

**THE EPISTEMOLOGY OF HUMAN RIGHTS:
A THEORETICAL ESSAY**

*Parmanand Singh**

Abstract

This essay may be read as a critique of the dispute among philosophers over the meaning of human rights. The common view is that the concept of human rights emanates from a moral requirement to act with respect for persons but there has been a long-running dispute among philosophers as to what counts as respect for persons, whether individual rights can be sacrificed for pursuing goals of prosperity, economic growth and so on or whether the various rights to welfare should simply matter of social policies or matters of enforceable rights and whether in a free market economy the government has the power to seek sacrifices from people to help those in need. The paper argues that the interpretative technique employed by the Indian Supreme Court while interpreting the idea of respect for persons as embodying a right to live with human dignity has promoted respect and legitimacy to human rights. In India, where human rights are rarely used as a protracted struggle against domination, tyrannies and deprivations, the judges as unrepresentative elites will remain the leading participants in national political debate by imposing their own convictions about human rights and providing legal resources for launching social movements and public campaigns for social reconstruction and legal change.

I Introduction: Multiple universes of human rights discourse

THE POPULARITY of the concept of human rights in current politics, the rapid growth of law relating to international protection of human rights and the frequent appeal to human rights for social change, curbing governmental lawlessness, exploitation, and satisfaction of basic needs, has been so overpowering in its force and acceleration that the language of human rights has become an empty catch-all under which any political or moral value can easily be subsumed. Today every benefit, every good or value and every claim against blows of misfortune, sadistic abuses of power and exploitation is being asserted by the people in the name of human rights. Since appeal to human rights is being employed as a stimulant to human emotions, a

* Formerly Professor of Law, Head and Dean, Faculty of Law, University of Delhi. The author can be reached at: parmanandsingh@yahoo.com.

list of these rights can easily be derived from deprivations, privations, brutalities and atrocities. If the rights have to be 'human' then 'human being' is the measure and there is no reason that a limit should be placed on the claims made in the name of human rights. Since 'human rights' are grounded in humanity, these rights simply require positive and political action in their support. It is considered quite unimportant that the new claims should be justified by any political or moral theory. And when we are thwarted in the realization of these proclaimed rights, we tend to abuse the legal apparatus or the political economy or point to the growing decline in political morality.

The concept of human rights has entered into the contemporary universe of rights talk after the second world war when the General Assembly of the United Nations adopted the Universal Declaration of Human Rights on December 10, 1948. The Declaration was motivated by horrors and outrages experienced during the war and it embodied the moral commitment to prevent the recurrence of these events in future. Right to life, health, food, shelter, decent living, freedom from torture, and degrading treatment and many other rights were declared to be indispensable for the dignity of the individual and free development of human personality.¹ The universality of human rights was re-affirmed in various international covenants ensuring both freedom from fear and freedom from want.

The normative development of human rights is sometimes traced in terms of three generations. The first generation of civil and political rights arose out of French and American Revolution. The second generation of economic, social and cultural rights is linked with Russian Revolution and the third generation rights are called solidarity rights reflecting contemporary issues such as peace, development and environment. The implication of tracing the development of human rights by reference to historical events which occurred in Western hemisphere, however, ignores a vital fact that the struggles for civil and political rights were fought even by the freedom fighters in non-Western societies, for example by the nationalist leaders in India. Mahatma Gandhi had a clear vision of human rights which he had proclaimed in as early as 1916. He said: "Every human being has a right to live and therefore to find wherewithal to feed himself and where necessary to clothe himself."² In 1931, he

1 For a brilliant account of international development in the area of human rights see, P.M. Smith, "The Notion of Development As a Right: Reflections from an International Perspective" in M. P. Singh (ed.) *Comparative Constitutional Law* 565 (Eastern Book Company, Lucknow 2011). Also see M.K. Sinha, *Hand book of Legal Instruments on International Human Rights Law and Refugee Law* (Lexis Nexis, New Delhi, 2014).

2 M.K. Gandhi, "Lecture at Allahabad (22 December, 1916)" 13 *Collected Works of Mahatma Gandhi* 312 (1958).

again said: “Every man has equal right to the necessities of life even as birds and beasts have.”³

The Congress Declaration of Independence of January 26, 1930 drafted by Gandhi proclaimed:⁴

We believe that it is the inalienable right of the Indian people as of any other people, to have freedom and to enjoy the fruits of their toil and have necessities of life, so that may have full opportunities of growth.

It is thus clear that the concept of freedom is not necessarily Western in origin.⁵ It is quite likely that the contributions made by Gandhi might have influenced the drafting of the Universal Declaration of Human Rights which incorporates both the right to basic necessities as well as right to freedom within the concept of human rights.⁶

Today, in India, everyone talks about human rights by bringing ordinary people in public focus. In a sense, human rights have become resources both for politics and populism. Long ago a leading scholar had very aptly remarked that “poverty alleviation programmes, even when they show some concern for the poor, are largely directed to meet the needs of party political regimes; and the gap between rhetoric on war against ‘poverty’ and the reality in terms of changing life-conditions of the ‘poor’ is very often a function of coherence of political ideologies, ways of organization of party cadres, and the leadership styles.”⁷

Some critics of India’s political economy contend that a model of economic development based on multinational capital and privatization of economy will have a negative impact on human rights contributing to increased inequalities, dismantling of social services with adverse effect on the poor and restrictions on the trade union

3 M.K. Gandhi, “Young India (26 March, 1931)” 45 *Collected Works of Mahatma Gandhi* 339 (1958).

4 Gandhi’s Draft (10 January, 1930), 42 *Collected Works of Mahatma Gandhi* 384 (1958).

5 C. Badrinath, “The Human Rights and Jainism: Foundation of Human Rights” *The Times of India* (Mar. 14, 1995). Badrinath argues that it would be wrong to conclude that freedom is chiefly a western idea. In India ‘from the first awakening of the human mind...freedoms were seen as the very substance of human worth.’ According to him the deeper foundation of human rights should be found in *dharma* and *Jainism* which preach *ahimsa* as supreme value. *Ahimsa* embodies the idea of human freedom from fear which is the first condition of human dignity.

6 In 1946, Mahatma Gandhi’s letter to UNESCO Secretary General, A. Huxley on principles for a Universal Declaration of Human Rights, it was stated: “...all rights to be deserved and preserved from duty well done”. UNESCO (ed.), *Human Rights: Comments and Interpretation: A Symposium* 18 (1949).

