

Centre for the Study of Human Rights

A Political Science
Approach to
Human
Rights

Laksiri Fernando

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*This book is dedicated to
those who wish to study
human rights in a
scientific manner.*

CONTENTS

	PAGE
PREFACE	1
INTRODUCTION	3
1. What are Human Rights?	9
2. A Paradigm of Human Rights	21
3. Genesis of Human Rights	27
4. Universality versus Cultural Relativity	35
5. Two Approaches to Human Rights	43
6. Role of the State	55
7. Processes of Human Rights Development	65
CONCLUSION	77
BIBLIOGRAPHY	83

PREFACE

Human rights have taken a central importance in politics both inside and outside Sri Lanka. They demarcate the boundaries between the citizens and the civil society, on the one hand, and the state and the political authorities on the other. The protection and promotion of human rights are considered to be important for peace, democracy and development throughout the world. Therefore, human rights have become significant both in political theory and practice. The practice and implementation of human rights, however, should be based on proper understanding and study of human rights. The theory or the theories of human rights are also important in the understanding and the study of human rights. The study of human is one major objective of the Centre for the Study of Human Rights (CSHR) at the University of Colombo. This is also an important objective of the UN Decade for Human Rights Education (1995-2004).

This short book written by Professor Laksiri Fernando on "A Political Science Approach to Human Rights" is an important contribution to the serious study of human rights. There are various approaches to human rights based on different academic disciplines such as Philosophy, Law, Political Science, and International Relations, etc. The

approach taken by the author in this book is based on his own academic discipline of Political Science. However, this book also would be valuable to other students' particularly for those who study International Relations, Law, and other academic subjects. Another important value of this book is the many cross-references and the Bibliography that he has compiled.

The book in its narrative explains the main theoretical concepts of human rights, traces the genesis of these concepts, discusses some of the controversial issues such as universality vs. cultural relativism, and explains in detail the various political processes within a state system that impinge on or contribute to human rights development. This book is an attempt to generate an understanding of the importance of human rights in state-society relations. Therefore, this book would be valuable for the general reader as well.

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INTRODUCTION

Human rights have become increasingly important both in political theory and practice the world over. This is one major outcome of the activities and efforts of the United Nations formed in 1945. Before its formation, human rights or, more correctly, the issues of rights constituted only marginal interest in political analysis. Power, and not morality, was considered the beginning and, most often, the end of the subject.

The contemporary focus of political analysis, influenced by jurisprudence or the philosophy of law, however, has taken a dramatic paradigm change since the end of the Cold War. The movement is towards raising and analysing moral and ethical issues of great magnitude in relation to power, political processes, the state, civil society, and international relations.

John Rawls' *A Theory of Justice* was a landmark inspiration in this endeavour.¹ He is, however, an emeritus professor of philosophy at the Harvard University and not a political scientist. The first political scientist to pave the new path perhaps was Jack Donnelly, who wrote *Universal Human*

¹. See Bibliography for details of works cited in the Introduction.

Rights in Theory and Practice. The importance of human rights in analysing political issues and processes was highlighted in this and other works of Donnelly. David Forsythe, Richard P. Claude and R. J. Vincent are three others who have made further contributions in this direction.

The end of the Cold War has marked an unprecedented move towards human rights internationally. The immediate reason appeared to be the importance of human rights in the democratic transformation of the political systems in Eastern Europe and the former Soviet Union.² Vaclav Havel, a university professor and a literary critic, was the leader of this democratic movement in Czechoslovakia.

Vaclav Havel is the current President of the Czech Republic after its separation from Slovakia. He wrote the Forward to Aung San Suu Kyi's *Freedom from Fear* and nominated her for the Nobel Peace Prize in 1991. This was after the democratic uprisings in Burma (Myanmar) led by Suu Kyi in 1988 and 1989 against the brutal military regime. Through this collaboration and others, some links between human rights movements in Eastern Europe and Asia were established.

Another reason why human rights have become important after the end of the Cold War has been the decline of ideological differences between liberalism and socialism in

² The present author was an eyewitness to the dramatic revolutionary upsurge in Prague in November 1989 and evidenced the role of human rights issues in this democratic uprising.

respect of major human rights issues. During the Cold War period, there appeared to be an 'irreconcilable' ideological contrast between those who emphasized the importance of civil and political rights, on the one hand, and those who highlighted the significance of economic, social and cultural rights, on the other. After the fall of the Berlin Wall, however, these differences seem to be only marginal and insignificant. As the World Conference on Human Rights held in Vienna, in 1993, emphasised, the "interdependence" and "indivisibility" of human rights are now greatly appreciated, if not completely followed.

In place of the Cold War controversies, new disputes, however, have emerged between the North and the South, in respect of the exact validity of human rights in developing countries, given their cultural specificity and/or the stage of social development. The debate appears to be a forthright challenge to what is called the universality of human rights. While China seemed to take more of a social-stage objection to universality, Malaysia advocates a classic cultural relativist argument. However, unlike the Cold War debate on human rights, which virtually resulted in a policy deadlock at the United Nations, the present debate is much more dynamic and has rendered more vitality to the importance of human rights rather than diminishing their significance.

The importance of human rights in multilateral international relations has been much emphasised since the formation of the United Nations. This emphasis has, however, been reinstated by several decisions taken by the UN recently. One

of them is the appointment of a UN High Commissioner for Human Rights in 1994, consequent to the Vienna Conference. Human rights have now given a constructive impetus to all types of UN activities from trade to nuclear disarmament, and from health to the issues of global warming.

It is mostly civil society activists who have taken great inspiration from the new resurgence of human rights movements in the aftermath of the Cold War. The state makers or the political elite of the developing countries has so far been influenced only marginally from these movements. As a declaration of a NGO gathering held in Sydney, in 1996, announced: "aspirations of the people of the Asia-Pacific region are increasingly being articulated in terms of human rights."

As a result of the above developments, new contradictions, gaps and conflicts have emerged between civil society agencies and state apparatus, leading to civil unrest and even civil disturbances in many Asia-Pacific countries, including Indonesia, East Timor, Sri Lanka, Burma, the Philippines, Papua New Guinea, and Cambodia.

Apart from human rights being a controversial factor in international relations, they have become volatile phenomena in internal relations between the states and civil societies. It is, therefore, a major challenge for the contemporary students of Political Science and others to understand the importance

of human rights in state-society relations, which is the main theme of this essay.

Separated into seven chapters, this essay attempts to give a conceptual overview on key human rights issues relevant to the understanding of state-society relations in the contemporary world. In Chapter 1, several theoretical views on human rights are discussed in order to introduce the subject to the readers. An attempt is made to distinguish between moral rights and legal rights, and rights and human rights.

The purpose of the second chapter has been to synthesise the above discussion and to formulate a realistic human rights paradigm through which the readers, students and researchers could identify relevant questions for further contemplation, investigation or study. In Chapter 3, the history of human rights is discussed briefly in order to highlight the evolution of the concept from natural rights to its contemporary international importance.

In Chapter 4, the main elements of the debate on universalism versus cultural relativism are discussed. The obvious bias of the author has been for 'universalism.' The purpose of Chapter 5 is to discuss two main approaches to human rights, liberalism and Marxism. The merits and weaknesses of both approaches are briefly discussed.

From Chapter 6 onwards, the essay attempts to develop certain independent and/or new ideas as to state-society

relations and on the question of how human rights might develop as political realities in developing societies. Chapter 6 highlights the importance of the role of the state in the process of human rights development and introduces several views in relation to what has been called the 'classical model' of human rights development. Chapter 7, perhaps being the most important in this essay, introduces the contemporary processes of human rights development and identifies state-making, political mobilisation and international influence as key to our understanding of the subject. The essay concludes by highlighting the importance of re-formation and/or re-making of the state through democratic political processes in order to incorporate international human rights.

This essay, initially written in 1997, could not see the light of the day due to various obstacles. Therefore, the author thanks the Centre for the Study of Human Rights (CSHR) for undertaking its publication.³

³. The author thanks Ranjani Mendis of the Centre for the Study of Human Rights for proof reading and copy editing.

1

What are Human Rights?

Meaning of the Term

What are human rights? It is possible to approach this complex subject starting with a simple exposition. The exposition is based on a dictionary meaning of the term 'right.' The Australian *Macquarie Dictionary* gives fifty possible meanings to the word 'right,' both as an adjective and a noun. The following comes closer to what we are investigating in this essay: a right is "a just claim or title, whether legal, prescriptive, or moral."

In English and in several other languages the word 'right' has two central meanings: rectitude, and entitlement. These two meanings in turn relate to what Maurice Cranston has distinguished as a moral right and a positive right. As he explains:

There is a considerable difference between a right in the sense of a positive right and a right in the sense of

a moral right. First, a positive right is necessarily enforceable; if it is not enforced, it cannot be a positive right. A moral right is not necessarily enforced. Some moral rights are enforced and some are not.⁴

The idea of a right as entitlement, moral and/or positive, is what is important in the definition of the concept. However, the difference between a moral right and a positive right is also important in practical politics. Most of the rights emerge as moral rights or claims before they become positive rights in the sense that they are accepted and enforced by law and government. Thus, the state plays a decisive role in converting moral rights into positive rights. The process of this conversion, in its simplest form, is something like the following.

Moral Rights ---> The State ---> Positive Rights

Morality and Rights

What is moral is undoubtedly a controversial question. What is moral under a particular condition might become not so moral under a different condition or vice versa. For example, the American Bill of Rights in the 18th century asserted, "the

⁴ . Maurice Cranston, *What are Human Rights?* The Bodley Head, London, 1973, p.5.

right of the people to keep and bear arms, shall not be infringed." However, the extensive violence related to the holding of firearms by unscrupulous American citizens has raised the contemporary controversy as to this right's continuous morality.

