 the then UN Secretary-General, Boutros

Boutros-Ghali, proclaimed that “*human rights constitute a common language of mankind and the ultimate norm of all politics. Adopting this language allows all peoples to understand others and to be the authors of their own history. Human rights, by definition, are the ultimate norm of all politics*”. (Boutros-Ghali, June 14, 1993, 8) Today everyone talks about them and struggles for their recognition, promotion and protection.

Meaning and Definition of Human Rights

The concept of human rights though is central to political science, it is poorly understood. There is no agreement on its meaning, nature, and content. It is a concept very much contested not only between East (representing former socialist States) and West (representing liberal-democratic States) but also between developed and developing countries. Each group of nations has a different perception of human rights.

The so-called first world countries of the West believed in the supremacy of the individual, while the communist countries of East focused allegedly on the community and the unconditional priorities of deprived class interest. Hence, the individual benefited from these group rights, as his/her rights were better provided for, within the community. The former communist States gave priority to economic, social and commune rights and insisted that they could not be separated from the class character of society in which they existed, while the liberal-democratic States asserted the primacy of civil and political rights. This debate of priority of one set of rights over another continued to occupy the agendas of national and international governance during major part of the 20th century.

The then newly emerging States of the Third World, while adopting the Eastern or Western model of human rights paradigms in their constitutions, or a combination of both, focused on solidarity or group rights such as right to self-determination of peoples, including sovereignty over their natural resources, the right to development,

the right to a healthy and ecologically balanced environment, the right to peace and the right to ownership of the common heritage of mankind. Although they insist on interdependence and indivisibility of all human rights – be they civil, political, economic and social, they aim to achieve economic development and eradication of poverty at the cost of freedom and civil liberty.

In short, despite variances, the ideal modern concept of human rights is comprehensive in its nature and content. It includes three types of rights: civil and political, economic, social and cultural and the emerging collective or group rights. Different political systems try to legitimize their rule according to some / and or all dimensions of human rights. That is there one sees a spectrum whereby different degrees of human rights are observed by different States. In fact, the catalogue of human rights is expanding everyday. Moreover, it must be noted that no catalogue elaborating specific human rights will ever be exhaustive or final. Its content goes hand in hand with the state of moral consciousness, or development of civilization at any given time in history.

It is gratifying to note that in the collapse of the East has generated a radical shift towards the West in their perception of human rights, and civil and political rights are now given greater attention than ever before. The collapse of communism and the end of the “Cold War” suggests that arguments over divergent concepts of human rights are no longer a subject of mutual accusation and a spirit of cooperation between East and West is evolving gradually. However, it must also be noted that the Peoples Republic of China and some Muslim States are pushing for a different and at time qualified version of the human rights, much different from the one proclaimed by the United Nations in 1948 in the Universal Declaration of Human Rights. For these States human rights are culturally rooted. Like cultural relativists, they are of the view that while in the West individuals’ rights are considered above group rights, this is not

universally applicable and that certain non-Western societies are ordered on the lines of the community; the rights and identities of individuals are submerged by the larger interest of the community. The aggressive promotion of a universal standard of human rights is sometimes viewed as a paternalistic attempt to impose alien Western values.

Let us discuss some important questions: What is the importance of human rights? Why do we need them? How can we define rights? Which is the most appropriate term for human rights? Whether terms such as natural rights, civil rights, political rights and fundamental rights are same or have different meanings? Here we explore answers to these questions.

Human Rights are those conditions of life that allow us to fully develop and use our human qualities of intelligence and conscience and to satisfy our spiritual needs. We cannot develop our personality in the absence of rights. They are fundamental to our nature; without them we cannot live as human beings. To deny human beings their rights is to set the stage for political and social unrest, wars, hostility between nations and between groups within a nation – and that denial leads to urgent demands for a better life in larger freedom. Human rights, far from being an abstract subject for philosophers; political scientists and lawyers, affect the daily lives of everyone – man, woman, and the child. Nobody disputes these general terms. However, when it goes to specific aspects of human rights, then the disputes arise. In fact, the verbal commitment becomes a justifying tool for severely violating human rights.

There exist definitional problems of the concept of rights in the literature. Many definitions of the concept of rights are found in the literature. Each of the following definitions helps us in understanding different facets of rights. Let us look at them.

1. According to Ernest Barker, ***“Rights are the external conditions necessary for the greatest possible development of the capacities of the personality”***. (Barker, 1951, 136)
2. Harold J. Laski defines rights as ***“those conditions of social life without which no man can seek, in general, to be his best”***. On their importance he remarked, ***“the state is known by the rights it maintains”***. (Laski, 1925, 91)
3. In the words of Bernard Bosanquet, ***“we have a right to the means that are necessary to the development of our lives in the direction of the highest good of the community of which we are a part.”*** (Kapur, 1996, 222)
4. Leonard Hobhouse says ***“Rights are what we may expect from others and others from us, and all genuine rights are conditions of social welfare. Thus, the rights anyone may claim are partly those which are essential to every man in order to be rational human person, and partly those, which are necessary for the fulfillment of the function that society expects from him. They are conditioned by, and correlative to, his social responsibilities”***. (Kapur, 1996)
5. Wilde considers that ***“Rights are reasonable claims to freedom in the exercise of certain activities”***. He further says: ***rights depend upon duties. “It is only in a world of duties that rights have significance”***. They are like the two sides of a coin. (Wilde, 1951, 119)
6. Professor Wesley Hohfeld calls the four things which the term ‘a right’ covers: “claims”; “privileges or liberties; “powers” and “immunities”. (Hohfeld, 1919, 12-25) Examples of “claim rights” are the right of an old-age pensioner to a pension and an unemployed to get his social security benefits. Examples of “liberty rights” are the right of a man to spend his leisure as

he pleases, and to grow a beard if he wants to. A “power right” entitles the right-holder to require other people to do certain things at his discretion. Examples are the right of a landlord to alter the rent paid by his tenants, and the right of a policeman to question eyewitnesses at the scene of a crime. An “immunity right” entitles the right-holder to be exempt from something – an MP (Member of Parliament) to be exempt from the law of libel for what he says in Parliament, a conscientious objector to be exempt from military service.

