

Programme- BA. LL.B.-IIIrd year (IX sem.)

Course - Human Rights Law and Practice

Course Code- BAL-593

Sem- IX sem.

Year- 2020-21

Unit- Ist (part 2)

Topic- Human Right a Legal Right

**Sub-Topic- Is Human Right a Legal Right?, Sources of International Human Rights Law,
Evolution of the Concept of Human Rights**

Faculty- Moolraj Singh

E-mail- moolrajtyagi1@gmail.com

Human Right a Legal Right

Is Human Right a Legal Right?

A question arises as to whether human rights are legal rights? It may be noted that legal right is a right which is recognized and protected by the legal system. Legal rights have two important essential elements i.e., firstly, the holder of the right, and secondly, the person bound by the duty. Only legal persons can be bound by duties or be the holder of the legal rights. Every right therefore involves a relationship between two or more legal persons. Rights and duties are correlative, that is, a person cannot have a right without a corresponding duty. Human rights belong to human beings and the State has the corresponding duty to protect the rights of human beings. Declaration of the Human Rights Defenders adopted by the General Assembly on December 9, 1998 laid down under Article 2 Para 1 that each State has the prime responsibility and duty to protect, promote and implement all human rights by adopting necessary measures. Para 2 of the above Article states that each State shall adopt necessary legislative, administrative and other steps to ensure that the right to protect human rights is effectively guaranteed. Further, International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights adopted in 1966 stipulated in the Preamble as to the obligation of States to promote universal respect for and observance of human rights and freedoms. The above implies that human right is a legal right. While human beings have right, the State has a corresponding duty to protect the rights.

Sources of International Human Rights Law

International human rights law has been developing extensively since the creation of the United Nations. The most fundamental point about human rights law is that it establishes a set of rules for all the people of all the States. International human rights law derives from the variety of sources which are as follows :—

(1) International Treaties. —

Treaties are the most important sources of international human rights law. Presently, a number of multilateral treaties relating to human rights are in force which are legally binding to those States which are parties to them. The most important amongst them is the United Nations Charter itself which is binding on all the States in the World and establishes at least general obligations to respect and promote human rights.

Regional treaties on human rights such as European Convention on Human Rights, American Convention on Human Rights and African Charter on Human and People's Rights are also legally binding on the contracting states and they therefore are the sources of international human rights law.

(2) International Custom. —

Certain international human rights have acquired the status of Customary International Law by their widespread practice by States and they therefore are binding on all the States without regard to whether they have expressly consented.

The 1987 Restatement (Third) of the Foreign Relations Law of the United States takes the position that customary International Law protects at least certain basic human rights. Section 702 of the Restatement provides, "A state violates International Law if, as a matter of State policy, it practices, encourages, or condones (a) genocide, (b) slavery or slave trade, (c) the murder or causing the disappearance of individuals, (d) torture or other cruel, inhuman or degrading treatment or punishment, (e) prolonged arbitrary detention, (f) systematic racial discrimination, or (g) a consistent pattern of gross violations of internationally recognized human rights." Although the above list might not be exhaustive or other may disagree to the above list of human rights as to have acquired the status of customary rule of international law, there seems to be widespread agreement that a number of rights are at present included within customary international law and consequently they are the source of international human rights law. It is desirable that a study is conducted to prepare a list of those human rights which have acquired the status of international customary law. It would be of immense help to the International Court of Justice, States and to their courts as they would come to know about them.

(3) Other International Instruments.—

A great number of international declarations, resolutions and recommendations relating to human rights have been adopted under the auspices of the United Nations which have established broadly recognized standards in connection with human rights issues despite the fact that they are not legally binding on the States. The most important of these is the Universal Declaration of Human Rights of 1948 which possesses a moral or political force that may be useful in persuading government officials to observe human rights standards. Some of the rights

referred therein have acquired the character of customary rule of International Law. Declarations adopted by the Tehran Conference (1968) and the Vienna Conference (1993) also serve as the source of the commitment by the international community.

(4) Judicial Decisions.—

Decisions of the various judicial bodies are relevant in the determination of the rules on human rights issues. Although action by the International Court of Justice in the area has been limited, there is no doubt that cases could fall within its competency. European Court of Human Rights—a regional court, since the *Lawless* case decided in 1960 has adjudicated many disputes successfully. The increasing case load prompted a lengthy debate which resulted into the creation of a new European Court of Human Rights on November 1, 1998. Although a few cases have been brought before the Inter-American Court of Human Rights, case law under the American Convention is as yet in its infancy. Decisions of the municipal courts on human rights issues have contributed immensely to the development of international human rights law.