The Marxists considered *Their Morals and Ours*, to mean the morals of the bourgeoisie and the proletariat to be entirely different to each other.⁵ But, what they referred to were socially conditioned class morals and not universally applicable human morals.

Morals also may differ depending on peoples' beliefs. Most of human beliefs are shaped by religions. What is moral to a Christian might not be moral to a Buddhist or a Hindu or vice versa. However, there is a possibility of ascertaining a core group of morals applicable to all human beings and all religions. Human rights are based on this core group of common morals and not morals relative to different religions, social conditions or cultures.

It is on the basis of these common human morals that the controversies over abortion, euthanasia, female genital mutilation and others might be resolved.

⁵. Leon Trotsky, *Their Morals and Ours*, Merit Publishers, New York, 1940.

Rights as a Process

In discussing the nature of rights, Jack Donnelly explains a three-way rule-governed process or interaction among

A right-holder,
A right and
A duty-bearer.⁶

According to Donnelly, the right-holder is the key element in this interaction and the duties correlative to rights "belong to" or are received by the right-holder. There are no correlative duties that should be performed by the right-holder in order to receive these rights as far as these rights are human rights. Because human rights are a set of rights that all human beings inherit as a result of their common humanness. However, there are legitimate limits to the exercise of human rights specified by law. These limits are there to ensure the non-infringement of similar rights of others.

Who are the right-holders? Donnelly strongly argues that only individuals have human rights. Here we concretely mean over a six billion individuals in the present world. However, individuals often exercise these rights in groups or through collective forms. Donnelly apparently has no objection to the notion of collective exercise of individual rights.

⁶ Jack Donnelly, *Universal Human Rights in Theory and Practice*, Cornell University Press, Ithaca, 1989, pp. 10-12.

Donnelly distinguishes among three separate processes of social interaction that are involved in the development of rights, which are important in any empirical investigation on rights or human rights.

First is the *assertive exercise* of a right where a right is claimed and the duty-bearer responds by respecting or violating that right. We often see the assertive exercise of rights through, for example, trade union action. The employers or the government either meet the demands or deny them. The assertive exercise can also be seen in respect of the right to self-determination or independence. Through movements for independence, one could see the development of assertive exercise of rights in countries like India, Burma and Indonesia during and after the Second World War. This is also the prevalent method of human rights development in modern society and key to democratic processes. Most of the rights that are accepted today by governments are a product of this democratic process of assertive exercise.

Second is the *direct enjoyment* of a right where the duty-bearer takes the right into active account even without a claim from the right-holder. It has been argued that benevolent kings and rulers of yesteryear granted rights even without a claim from the people. This was the legend about Dharma Asoka, the Buddhist King in the 3rd century BC. Perhaps this is also akin to the process through which Sri Lanka achieved independence. There was no immediate claim for independence in 1948, but the British Raj took Sri Lanka's right to independence "into active account." The

granting of independence to India, Pakistan and Burma in 1947 and 1948 undoubtedly influenced this eventuality.

In most cases of direct enjoyment, external factors influence the duty-bearers to grant rights to the right-holders. The granting of universal franchise in Sri Lanka in 1931 was also an example of what Donnelly calls direct enjoyment or grant. Except the claims by the tiny labour movement, there was no popular claim for universal franchise in the country. However, after the introduction of full universal franchise in England in 1928, Britain took the right of Sri Lankans to universal franchise into active account.

Third is the *objective enjoyment* of a right where the right is not claimed, the duty-bearer does not intervene, and the right is nevertheless enjoyed. It is assumed that most of the underlying principles of human rights are products of objective enjoyment. The right to life, for example, is not something that people need to claim or rulers need to grant. That is something that people should enjoy. The same applies to the right to self-dignity. These are or should be the most natural rights that people should possess without a claim or an active grant.

The most important aspects of these three models of interaction are that human rights emerge as verifiable realities in political analysis: (1) as moral claims, (2) as conditions of legal enjoyment or (3) as cases of brutal violation. These realities are empirically, observable. They can surely be documented. Sometimes, they can even be

quantified. The observation, documentation and quantification are the purposes as well as the methods of human rights research. The ultimate purpose is to analyse and derive conclusions in order to improve human rights conditions.

These models also reveal the importance of the state as the principal duty-bearer in society in shaping the outcomes of human rights, either through respect or violation of those rights. This is very central to the subject of Political Science, a study primarily of relations between the state and citizens.

Another Point of View

R. J. Vincent analyses a right as consisting of five main elements:⁷

1. A right-holder, the subject of a right,
2. Has a claim to some substance, the object of a right,
3. Which he or she might assert, or demand, or enjoy, or enforce, exercising a right,
4. Against some individual or group, the bearer of the correlative duty,
5. Citing in support of his or her claim some particular ground, the justification of a right.

⁷ R. J. Vincent, *Human Rights and International Relations*, Cambridge University Press, Cambridge, 1986, p. 8.

In this interpretation the subject, the right, and the exercise of the right, the correlative duties and the justification of the right all become intrinsically interconnected. The subject of a right is most obviously an individual, but Vincent does not rule out the possibility of a group bearing a right. He rather notes with fascination the proliferation of right-holders in the recent period:

Recently, it has been suggested that not only animals, but also trees have rights, and the coasts, rocks and historic buildings might follow them.

A right can be a negative one, a claim or an entitlement to have a secured space. The most appropriate example would be the freedom from interference. It means the secured space of an individual without outside interference to his or her life. Most of the rights in the name or with the title of freedom/s are negative rights. 'Freedom of conscience,' 'freedom of religion,' 'freedom of expression' and 'freedom from torture' are basically rights of this category. The right to privacy is another good example. Like the freedom from interference, the right to privacy means the freedom of an individual to conduct her or his affairs with confidentiality and personal discretion. The interference in private correspondence, home, family, sex life and other personal affairs is an infringement of the right to privacy.

A right can be a positive one. According to Vincent, "here the space has to be filled with something tangible." The right to food, the right to education, the right to social security, the

right to employment or the right to unemployment benefits are some categories of positive rights. The state's or society's intervention in delivering these rights is the main characteristic of positive rights.

There has been a tradition until recently to call civil and political rights, negative rights; and economic, social and cultural rights, positive rights. It was believed that the enforcement of positive rights requires resources, while the negative rights do not need them. But Henry Shue has shown that the above distinction is a superficial and mechanical one.⁸ His claim is that most of the rights contain both positive elements as well as negative ones. The right to freedom from torture not only requires the state's abstinence from torture, but also, the state's active intervention in guaranteeing this right through police training, appropriate prison facilities, education etc.

Likewise, the enforcement of economic rights sometimes require not only government spending on the subject, but also the non-interference of the state in business, trade and employment matters.

A right, however, is an "interest whose great importance is marked by the attachment of the label right." The exercise of a right, or the activity which connects a subject to a right, takes several forms. One is a claim for something uncontestable. Another is a more assertive demand of a new right. Two other forms are akin to what Donnelly has called direct enjoyment and objective enjoyment.

⁸ Henry Shue, *Basic Rights: Subsistence, Affluence, and the U.S. Foreign Policy*, Princeton University Press, Princeton, 1980.

Rights, with some exceptions, are held against someone or something. This something is usually the state. Rights cannot emerge in a vacuum. It is difficult to believe that rights had any relevance to Robinson Crusoe, in his captive island, until Friday came into the picture. Vincent agrees with the "pattern of rights having correlative duties." The final and perhaps the most controversial aspect of rights is the justification. This suggests "social acceptance of the right as of great importance." Vincent lists types of justification as custom, reason, statute or contract. International recognition i.e. through the UN, can be added to this list as an increasingly popular form of justification.

Two notable properties of rights also can be discernible from this analysis. First, rights represent vital human interests and/or needs. Second, their social acceptance is of great importance.

Rights and Human Rights

It is pertinent at this stage to ask what does it mean to attach the adjective 'human' to the notion 'rights.' To Vincent, a realist by approach, the reasons are simple:

It means... that everybody has them. The subjects of human rights are not members of this or that society, but of the community of humankind.⁹

⁹. Vincent, *op. cit.*, p. 9.

To Donnelly, a liberal by approach, the meaning is much more profound:

Human rights are a special class of rights, the rights that one has simply because one is a human being.¹⁰

'Human' here signifies not only a classification but also a justification. He goes on to say, "the source of human rights is man's moral nature, which is only loosely linked to the 'human nature' defined by scientifically ascertainable needs. Human rights are 'needed' not for life but for a life of dignity."¹¹

There has been a considerable confusion between what we mean by a right and what we mean by a human right. These two are not necessarily the same. Rights become human rights not because they are not the rights of animals or trees, but because they derive from a common humanity.

There can be and there are rights exercised by groups of human beings deriving from their special social position and not from the common humanity. For example, until the end of the Second World War period, some nobles and university dons in Britain had the right to have two votes in elections. This was entirely different to what we mean by universal franchise as a modern human right.

¹⁰. Donnelly, *op. cit.*, p. 12.

¹¹. *Ibid.*, p. 17.

In many pre-modern societies, both in the West and the East, there were strict social hierarchies and the rights of various categories of people were defined accordingly. These rights were not human rights. Even today, the rights of men in many societies are placed superior to women in respect of the family, property and the custody of children. Although accepted in law, these male rights cannot at all be considered human rights. On the contrary, the concept of women's rights fall under human rights because they aspire for equality with men.