In short, rights, in these liberal views, are nothing but claims against the State or government or individual persons. In other words, human rights are those conditions of life that allow us to develop and use our human qualities of intelligence and conscience and to satisfy our spiritual needs. We cannot develop our personality in their redundancy. They are fundamental to our nature; without them we cannot live as human beings. In sum, they constitute, as opined by Michael Freedon, “*a conceptual device, expressed in linguistic form that assigns priority to certain human or social attributes regarded as essential to the adequate functioning of a human being; that is intended to serve as a capsule for those attributes; and that appeals for deliberate action to ensure such protection*”. (Freedon, 1991, 7)

Rights are also used in a variety of ways indicating differences in ideological and philosophical perceptions. For some, rights are “normative attributes” that belong to a self-conscious person who perceives himself as an agent of purposive creative action. (Benn, 1978, 66) & (Gewirth, 1984, 31) For others, rights are entitlements to choose from. (Beitz, 1984, 172) McCloskey describes rights positively, as entitlements, to do, to have, enjoy or have done. (McCloskey, 1976, 99) For McCormick rights “*always and necessarily concern human goods*”, that is, concern with what it is good, at least, in normal circumstances, for a person to have. (McCormick, 1982, 143) Feinberg and White asserted that rights can be “*possessed, enjoyed, exercised and*

claimed, demanded and asserted". (Feinberg, 1980, 239) & (White, 1984, 17) James Nickel states that human rights aim to secure for individuals the necessary conditions for leading a minimally good life. Public authorities, both national and international, are identified as typically best placed to secure these conditions. So, the doctrine of human rights has become, for many, a first port of moral call for determining the basic moral guarantees all of us have a right to expect of those national and international institutions capable of directly affecting our most important interests. (Fagan, July 15, 2009, 2)

The definitions of rights examined above represent the liberal views on the concept of human rights. The communist philosophers, Muslim and Hindu scholars / law givers have evolved a divergent concept of human rights to suit their socio-political milieu. In fact, in this multicultural world there exist divergent conceptions of human rights. (Vijapur, 1998, 22-35) A study of human rights traditions in African, Chinese, Islamic, and Hindu-Buddhist traditions confirms this.¹

¹ . There is a vast literature on this aspect. To have an overview the following publications may be consulted: Asmaron Legesse (1980), "Human Rights in African Political Culture", in Kenneth W. Thompson (ed.), *The Moral Imperatives of Human Rights: A World Survey* (Washington D.C.: University Press of America), pp. 125-27; Chung-Shu Lo (1949), "Human Rights in the Chinese Traditions", in UNESCO, *Human Rights – Comments and Interpretation* (London: Allan Wingate); Romila Thapar (1966), "The Problem of Human Rights in the Hindu and Buddhist traditions", *International Social Science Journal* (Paris), Vol.18, No.1, pp.34-44; Ved P. Nanda (1997), "Hinduism and Human Rights", in Daniel Warner (ed.), *Human Rights and Humanitarian Law* (The Hague: Kluwer Law International); Abdulrahim P. Vijapur (1993), "The Islamic Concept of Human Rights and the International Bill of Rights: The Dilemma of Muslim States", *Turkish Yearbook of Human Rights* (Ankara), Vol. 15, pp. 103-33; Anne E. Mayer (2006), *Islam and Human Rights – Tradition and Politics*, 4th edn.(Boulder, Co: Westview Press), Majid

The term “human rights” is all comprehensive – it includes both civil-political (negative rights) and economic, social and cultural (positive rights) and collective or group rights. On the other hand, the term natural rights implies that nature has endowed human beings certain inalienable or natural rights like right to life, liberty and property. The terms civil rights or political rights have narrow connotation. The term “fundamental rights”, which we find in the Indian constitution, refers to certain basic / core civil and political rights. Socio-economic rights are not made fundamental in it. Since the constitution is the fundamental or basic law of the land, rights included in it are known as fundamental rights. But it must be noted that in many constitutions in the West, as we shall see in the ensuing pages, socio-economic and cultural rights are provided as fundamental rights.

There are two other terms – legal rights and moral rights. The former refers to rights laid down in law and the latter refer to rights based on general principles of fairness and justice. Moral rights may or may not be enforced and supported by the law of the land. For example, a teacher may claim that he/she has a moral right to discipline their pupil, offer them advice about their academic and moral development or about their choice of career. Sometimes people claim certain rights because of what they earn through their work (by writing a book an author may gain both a moral and legal right to a

Khadduri (1946), “Human Rights in Islam”, *Annals of the American Academy of Political and Social Science*, Vol. 243, pp. 77-81; Sultan H. Tabandeh (in Persian from Tehran, 1967 and London, 1970), *A Muslim Commentary on the Universal Declaration of Human Rights*. and Seyyed Hossein Nasr (1980), “The Concept and Reality of Freedom in Islam and Islamic Civilization”, in Alan S. Rosenbaum (ed.), *The Philosophy of Human Rights: International Perspective* (Westport, Conn.), pp. 95-101.

percentage of the proceeds from sales).