7 U. Baxi, *Law and Poverty: Critical Essays* 12 (N.M. Tripathi Pvt. Ltd., 1988).

rights.⁸ A UN Report⁹ submitted in 2012, on human rights has slammed India for its poor record on human development. The report says that the government policies driven by neo-liberal economic paradigm continue to perpetuate “exclusion” and ignore the poor. India ranks 131 out of 187 countries on UNDP’s Human Development Index (HDI) and 129 out of 147 countries on gender inequality index. The report says that India has worst child mortality sex ratio in the world. While country’s wealth may have increased, there is no willingness to invest a part of it for a better life for the poor. The report also looks at the violation of right to food and housing. The report cites a survey according to which around 42% of children under five are underweight and more than 50% are stunted. There are no entitlements for urban poor, no urban equivalent of National Rural Health Mission or National Rural Employment Guarantee Scheme. India has one of the most privatized health care systems in the world. World Bank data for 2010 shows India’s proportion of public expenditure to total spending on health at 29.2%, is much lower than the global average of 62.8%. Not only does India spend less on health care than most of the world, whatever little is spent comes from private sources.¹⁰

Some scholars argue that in a capitalist society, rights serve as an ideological legitimization to mask social and economic inequalities in the society.¹¹ Rights on this view are simple devices for mystifying the masses and masking the reality of capitalist dominance. The implication of this approach is that in a capitalist society, the exercise of market liberty creates space for domination by some over others and thus the conception of ‘rights as freedoms’ becomes repressive and a device of ‘primitive accumulation’.¹² It is widely perceived that the new philosophy of trade would increase

8 D.J. Ravindran, “Indivisibility of Human Rights: A Neglected Concept” *Mainstream* 8-10 (Oct. 15, 1994). Joseph E. Stiglitz, *Globalization and Its Discontents* (W.W. Norton & Company, New York, 2002). For a contrary view that economic liberalization will bring economic prosperity and generate more employment, and will eliminate hunger and poverty, see Jagdish Bhagwati and Arvind Panagariya, *India’s Tryst With Destiny: Debunking Myths that Undermine Progress and Addressing New Challenges* (Collins Business, 2012).

9 Anahita Mukherji, “Growth Pangs; A Recent U N Report on Human Rights Slammed India for its Poor Record: Why an Emerging Economy is Doing So Bad on Human Development Index” *The Times of India* (June 3, 2012). This report is available at: <http://www.wghr/pdf/status%report%2013.05%versionpd> (last visited on Feb. 2, 2015).

10 See P. Singh, “Economic Globalization and Social Rights in India” in P. Singh and A. F. Julian (eds.), *Globalization and Sustainable Good Governance; Challenges and Opportunities* 361 (Manak, Delhi, 2010). J. Dreze and A. Sen, *An Uncertain Glory: India and its Contradictions* (Allen Lane, 2013).

11 B. Parekh, “The Modern Concept of Rights and its Marxist Critique” in U. Baxi (ed.), *The Right to Be Human* 1-23 (Stosius Inc/Advent Books Division, 1987).

12 U. Baxi, “Law and State Related Capitalism in India: Some Preliminary Reflections” in *Capitalist Development: Critical Essays* 185-209 (1991).

unemployment, and lead to a model of modernization that will push the people to the brinks of survival, erode worker's rights and further depress the conditions of migrant women and child labor.¹³ One commentator is critical of the new economic policy of India of handing over the country to foreign sharks and their Indian business cohorts whose sole interest is quick profit and they are not in the least concerned for the poor Indians.¹⁴ A recent work has adopted a new approach arguing that corruption constitutes a violation of human rights.¹⁵

The multiple universes of rights talk renders the concept of human rights confused from the start because the meaning ascribed to this concept and the uses made of it by lawyers, judges, economists, activists, and legal scholars is of different and conflicting dimensions and contexts. In most of the Western legal material the expression "human rights" is used in the sense of freedom of speech, liberty of person, religious freedom and freedom from arbitrary coercion and torture. In the third world countries people speak of human rights in terms of 'development' and basic needs satisfaction. Some people talk of 'human dignity' as the source of all positive entitlements.

The crucial philosophical question that should be asked is: What does it mean to say that there are human rights or that persons have them? Are human rights primarily claim-rights in the sense that they entail correlative duties on other persons or the government to act or refrain from acting in certain ways? Are these rights different in theory and content from the old family of civil and political rights? Can human rights be restricted for the fulfillment of collective goals or general welfare? Are these rights properties of the individuals? As Joel Feinberg puts it:¹⁶

Rights are not mere gifts or favour...for which gratitude is the sole fitting response. A right is something which a man can stand on, something that can be demanded or insisted upon without embarrassment or shame.

It is doubtful whether several claims advanced today in the name of human rights can fulfill the characteristics of a right as described by Feinberg. The only thing that the contemporary discourse on human rights points out is that the new claims represent a response to a new situation of people frustrated by the existing inequities of political

13 R. Kothari, "Flawed Democracies: Critique of Indian and U S Models" *The Times of India* (May 30, 1994).

14 M.N. Buch, "Economic Reforms: Myth and Reality" *The Hindustan Times* (Jan. 3, 1994). Also see U. Baxi, *The Future of Human Rights* (OUP, New Delhi, 2008) for an insightful critique of the consequences of economic globalization on the human rights of the poor and the disadvantaged.

15 C. Raj Kumar, *Corruption and Human Rights in India* (OUP, New Delhi, 2011).

16 J. Feinberg, "Duties, Rights and Claims" 3 *American Political Quarterly* 137 (1966) quoted in L. Lloyd and M. D. Freeman (eds.), *Lloyd's Introduction to Jurisprudence* 134 (Sweet and Maxwell, 1985).

economy and repressive nature of modern capitalist society. One way to understand the concept of human rights is to examine the difference, if any, between the traditional individual rights and the new doctrine of rights. In other words, is there any theoretical distinction between rights against various forms of intrusions and interference and rights to positive social goods and services? We now turn to this question.

II Are the new rights different from the traditional individual rights?

In legal and moral theory the concept of rights first appeared on the stage of thought in the guise of natural rights. Such philosophers as Hobbes, Locke and Rousseau and such acute political thinkers such as the leaders of French and American Revolution each had a clear conception of rights that must be assured to the people if they were to live with security and dignity. According to this doctrine of natural rights of the 17th and 18th century, man was believed to have a fixed and unalterable nature, to be endowed with reason, which gave him certain rights without which he ceased to be a human being. The natural rights summed up in the Lockean formula of 'right to life, liberty and property' were largely concerned with protecting the individual person against governmental power. The moral requirement was to act with respect for persons. The idea of respect for persons was interpreted as freedom from interference by others. Thus, right against arbitrary coercion, physical restraint, freedom of speech, guarantee of due process, and right against discrimination were concerned with the protection of the individual person against governmental power. These natural rights had metaphysical or moral status derived from God or Nature or dictate of Reason and belonged to men as part of their intrinsic nature. The doctrine of natural rights had greatly influenced the drafting of the British Bill of Rights (1639), Declaration of Independence (1776), Declaration of Rights of Man and Citizen (1789) and formed part of the U.S. Constitution.¹⁷ The doctrine of natural rights viewed man as a self-determining and self-directing agent living in an environment that offered him ample resources and opportunities to pursue his own goals and chose his own actions free from interference by others.