The characteristic of equality and the applicability to all human beings are the main criteria for human rights. However, any claim can become a right, if law, custom or contract accepts it. It may stand the test of a human right; or may not.

The theory that all human beings have human rights simply because they are human beings is a revolutionary theory. This theory renders profound changes in human thinking and human action, in the state system and civil society. Therefore, they are important to the analysis of politics.

A Paradigm of Human Rights

A Synthesis

The two arguments of Jack Donnelly and R. J. Vincent, explained in the previous chapter, represent two major approaches to human rights, the liberal and the realist, respectively, and have different merits for analysis and advocacy. Suffice it to say that there seems to be a greater agreement in the world today than ever before that over six billion people living in nearly two hundred countries belong to one community of humankind. But there is less agreement among them about what the notions such as 'moral' or 'human nature' actually mean.

Based on the ideas of both Donnelly and Vincent, the following simple figure, however, can be synthesised to explain the main elements of what one can call a human rights paradigm. This paradigm has a direct relevance to the hypothesis of human rights development that will be further explained at the end of this essay.

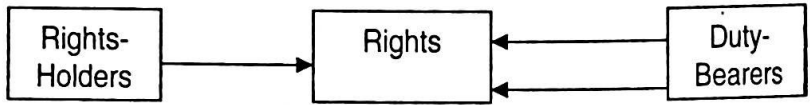


Figure 1

This paradigm has three important components. Rights holders are those who are entitled to rights, legally or morally. They claim and/or assert rights. Rights in a society are defined and/or accepted by law or by custom. The paradigm is not complete without those who are 'duty-bound' to ensure these rights. There are accepted notions in every society as to the duty bearers. However, this does not mean that duty-bearers always or automatically respect and ensure rights.

A human rights paradigm, in essence, is a conflictive one, both in theory and in practice. In terms of theory, as we have already noted, there is disagreement among scholars as to the component elements of such a paradigm, their relevance, nature and interactions; among which is the role of the 'duty-bearer' or the state.

The present author maintains the position that the state constitutes a major component in the paradigm than most of the human rights theorists seem to accept at present. This does not mean assigning everything to the state, but refers to its role. In respect of the state, we can distinguish two main reactions: (1) human rights observance, or (2) human rights

violations - observance accompanied by duties, and violations often accompanied by brutal force.

In terms of practice, the pursuit of human rights and the denial of them are extremely conflictive social processes involving claims, counter-claims, controversies, violations, and in fact civil war. How do all these fit into the state-society relations is a major question for the students of political science.

Some Key Questions

There is a possibility in fact to relate all the known theoretical and practical questions about human rights to one or the other aspect of the above paradigm. Some such questions are:

- (1) Who are the legitimate rights-holders?
Individuals? Groups? Peoples? Nations? States?
- (2) What is the nature of human rights claims?
Moral? Legal? Political?
- (3) Who can legitimately make such claims?
Rights-holders? Representatives? The international community?

(4) What are the legitimate justifications for claims? Statutes? Customs? Nature? Human need? Utility? International acceptance?

(5) What are the categories of human rights? Civil? Political? Economic? Social? Cultural? Or Women's? Children's? Workers' etc. ?

(6) Does the right to self-determination of peoples constitute a human right?

(7) Are there human duties correlative to rights, or only limitations? If there are duties, what are they?

(8) What are the legitimate limitations of human rights in a democracy?

(9) What category of human rights is primary? Civil/political? Economic/social/cultural?

(10) Are all human rights equally important? Are some human rights more important than the others?

(11) What is the genesis of human rights? Are human rights modern or old as the Greeks?

(12) Is there a distinction between classical notions of natural rights and current notions of human rights?

(13) Are human rights universal or culturally relative?

(14) What is the role of the state in human rights? Hostile? Negative? Positive? Or neutral?

(15) Can there be justifications for violations/curtailment of human rights? Such as culture, economic development, or war?

(16) Could human rights be achieved outside the framework of the state? In a stateless society or global community?

(17) What is the role of civil society in contrast to that of the state in ensuring human rights?

Investigation of all these questions is beyond the scope and purpose of this essay. The references/bibliography and other studies have dealt extensively with many of these matters. Questions from 1 to 12 are rather exhausted ones. However, the question as to whether human rights are universal or culturally relative does not seem to have been settled and remains important in any discussion on human rights. It is also important to trace the origins of the concept and the main contemporary discourses as background to the subject. We will discuss the question of origin and the contemporary discourses first, and the question of cultural relativity thereafter.

The most important functional questions of human rights in relation to the state, for example questions from 14 to 17,

largely remain unanswered in many of the current discussions. Therefore, we had no option but to go back to the ideological paradigms of liberalism and Marxism to investigate this problematic issue. It is on the basis of that discussion that I have developed some of the ideas in respect of the role of the state. However, the main purpose of this essay is to present a synthetic view on the concept of human rights in a scientific manner.

3

The Genesis of Human Rights

Origins of the Concept

From the perspective of history, 'human rights' is a successor term to 'natural rights' but there is a great distinction between the two.

The natural rights theory emerged and developed with the ascendancy of the modern state to safeguard the rights of the individual in civil society from the encroachment of the state. The natural rights theory was based on the concept of the law of nature that traced its roots as far back as the Greek city-states. There is disagreement among scholars whether natural rights theory itself dates back to the pre-modern period or not. Alasdair MacIntyre asserts that:

There is no expression in any ancient or medieval language correctly translatable by our expression 'a right' until near the close of the middle ages. The concept lacks any means of expression in Hebrew, Greek, Latin, and Arabic classical or medieval, before about 1400, let alone in Old English, or in Japanese as late as the mid-nineteenth century.¹²

¹². Alasdair MacIntyre, *Ater Virtue: A Study in Moral Theory*, University of Notre Dame Press, Notre Dame, 1984.

Is it then a new word to express a concept as old as the Greeks? There is no doubt that the Greeks spoke about freedom. There is no evidence, however, to conclude that there was a concept or theory of rights, as we understand them today. Whatever notions existed about freedom at that time were short-lived and applied to the privileged classes of citizens.

This author maintains the position that rights as a continuous, common and sustainable phenomena emerged with the development of the modern state, urbanisation, capitalism, industrialisation and individualism. The enterprise of legitimising rights on the basis of an idealised version of ancient history is a feature of political rhetoric and not political science.

The development of rights as empirical phenomena in the context of the modern state can be traced to certain legal texts. These texts were based or supported by political discourses and movements. They provide a common language and common ground for discussion.

The Bill of Rights enacted by English parliament consequent to the revolution of 1688 established the right to trial by jury and disapproved excessive bail, fines, and cruel and unusual punishments. It marked a reform in the justice system pertaining to what we now call civil rights.¹³ The English revolution was a landmark in the emergence of the modern democratic state with individual liberties, civil society and constitutional government.

¹³. The Magna Carta (1215) and the Petition of Rights (1628) were two previous documents. For the text of the Bill of Rights, see Ian Brownlie, *Basic Documents of Human Rights*, Clarendon Press, Oxford, 1971.

USA and France

There were several documents in the United States that marked a similar development in that country and reiterated the conception of natural rights of that period. The Bill of Rights adopted by the Virginia Convention in June 1776 was the first, based on the model of the English Bill of Rights.¹⁴ The American Declaration of Independence in July 1776 went further on to say that:

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.¹⁵

The Constitution of the United States and its consequent amendments defined these rights in further detail. The first ten amendments in 1791 and the three Civil War amendments comprise the United State's Bill of Rights.

The 1789 French Declaration of the Rights of Man and the Citizen was the climax of the development of natural rights and declared, "men are born and remain free and equal in rights."¹⁶ It asserted: "The purpose of all civil associations is

¹⁴ . Cranston, *op. cit.*, p. 1.

¹⁵ . Brownlie, *op. cit.*, pp. 11-13.

¹⁶ . *Ibid.*, pp. 8-10.

the preservation of the natural and imprescriptible rights of man. These rights are liberty, property and resistance to oppression."

The Declaration further said, "Liberty consists in the power of doing whatever does not injure another." The French Declaration defined liberty to include the right to free speech, freedom of association, and religion, and freedom from arbitrary arrest and confinement. "Every man being counted innocent until he has been convicted." There have been several, though similar, declarations and documents as a result of regime changes in France after this initial declaration in 1789.

Limitations of Rights Development

The documents referred to above mark the emergence of both a theory and a practice of rights. They, however, were confined to the internal contexts of national states in Europe and North America. They emerged from a narrow socio-economic base of early capitalism and were limited to less than half a dozen distinguishable civil and political rights.

There were no notions of economic, social and cultural rights. In terms of a theory, rights referred to the notions of divine creation and/or the law of nature. They talked about inherent, inalienable, imprescriptible and self-evident rights as a result.

Natural rights theory came to be criticised for different reasons by philosophers like Hume, Burke, Bentham, Marx, Dicey and Austin. Bentham's criticism in *Anarchical Fallacies* was stronger than any of the others, and even to Marx, who said that:

Right is a child of law; from real laws come real rights, but from imaginary law, from 'laws of nature', come imaginary rights... Natural rights are simple nonsense: natural and imprescriptible rights, rhetorical nonsense, nonsense upon stilts.¹⁷

The importance of this criticism was that any natural or divine origin of rights could not be empirically established. The nature argument became more of a rhetorical justification than of a positive theory. It served a historical purpose in the initial ascendancy of rights, but it may or may not be acceptable in contemporary and non-Western contexts.