It should be acknowledged that rights and duties are two sides of the same coin. One's rights impose duties on others. Allegiance to the State, where a citizen resides, obeying the laws of the State, payment of taxes, exercising right to vote, rendering compulsory military service, parental duty towards their children when they are young and the duty of adult persons to take care of the needs of their old parents, etc. are some of the duties which have been recognized in different countries. In 1976 the Indian constitution added ten fundamental duties through an amendment.

Evolution of Human Rights

The idea of "rights" and "duties" of citizens is as old as the concept of the State. One may find their origin in ancient Greek and Roman political systems in Europe, Confucian system in China, the Islamic political system in the Muslim world and the "Panchayat" system in India. But the concept of rights in those systems was not fully developed and understood in the sense we know it today. It suited those socio-political milieus. However, it must be noted that this does not apply at least to Iranian and Western cases (prior to the beginning of constitutional era, when human rights provisions were articulated in such British constitutional documents as Magna Carta, 1215, the Petition of Rights, 1628 and the Bill of Rights, 1689 as they were the forerunners of the modern bills of rights), where obligations and responsibilities were more prevalent terms.

Many important events and revolutions also contributed towards the development of human rights. It was in the late 17th and the 18th centuries that the necessity for a set of written guarantees of human freedom was felt as a new philosophy of governance. The dignity and rights of man was the dominant theme of political philosophy of the 18th century. This theme flowered into practical significance with such historic documents as the Virginia Declaration of Rights, 1776,

the American Declaration of Independence, 1776, the French Declaration of the Rights of Man and Citizen, 1789 and of more lasting importance, the series of Amendments to the U.S. Constitution, adopted in 1791 as the American Bill of Rights.

The constitutional settlement in the U.S. and the attached Bill of Rights provided a model for the protection of human rights. For many years this U.S. model stood almost alone till a more detailed incorporation of rights was made in the Belgian constitution of 1831, followed by the Italian constitution of 1848, the Greek constitution of 1864, the Danish constitution of 1866, the Austrian constitution of 1867, the Spanish constitution of 1876, and also the Argentinean constitution of 1893. This trend of incorporation continued in the 20th century also. Now the overwhelming majority of states in the world have a written constitution providing checks and balances against the abuse of authority and enshrining in one form or another fundamental rights and liberties of individuals.

While the British, American and French documents gradually elaborated important civil and political rights, the October revolution of Soviet Russia in 1917 brought to forefront the social, economic and cultural rights. This socialist revolution left a lasting impact on developing a new concept of human rights that recognized economic, social and cultural rights as human rights. Traditionally the Western liberal countries (including their scholars) did not regard them as human rights.

The impact of socialist revolution is clearly seen in the drafting of many international human rights treaties under the auspices of the United Nations. With the establishment of the United Nations in 1945 the process of evolving an "International Bill of Rights" began. In 1948 it adopted the Universal Declaration of Human Rights, which included both civil-political and economic-social rights in a single document. Since the Universal Declaration was not a legally binding instrument, the UN subsequently adopted two Covenants in 1966

(one on civil and political rights and the other on economic, social and cultural rights). These Covenants are legally binding on ratifying states. It must be noted that the Universal Declaration and the two Covenants constitute what is popularly known as the International Bill of Rights. Thus human rights have been internationalized and they are made available to every human being wherever he / she lives.

This new concept of human rights giving equal treatment, if not equal importance, to both sets of rights (i.e., civil-political and economic-social) became a characteristic feature of many constitutions that came into existence after the Second World War. These constitutions in various manifestations included certain social and economic rights besides elaborating in detail the civil and political rights. The Italian constitution of 1948 and the Bonn Constitution of 1949 are the prominent examples in this regard. Many European States are increasingly accepting the idea that the state should be socially responsible and take care of the basic needs of the individuals. In recent decades many countries have enacted either new constitutions or parliamentary statutes to give a constitutional status to the emerging concept of human rights, one that is comprehensive in nature and content.

It is beyond the scope of this article to give details of individual constitutions and human rights protections they afford. However, our discussion centers on some major political systems in the world whose constitutions enshrine human rights provisions. These include the UK, USA, USSR, Germany, Switzerland, Canada, India and South Africa.

Western Perspective of Human Rights

In the liberal democratic political systems of the West European and North American states traditionally the primary focus was on civil and political rights. Socio-economic rights were not recognized as

fundamental rights in these states, though a few of them found their way in one or other form in the constitutions of these states. It is only in the later part of the 20th century that states like Canada and Switzerland included in their constitutions positive rights or group rights. Let us examine the human rights provisions in the constitutions of the UK, USA, France, Switzerland and Canada.

Human Rights in the United Kingdom's Constitutional Tradition

There is no written constitution in the UK. The law of the constitution is embodied in historic documents or charters, in statutes of a constitutional nature, and in the common law (judge made legal rules). As noted earlier, Magna Carta (1215), the Petition of Rights (1628) and the Bill of Rights (1689) were the best-known historic documents. The other documents of importance were the Act of Settlement (1701), The Reform Act of 1832 and the Parliament Act of 1911. Because such laws deal with fundamental political rights and the allocation of power among governmental institutions, they are regarded as part of the constitution. Most of the civil rights are rooted in common law. Rights are safeguarded through the application of the "rule of law". Although the British have no detailed list/bill of rights such as that exists in the American constitution, these rights are nevertheless protected.