Natural rights, thus, represented the struggle of man against various form of intrusions and oppressions. These rights placed great emphasis on the values of freedom and independence of individuals. Since the doctrine of natural rights was theoretically suspect from the start, it never acquired intellectual respectability and failed to exploit the ground it had won. Towards the end of eighteenth century, Jeremy Bentham, the founder of classical utilitarianism and analytical positivism, mounted an attack on the doctrine of natural rights. Bentham argued that the doctrine of natural rights could settle nothing. The only proper basis for determining how people should

17 C.J. Friedrich, *Constitutional Government and Democracy* 156 (OUP, 1965).

live was the principle of utility. He held that rights and laws could be evaluated by reference to the principle of utility and not by reference to a misleading belief in the existence of natural rights. Rights were, according to him, not a matter of political or moral legitimacy but owed exclusively to positive law.¹⁸

The legal positivists transformed natural rights into legal rights by first refining the concept of individual rights and establishing a catalogue of specific rights and then by developing the substantive and procedural apparatus to secure these rights. Like natural rights, these legal rights were also viewed as freedom from interference. Not only constitutional rights, but also various common law rights formulated in such terms as negligence, tort, liability, defamation, assault, and nuisance are defined as prohibitions against interference with individual freedom. Then most of the fundamental rights are controlled by a negative verb forbidding the state to deny, abridge, violate, infringe, deprive, or discriminate against specific rights. These rights rarely require a positive social or political action to endow men with positive social goods and services.

According to Iredell Jenkins, human rights are different from traditional individual rights in as much as they “tend to take the form of claims to or for something. Their function is to assure people certain goods, benefits and support for which they experience an urgent need, to which they feel entitled, and which they are unable to procure by their individual effort.”¹⁹ The essence of “what is happening here is that the concept of right is being enlarged to include not only means but also ends. What men are now claiming as a right is not merely that they be left unhindered in their pursuit of values, but these values be bestowed upon them.”²⁰

Jenkins holds that the origin of “human rights is quite similar to that of natural rights: each is born of desperation and dedicated to action. But there are also important differences that will have important consequences. The doctrine of human rights appeals chiefly to the feelings of men, while that of natural rights spoke more seriously to their minds.”²¹ According to him, the doctrine of human rights marks a return to that of natural rights but without metaphysical foundation of the latter.²² The long passage from natural to legal to human rights has been very poignantly summed up by Jenkins thus:²³

18 Bentham ridiculed natural rights as a non-sense upon stilts and a ‘wasted breath’. See Jeremy Bentham, *Of Laws in General*, 120 quoted in *Lloyd’s Introduction to Jurisprudence*, *supra* note 16 at 254.

19 I. Jenkins, *Social Order and The Limits of Law : A Theoretical Essay* 253 (Princeton University Press ,1980).

20 *Id* at 257.

21 *Id* at 251.

22 *Ibid*.

23 *Id.* at 254-55.

The concept of natural rights teaches us that any doctrine of rights must have a firm theoretical basis. Since rights are means to the achievement of human good, a correct catalogue of rights depends upon a sound theory of human nature and the human situation. Without such a theory, determination of what claims constitute rights becomes purely a subjective and haphazard operation; all we can do is to attend to the manifold demands that men voice, estimate the extent of their support, and try to satisfy those that are most widely and vociferously urged. This obviously a hit and miss procedure substituting clamor (if not violence) for reason and discontent for justification.

He further observes:²⁴

The doctrine of legal rights teaches us that declaration of rights is vain without an effective apparatus to implement them. This is a familiar teaching, but two of its important lessons are often overlooked. One of these concerns the need for a constant renovation of the legal apparatus itself, to keep it responsive to changes in social circumstances and human expectations. The other reminds us that we must take steps to ensure that all men are able to invoke these rights which they stand in need of them. *Legal rights cannot be truly established until everyone has equal access to, and standing before, the legal apparatus.*

If the idea of rights involves the notion that their holders must be able to invoke these rights when they stand in need for them, then how do we justify various rights to well-being or beneficial rights within the established theory of rights?

III Rights as respect for persons

Some moral and political theories hold that the only right is right to freedom which requires only duties of non-interference. Rights as freedoms are related closely to the will theory of rights. This theory holds that rights mark out an area within which a person's will is decisive. In other words, rights make the enforcement of another's duty depend on one's exercise of will. The will theory presupposes the correlativity of rights and duties in Hohfeldian sense and treats rights as a power of waiver over someone else's duty. H.L.A Hart who is the contemporary exponent of will theory shares the view that all rights are derived from a basic right to equal liberty.²⁵ According to this view, rights make sense only in a system where people are left free to lead their own lives and are responsible for their actions and decisions. The basic moral requirement is to act with respect for persons. When a person's action interferes

²⁴ *Id.* at 255 (emphasis added).

²⁵ H.L.A. Hart, "Are there any Natural Rights" 64(2) *Philosophical Review* 175 (1955). Hart says: "If there is any natural right at all, it follows that there is at least one natural right, the equal right of all men to be free".

with the equal liberty of other, only then a person can be restrained by law. Many traditional civil liberties such as right to privacy, right to equality and right against discrimination, right to life and personal liberty, right to free speech and right to freedom of religion and property have been derived from a basic right to equal liberty. In other words, liberty in the sense of freedom of action is recognized as a distinct value to be respected by all persons and the government.

The contemporary belief in human rights as embodying both the rights to freedom from interference and rights to welfare cannot be accommodated within the will theory and the idea of correlativity of rights and duties. Rights to welfare such as right to food, health, housing, work, education and so on can hardly be enforced unless the government takes positive measures in the form of beneficial or social legislation or welfare schemes. What then counts as respect for persons when we speak of human rights as involving both freedom and welfare? If one takes a wider view of human rights, then freedom of will implying freedom of action ceases to be distinct value. The notion of freedom now takes within its hold freedom of action as well as freedom from hunger, disease, noise, poverty, illiteracy and so forth. Apparently the modern doctrine of human rights seeks fresh grounds and content of rights so that the deficiencies of individual rights are exposed and unmet needs and neglected values are accommodated within the theory of rights. The new concept of rights is, in a sense, impelled by the logic that traditional individual rights only promote purely acquisitive values and ‘rugged’ individualism and thus, lead to capitalist exploitation and repression.

Susan Moller Okin defines human rights as a claim to something (whether a freedom, a good or a benefit) of crucial importance for human life.²⁶ The things crucial for human existence, according to her, are claims to basic physical goods, to physical security and to be treated with respect by persons. Susan’s description of human rights thus includes both the values of freedom and welfare. If human rights are viewed as respect for persons, these will include right to life, freedom from arbitrary coercion and to be respected as a human person.

In author’s view, when someone says that dignity can create rights, it signifies nothing more than this that every human person has the right to be respected and every human being, as a moral agent has a certain fundamental moral status. Respect for persons, in this sense, involves the idea of mutual respect and co-operation without being dominated and harmed by others. As has been stated by Jeremy Waldron:²⁷

26 S. M. Okin, “Liberty and Welfare: Some Issues in Human Rights Theory” in J. R. Pennock and J. W. Chapman (eds.), *Nomos XXVII; Human Rights* 235 (1985) quoted in *Lloyd’s Introduction to Jurisprudence*, *supra* note 16 at 233.