Contemporary Discourse

The current development of human rights can be traced to the UN Charter promulgated in 1945, and the Universal Declaration of Human Rights in 1948.¹⁸

¹⁷. See Eugene Kamenka and Alice Erh-Soon Tay, eds., *Human Rights*, Edward Arnold, London, 1978, p. 10.

¹⁸. Hereinafter called the Universal Declaration or the Declaration. All UN human rights documents referred to in this essay are from : United Nations, *Human Rights: A Compilation of International Instruments*, United Nations, New York, 1993.

These documents started the internationalisation of human rights.¹⁹

Under Article 55 of the Charter, the UN has the duty to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion," with a view to "the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples."

Under Article 56, all members of the UN "pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55." The political doctrine of the Charter in respect of human rights is very clear. The protection of human rights is considered necessary for international peace.

Although the Charter recognised the protection of human rights as a main purpose of the UN, it did not enumerate or define them. This task was left to the Universal Declaration. The Declaration consists of a Preamble and 30 Articles. The Preamble links the Declaration to the Charter and proclaims

¹⁹. One can also identify a second or an intermediary wave of human rights development during the 19th and the early 20th century Europe, as an aftermath of the industrial revolution, where economic and social rights evolved. This wave was also characterised by the expansion of electoral rights. The advocates of this movement were socialists and various types of democrats.

the Declaration “as a common standard of achievement for all peoples and all nations.” The objective of the Declaration is “to promote respect for these rights and freedoms by progressive measures, national and international.”

The Declaration brought forward to the rights theory the notions of “human rights” and their “universality.” Another major difference of the Declaration, from the previous documents of the 18th century referred to earlier, was that the Declaration incorporated the economic, social and cultural rights apart from traditional civil and political rights. Article 1 enumerates the philosophical postulates of the Declaration. It reads as:

All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.

The doctrine of the Declaration is basically a moral one, in contrast to the doctrine of the Charter, which is political. It characterises ‘humans’ as moral and rational beings. Humans are different from other beings and therefore entitled to certain rights and freedoms by birth. Articles 3 to 21 of the Declaration deal with civil and political rights, while Articles 22 to 27 are devoted to economic, social and cultural rights.

The concluding Articles 28 to 30 recognise that everyone is entitled to a social and international order and stress the duties and responsibilities that each individual owes to the community.

There are many contemporary discourses on human rights, all referring to the Declaration. There are controversies as to whether the Declaration specifies ideal standards that countries should try to achieve,²⁰ or minimum universal standards that everyone is obliged to respect.²¹ There is also the question of the legal validity of the Declaration.

There are some that argue that it is a declaration, a statement of good intentions, and therefore not legally binding. There are others who consider the Charter as a 'world constitution' in effect, and the Declaration as an interpretation of the human rights clauses of this constitution and therefore legally binding.

There is general agreement among international lawyers that the Declaration has become part of the international customary law through state practice and judicial decisions.²² Many countries have incorporated rights and freedoms enumerated in the Declaration into their respective Constitutions, and many judges have referred to it in their court decisions. However, the universality of the basic notions of human rights is still a controversial question.

²⁰. A. J. Milne, *Human Rights and Human Diversity*, MacMillan, London, 1986, p. 2.

²¹. See Donnelly, *op. cit.*, Chap. 2.

²². John P. Humphrey, *Human Rights and the United Nations: A Great Adventure*, Transnational Publishers, New York, 1984, p. 65.

Universality versus Cultural Relativity

The Difference

It is usually said that people have human rights simply because they are human beings. The link between humans and rights seems self-evident to some scholars, but not to all.

MacIntyre considers it illogical to attach rights "to human beings simply qua human beings." His argument, based on linguistic research, is that the link has not existed without time and space for the link to be universally true. Among political scientists who argue for cultural relativism in respect of human rights are Adamantia Pollis and Peter Schwab.²³

The main argument of cultural relativism is that all concepts of truth and goodness are relative to particular cultures. This

²³ . Adamantia Pollis and Peter Schwab, eds., *Human Rights: Cultural and Ideological Perspectives*, Praeger Publishers, New York, 1980.

argument basically derives from the discipline of anthropology. Franz Boas and Melville Herskovits are two anthropologists who argue for extreme cultural relativism. There are others, Wilcomb Washburn and Henry Bagish, who do not endorse pure or absolute cultural relativism. A. J. Milne goes along with this new trend of 'soft cultural relativism' and argues for minimum moral standards of human rights. He says, "Because it only sets minimum requirements, it would still be compatible with considerable human diversity."²⁴ He warns about extreme universality and emphasises human diversity.

For human rights to be absolutely universal they have to exist and apply irrespective of time and space. Did people during the Angkor Empire in Cambodia or similar periods in India, Burma or Sri Lanka then have human rights? History shows that human rights as we understand them today were not accepted notions of the political doctrines of that time based on Dharma Sutra of Manu or Buddhist theology.²⁵ Notions of duties and responsibilities mainly governed the relationship of 'citizens,' or more correctly 'subjects' and the state.

²⁴. Milne, op. cit., p. 9.

²⁵. Romila Thapar, "The Hindu and Buddhist Traditions," *International Social Science Journal*, 18(1), p. 40.

There were certain privileges attached to the 'priestly' and 'noble' classes.²⁶ The peasants entertained some form of land related titles through a system akin to customary law. What has been common is the notion of human dignity and not rights.

The present essay argues for a developmental approach to understand the sources of human rights and their internationalisation. Modern human rights are a product of human development and not human nature. There is no static quality that can be referred to as the human nature. Likewise, it is difficult to ascertain that human beings always behave in a rational manner, which is one of the premises of the universalist theory. Human behaviour can be rational or even irrational. Human beings show only a capacity to be rational.

The foundation of human rights can be considered the transformation and development of the notion of human dignity into modern social and political conditions. Rights and dignity are not the same. Dignity can be defined as the moral esteem and the social worthiness of the human person and his or her proper place in society. It has been admitted that dignity can be protected in a society that is not based on rights.²⁷

²⁶. The Kandyan Convention of 1815 in Sri Lanka, between the British Governor and the local chiefs, is an example for the existence of these privileges. See *The Sri Lanka Archives*, Vol 1, No 1, p. 69.

²⁷. Rhoda Howard and Jack Donnelly, "Human Dignity, Human Rights and Political Regimes," *American Political Science Review* 80, (September, 1986), p. 802.

All cultures and religions appear to reveal notions of human dignity. Nevertheless, all cultures have not articulated human rights. Some cultures, especially the Asian, have expounded notions of human duties, instead of rights. There is no evidence that any religion developed human rights directly. On the contrary, religion was not only tardy in championing human rights; at times it was actually retarding and reactionary.²⁸

Secularism

Human rights have emerged as a part of secular political philosophy, although most of the religions today seem to have come to recognise them. The cultures that have expounded human rights, especially in the West, have not done so simultaneously or in a uniform manner. It has been pointed out, for example, that there are differences at present between the Netherlands and the United States in their implementation of human rights.²⁹

²⁸ . A. H. Silver, "Prophetic Religion and World Culture," in Amandus William Loose, ed., *Religious Faith and World Culture*, Books for Libraries Press, New York, 1951, p. 138.

²⁹ . David P. Forsythe, *The Internationalisation of Human Rights*, Lexington Books, Lexington, 1991, p. 5.

Socio-economic and political transformations have become equally or more decisive in producing human rights than cultural differences have. As Seneh Chamarick says, "in the Third World one also finds a situation of human aspiration for freedom and dignity which is inexorable, although, unlike in the West, without the historical background of radical social transformation."³⁰

The human rights recognised by international law today are the standards set out by the UN system in its various instruments. These instruments altogether amount to over a hundred declarations and conventions. The Universal Declaration, the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR), collectively called the International Bill of Human Rights (IBHR), can be considered the foundation of the international human rights system which affects any country directly or indirectly. Is this system universal in terms of origin, validity and practice?

There can be no doubt that Western culture dominated the formulation of early international standards of human rights. "As a cursory reading is enough to show, these embody the values and institutions of modern liberal-democratic industrial society."³¹

³⁰. Seneh Chamarick, "Some Thoughts on Human Rights Promotion and Protection," in Harry M. Scoble and Laurie S Wiseberg, eds., *Access to Justice: Human Rights Struggles in South East Asia*, Zed Books, London, 1985, p. 9.

³¹. Milne, *op. cit.*, p. 2.

Mahatma Gandhi, commenting on the proposed Universal Declaration in 1948, said, "I learnt from my illiterate, but wise mother that all rights to be deserved and preserved came from duty well done."³² He proposed that human rights should be correlated to human duties. There was no effort at that time to incorporate Gandhi's proposal, which might be called 'Asian' in perspective.

"The Universal Declaration, and this is one of its weaknesses, makes scarcely any mention of the other side of human rights, namely the duties of people and their obligations to the community and the state."³³ Vincent also stated that "as part of moral discourse, duty might seem more obvious, and is certainly more ancient than right."³⁴ The situation, however, has become increasingly changed since the 1960s when newly independent non-Western countries began participating in the formulation of international standards. It is mostly the legacy of the initial period that led to doubt being cast on the universality of human rights and their suitability for application in non-Western cultures.

³². Quoted in German Arciniegas, "Culture, A Human Right" in Julian Huxley, ed., *Freedom and Culture*, Vintage, London, 1951, p. 32.

³³. Georges-Hendri Dumont, "Unesco's Practical Action on Human Rights," *International Social Science Journal*, 122 (November) 1989, p. 586.