It is gratifying to note that in 1998 the British Parliament passed a "Human Rights Act", which became operational in October 2000. This Act incorporates the European Convention on Human Rights (ECHR). The UK had ratified the ECHR in 1951. Now the rights enumerated in ECHR have a status of domestic law. Jack Straw, the then Home Secretary, described the Act as "*one of the most important pieces of constitutional legislation the UK has seen*". (Butler, 2000, xi) While speaking in the House of Commons on the Bill, the Home Secretary said: "*Over time the Bill will bring about the creation of a human rights culture in Britain. In future years historians may regard the Bill as*

one of the most important measures of this Parliament". (Butler, 2000, 49) Professor K.D. Ewing has remarked that the adoption of the Act is certainly the greatest constitutional change since the Parliament Act of 1911 and quite possibly since the Bill of Rights of 1688. (Ewing, 1999, 79)

Human Rights in the Constitution of the United States of America
Compared with other liberal democratic systems, the American System seems to be fully defined and safely implemented or protected. The first ten amendments to the constitution (in 1791) are popularly known as the Bill of Rights, which guarantees certain individual freedoms to US citizens. These classical rights and liberties are written into both federal and state constitutions. The courts enjoy judicial supremacy and the power of judicial review, which enables them to determine the constitutionality of the laws and to make observance of human rights real. While interpreting the provisions of the constitution or laws the courts uphold these rights and also determine their nature and content.

Following civil and political rights are recognized by the American system: the freedom of religion, speech, the press, peaceful assembly, association, and petition; security against unreasonable searches and seizures; protection against deprivation of life, liberty, or property without due process of law; protection against having private property taken for public use without just compensation; the right to a speedy and public trial by an impartial jury; the right to choose counsel for one's defense; to subpoena witnesses in one's favor, and to have a trial that is fair in all respects and in accordance with due processes of law; security against excessive bail or fines and against cruel and unusual punishments; the equal protection of laws; protection against slavery, involuntary servitude, ex-post-facto laws, unwarranted suspension of the writs of habeas corpus, and finally, various guarantees related to taxation. Later amendments prohibited

human slavery (1865), extended the suffrage to racial minorities (1870), granted voting rights to women (1920) and provided equal rights to women and the non-denial or non-abridgement of equality rights on account of sex (1972). Thus, it must be noted that the original bill of rights of 1791 has been expanded from time to time. The Americans took almost two centuries in developing their modern bill of rights.

Although the U.S. Bill of Rights was very impressive and best in the world, the blacks from the South experienced discrimination, bias, and prejudice, and police arbitrariness. For almost a century the Supreme Court endorsed the Southern apartheid system in U.S. and did not protect the constitutional rights of racial minorities. The breakthrough came finally in 1954 with the decision in *Brown v. Board of Education*, in which a unanimous Supreme Court declared racial segregation in public schools to be unconstitutional. Despite the advances made by the civil rights movement after *Brown* judgment, many states retained racist legislation, notably laws outlawing interracial marriages. However, in 1964 Civil Rights Act was passed which introduced a new concept of “affirmative action” principle into the political, judicial and administrative language of the USA. Its purpose was to reduce inter-ethnic inequalities in society. This Act was amended by the Congress in 1991. (<http://www.eeoc.gov/policy/cra91.html>)

Human Rights in French Constitution

In contrast to the British system, the French Constitution (Fifth Republic) includes both sets of rights — i.e., civil-political and economic-social. For instance, the preamble to the constitution declares that the French people solemnly proclaim their attachment to the rights of man, which were confirmed by their incorporation in the preamble to the Fourth Republic constitution of 1946. The Constitution recognizes and guarantees such rights as those of

workers to organize unions of their own choice, to bargain collectively, and to strike; equal access to education for all persons; and the guarantee of protection against the hazards of illness, unemployment and old age. Protection to these individual liberties is offered through the system of administrative jurisdiction, but these procedures protect personal rights (such as property rights, against an entrenched and solid bureaucracy), rather than political freedoms. Infringements of traditional civil liberties are not infrequent. Article 16 places in the hands of the President virtually unlimited power over the fundamental liberties of Frenchmen.

Human Rights in Germany's Constitution

In erstwhile West Germany the Bonn Basic Law (i.e., the constitution) of 1949 guarantees the basic rights in chapter I itself covering nineteen articles. It includes an impressive list of rights compared to the Weimar Constitution of 1919, which provided rights of religious communities only. The new constitution guarantees such basic rights as inviolability of person, right to full development of personality, freedom of worship and expression, freedom to hold meetings and form associations, equal rights for both sexes and all races and creeds. Certain articles guarantee freedom of movement and free choice of work, which prohibit the searching of homes or the reading of private letters except under proper legal procedure, and which assert the prime right and duty of parents to care for their children. The entire educational system is placed under state supervision, and covers both secular and denominational schools. Academic freedom for teachers is assured provided they are loyal to the constitution. While guaranteeing the right to form associations and societies, the constitution states that whoever abuses the basic rights to overthrow democracy shall forfeit them, and declares unconstitutional any political party which shows by its aims, behavior, or internal organization that it is opposed to democratic principles. It may be

noted that the Communist Party and a neo-Nazi party have been suppressed in accordance with these provisions. The rights of property and inheritance are guaranteed, but law can determine their extent. Property involves obligations and it must be so used as to promote the welfare of the community as well as of its owner.

Other rights guaranteed are equality before the law, gender equality, marriage and family related rights, requiring the protection of family, children born outside marriage, right of asylum and right of petition. The Bonn constitution declares that certain basic rights are un-amendable and government can no longer suspend them in emergency situation. It only sets various limits on the exercise of political rights. The legislature cannot infringe them. The German constitutional court has vigorously asserted itself in the matter of protection of rights. Judicial review extends to the field of rights and liberties. For a country with strong authoritarian traditions, this is considered to be an important development.