27 J. Waldron, *The Law* 96 (Routledge London, 1990). I thank Professor M.P. Singh for making this book available to me.

One possible view is that our convictions are based on a deep ethical view about respect we owe to one another in virtue of our common humanity and in virtue of our potential to act morally. Individually and in our political life, we believe that people have got to be able to retain their dignity, their self-esteem, and at least the basic capacity to make a life for themselves in the society we are organizing.

And further:²⁸

Human dignity is violated when someone is tortured, their home-life thrown open to surveillance, their culture denigrated, their political voice taken away or their needs treated with indifference. You cannot do that to people and expect them to retain their self-esteem that they must have in order to live a human life.

So long the concept of respect for persons or human dignity is limited to freedom from pain, torture, neglect, exploitation, repression and suffering or other forms of tyrannical or sadistic uses of power, there would be no difficulty in advocating a legal or political morality to act with respect for persons. Some philosophical problems might, however, arise, when respect for persons is interpreted as embodying claims to positive social goods and services such as food, clean air, an efficient transport or economic system, medical aid, potable water, means of livelihood, adequate nutrition and so on. As we have seen above many of these claims can simply be promoted. Perhaps, by their very nature, they are incapable of being secured by affirmative litigation in absence of positive state action in the form of beneficial legislation or welfare schemes. What type of moral belief is implied in treating these claims as those of human rights?

Neil Mac Cormick²⁹ has offered a modern version of interest theory of rights which might be employed to treat human rights as embodying both the rights to freedom from interference and the rights to assistance of others. Mounting heaviest criticism on the will theory, he argues that the will theory obscures the fact that duties are imposed in order to protect rights and that this theory unnecessarily emphasizes the correlativity of rights and duties. According to him, rights can exist without being adequately protected by established legal rules and procedures imposing duties. The purpose of rights is not to protect individual assertion or free exercise of will but certain interests or benefits. A person has a right whenever the advancement of his interest has received social or legal recognition. Such recognition itself is a good reason for imposing a duty or for providing assistance to those who stand in need. Thus viewed, the existence of rights is independent of whether they are enforced or not.

28 *Ibid.*

29 N. Mac Cormick, "Rights in Legislation" in H.L.A. Hart, P. Hacker and J. Raz (eds.), *Law, Morality and Society* (Clarendon Press, 1977).

Thus a judge may talk of right to life as including a right to clean air, education, medical care, housing, clothing, decent living, and so on without exactly determining who has the duty and how such duty can be protected. Similarly, various freedoms such as that of speech, assembly, religion, physical security and the like can be seen as advancing some interests or benefits of the individuals. Rights, on this view, have an objective existence and cannot simply be invalidated because they cannot be enforced. Thus Neil Mac Cormick holds that when we ascribe a right to someone, we are saying that the interest represented by that right is an interest which *ought* to be protected. In other words, the *rights* would appear to be correlatives to *oughts*.

In this way we get a picture of rights which takes the forms of claims to or for certain benefits or positive assistance along with freedoms against intrusions and oppressions. The question is: can we make people more free and at the same time achieve positive equality? The arguments for rights to welfare are in reality arguments of distributive justice. One of the most accepted conception of justice is that it consists in giving each person his due. Here one is reminded of the celebrated formula of Karl Marx: “[f]rom each according to his ability to each according to his need.” The dream embodied in the second half of this formula, “each according to need” represents the idea of positive equality or equal distribution of resources and opportunities. But the Indian Constitution and the principles of common law also embody the first part of Marx’s formula, “from each according to his ability” which is represented by the guarantee of various freedoms and liberties forbidding the state to intrude into these freedoms and liberties, except on certain urgent grounds.

It is difficult to see how the right to freedom and the right to welfare can co-exist in the present form because the conditions that liberty and welfare (positive equality) are intended to provide are irreconcilable. In guaranteeing various freedoms such as of speech, assembly, religion, profession, trade or privacy, the doctrine of individual rights requires that the state must not interfere in the lives of people, but leave them free to live as they like and bear the risk of their decisions and choices. In securing basic human needs the doctrine of positive equality requires that the state must supply positive goods and services to the citizens and protect them against their mistakes and misfortunes.

Put in more legal terms, right to welfare is not a right not to be interfered with, but a right to be positively assisted. How can such rights have any place in a scheme based on the basic right to equal freedom? Such claims of positive assistance by others can only be justified by a political or moral theory which justifies constant interference with certain specific liberties in order to achieve equality of welfare or resources. Such theories have been offered by John Rawls, Ronald Dworkin, Robert Nozick and Amartya Sen and an attempt will be made now to briefly refer to these theories in so far they are relevant for this essay.

Utilitarianism, inspired by British philosopher Jeremy Bentham and political liberalism, inspired by American political philosopher John Rawls, have remained two major philosophical trends in the contemporary century. Utilitarianism looks at pleasure, happiness, and fulfillment of desires, and seeks to maximize happiness of the greatest number of people in society. For example, development activities such as constructing huge dams, establishing huge power projects or in engaging large scale deforestation encouraging foreign direct investment and so on may be justified by the utilitarian principle of maximizing the happiness of large number of people by providing more irrigation facilities, more housing colonies, and improving over-all quality of people's lives. A utilitarian would easily tolerate the miseries and deprivations caused to those who have been displaced or ousted by these mega projects including slum-clearing projects for the beautification and modernization of big cities. The persons so displaced or ousted will be deprived of their livelihood, life support resources, and their styles of life, but these deprivations will hardly merit attention of a utilitarian so long as these projects are designed to serve the common good. The persons so displaced or ousted will be required to sacrifice their claims to promote the common good.

John Rawls articulated his anti-utilitarian point of departure in his book *A Theory of Justice*.³⁰ Rawls's theory of justice places individual rights and human dignity at the heart of his political philosophy. His first principle of justice holds that each person is entitled to the most extensive system of basic liberties that is compatible with a similar system for every one.³¹ In other words, his first principle of justice requires that civil and political rights must be given absolute priority and no economic or social consideration can justify the curtailment of these rights. The second principle of justice, which is also known as difference principle, holds that social and economic inequalities are only fair as far as they work to the advantage of the least advantaged people in society.³² His second principle seeks to balance the demands of efficiency and justice by saying that while society's offices and positions should be available to everyone in open competition, in order to keep social inequalities within manageable proportions, special attention should be paid to the needs of the worst in society. The rights, according to Rawls, have lexical priority in as much as the first principle takes priority over the second. In other words, the inequalities in society will be rectified only if certain specific liberties such as traditional civil liberties of freedom of speech,

30 J. Rawls, *A Theory of Justice* (Harvard University Press, 1971). Rawls further developed his anti-utilitarian approach in, *Political Liberalism* (Columbia University Press, 1993).

31 According to John Rawls, the rational person in original position will choose the principles of justice in the 'veil of ignorance'. The discussion on Rawls is based on the analysis of Rawls's theory by N. E. Simmonds, *Central Issues in Jurisprudence: Justice, Law and Rights* 39-54 (Sweet and Maxwell, 1986).