³⁴. Vincent, op. cit, p. 7.

Universality

The concept of human rights must now be considered universal in validity. Universal does not mean eternal, static or absolute. The concept is dynamic and evolutionary, "that has recently been extended to cover many aspects of human dignity not contemplated under the traditional Western rubric of human rights."³⁵

Among new additions to human rights are the concepts embodied in the ICESCR and the Declaration on the Right to Development. The period in which human rights were bluntly rejected as Western is almost over.³⁶ The controversies have become much more complex, finer and specific. There are controversies across cultures. It is argued that a certain degree of relativism may prevail in human rights discourses along with universal standards in respect of contextual interpretation.³⁷

³⁵. Virginia A. Leary, "The Effect of Western Perspectives on International Human Rights," in Abdullahi Ahmed An-Naim and Francis M. Deng, eds., *Human Rights in Africa: Cross-Cultural Perspectives*, The Brookings Institution, Washington, 1990, p. 30.

³⁶. K. P. Saksena, "Forward," in David P. Forsythe, ed., *Human Rights and Development: International Views*, MacMillan, London, 1989, p. xi.

³⁷. Milne, op. cit., p. 10.

Two Approaches to Human Rights

Liberalism and Marxism

Two classical approaches to human rights are liberalism and Marxism, both having considerable influence on contemporary thinking and approaches to the subject.

There is a clear lineage among liberalist, contemporary, universalist and non-governmental (NGO) approaches. The governmental approaches fit more into a realist than a liberal paradigm, whether the governments are Eastern or otherwise.

The Marxist approach to human rights has mainly been a critique of the liberal discourse, than a separate theory on human rights. There also have been efforts by former Soviet academics to develop alternative interpretations of human rights based on the experiences of the 'socialist' countries.³⁸

³⁸. Vladimir Kartashkin, "The Socialist Countries and Human Rights," in Philip Alston, ed., *International Dimension of Human Rights*, UNESCO, Paris, 1982, pp. 631-650.

The contemporary Marxists or the New Left, however, have paid very little attention to the subject in theoretical terms.³⁹ Some of the Marxist notions, however, have come to stay, in the approaches of some Third World academics who often identify human rights as imperialist design.⁴⁰

The Liberal Approach

The cornerstone of liberalism is the concept of autonomous individual and his/her liberty. The social background of early liberalism was the transformation of feudalism into capitalism during the 18th and the 19th century Europe. Without this transformation, liberalism could not have emerged and flourished. This transformation encompassed not only the changes in the mode of production and distribution, but more broadly in the social formation as a whole to include the family, the Church, education, ideology, culture, and the authority structure of society.

³⁹. One exception is Steven Lukes, who has tried to develop a contemporary Marxist theory of human rights. See his *Marxism and Morality*, Oxford University Press, Oxford, 1987, pp. 61-70.

⁴⁰. Issa G. Shivji, *The Concept of Human Rights in Africa*, CODESRIA Book Series, London, 1989.

All these could not have been meaningful or sustainable without major transformations within the state itself - its objectives, structure and functions - to contain and manage the social transformations and give law and order to their developments.

Plamenatz related the origins of liberalism to three events: "The emergence of the Modern State, the expansion of trade and industry, and the proliferation of organised religions."⁴¹ Of course, the purpose of liberalism was not to theorise on all of these aspects, but to focus on its prime concern, the liberty of the autonomous individual. As a result, liberalism has developed a theory of rights but not a convincing explanation of the sources and/or the development of rights.

Two strands of theories seem to have contributed to the liberal philosophy of rights. The first is the natural rights theory expounded by John Locke. The second is the utilitarian theory advocated by Jeremy Bentham and John Stuart Mill. The utilitarian theory is an empirical approach, having much influence on some contemporary analysts who refer to human needs rather than to morals in analysing human rights. However, both strands, natural rights theory and utilitarianism, shaped the liberal theory in general with salient characteristics of individualism and anti-statism.

⁴¹ . John Plamenatz, *Readings from Liberal Writers: English and French*, Allen and Unwin, London, 1965, p. 15.

The idea of natural rights was a glorification of the autonomous individual. Humans, Locke argued, have natural rights to "life, liberty and property." To justify this assertion Locke had to invoke the legends of a state of nature and a social contract. According to which the people formed the civil society, and then contracted the government "for the mutual preservation of their lives, liberties, and estates or property."

While advocating a contractual theory on government, Locke upheld a natural theory of rights. He wanted to place rights beyond politics, government, contracts and consent. A right is not something one consents to, but something one inherits. This argument might be correct in the case of life, conscience and dignity, but not in the case of outer/extended forms of present-day rights such as freedom of the press, the right to work, the right to vote, the right to education, etc.

The rights that Locke considered as natural, except property, since then have come to constitute what Macridis has called "the moral core of liberalism: life, dignity and liberty."⁴² It is from this moral core that the political core, or political and civil rights, seem to derive in contemporary liberalism. Although there is an economic core to liberalism, *laissez-faire*, there are no economic rights directly deriving from liberalism, except the right to property.

⁴². Roy C. Macridis, *Contemporary Political Ideologies*, Little, Brown and Company, Boston, 1983, p. 23.

The anti-statist aspect of liberalism has never been put forward more clearly than in John Stuart Mill's essay *On Liberty*. He made a very clear distinction between the spheres of the autonomous individual and of the state. As Macridis explained:

Strictly speaking, they constitute two different spheres of life and action. But when the two spheres do intersect, the intersection should cover only a limited and recognised area.⁴³

According to Mill, every restraint imposed on the autonomous individual by the state is bad.

The liberal conception of rights is a 'negative' one to the extent that it does not imply any positive obligations on the part of the society or the state towards the individual. The whole philosophy is based on the assumption that non-interference by the state will suffice to safeguard rights, except in extreme cases of interference by other social forces against individual rights. As Raphael summarised:

The task of the State is to prevent men from encroaching on each other's freedom... the State is not

⁴³. Ibid, p. 38.

expected to take positive action to improve the lot of individuals. That is to be left to their effort.⁴⁴

The Marxist Approach

Karl Marx's ideas on human rights appear mainly in *On the Jewish Question*, written in 1843 as a polemic against Bruno Bauer on the same question.⁴⁵ His ideas can be discernible from his agreements and disagreements with Bauer. Both agreed that the Jewish question had a universal significance, which was independent of specific German conditions, i.e. the relationship between religion and the state. Marx also did not seem to have a disagreement with Bauer's statement that,

The idea of the rights of man was not discovered in the Christian world until the last century. It is not innate in man. On the contrary, it can only be won in a struggle against the historical traditions in which man has up to now been educated. Therefore, the rights of man are not a gift of nature or a legacy of

⁴⁴ . D. D. Raphael, "The Liberal Western Tradition of Human Rights," *International Social Science Journal*, 18(1), 1966, p. 24.

⁴⁵ All quotations of Marx and Bauer in this section are from Karl Marx, *Early Writings of Marx*, :introduced by Lucio Colletti, Penguin Books, New York, 1975.

previous history, but the prize of the struggle against the accident of birth and the privileges which history has handed down from generation to generation.

However, Marx disagreed with Bauer when Bauer asserted that humans must sacrifice the “privilege of faith” in order to be in a position to receive the universal “rights of man.”⁴⁶ The reason for the disagreement was that Bauer considered the acquisition of “rights of man” as a part of a cultural emancipation from religion, Jewish or Christian. Marx had serious criticisms of this assertion.

Marx considered the “rights of man” as partial but important political achievements, including the freedom of conscience, and showed this through a discussion on the US and French constitutions and declarations on rights. He said:

These rights of man are partly *political* rights, rights that are only exercised in community with others. What constitutes their content is *participation* in the *community*, in the *political* community or *state*. They come under the category of political freedom, of civil rights, which as we have seen by no means presupposes the consistent and positive abolition of religion and therefore of Judaism.

⁴⁶. The word ‘man’ is used in this essay when it refers specifically to the concept of ‘rights of man’ or in direct quotation from original authors. In other circumstances ‘human’ is preferred.

What Marx criticised about the “rights of man” was their partial or bourgeois nature at that time. He contrasted political emancipation with human emancipation. He said, “Political emancipation by itself is meaningless.” Nevertheless,

Political emancipation is certainly a big step forward. It may not be the last form of general human emancipation, but it is the last form of human emancipation within the prevailing scheme of things. Needless to say, we are here speaking of real, practical emancipation.

While criticising political emancipation as partial, Marx attributed two major transformations to it, which bring the modern state into being and with it the ‘rights of man.’ These were: (1) the split between the state and civil society, on the one hand; and (2) the displacement of religion from the state, on the other.

However, Marx thought that political revolution and the development of human rights within the capitalist framework had come to a completion. He said:

It is important to understand where the limit of political emancipation lies. The splitting of man into his *public* and his *private* self and the *displacement* of religion from the state to civil society is not one step in the process of political emancipation but its *completion*.

Marx argued that "political emancipation, at the same time, is the dissolution of the old society," which he characterised as feudalism. Feudalism was characterised by the link between civil life and political life. "The old society had directly a political character, i.e. the elements of civil life such as property, family and seignior, estate and guild to the level of elements of political life." He further stated:

The political revolution thereby *abolished* the *political character of civil society*. It shattered civil society into its simple components - on the one hand *individuals* and on the other the *material and spiritual elements* which constitute the vital content and civil situation of these individuals.

It was based on the above analysis that Marx criticised the concept of natural "rights of man," while making a clear distinction between them and the rights of citizen. "The rights of man as such are distinguished from the rights of the citizens," he said.