Human Rights in Canadian Constitution

The Canadian constitution is distinct in two respects from the general Western liberal perspective which lays greater stress on the rights of the “individual” and neglects community or group rights. First, it incorporates a scheme of minority rights and the rights of indigenous people and second it also includes some positive rights. Let us elaborate these aspects.

The 1867 Constitution Act had guaranteed linguistic rights to minorities, besides granting religious freedom. The use of English and French was guaranteed. The Act had also stated that preservation of culture, religion, language, local communities and minority rights required significant governmental involvement and support. Similarly, the 1982 Canadian Charter of Rights and Freedoms not only elaborates and spells out the content of the classical civil liberties, but also provides many positive rights, i.e.,

guarantees of affirmative entitlements. For instance, section 23 of the Charter guarantees the rights of parents of the French or English-speaking minority to have their children receive education in their language. The public funds have to be provided for this purpose.

Among the civil and political rights guaranteed by the 1982 Charter includes freedom of religion, speech, association, freedom of movement, right to vote and contest election, legal right of personal integrity, right to be secure against unreasonable search or seizure, right not to be arbitrarily detained or imprisoned, right to be informed on arrest/detention, fair trial, no cruel punishment, right against self-incrimination, right to interpretation, linguistic and educational rights of minorities.

(http://laws.justice.gc.ca/en/const/annex_e.html) &

(<http://198.103.98.49/en/charter/index.html>)

The Canadian Charter, which is a Constitutional Act, is not indifferent towards socio-economic disparities in the state. It mandates the state to provide financial assistance for interpretation in the courts if the witnesses do not understand the language of the proceedings. The sense of community solidarity with the poor and weak, social responsibility of the state, respect for human dignity, recognition of group membership, and peaceful accommodation of social and cultural differences are some of the characteristic features of the constitutional law in Canada. According to the Charter human rights constitute *limits* as well as *objectives* of governmental action and incorporate both *don'ts* and *dos*.

Another significant feature of the Charter is that it gives a constitutional status to the existing aboriginal and treaty obligations. Summing up it can be said that multiculturalism, group rights, minority rights and the rights of aboriginals form important agenda of contemporary Canadian political discourses.

Socialist Perspective of Human Rights¹

The Marxist-Leninist theory of human rights is in sharp contrast to the Western liberal perspective. It represents a unique model and a distinct paradigm of rights. It considers that the individual is not an abstract entity, or an autonomous person, but is indivisible from the social whole. The rights of the individual derive from a fundamental economic relationship and from his place in a pattern of production. Therefore, the socialist perspective gives priority to economic and social rights. In fact, economic and social rights are taken to come before civil and political rights. The primary liberty in the socialist countries is economic; the freedom from exploitation that is delivered by having power in the hands of the working class. As social relations improve, and as the socialist system is consolidated and its material and spiritual wealth increases, the ways and means for implementation of human rights likewise increase.

The socialist doctrine of rights is best reflected in the constitutions of the former Union of Soviet Socialist Republics (USSR) (1936 and 1977). The latter provided an impressive bill of rights. Most of the rights enshrined were economic, social and cultural rights, such as

¹. See Micheline Ishay (2005), "The Socialist Contributions to Human Rights – An Overlooked Legacy", *The International Journal of Human Rights*, Vol.9, No.2, pp. 225-45; Franciszek Przetacznik (1971), "The Socialist Concept of Human Rights", *Social Research*, Vol.38, No.2, reprinted in *Revue Belge De Droit international* (Bruxelles), Vol.3, 1977, pp.238-78. Also see Bhikhu Parekh (1986), "The Modern Conception of Rights and its Marxist Critique," in Upendra Baxi (ed.) *The Right to be Human* (New Delhi: India International Centre), Richard Nordahl (1992), "A Marxian Approach to Human Rights", in Abdulahi Ahmed An-Nai'm (ed), *Human Rights in Cross - Cultural Perspectives – A Quest for Consensus* (Philadelphia: Pennsylvania University Press), pp.162-87. For a brief overview of human rights situation in socialist countries see *Human Rights in Socialist Society* (1981), (Moscow: Novosti Press Agency Publishing House).

right to work, right to rest and leisure, right to material maintenance in the event of sickness and disability, right to health protection, right to housing, right to education, right to enjoy cultural benefits, right to freedom of scientific, technical and artistic work and right to participate in public affairs of the state. Political rights are also recognized. These included freedom of speech, of the press, of assembly and meetings, street processions and demonstrations, and the right to association. Many personal freedoms were also included such as inviolability of person, inviolability of homes of citizens and privacy of correspondence, the defendants' right of defense, freedom of conscience and equality of rights of citizens. For exercising these rights the citizens are expected to perform many obligations and duties imposed by the socialist system of governance. These rights can be enjoyed in conformity with the interests of the working class and in order to strengthen socialist system.

Western scholars criticized the Soviet system of rights and liberties. Political rights such as to form associations and right to criticize or freedom of press were allegedly restricted. No political party other than communist party was allowed to exist. Under the Soviet constitution we find a monopolistic party, i.e., the Communist Party of the Soviet Union (CPSU). The right of association (Article 126 of the constitution) is exercisable only in "conformity with the interests of the working people". It is subject to the Communist Party, which in that article is ascribed the right to be the "leading core of all organizations". The growth of parties outside the official party is made impossible by treating such activities as "counter revolutionary" to be punished under the criminal code. When meetings of other associations cannot be held without the police permission, how can a new party be formed?¹ (Finer, 1960, 656)

¹. It must be noted that the 1977 Constitution of the USSR under article 6 stated that "*The leading and guiding force of Soviet society and the nucleus of its*

Many provisions of the Soviet bill of rights were subject to many limitations. There was freedom for antireligious propaganda, but not for pro-religious teachings. There was right to work, but no right to strike. There were a number of enumerated duties, such as military service, and the duty to abide by the constitution, to observe the laws and to maintain labor discipline. In sum, the constitution not only specified the purposes for which “rights” may be employed but in addition insisted that the furtherance of these purposes was among the primary duties of the citizens.