32 *Id.* at 42.

freedom from arbitrary coercion or arrest, freedom of conscience and freedom to hold personal property are protected. These specific liberties cannot be interfered with, under any circumstances, not even to promote general welfare or social utility. Other liberties such as market liberties do not require any special protection, because Rawls is positively hostile to free market transactions which inevitably result in acquisitive capitalism and encourage oppression and domination.

The second principle of justice or the difference principle of justice requires that inequalities in the distribution of resources must be justified by reference to the interests of the least well-off. Rawls explains his difference principle by contrasting what he calls the system of 'natural liberty' and the notion of 'equal opportunity'. The system of 'natural liberty' connotes the liberty of pure free market which allows people's life chances to be unduly influenced by considerations of one's luck or fortune or social status. Such a system is objectionable from moral point of view because people's prospects in such a system are determined by one's wealth or economic status. The notion of 'equal opportunity' allows people's prospects to be determined by one's natural talent, ability, desert and so on. For Rawls, even one's natural talent or ability is an arbitrary factor in determining the life chances of the individuals. Rawls, therefore, rejects both the system of 'natural liberty' and the notion of 'equal opportunity' as irrelevant from the point of view of justice. He then develops the idea that the natural talents of the individuals are to be treated as common assets of the community. N.E. Simmonds sums up Rawls's conception of difference principle as follows:³³

If I am a talented individual in a Rawlsian society, I will be allowed to increase my material welfare only, if, in doing so, I also increase the material welfare of the least advantaged. Thus my talents are not resources that I may exploit for my own benefit alone, they are to be regarded as common assets that must be exploited for the benefit of everyone.

Can the dream of Rawls ever be fulfilled in modern society where market liberty and money alone are regarded as the constituent of good life? The growth driven and export-oriented policies of Indian government will inevitably affect a shift in agriculture from food crops to cash crops with high capital inputs like power, water, chemicals and fertilizers. This will deprive the village workers of the means of production. The intrusion of multinational capital into India's economy is also resulting in ecological degradation, displacement of tribal population and mushroom growth of urban slum dwellers. When we promote a system of 'natural liberty' in the Rawlsian sense, we are expressing our fundamental commitment to acquisitive values of capitalism. We are made to believe that a truly valuable, good and worthwhile life is the life of individualism, and egoism in which a person is the exclusive owner of the fruits of his labor.

33 *Id.* at 43-44.

A Rawlsian society would have a different conception of a truly valuable, good and worthwhile life. A society where one's worldly possessions shall be the common asset of the community will be a society of caring and compassionate individuals. Such a society will discourage individualism, material acquisition, and capitalist domination, and encourage a sense of sacrifice or obligation to assist those in urgent need. The point is that if a theory of rights has to be based upon the facts of human nature, how can we talk of rights to welfare, when all our efforts to require sacrifices and contributions from the fortunate ones is thwarted by a system of 'natural liberty' characteristic of a pure market society?

Philosophers such as Robert Nozick³⁴ would oppose Rawls and argue that a theory of rights requiring positive assistance of others would violate the individual right to liberty and property. Nozick maintains that liberty and equality are incompatible ideas. Any attempt to achieve equal distribution of resources and opportunities would require constant interference with liberty and this would violate the 'distinctness' of persons implied by the basic idea of respect for persons. The idea of 'distinctness' of persons entails an exclusive right of each person in his labour, and in his own person and no right in the person or labour of others. If a person acquires something by his own efforts by a free and voluntary transaction without the use of force or fraud, then he has the exclusive right to that thing. This implies the individual rights to liberty and property. In this way, Nozick offers his famous historical entitlement view of justice. He thus rejects a patterned conception of justice, which seeks a pattern of distribution by employing the maxims such as distribution according to need or equal distribution. If wealth is brought into existence by person's individual efforts, such wealth cannot be divided up by a patterned conception of justice. It is thus clear that a state which gives overriding consideration to free market transaction implied by a liberalized economy would consider money and liberty as the highest value for pursuing a good and worthwhile life. Right to well-being or positive equality would be a mere rhetoric or benevolent paternalism in such a society. In other words, the rights of citizens will have to be sacrificed for the sake of new economic development, human rights remaining mere rhetoric, as tools of political legitimacy.

Amaratya Sen's non-utilitarian approach takes sides of political liberalism as he also believes in the universality of human rights and stresses the value of democracy and free press as a means to launch public discussion and public action to motivate the policy makers to take measures to end human deprivations, famines and poverty.³⁵

34 R. Nozick, *Anarchy, State and Utopia* (Basic Books, 1974), chapters 7 and 8.

35 A. Sen, *Development as Freedom* (OUP, 1999). He further develops this idea in his, *The Idea of Justice* (Allen Lane, 2010) and Dean Dreze and A. Sen, *An Uncertain Glory: India and its Contradictions* (Allen Lane, 2013).

Public reasoning and public discussion can also play a major role in the formulation of social goals and values.³⁶ Sen though recognizes the immense value of Rawls's theory of justice, which requires that people's standing in society should be judged with reference to basic liberties and opportunities which society offers them. However, Rawls's theory is limited from the point of view of human diversity: it does not go deep enough to capture some blatant inequalities in society. According to Sen, Rawls's theory works with the assumption of liberal society where citizens have more or less equal capacities.³⁷ The advantage of thinking of human development as an expansion of human capabilities and human freedom is that it addresses the problems of malnutrition, hunger, premature mortality, illiteracy, and social exclusion. The most abiding contribution of Sen is to develop a Human Development Index (HDI) that measures human well-being along with three dimensions of life expectancy, educational attainment and command over natural resources. According to Sen:³⁸

Creation of social opportunities makes a direct contribution to the expansion of capabilities and quality of life.Expansion of health care, education, social security etc contribute directly to the quality of life and to its flourishing.In judging economic development, it is not adequate to look only at the growth of GNP or some other indicators of overall economic expansion. We have to look also at the impact of democracy and political freedom on lives and capabilities of the citizens.