Karl Marx, in the present author's opinion, seemed to accept, at least partially, the progressive nature of rights in general, and political rights in particular, but not the ideology of natural rights. He said:

The first point we should note is that the so-called rights of man, as distinct from the rights of the citizen, are quite simply the rights of the member of civil society, i.e. of egoistic man, of man separated from other men and from the community.

Marx's criticism especially came over the four concepts of natural rights, i.e. equality, liberty, security and property. He maintained that none of these rights "go beyond egoistic man, man as a member of civil society, namely an individual withdrawn into himself, his private interests and his private desires and separated from the community."

Another aspect of his criticism was the gap between the theory and practice of human rights. Marx wrote:

While, for example, security is declared to be one of the rights of man, the violation of the privacy of letters openly becomes the order of the day. While the 'unlimited freedom of the press' is guaranteed as a consequence of the right to individual freedom, the freedom of the press is completely destroyed...

Relative Merits

Liberalism and Marxism undoubtedly are two divergent paradigms of human rights. The analytical parameters of these two philosophies are quite different. In liberalism, the autonomous human is the primary matter of analysis and he/she constitutes a higher ethic. In Marxism, the main analytical premise has been the means of production. The human existence under capitalism, or the "bourgeois man," as Marx used to call him/her, is egoistic and rather anti-social.

Liberalism considered the relationship between human rights and the state in a mechanical and an antithetical way. If human rights were to be increased, the state has to be diminished in its functions. Liberalism in essence was an

anti-statist philosophy. Marxism is not necessarily anti-statist. In his early writings, before Marx became a Marxist, he attributed a certain degree of autonomy to the state. The state plays an independent role in its transformation into modernity. Marx went as far as to say, "The state is the intermediary between man and man's freedom."⁴⁷

While liberalism considered life in civil society to be fundamental to life in the state, Marx considered otherwise. It was the nature of civil society that Marx was critical of and not the state as such. He said, "All the presuppositions of this egoistic life continue to exist outside the sphere of the state in civil society, but as qualities of civil society."

However, as Steven Lukes, a contemporary Marxist, admitted, "rights are central to the theoretical tradition of liberalism... Marxism by contrast... has never been similarly committed, as a matter of principle, to the promulgation and protection of rights..."⁴⁸ Anti-human-rights tendencies in Marxism emerged greatly, in my opinion, from its Hegelian origins and the maximalist notion of human emancipation. The notion of human emancipation is in essence a utopian conception that has never been explained clearly and as a result led to different interpretations in different strands of Marxism.

⁴⁷. The autonomous conception of the state did not develop in Marxism any further. Instead the instrumentalist approach to the state became predominant and rather vulgar. Contemporary Marxist analysts like Ralph Miliband, Nicos Poulantzas, Perry Anderson, Goran Therborn and Claus Offe reinvented a relative-autonomous conception of the state. See Theda Skocpol, *States and Social Revolutions: A Comparative Analysis of France, Russia and China*, Cambridge University Press, Cambridge, 1979, p. 27.

⁴⁸. Lukes, op. cit., p. 62.

Role of the State

Main Argument

The bottom line argument of this essay is that modern human rights cannot exist without the framework of the state. As Karal Vasak agreed, this is the primary condition, a *de jure* state.⁴⁹ Here we mean, under the current circumstances, unfortunately though it may be, the territorial state with its monopoly of coercive power.

Rights by definition relate to the notion of law. In some languages, the same word - *jus*, *droit*, and *recht* - is used to refer to law and rights. Both rights and law are matters for the modern state in respect of their final implementation. Whatever justice systems or laws that existed prior to the modern state, at municipal or community levels, they have effectively been abolished or absorbed into the modern state. The international system at present is an outgrowth of the modern state and as such does not stand against this basic argument.

⁴⁹. Karal Vasak, "Human Rights: As a Legal Reality," in Philip Alston, ed., *The International Dimensions of Human Rights*, Unesco, Paris, 1982, p. 4.

Human rights jurisdiction assigned to the international system has been eventuated by agreements of the national states and, therefore, represents the broader framework within which human rights are being administered by the states with checks and balances. The above argument may sound legalistic and formal, but very fundamental in understanding the structural framework within which human rights operate.

The above argument also takes the state as an arena within which human rights issues are being battled out. The state is not only a part of the human rights paradigm outlined in Figure 1 (p.22), but also an arena within which the paradigm operates. The right-holders assume a specific legal status as citizens within the state. The history of citizenship in a country is the history of human rights. The state is the main authority that receives and sorts out human rights claims from its population.

It is only the state that can convert human rights demands into positive law and takes measures to operationalise them through public policy. Human rights claims may or may not be directed against the state. However, most of the contemporary human rights demands require state protection. The state may act as a clearinghouse for human rights demands in some circumstances. In others, it may use coercive power in curtailing them. In order to understand the behaviour of the state in response to human rights demands, it is necessary to understand the level of state formation and its structure.

Human Rights as a Struggle

Human rights processes often take the form of a struggle and even a "class struggle." Forsythe says, "much of the history of the human rights movement, both national and international, should be understood as claims by the have-nots, by the masses, against the haves, the elites, those with wealth and authority."⁵⁰

Nevertheless, human rights struggles are different to typical class struggles, although both involve issues of power and public policy. The former, most often than not, takes a multi-polar nature while the latter is by definition a bi-polar one. The multi-polar character of human rights movements gives substantial leverage to the state to manoeuvre and manipulate within different segments of the population in responding to the claims of these movements. The state assumes, therefore, a much more autonomous character within a human rights struggle, than in a class struggle.

The objectives of human rights movements also are multiple. Although these movements could go along with class struggles and eventuate social revolutions, as in the case of the French Revolution in 1789, the objectives are geared, in general, to change political regimes and public policy. Human rights movements, therefore, do not place the state at high risks like class struggles.

⁵⁰. Forsythe, *op. cit.*, p. 20.

The social bases of human rights movements are diverse and often multi-class. This allows both the state and the movements a substantial amount of influence on each other depending on the maturity of the class structure and the state. The state-makers and human rights leaders may emerge from the same class or even the same coterie of personalities. However, their rapprochement will depend much on the issues at stake. The underdeveloped states appear to respond more abrasively, than the developed ones, to human rights demands. It is, therefore, not possible to understand a particular behaviour of the state in confronting human rights issues without understanding the level of state formation, its structural conditions, and the issues at stake.

State Formation

This essay uses the term 'state formation' to mean not only the act of state-building or state-making,⁵¹ but all the parameters encompassing the act, the process, the manner and even the development of the structure of the state.

In historical literature, the term 'state formation' is usually identified with the early appearances of state-type organisations in social history. The most popular terms used to describe the development of the modern state seemed to be "state-building" or "state making." However, I do not see

⁵¹. The terms 'state-building' and 'state-making' are used interchangeably in this essay.

any reason why the term cannot be used to mean the development of the modern state as already done elsewhere by Charles Tilly.⁵²

My main emphasis is on the process and the act of state-making. The personalities involved are only a part of it. It is within the process of their development that states appear in different forms as subjects, which may or may not incorporate democracy and human rights, depending on the specific circumstances. The important point here is that the state is not merely an object in the hands of some distant state-builders. The state-makers are important but as an attached party to the state formation itself.

This chapter has built its ideas interlinking human rights to state formation on the basis of the European experience, particularly as studied by scholars like T. H. Marshall, and Richard P. Claude. Marshall and Claude offer elaborate explanations on the development of human rights, based on the experiences of Western Europe and North America.

Marshall's Thesis

T. H. Marshall, at a commemoration lecture of Alfred Marshall in 1949 at Cambridge, elaborated his ideas on the subject, "Citizenship and Social Class" based on the

⁵². Charles Tilly, ed., *The Formation of National States in Western Europe*, Princeton University Press, Princeton, 1975.

experiences of Britain.⁵³ Marshall divided the rights of citizenship into three aspects - civil, political and social - and traced their evolution during the past 250 years.

The meanings he gave for these three elements, civil, political and social, are identical to the standard interpretations of human rights. Most importantly, while defining these meanings, he also identified the corresponding state forms directly relevant to these rights. He said:

The civil element is composed of the rights necessary for individual freedom - liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice... *the institutions most directly associated with civil rights are the courts of justice.*

By the political element I mean the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body. *The corresponding institutions are parliament and councils of local government.*

By the social element I mean the whole range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society.

⁵³. T. H. Marshall, *Class, Citizenship and Social Development*, The University of Chicago Press, Chicago, 1964, pp. 71-134.

*The institutions most closely connected with it are the educational system and the social services.*⁵⁴

(My emphasis)

It should be noted that structural links between human rights and state institutions are not mechanical or one to one. Marshall himself does not indicate that. On the contrary, both human rights categories and state forms are intermixed in a complex matrix. The important point here is how this complex matrix came into being. This is the secret of state formation and institutional differentiation.

Marshall is not directly concerned about state formation, but he has some pertinent thoughts on the subject. Tracing back the history of political institutions, he says, "its evolution involved a double process, of fusion and of separation. The fusion was geographical, the separation functional."⁵⁵ To illustrate his point he quoted Maitland who had said:

The further back we trace our history the more impossible it is for us to draw strict lines of demarcation between the various functions of the State... Everywhere, as we pass from the ancient to the modern, we see what the fashionable philosophy called differentiation.⁵⁶

⁵⁴. Ibid, p. 78.

⁵⁵. Ibid, p. 79.

⁵⁶. Quoted from F. Maitland, *Constitutional History of England*, p. 105.