In addition to the judicial decisions, opinions of the arbitral bodies whose function is to mediate on complaints of human rights violations under the various treaties also assist in the determination of the rules relevant to international human rights.

(5) Official Documentations.—

Official documents of the United Nations and its subsidiary bodies have produced a vast amount of documentation relating to human rights matters. Human Rights Law Journal, Human Rights Review and European Law Review and the collective work done under the auspices of the international bodies are of considerable value.

The above are the important sources of international human rights law but they by no means are exhaustive. Many international and national institutions contribute to the protection of human rights despite the fact that they primarily concern with other issues. Further, a variety of actions taken by the United Nations organs and other international bodies have too supported specific efforts to protect human rights.

Evolution of the Concept of Human Rights

The roots for the protection of the rights of man may be traced as far back as in the Babylonian laws. Babylonian King Hammurabi issued a set of laws to his people which is called Hammurabi's Codes, established fair wages, offered protection of property and required charges to be proven at trial. The Codes, while often harsh in their punishments, provided standards by which Babylonians could order their lives and treat one another. Assyrian laws, Hittiti laws and the Dharm of the Vedic period in India also devised different sets of standards by which obligation of one was provided to another. The World's all major religions have a humanist perspective that supports human rights despite the differences in the contents.

The Magna Carta (also called Magna charta)² or the Great Charter of the Liberties of England granted by King John of England to the English baron on June 15, 1215 was in response to the heavy taxation burden created by the third Crusade and the ransom of Richard I, captured by the holy Emperor Henry VI. The English barons protested the heavy taxes and were unwilling to let King John rule again without some concessions in their rights. The overreaching theme of Magna Carta was protection against arbitrary acts by the King. Land and property could no longer be seized, judges had to know and respect laws, taxes could not be

imposed without common council, there could be no imprisonment without a trial and merchants were granted the right to travel freely within England and outside. The Magna Carta also introduced the concept of jury trial in clause 39, which protects against arbitrary arrest and imprisonment. Thus, the Carta set forth the principle that the power of the King was not absolute. In 1216-17, during the reign of John's son, Henry III, the Magna Carta was confirmed by Parliament, and in 1297 Edward I confirmed it in a modified form. Although the Charter applied to a privileged elite, gradually the concept was broadened to include all Englishmen in the Bill of Rights in 1689 and eventually all citizens. The Carta was buttressed in 1628 by the Petition of Rights, which asserted the rights of the citizens to be free from unrepresentative taxation and arbitrary imprisonment. The Bill of Rights of 1689 formed the platform for parliamentary superiority over the Crown and to give documentary authority for the rule of laws in England. In addition to the above, the writings of St. Thomas Aquinas and Grotius also reflected the view that human beings are endowed with certain eternal and inalienable rights.

The expression 'fundamental rights of man' was stated in the declarations and constitutional instruments of many other States. For instance, the Declaration of Independence of the Thirteen United States of America in 1776 (The Virginia Declaration, 1776); the Constitution of the United States of 1787 with amendments in 1789, 1865, 1869 and 1919 specified a number of rights of man. The Virginia Declaration of Rights affirmed that all men are by nature equally free and independent and have certain inherent rights. The French Declaration of the Rights of Man and the Citizen of 1789 stipulated that men are born and remain free and equal in rights... the purpose of all political association is the conservation of the natural and inalienable rights of man : these rights are liberty, property, security and resistance to oppression.

Sources

1. Laws promulgated in the reigns Of Urukagina of Lagash (3260 B.C.), Sargon of Akkad (2300 B.C.) and Hammurabi Of Babylon (1750 B.C.). Cited in Inaugural Address of Justice P.N. Bhagwati, Supreme Court Of India in the seminar on 'Human Rights' organised by International Law Association, Allahabad Centre (1980)' P• 7'
2. See Henle, S.J., 'A Catholic view Of Human Rights : A Thomistic Reflection' in Alan S. Rosenbaum, 'The Philosophy Of Human Rights, International Perspectives' (1980).
3. Dr. H. O. Agarwal, International Law and Human Rights, CLP, 2013