The capabilities approach articulated by Amartya Sen in his economic analysis of famines, poverty and development problems provides a stimulating conceptual framework for the realization of welfare rights. Some people maintain that Sen has taken a very pragmatic view of economic liberalism. Economic liberalism is often characterized by the assumption that market solutions are most efficient in organizing large-scale human interactions. According to Sen, "if private property and a free market for food were to lead in a particular case to cause and aggravate famine and hunger, it should be curtailed. If on the contrary the world market provides corn and rice at cheap prices it would be better for a particular country to grow export crops and import food."³⁹ Thus Sen is not opposed to market economy or economic growth as a value so long as the gains of economic growth filter down to providing social opportunities to the deprived people in order to enhance their capabilities. Market solutions are justified if, for instance, they can eliminate hunger, unemployment and illness in society. He believes that an interventionist state "is indispensable for obtaining

36 A. Sen, *Development as Freedom*, *id.* at 158.

37 See John M. Alexander, "The Sen Difference" 22(4) *Frontline* 12-25 (Feb., 2005).

38 A. Sen, *Development as Freedom*, *supra* note 35 at 144.

39 *Id.* at 18.

social justice, but this does not mean that markets have to be eliminated. On the contrary, markets need government in order to function properly.”⁴⁰ Sen argues that “development requires removal of major sources of unfreedoms: poverty as well as tyranny, poor economic opportunities as well as systemic social deprivation, neglect of public facilities as well as intolerance or over activity of repressive States.”⁴¹ The criterion of ‘capabilities’ as a target of public policies is in essence the characteristic of good governance. Traditionally, progress or development of a country was measured in terms of economic growth or increase in income per capita. According to Sen, this approach ignores the crucial facts pertinent and relevant to assess the quality of life of the people. For example, a country that has achieved sufficient growth in terms of per capita income, nevertheless, may have a vast section of the population subject to malnutrition, premature mortality, illiteracy and ill health. The idea of respect for persons as the constituent of human rights, according to Sen, consists of paying attention to nutrition, health, literacy, self-respect and political participation and promoting them through coherent public policies.

One of the most interesting philosophical theories of rights as the basis of legal and political morality to be offered in recent years is that of Ronald Dworkin.⁴² Dworkin’s basic idea is that a right is a political trump which overrides considerations of general welfare or social or economic policies. When the governments and legislatures are taking critical decisions or formulating policies for governance or for developing economic, legal, or social institutions, the fact that a particular policy or law or decision will advance the overall equality or general welfare or social utility better than any other alternative, cannot permit the government to interfere with individual rights. When we ascribe a right to someone, such as right to freedom of speech or right to education, we are in effect holding that the person ought not to be interfered with, in respect of his freedom of speech or his right to education, even if such interference would be in the interest of social utility or general welfare.

Dworkin argues that Rawls’s theory presupposes a basic right to equal concern and respect which finds expression in the required unanimity of the choice of the principle of justice in the original position. He believes that anyone who talks about rights seriously must accept the basic idea of human dignity which consists in the

40 *Ibid.* Joseph Stiglitz also argues that a market economy needs governmental intervention so that the gains of economic growth percolate to the poor and the disadvantaged people. Economic liberalization in India has to be reconciled with equity so that the poor are not left at the mercy of market forces. See Joseph E. Stiglitz, “A Social Democratic Agenda for a More Dynamic Indian Economy” in Sunil Khilnani and Manmohan Malhotra (eds.), II *An Indian Social Democracy: Integrating Markets, Democracy and Social Justice* 280-283 (Academic Foundation, 2013).

41 *Supra* note 35 at 5.

42 R. Dworkin, *Taking Rights Seriously* (Harvard University Press, 1977).

moral requirement that people have a basic right to equal respect and concern when certain laws are enacted or governmental decisions are taken that affect people.⁴³ Like Rawls, Dworkin also rejects classical utilitarianism and a general right to liberty. To him, rights have dimensions of weight and therefore vary in importance depending upon their power to trump consideration of utility. A right which does not have such power to override the consideration of general welfare cannot be a genuine right. Rights cannot be thought of as coming and going with fluctuating calculus of utility. They must be stable. Dworkin concedes some specific liberties to people such as freedom of conscience and religion, freedom of speech and freedom from arbitrary coercion, which cannot be restricted in pursuit of utility. He rejects a general right to liberty because such a right would always result in an unrestricted right to free use of property and thus encourage a market economy.

“The central concept in my argument” says Dworkin, “will be the concept not of liberty but equality.”⁴⁴ He holds that an ideal society is that which is dedicated to equality. He draws a distinction between two senses of equality. One of these is right to equal treatment—“to an equal distribution of some opportunity or resources or burden”⁴⁵ the other is the right to be treated as an equal, “to be treated with same respect and concern as anyone else.”⁴⁶ He further holds that the right to treatment as an equal is fundamental and the right to equal treatment is derivative.⁴⁷ Right to treatment as an equal is a right in the strong sense, and the government would do wrong if someone is denied this right.

Dworkin says:⁴⁸

I shall say that an individual has a right to a particular political act within a political theory, if the failure to provide the act, when he calls for it would be unjustified within that theory even if the goals of the theory, would on the balance be disserved by the act.

At another place he states:⁴⁹

43 In a recent work Dworkin further develops the idea that dignity and self respect, whatever these turn out to men, are indispensable conditions for living well. See R. Dworkin, *Justice for Hedgehogs* (Harvard University Press, 2011).

44 *Supra* note 42 at 272. Instead of a general right to liberty, Dworkin would concede certain specific liberties such as freedom of conscience, speech, freedom from arbitrary arrest, and other traditional civil liberties but not market liberties. The liberty of conscience or speech will be subject to external preferences and hence require stronger protection. According to Dworkin, only personal preferences should count and external preference should be ignored in deciding about the rights of the people. *Id* at 235.

45 *Id.* at 227.

46 *Id.* at 277.

47 *Id.* at 272.

48 *Id.* at 273.

49 *Id.* at 272-273.

Government must not only treat people with concern and respect but with equal concern and respect. It must not distribute goods or opportunities unequally on the ground that some citizens are entitled to more because they are worthy of more concern.

Closely linked with his theory of rights is Dworkin's famous (but controversial) distinction between arguments of policy and arguments of principle. Arguments of policy are based on the ground of fulfilling some collective goals. Arguments of principles are based upon the appeal to some individual rights which operate as trumps over collective goals. Let me illustrate this distinction by an example. A society may have various goals such as full employment, clean environment, an efficient balance of payment system, high industrial productivity, an efficient transport system, low inflation and so on. These policies may conflict with each other and may justifiably be balanced against one another. Priorities may be laid down and one policy may be traded off against another. But individual rights, according to Dworkin, cannot be traded off this way. If one has a right, such as right to be free speech or right to education, such a right cannot be interfered with even for the pursuit of utility or general welfare.

The point in Dworkin's theory is that, policies might be influenced by people's preferences in a democratic process or legislative process. Rights should not be influenced by people's preferences because as principles they operate as trumps over utilitarian goals. In this sense, rights are stable and are rights against the ruling forces in the society and polity. Since freedoms of speech, religion and freedom from torture are likely to be influenced by people's preferences or external preferences, these freedoms require stronger protection than the freedom of contract or property which is far less likely to be influenced by such preferences.

Dworkin treats right to equal concern and respect as a fundamental political right prohibiting government from treating people in certain ways that would impede people's right to treatment as equals. Apparently, this concept of right is non-possessive, non-conflictual and non-aggressive because a fundamental political right to be respected as an equal and to be not subjected to prejudicial laws and institutions cannot conflict with the rights of others. Dworkin's theory, in this way, offers a sound basis of political morality and serves as a strong control over the ruling powers in the society.