Marshall was of the view that even in early times the three strands of citizenship were in existence in some limited form but they departed later on to take their own course and then came together in the present century. He claimed that, "it is possible, without doing too much violence to historical accuracy, to assign the formative period in life of each to a different century - civil rights to the eighteenth, political to the nineteenth and social to the twentieth."

· He added that "these periods must, of course, be treated with reasonable elasticity, and there is some evident overlap, especially between the last two." What is more important to our study is the fact that, civil aspects of human rights arose with the emergence of the *liberal state*, political with the *democratic state*, and social with the *welfare state*. These are in fact not different states but different forms or stages of development of the same state. The development of liberal, democratic and welfare aspects of the state can also be assigned to the three centuries. Marshall reminds us that human rights in Britain developed in stages spread out through at least in three centuries and not in one stroke.

Classical Model

R. P. Claude, in a more recent exposition, has studied the political-legal history of human rights in France, Great Britain and the United States on a comparative basis and has come up with what he has called "The Classical Model of

Human Rights Development.”⁵⁷ “The analysis set out in this essay assumes that a set of problems can be identified in terms of differentiated steps towards human rights achievements.” Claude has labelled them as: “(1) the problem of political freedom, (2) the problem of legal guarantism, (3) the problem of equality rights and political participation, and (4) the problem of positive (socio-economic) rights policy.”⁵⁸

The differentiated steps in Claude's "model of gradual change" is quite akin to Marshall's three stages except for the fact that he has placed the civil rights phase more broadly as the problem of political freedom and introduced legal guarantism as a step which Marshall considered as an institutional condition "most directly associated with civil rights."

However, for anyone looking for generalisations derived from comparable processes in developed nations to study the processes in developing countries, Marshall's model is more useful than Claude's model in my judgement. The importance of Claude's study is the enormous comparative information that he has supplied on the three countries under investigation and the set of questions he has raised in classifying them. Also important is what he has identified as the "background condition."

⁵⁷. Richard P. Claude, "The Classical Model of Human Rights Development," in Richard P. Claude, ed., *Comparative Human Rights*, John Hopkins University Press, Baltimore, 1976, pp. 6-49.

⁵⁸. *Ibid*, p. 6.

In Claude's words, "it simply means that, preliminary to any movement toward human rights development, the framework of an operative legal system must be securely established."⁵⁹ This means a *de jure* state, identified at the beginning of this section as a primary condition for human rights development in any country.

However, as Claude himself said; "the model is rooted in the experiences of liberal democratic systems. Projecting it into third world and socialist people's republics can be done only with caution, if at all."⁶⁰ There are two main differences between the Western experience and the Third World reality, or the classical period and the modern period.

First, classical development was mainly guided by internal forces, although there were mutual influences among Britain, France and the US during their democratic revolutions and thereafter. In contrast, the dynamics of contemporary human rights development are overwhelmingly international with the formation of the UN, and an extensive system of international human rights standards and international pressure groups.

Second, the challenges or problems of human rights in developing countries do not follow the same stages as in the West as identified by Claude or Marshall. The developing countries usually confront issues of civil, political and social rights in a combined way, although some countries prefer to give priority to social rights over civil and political rights or vice versa.

⁵⁹. Ibid, p. 7.

⁶⁰. Ibid., p. 43.

Processes of Human Rights Development

Political Processes

The main argument of this essay is that the political formation of human rights (HR) in developing countries is governed by the interplay between, and the nature of, three main political processes: state-making (SM), political mobilisation (PM), and international influence (II). The following figure illustrates the main elements of the argument and their possible interconnections.

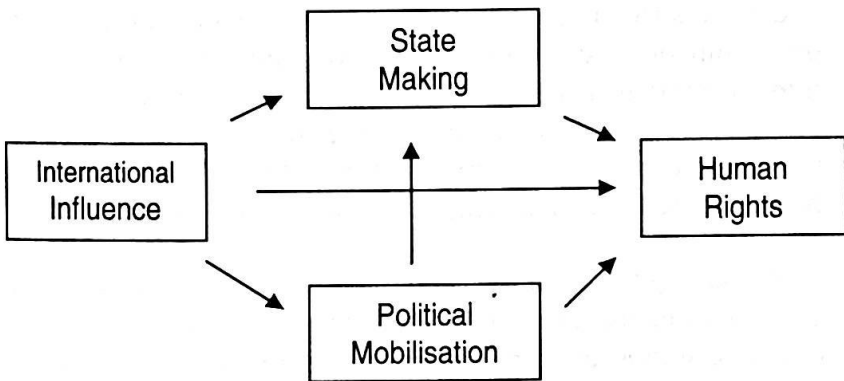


Figure 2

Human rights are the dependent variable in the argument. State-making, political mobilisation and international influence are the independent or the explanatory variables. While PM and II independently affect human rights in a country, they also work through the mechanism of SM in shaping the practical and legal nature of human rights. There is considerable leverage of II over SM. Further interpretations of these independent variables, and their interactions and nature, are explained below.

State-Making

State-making is the process through which states are created, consolidated and developed. It is true that no state is created without violence. It is equally true that states, especially under modern circumstances, require peace and harmony for development and prosperity. Favourable conditions for human rights usually appear when state-making moves from consolidation to development. If the Western states entered this phase during the last two centuries, the Eastern states can be considered to be entering this period only at present.

State making that is based on pure violence faces, almost as a general rule, the cyclical fate of rise and fall. The fate of empires, authoritarian regimes and dictatorships are common examples. Modern state makers, by and large, are aware of these rules whether they follow them or not.

State-making increasingly needs popular support for both local and international legitimacy. Peace, democracy and bargaining over conflicts emerge as the most stable and reliable methods of contemporary state-making.

State-making involves not only the creation of armies and the demarcation of territories but also the development of constitutions, institutional structures and legal codes for civil and criminal justice systems. They, on the other hand, affect the place and status of the populace and their human rights in society. Human rights were hardly a consideration of state-making in the past; they have been forced onto its agenda at present, as a result of political mobilisation and international influence.

To use a simile, state-making is like cake-making. It involves ingredients, recipes and makers. There are vast differences in ingredients, recipes and makers from the pre-colonial to the post-colonial times. Contemporary state-makers at times try to emulate their predecessors in the pre-colonial past. They also argue that human rights were not among those ingredients. These arguments are expressed in the idioms of "cultural relativism."

State-makers also borrow recipes from outside. This is part of what we call international influence. This has been a practice even during the pre-colonial state. There is a considerable narrowing down of recipes available or attractive to state-makers since the collapse of Communism in the former Soviet Union and in Eastern Europe. This

situation has even been exaggerated as a total victory for liberalism or "the end of history."⁶¹

The most essential ingredient in state-making has always been the people. The pre-colonial state-makers handled the people using what Michael Mann has called "despotic power."⁶² The control of the people took different forms: ideological or physical. Physical control included population transfers, social stratification, and enslavement.⁶³

Contemporary state-makers use 'infra-structural power,' instead of despotic means. They have to confront, in modern times, not only a politically articulate and mobilised populace, but also their human rights demands. Rational state makers tend to incorporate these human rights demands into their own policies, while charismatic type traditional leaders disregard them through authoritarian means. As Max Weber said:

⁶¹. Francis Fukuyama, "The End of History?" *The National Interest*, (Summer Issue), 1989, pp. 3-18.

⁶². Michael Mann, "The Autonomous Power of the State: Its Origins, Mechanisms and Results," in John A. Hall, ed., *State in History*, Basil Blackwell, Oxford, 1985.

⁶³. Lawrence Krader, *Formation of the State*, Prentice Hall, Englewood Cliffs, 1968, p. 10.

The demands for 'legal equality' and of guarantees against arbitrariness require formal rational objectivity in administration in contrast to personal free choice on the basis of grace, as characterised the older type of patrimonial authority.⁶⁴

There are certain processes involved in state-making that this essay is interested in. The most important aspect of state making, in terms of human rights, throughout history, has been the administration of justice.

Political Mobilisation

"The word 'mobilisation' conveniently identifies the process by which a group goes from being a passive collection of individuals to active participants in public life."⁶⁵ Political mobilisations for human rights are new phenomena in developing countries. They hardly existed in the pre-colonial times. With the advent of colonialism, mobilisations came into being as a reaction first based on the pre-colonial privileges and rights of the nobility. Then they turned into mass movements of nationalism combining with trade unionism and peasant organisations.

⁶⁴. Max Rheinstein, ed., *Max Weber on Law in Economy and Society*, Harvard University Press, Cambridge, 1954, p. 355.

⁶⁵. Charles Tilly, *From Mobilization to Revolution*, Addison-Wesley Publishing Company, Reading, Mass., 1978, p. 69.

Political mobilisations vary and affect state formation and human rights differently. The most important criteria are their nature, objectives, and methods used. Depending on these criteria, political mobilisation may affect human rights positively or negatively.

People are mobilised in politics by virtue of their social identity or political ideology or both. Among social considerations are class, caste, ethnicity, and religion. Mobilisations based on social identities are often conflictive and lead to violence and violations of human rights. Ethnic and religious mobilisations are two major examples of this negative influence. These mobilisations claim their legitimacy or justification on the basis of perceived privileges or rights. Their claims are often derived from historical legacies and ideologies. Nevertheless, there are legitimate human rights issues involved when majority ethnic groups suppress and subjugate minority communities.