Despite these limitations on the rights and the virtual absence of political and other civil rights in the sense we find in Western democracies, the Soviet system should be lauded for its seriousness in implementing some of the socio-economic rights. For instance, right to health protection and right to housing were not only proclaimed but were actually implemented. It is interesting to note that the USSR had more than 120 beds in hospitals for every 10,000 people in comparison to 80 in the USA, and 90-95 for Britain and France. (Kaushik, 1983, 53) In institutionalizing and implementing right to housing, the Soviet Union was the first country in the world. During a period of 10 years (1965-1975) it built 22.5 million flats providing

political system, of all state organizations and public organizations, is the Communist Party of the Soviet Union. The CPSU exists for the people and serves the people.

The Communist Party, armed with Marxism-Leninism, determines the general perspectives of the development of society and the course of the home and foreign policy of the USSR, directs the great constructive work of the Soviet people, and imparts a planned, systematic and theoretically substantiated character to their struggle for the victory of communism.

*All party organizations shall function within the framework of the Constitution of the USSR”. The text of the Constitution is reprinted in Boris Topornin (1980), *The New Constitution of the USSR* (Moscow: Progressive Publishers). The text of Article 6 can be found on page 238.*

accommodation to 111 million people, i.e., half of the country's population. By 1980, 80 per cent of the people in towns had received their self-contained flats on a nominal rent amounting to a mere 3 per cent of family income. (Kaushik, 1983, 53-54)

It is interesting to note that Russian Federation, the successor state of USSR, has since ratified the European Convention of Human Rights. The new constitution of Russian Federation, adopted in 1993, after the dissolution of the USSR, no doubt lists major civil and political rights that we find in the Western liberal traditions of human rights; it does not altogether ignore positive socio-economic rights. It provides for right to a home, right to health care and medical attendance, right to education etc.

Synthesizing Civil-Political and Socio-Economic Rights: Emerging Trends

Some constitutions drawn up in recent decades are including both civil-political and socio-economic rights in their provisions. The hitherto neglected socio-economic rights, imposing positive obligations on the states, are being increasingly recognized in the constitutions drafted after the end of the Cold War, for instance those of South Africa and Switzerland. These constitutions, like the Indian Constitution of 1949, adopt a synthesizing approach of human rights. Here we discuss briefly the constitutional developments in India, South Africa and Switzerland.

The Indian Constitution includes a detailed bill of rights elaborating civil and political rights, which are guaranteed and enforced by the Supreme Court and the High Courts. Five significant features of the Indian constitution regarding human rights and duties are worth mentioning here.

First, the constitution not only includes the rights of the individual but also provides for cultural and educational rights of minorities under article 29 and 30.

Second, besides abolishing un-touch-ability (under article 17) and by enacting many other secular laws to abolish discriminatory treatment of untouchables and Hindu women (whose rights were extremely limited compared to their male companions), the Indian political system is striving to replace the traditional, unjust and stratified social order (which guaranteed rights to only higher castes) with an egalitarian and socialist system.

Third, it provides for positive discrimination or affirmative action policies towards weaker sections of the society such as the Scheduled Castes and tribes, other backward classes and women. This policy is unprecedented in scope and extent and has no parallels in any part of the world. Under this policy 49.5 percent of jobs are reserved for these groups besides reserving 22.5 per cent of seats in educational institutions and legislative bodies. 73rd and 74th Constitutional Amendment Acts, 1992, reserve 33 per cent of seats in panchayat and municipal bodies for women. As a result, now more than one million women have been elected in panchayat elections, reflecting the broad participation in local government. This has strengthened the grass roots of democratic institutions.

The inclusion of non-justifiable socio-economic rights in the constitution, under the title “Directive Principles of State Policy”, constitutes the **fourth** important feature. It includes right to adequate means of livelihood, right of both sexes to equal pay for equal work, right against economic exploitation, children’s rights and their protection against exploitation and to opportunities for healthy development, consonant with freedom and dignity; right to equal opportunity for justice and free legal aid; right to work; right to public assistance in case of unemployment, old age, sickness and other cases of undeserved want; right to humane conditions of work and maternity relief; right to a living wage and conditions of work ensuring decent standard of life for workers and right of workers to participate in the management of industries. Though these rights are

non-enforceable by judiciary, they have been at least recognized in the constitution. Moreover in many cases they have been implemented through court orders or the statutory laws.

Finally, under article 51A, the constitution includes ten fundamental duties. These duties were incorporated by the 42nd constitutional amendment Act in 1976.

The South African constitution of 1996 includes a “bill of rights”, which is very comprehensive as it includes civil-political, economic-social-cultural and group or collective rights. Articles 7-39 of the constitution elaborate the detailed nature of human rights. Besides reiterating the classical civil-political rights, it recognizes the rights of everyone to a healthy and clean environment, right to housing, health care, food, water and social security, right to education, the rights of cultural, religious and linguistic communities.