IV Respect for persons and welfare rights

A person has a right whenever the advancement of his interest has received social or legal recognition and such recognition itself is a good reason for imposing a duty or for providing assistance to those who stand in need of them. The Indian Supreme Court has accorded legal recognition to various welfare rights. Relying mainly on the right to life guarantee and using the directive principles as an interpretation aid, the

directive principles have been integrated into enforceable fundamental rights,⁵⁰ even though the directive principles have been expressly made non-justiciable by the Constitution.⁵¹ During the public interest litigation movement social activists and other public spirited citizens have actively used the device of public interest litigation⁵² as part of their struggle to secure welfare rights. Interpreting 'human dignity' as the central idea implicit in right to life,⁵³ and declaring certain welfare rights as an aspect of right to life the Indian Supreme Court has paved the way for translating the legal rhetoric into genuine rights. Since these welfare rights cannot be realized immediately but have to be realized over a period of time depending upon the economic capacity of the state, the court has to rely upon the state authorities to assign to the people minimum basic amenities which enable them to remain free from hunger, disease and physical sufferings. The courts rarely issue directions to the government to open more schools, more hospitals or provide more housing or provide other social goods as these are the matters of political process and public policy having budgetary implications and are considered to be outside the judicial function. However, the court keeps reminding the state authorities time and again to fulfill its constitutional commitments to achieve social justice by realizing welfare rights.

The Supreme Court has interpreted the idea of respect for persons as a right to live a life of human dignity. In *Francis Coralie Muller*⁵⁴ Justice P.N Bhagwati observed:

50 The essence of directive principles is captured by article 38 of the Indian Constitution, which declares that the "State shall strive to promote the welfare of the people by securing as effectively as it may a social order in which justice, social, economic and political shall, inform all institutions of national life". Article 39(a) requires the state direct its policies towards securing adequate means of livelihood for its citizens. Article 39(b) requires the state to ensure that the operation of the economic system and the ownership and control of the country's material resources sub-serve the common good. Article 47 spells out the duty of the state to raise the level of nutrition and the standard of living of its people. Article 41 spells out the duty of the state to secure for its people the right to work, to education, and public assistance in cases of unemployment, old age, sickness and disablement.

51 Article 37 of the Constitution of India reads: "The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in governance of the country and it shall be the duty of the State to apply these principles in making laws."

52 See P. Singh, "Protecting the Rights of the Disadvantaged Groups Through Public Interest Litigation" in M.P. Singh *et al* (eds.), *Human Rights and Human Needs: Theory and Practice* 305 (Universal Publishers, Delhi, 2008); M P Singh, "Statics and Dynamics of Fundamental Rights and Directive Principle: A Human Rights Perspective" in S.P. Sathe and S. Narain (eds.), *Liberty, Equality and Justice* 45 (Eastern Book Company, Lucknow, 2003).

53 Article 21 of the Constitution of India reads: "No person shall be deprived of his life or personal liberty except according to procedure established by law."

54 *Francis Coralie Muller v. Administrator Union Territory of Delhi* (1981) 2 SCR 516 at 529.

The right to life includes the right to live with human dignity and all that goes with it, namely the basic necessities of life such as adequate nutrition, clothing, and shelter and facilities for reading, writing, and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human- beings. The magnitude and components of this right would depend upon the extent of economic development of the country, but it must, in view of the matter, include bare necessities of life and also to carry on such functions and activities as constitute the bare minimum expression of the human self.

In *Bandhu Mukti Morcha*⁵⁵ Justice Bhagwati again observed that the right to live with human dignity enshrined in Article 21 “derives its life breath from the Directive Principles of State Policy, ... and therefore it must include protection of health, and strength of workers, men and women, and of the tender age of children against abuse, opportunities and facilities for children to develop in a healthy manner and in conditions of freedom and dignity, educational facilities, just and humane conditions of work and maternity relief.”⁵⁶ The court, however, added that since the directive principle are not enforceable in a court of law:⁵⁷

it may not be possible to compel the state through judicial process to make provisions by statutory enactment or executive fiat for ensuring these basic essentials which go to make up a life of human dignity but where legislation is already enacted by the state providing these requirements...the State can certainly be obligated to ensure observance of such legislation for inaction on the part of the state in securing implementation of such legislation would amount to denial of the right to live with human dignity.

*Olga Tellis*⁵⁸ involved the rights of slum and pavement dwellers who had occupied public space and were facing eviction by municipal authorities. They asked for alternate accommodation by the State before they could be evicted. They argued that their eviction would deprive them of their means of livelihood and work. The Supreme Court agreed that right to life includes right to livelihood and work and the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation but it contradicted itself by saying that these rights could be taken away by following a reasonable procedure:⁵⁹

The State may not by affirmative action be compellable to provide adequate means of livelihood or work for its citizens. But any person who is deprived of his right to

55 *Bandhua Mukti Morcha v. Union of India* (1984) 3 SCC 161.

56 *Id.* at 183.

57 *Id.* at 183-184.

58 *Olga Tellis v. Bombay Municipal Corporation* (1985) 3 SCC 545.

59 *Id.* at 573.

livelihood except according to just and fair procedure established by law can challenge the deprivation as offending right to life conferred by Article 21.

That securing right to work would depend upon the capacity of the state and is a matter of policy has been reiterated in *D.D. Horticulture*⁶⁰ where the Supreme Court frankly admitted that it is probably false to proclaim that right to livelihood is an enforceable fundamental right when Justice P.B. Sawant held:⁶¹

This Country has so far not found it feasible to incorporate the right to livelihood as a fundamental right in the constitution. This is because the country has so far not attained the capacity to guarantee it and not because it considers it any less fundamental to life. Advisedly, therefore, it has been placed in the chapter on Directive Principles, Article 41 of which enjoins upon the state to make effective provision for securing the same within the limits of its economic capacity and development.

In author's view it is important to bear in mind the distinction between recognition of something as rights and the enforcement of recognized rights. Sometimes the court may declare something as a fundamental right but such declaration will be of little consequences unless the state translates such declared or recognized rights into a reality. For example in *Unnikrishna*⁶² the Supreme Court recognized right to elementary education as flowing from articles 21 and 45 but it immediately acknowledged the financial constraints of the state in implementing this right. The court did not ask the state to initiate any scheme for providing elementary education to all children up to the age of 14. Realizing the state's limited resources the court suggested that "while allocating resources the regard should be had to the wise words of founding fathers in Article 45 and 46".⁶³ The court did not ask the state to establish adequate number of schools so that every child in the country has access to free and compulsory education but left it to the state to fulfill its constitutional obligation.

The government first responded to the judicial recognition of right to elementary education in 2002 by incorporating the right of children to free and compulsory education as enforceable fundamental right under article 21A⁶⁴ of the Constitution by an amendment of the Constitution and seven years later it enacted Right of Children to Free and Compulsory Education Act, 2009 to create education as a positive entitlement. Thus, prompted by judicial recognition of right to elementary education

60 *D.D. Horticulture Employees' Union v. Delhi Administration*, AIR 1992 SC 789.

61 *Id.* at 795.

62 *Unnikrishnan v. State of Andhra Pradesh* (1993) 1 SCC 645.

63 *Id.* at 737.