Almost all class mobilisations in the contemporary world are ideologically oriented. In the West, while the bourgeoisie followed liberalism, the proletariat tended to follow different varieties of socialism. In many developing countries liberalism has not been very attractive or prominent, except among a small layer of Western-educated elite. The bourgeoisie of these countries, closely linked to the traditional classes, have usually followed nationalism but not liberalism, in their mobilisations.

The most attractive ideology of the proletariat or the poorer classes of these societies has been Marxism and its authoritarian varieties of Stalinism and Maoism. Social democracy or Fabian views became known only where there was an organised trade unions, based on moderate leadership. Both the ideology and the modes of mobilisation of Maoism, with a clear rejection of individual rights, have tended to be major obstacles to human rights development in many developing countries.

Political mobilisations with clear objectives of human rights are a recent development. They are mainly in the form of local human rights groups affiliated to or supported by international organisations. Under particular circumstances oppositional movements against repressive regimes also take the form of human rights mobilisations.

International Influence

International influence, in its broadest definition, means how ideas and institutional notions travel beyond national boundaries and affect other countries. 'Globalization' is the current manifestation of this process. Peter Gourevitch explained the importance of the international factor, in comparative politics, as follows:

A comparativist often seeks to explain the nature of the domestic structure: why it is as it is, how it got that way, why one structure differs from another, how it affects various aspects of life, such as health,

housing, income distribution, economic growth and so on. To answer such questions, the international system may itself become an explanatory variable. Instead of being a cause of international politics, domestic structure may be a consequence of it. International systems, too, become causes instead of consequences.⁶⁶

International influence is one of the oldest influences in state formation. However, how these influences affect human rights depend on the types of ideas and notions that they bring forth. For example, so-called Indianisation of the pre-colonial state brought the "Laws of Manu" and the notions of caste, which were in fact antithetical to the basic tenets of human rights.

"Of course, the clearest form of external influence on politics is outright invasion and occupation..."⁶⁷ This "outright" influence could be seen during the colonial period of many Third World countries. The purpose of colonialism, however, was not human rights, but commercial and political interests. Human rights were introduced only when colonial administrations came under the pressure of the people, in the colony or the imperial country. The nature and differentiation of these influences largely depended on the colonial power

⁶⁶. Peter Gourevitch, "The Second Image Reversed: The International Sources of Domestic Politics," *International Organisation*, 32 (4), 1978, p. 882.

⁶⁷. *Ibid.*, p. 883.

concerned, the exact colonising policies they pursued, and the levels of human rights development of those countries themselves.

International concern for human rights has changed dramatically over time. At the beginning of the 19th century, it was a concern over slavery, "largely inspired by [William] Wilberforce, [who] sought to prohibit it internationally."⁶⁸ The international labour movement played a considerable role toward the end of the century in questioning colonial policies and how the colonies were run.⁶⁹ By the beginning of the 20th century, international concern was focused on the questions of minorities and the victims of war.

All these concerns over time became reflected in international proceedings and international law. The formation of the League of Nations in 1919 was a major effort to promote these concerns through international consensus and agreements, but did not yet consider that international law had binding obligations on the part of the nation-states. Oppenheim, a leading authority on international law at the beginning of this century, did not

⁶⁸ . A. H. Robertson and J. G. Merrills, *Human Rights in the World: An Introduction to the Study of the International Protection of Human Rights* (third edition), Manchester University Press, Manchester, 1989, p. 14.

⁶⁹ . For labour's role in democratisation, see Goran Therborn, "The Rule of Capital and the Rise of Democracy," *New Left Review*, 103, p. 24.

believe that the "so-called rights of man" should enjoy protection under international law "because that law is concerned solely with the relations between States and cannot confer rights on individuals."⁷⁰

This perception has drastically changed since World War II. As John Humphrey remarked, "there has been a radical change not only in the content but in the very character of international law - now better called world law - which now extends its protection to and imposes duties on not only states but other entities, including individual men and women who now possess a degree of personality under the order."⁷¹

Since the formation of the UN there has been an expanding international regime of human rights to promote, protect and implement human rights policies worldwide. This international regime is composed of: (1) the UN and its agencies; (2) Western governments with human rights as a foreign policy objective; and (3) international NGOs, such as the Amnesty International, the International Committee of the Red Cross, and the International Commission of Jurists.

⁷⁰. Robertson and Merrills, op. cit., p. 2

⁷¹. John Humphrey, "The International Bill of Rights: Part One," in UNESCO, ed., *Philosophical Foundations of Human Rights*, UNESCO, Paris, 1986. p.60.

The UN system is the most extensive, with a multitude of human rights instruments and mechanisms.

The UN mechanisms can be separated into two sets of institutions: Charter-based bodies and Treaty-based bodies. The Charter-based bodies monitor and take action on gross violations and overall performance of human rights in member countries of the UN in general. The Treaty-based bodies are more specialised institutions to monitor the human rights compliance of countries signatory to particular treaties. The UN Commission on Human Rights and its Sub-Commission are the main parts of the Charter-based bodies. Through the means of investigation, monitoring, criticism, diplomacy, sanctions and UN interventions, the international system of human rights affects the processes of state-making and human rights in many parts of the world.

CONCLUSION

Human rights epitomise a complex, interactive, dialectical and yet unfortunately volatile relationship between people and their states. It is because of this problem that human rights are important to the discipline of Political Science. If people and states are the primary concerns of Political Science, human rights definitely come in between these two concerns.

Human rights can be understood in two paradigms, moral and political. While human nature determines the moral paradigm of human rights, states demarcate their political and legal nature. In theory, human rights may exist beyond and above states, but in practice, they are largely confined to the nature, maturity, structure and limitations of the states. The social reality of human rights is a combination of both these paradigms.

How human rights develop from a moral to a political level or from theory to practice has been the main concern of this essay. As a normative principle, morality, to mean what is right or good, can be and should be considered the basis of the political practice of human rights. But this is not always the case as far as both the states and some of the non-state actors are concerned. Human rights are often used as means to other ends, both in international and national politics. Transformation from moral to political often comes through struggles, agitation, regime change, international influence,

intervention, or force. It does not, unfortunately, come through peace and harmony.

There are instances, when human rights are violated ostensibly to achieve 'human rights.' Yet, as far as long-term human rights progress or development is concerned, the morality of human rights has always been the underlying substantive dynamic irrespective of conjunctural violence or violations. Whether a Hegelian "prior state of consciousness guides this dynamic," as Francis Fukuyama seems to advocate, is difficult to verify in empirical terms.⁷²

Moral cognizance of human rights has not always existed throughout human history, but has emerged during particular social development associated with free labour, free market, and modern education. What we can observe since then is a dialectical process in which morality or consciousness often takes a priority position in determining the conditions of human rights in the long term.

The discovery and/or awareness of human rights are the important link between the moral paradigm and the political paradigm of human rights. This in turn is the foundation of what we have identified as political mobilisation for human rights. From a historical point of view, it has taken some centuries for human rights to move from its moral base to international politics. It was only after the formation of the

⁷². Fukuyama, loc. cit., p. 6.

UN, that human rights became established in international law.

Why has this development been so slow and problematic? Why are human rights still being grossly violated in some countries, if their moral base is so established in international law? Answers to these questions lie in the nature and the formation of the state/s. The states have been in existence for over six thousand years before human rights were discovered in the West. This "world time gap" between the origins of the state and the discovery of human rights largely explains the slow and problematic growth of human rights as legal entitlements under state systems.

There are interesting contrasts between human rights and states. While Human rights are discoveries, states are creations and re-creations. States are created and recreated for various reasons. Only since the 17th century have human rights come onto the agenda of state-making, there to be met by tremendous hostility and antagonism. It is difficult to identify a single determining factor, such as class or ethnicity, in state-making. What is clear is that states are the creations of state-makers whatever their social reference group. State-makers have been a specific group of people from earlier times until now, including kings, ministers, military commanders, guerrilla leaders, prime ministers, presidents, diplomats, and judges. They have usually come from a closed social group of class, caste, family, ethnicity, or elite.

While human rights are universal attributes, states are not. States only have some common characteristics. Although human rights are natural to human beings, they are not natural to states. States relate not to human nature as such, but to social relations. States have emerged as organisations of compulsory rule making based on coercive power. They have emerged in different societies at different times depending on social developments.

This essay highlighted the importance of the state and its process of formation in understanding and analysing human rights and human rights development. In this respect the essay deviated from existing approaches to human rights and can be considered a renewed effort to investigate human rights taking the state as its main framework. The discipline of Political Science has traditionally analysed rights in relation to the state.⁷³

However, this approach has been neglected in many discussions of human rights in the last five decades. One reason has been that international lawyers and not political scientists have dominated these discussions. The other reason has been the general abandonment of the state as a framework for analysis in social science until it was "brought back in" only recently.⁷⁴

⁷³. H. J. Laski, *A Grammar of Politics* (4th edition), Billings and Sons Ltd., Guildford, 1941, pp. 89-141. Also Dorothy Pickles, *Introduction to Politics*, Sylvan Press, London, 1951, pp. 150 - 197.

⁷⁴. Skocpol, op. cit., p. 4.

In terms of human rights practice, re-formation or re-making of the state is the main conclusion that this essay offers to the readers to overcome the conditions of human rights violations and underdevelopment. How far this task can be fulfilled would depend on the leverage that can be exerted on state-making, political mobilisation, and international influence. This conclusion is offered not only to the state-makers and students of politics, but also to the human rights activists and advocates.

As our investigation reveals, the state and human rights constitute a terrible historical antithesis quite detrimental to the present knowledge and values of human nature and their needs. Turning this antithesis into a synthesis is the task ahead for human rights movements.

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