In the 1999 Swiss constitution (which entered into force in 2000) also the synthesizing approach of both sets of rights is reflected. It recognizes certain socio-economic rights. For instance, it enshrines a person’s right to have his or her elementary needs fulfilled in a provision stating: *“persons in distress and incapable of looking after themselves have the right to be helped and assisted, and to receive the means that are indispensable for leading a life in human dignity”* (Article 12). It includes in Article 41(1) an entire catalogue of social policy of goals such as social security, health care, protection of the family, fair and adequate labor conditions, affordable and acceptable housing, education and vocational training according to their abilities for children and young people, and the social, cultural and political integration of children and young people. Moreover, the ratification of the International Covenant on Economic, Social and Cultural Rights in 1991 (by which its provisions have immediately become part of the Swiss law) has reinforced the significance of social and economic rights within legal and political debates in Switzerland. Regardless of the actual progress made in implementing these socio-

economic rights, it can be said that the idea of a socially responsible state is now firmly entrenched in Swiss constitutional thinking. (Tran, 2000, 112)

International Human Rights Law

One of the greatest, in fact, revolutionary, developments in the annals of human history is that for the first time (under the aegis of the United Nations) in international relations a comprehensive list of “human rights” has been recognized which *every individual*, irrespective of his/her origin, religion, race, color, sex, nationality, etc. can claim as a member of human society. With the establishment of the United Nations “the age of Human Rights” has dawned. The UN Charter is the first international treaty to grant recognition to human rights. It made several references to the concept of human rights, which could not elaborate the catalogue of rights for lack of time during its drafting and also the issue of defining rights acceptable to the international community was very complex. The job of defining them was assigned by the Charter to the General Assembly and the newly created UN Commission on Human Rights. During the last 61 years the United Nations has adopted nearly 100 human rights instruments, (For the texts of these documents see, United Nations, 2002) covering the entire gamut of human relationship. These, *inter alia*, deal with the rights of women, children, refugees, migrant workers, stateless persons, minorities, prohibition of torture, slavery, genocide, racial or religious discrimination, right to development, right to peace, etc. The most important among these documents are the 1948 Universal Declaration of Human Rights, the 1966 International Covenant on Economic and Social Rights, and the International Covenant on Civil and Political Rights (ICCPR), the First (1966) and the Second (1991) Optional Protocol to ICCPR on individual’s right to petition and on the abolition of death penalty respectively. These five human rights instruments together are

known as the “International Bill of Human Rights” – the first international bill adopted in human history. (For a detailed study of the International Bill of Rights see Vijapur and Savitri, 2010)

What is of great interest to know is that before the Second World War there was almost no international law of human rights? There are now approximately 200 international legal human rights instruments, which include regional human rights treaties. (Freeman, 2002, 36) One of the important features of all these documents is that they are universally applicable to every individual, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property or other status (Article 2 of the Universal Declaration of Human Rights). Sixty five of these international treaties acknowledge the Universal Declaration as a source of authority. Thus, non-discrimination is a guiding principle of international human rights law. (Vijapur, 1993, 69-84)

Constitutional Protection of International Human Rights Standards
The United Nations, the Council of Europe, the Organisation of American States, and the African Union have adopted a large number of international human rights treaties. Prominent among them are the International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), the European Convention on Human Rights (ECHR), the American Convention and the African Charter on Human and People’s Rights. These treaties have been widely ratified. By January 2010 ICCPR was ratified by 165 States; ICESCR by 160 States; as of 24 October 2009 the ECHR was ratified by 45 of the 47 (Monaco and Switzerland have only signed it) States of Council of Europe; American Convention by 22 States; and African Charter on Human and People’s Rights – by all 53 States of African Union. By ratifying the two UN Covenants and the regional human rights treaties,

majority of States in the world have accepted international obligations on human rights, which are available to all human beings within their respective jurisdictions.

The actual domestic protection afforded to the rights enumerated in International Bill of Rights depends on the legal and political system of the relevant States parties to the UN Covenants. In certain states, such as the Netherlands, the ICCPR has direct effect, and is therefore part of a State party's domestic law. Alleged breaches can be litigated in domestic courts. In other States, the ICCPR is not self-executing, and so is not automatically part of municipal law, e.g., in the UK, India and Australia, treaties must be specifically incorporated into domestic law before they become enforceable. In India and Australia the ICCPR has not been so incorporated. However, in these States statutes of various kinds protect the rights contained in the ICCPR. Furthermore, in these States, the ICCPR has an indirect effect in that its norms are used by the judiciary to construe ambiguous statutes, and to fill lacunae in the common law.

Among the three regional human rights treaties the ECHR, which is the oldest (entered into force in 1953), has an impressive record of achievements. It has been ratified by both West and East European States (the latter after the collapse of communist systems there). The list of rights guaranteed in the ECHR has been expanding over the years. Originally, the Convention recognized right to life, prohibition of torture, prohibition of slavery and forced labor, right to liberty and security, right to a fair trial, no punishment without law, right to respect for private and family life, freedom of thought, conscience and religion, freedom of expression, freedom of assembly and association, right to marry, right to effective remedy, prohibition of discrimination and right to petition by person, NGOs, or groups of individuals. Subsequently through the adoption of Protocols 1, 2, 6 and 7 new rights have been added, such as right to property, education, free elections, prohibition of imprisonment for debt,

prohibition of expulsion of nationals and prohibition of collective expulsion of aliens, abolition of the death penalty and compensation for wrongful conviction. In a substantial number of States parties, the ECHR enjoys the status of domestic law. For instance, it has been incorporated in UK, Nordic and Baltic countries. Under the Croatian Constitution (article 134), the Convention became a part of internal legal order with legal force superior to ordinary law after its ratification in 1997. In Slovenia, the ECHR had similar status. Under article 10 of the Czech Republic, the Convention applies immediately and prevails over national domestic law.

In recent years the constitution makers in many countries are attaching growing importance to the need to secure the observance of international human rights standards through special clauses in their constitution. Such clauses have been written into the Swedish (chapter 2, section 23); Norwegian (section 110 C), Latvian (article 89), and Finnish (section 16a) constitutions. In Norway a Human Rights Act was promulgated on 21 May 1999. Distinctive features of this incorporation Act are that it includes a priority clause (section 3) and covers three treaties, the ECHR, the ICCPR and the ICESCR. In Estonia (article 3 and 123) and in Lithuania (article 138) the constitutional guarantee for international human rights is achieved through general clauses on the domestic applicability and even supremacy of international treaties. Thus, in all these countries the ECHR provisions may be invoked as law in the national courts. The ECHR rights are directly enforceable by individuals. Even in States parties where the Convention is not incorporated in domestic law, the national courts frequently look to it while interpreting and applying domestic law so as not to violate this treaty.

Finland has gone a step ahead. The recent Bill of Rights Reform of 1995 included economic and social rights in chapter two of the Constitution Act. This implies that socio-economic rights can also be judicially enforceable. Finland also has incorporated the European

Social Charter (1961) in 1990, which elaborates socio-economic rights. When invoked by individuals the domestic courts can implement its provisions.

Under ECHR there is a mandatory procedure of individual complaints system. The individuals of the States, which have ratified the convention, can petition the European Court of Human Rights at Strasbourg, France, if they feel that their governments have violated their Convention rights. A huge corpus of human rights jurisprudence has emerged as a result of judgments by the European Court of Human Rights. In many an instance, it has found States in breach of its international obligations to protect human rights. Thus, the ECHR has developed over the last fifty five years into a constitutional bill of rights for the entire continent of Europe. (Jacobs & White, 2006)

Violations of Human Rights

Notwithstanding the adoption of Bills of Rights in the national constitutions and ratification of international treaties on human rights by a large number of States, human rights of the individuals are violated in almost all countries. Absolute power allows governments to destroy different communities, it also enables them to infringe on the rights of citizens. Just as governments can help to institutionalize the concept of human rights and protect them for everyone irrespective of one's caste, color, sex, or religion, they can also use their powers to violate human rights in the most systematic manner.

The 20th century has witnessed enormous progress in the extension of civil, political, economic, social and cultural rights in all societies in the world. However, at the same time core human rights, such as right to life, freedom from torture, slavery etc. have probably never before been violated on such a gross scale. Millions of people have lost their lives in political persecution by dictatorial regimes. Millions were also killed in Nazi extermination camps and during Stalin's rule

in the former Soviet Union. Gross violation of human rights were seen in China, Cambodia, Chile, Iraq, Argentina, Guatemala and Haiti, Bosnia-Herzegovina and the apartheid regime of South Africa, although on a smaller scale. These extreme abuses of governmental power illustrates a dilemma that troubled the founding fathers of the American Revolution: *“the problem of creating a government strong enough to govern effectively but not so strong enough that it could destroy the rights of those whom it was so designed to serve.”*

Concluding Observations

A comparative analysis of human rights in different countries and regions of the world reveals that the concept of rights has a diverse meaning, understanding, history and practices. The Western liberal democracies, where the idea of constitutional rights first originated, assigned priority to civil and political rights and ignored to acknowledge the importance of economic, social and cultural rights. Whereas the erstwhile socialist States of Eastern Europe assigned primacy to the second generation / positive rights (i.e., economic and social rights) and ignored to acknowledge the value of civil and political rights. With the establishment of the United Nations and the adoption of the International Bill of Human Rights, which gives equal importance to both the sets of rights, the idea of a comprehensive approach to human rights is getting widely accepted all over the world. The UN approach provides an integrated view of all human rights and attempts to overcome the artificial split between two sets of human rights on ideological grounds. It treats all human rights as universal, inalienable, indivisible, interdependent and interrelated.

This new thinking on human rights is reflected in the constitutions drafted after the Second World War in general and in the constitutional development in some European countries (e.g., Switzerland and Finland), and in Canada and South Africa in the last two decades in particular. In some of these constitutions we find both

sets of rights and, sometimes, additional rights like minority or group rights.

Almost all East European States, after the collapse of communism, are now increasingly accepting the Western liberal perspective of human rights and providing civil-political rights to their citizens. They have not only ratified the ECHR but some of them have also made it a part of their national law with its status superior to ordinary law. Thus, it can be stated that the East and West are no longer divided now on the nature and content of rights. Their ideological divide has become a thing of the past and now the ECHR is developing into a constitutional bill of rights for the entire continent of Europe.

Despite the constitutional guarantees of human rights and their international recognition in UN Covenants and regional human rights treaties like the ECHR, violation of basic rights abound in all parts of the world. Genocide, "ethnic cleansing", torture and disappearances are some of the serious manifestations of human rights abuses. Moreover, the concept of rights or "Human Rights" originates from the voice of protest against the oppression perpetrated by the dominating groups in society. Rights are meant to safeguard the individual from the irresponsible and arbitrary use of power by the ruling class. Eminent social scientist, R.M. MacIver, in his book, *Great Expressions of Human Rights* (ed.), has significantly observed:

"Over most parts of the earth and throughout the major range of recorded history the masses of men have lived in a condition of misery and oppression. Nearly everywhere small dominating groups acquired the techniques of power and used them to keep in subjection their fellowmen.... In every age the voice of protest has been heard. In every age the vision of human liberation has been glimpsed [Preface, p.ix]." (Guaba, 1995, 198)

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