64 Article 21A of the Constitution of India provides: "State shall provide free and compulsory education to all children of six to fourteen years in such manner as the State may by law, determine."

the state translated this right into an enforceable fundamental rights which is now being enforced by the court in case of their violation.⁶⁵

On the other hand, where a social legislation or a welfare scheme incorporating welfare rights already exists and the executive has failed to implement them or ignored them, the courts will step in and enforce these rights by issuing binding directions. For example, in *Bandhua Mukti Morcha*⁶⁶ the Supreme Court ruled that non-enforcement of welfare legislation like the Minimum Wages Act 1948 and Bonded Labour (Abolition) Act, 1976 would tantamount to denial of right to live with human dignity and then issued directions to the state for identifying, releasing and rehabilitating bonded labour, ensuring minimum wage payment, observance of labour laws, providing wholesome drinking water and setting up dusk-sucking machines in stone quarries. The court also appointed a monitoring committee to ensure compliance of the court orders.

Similarly in *Food Petition*⁶⁷ the court intervened to direct the governments at the centre and the states to implement centrally sponsored poverty alleviation schemes and make available food grains overflowing in the state godowns to those living below poverty line. Recognizing the right to food as an enforceable fundamental right, the court broadened the scope of this right not only to be free from hunger but also to the right to be free from malnutrition, especially for women, children and the elderly. The court's activism in this case stemmed from the general apathy of the governments in implementing welfare schemes.

In other words, the Indian Supreme Court has intervened and has enforced welfare rights in cases where the government has undertaken an obligation to implement them but has failed to fulfill its obligation or has ignored it. For example, if a school established to provide free and compulsory elementary education is charging fee or a housing scheme initiated to rehabilitate the poor is denying the right to housing to some eligible persons, the court will enforce the right to elementary education or the right to housing, depending upon state action.

65 *Society for Unaided Private Schools of Rajasthan v. Union of India* (2012) 6 SCC 1. The Supreme Court upheld the constitutional validity of section 12(1)(c) of Right of Children to Free and Compulsory Education Act, 2009 that makes it mandatory for all private schools to reserve 25% seats for children belonging to weaker and disadvantaged sections of the society. Later, in *Pramati Educational and Cultural Trust v. Union of India* (MANU/SC/04192014.WP (C) No 416 of 2012 decided on May 6, 2014) the court upheld the constitutional validity of article 21A of the Constitution as not violative of the basic structure of the Indian Constitution.

66 *Supra* note 55.

67 *PUCI v. Union of India* (2001) 7 SCALE 484, (2003) 9 SCALE 835, (2007) 1 SCC719, (2009) 14 SCC 392, (2010) 14 SCC104, (2013) 2 SCC 663. For a critique see P. Singh, "Hunger Amidst Plenty: Reflections on Law, Poverty and Governance" 48 *Journal of the Indian Law Institute* 57 (2006); B.B. Pande, "Re-Orienting The 'Rights' Discourse To Basic Human Needs" in M.P. Singh *et al* (eds.), *Human Rights and Basic Needs: Theory and Practice* 150 (Universal Law Publishing House, 2008).

The judicial declaration or recognition of welfare rights as enforceable fundamental rights has not resulted into a regime positive entitlement⁶⁸. However, such recognition has enabled the people to approach the courts on behalf of specific groups or class of persons, who are adversely affected by a governmental policy or executive decision, such as victims of forced eviction⁶⁹ persons in need of emergency medical treatment,⁷⁰ or persons who are hungry and starving due to collapse of public distribution system. In all such cases the nature of judicial relief has been given to the affected group or class of persons or specific directions have been issued to the government to protect the newly conceptualized socio-economic or welfare rights. Right to food has been enforced by directing the state to implement the poverty alleviation schemes. Right to livelihood of the slum or pavement dwellers has been protected by asking the government to give adequate notice before these people illegally occupying public lands are evicted because their livelihood as hawkers may be affected. The judicial declaration here is not asking the government to create work or employment for them nor is creating any right to housing.

In cases where the Supreme Court has enforced right to health by exhorting the state to provide timely medical treatment to a person who is facing emergency, the court has not created a general right to free health care, medicines or treatment at all hospitals. The courts have provided relief or devised judicial remedies on a case to case basis. Right to health will be violated if the state has established a health care system or a hospital and people are either denied access to health care facilities or are subjected to discrimination or if health care system is not being properly maintained. Through activism the judges will not compel the state to establish more hospitals nor will they inquire about the budgetary allocation on health sector. If there are public policies, social legislations or welfare schemes for realizing welfare rights, it is open for anyone to approach the court for a direction to the state to implement these measures.

68 See P. Singh, "Constitutional Right to Access to Basic Amenities: Perspectives on the Limits of Law in Social Empowerment" 3 *Jindal Global Law Review* 39-60 (2011).

69 *Olga Tellis v. Bombay Municipal Corporation*, *supra* note 47; *Ahmedabad Municipal Corporation v. Navab Khan* (1997) 11 SCC123. These decisions show that the right to housing will be enforced by the courts if a housing scheme currently in operation is being implemented arbitrarily resulting in denial of housing benefits to eligible persons. The courts never direct the governments to initiate any housing scheme nor do they ask about the budgetary allocation for housing schemes.

70 *P. Katara v. Union of India* (1989) 4 SCC286; *Rakesh Chandra v. State of Bihar*, AIR 1989 SC 348; *B.R. Kapoor v. Union of India* (1989) 3 SCC387; *Paschim Banga Khet Majoor Samity v. State of West Bengal*, AIR 1996 SC 2426; *Consumer Education and Research Centre v. Union of India* (1995) 3 SCC 42. In all these cases involving right to health the Supreme Court has provided relief or devised judicial remedies on case to case basis for instance, by exhorting the government to provide timely emergency medical treatment, or to properly maintain a mental asylum or to provide basic curative and preventive health services to the workers in asbestos industry.

Judicially recognized welfare rights have also been utilized as a legal resource for seeking changes in law in the area of welfare rights. For instance, *Unnikrishnan*⁷¹ prompted a national campaign for right to elementary education which forced the government to establish right to elementary education as enforceable fundamental right. The Right of Children to Free and Compulsory Education Act, 2009 as interpreted by the Supreme Court in *Society for Unaided Private Schools*⁷² and *Pramati Educational and Cultural Trust*⁷³ have proved to be a trend setter in creating the right to elementary education as a positive entitlement and in integrating the efforts of state and non-state actors in promoting right to elementary education. This law has paved the way for similar enactments in the area of health and housing. The Supreme Court's recognition of the right to food in *Food Petition*,⁷⁴ and the national campaign for right to food⁷⁵ as an entitlement that it inspired, culminated into the enactment of National Food Security Act, 2013. Even much applauded Mahatma Gandhi National Rural Employment Guarantee Act, 2005 owes its origin to the Supreme Court's activism which led to a national campaign for the rights of the rural poor.

The foregoing discussion has made it amply clear that the approach of the Supreme Court in interpreting right to life as implying social rights or welfare rights has enabled the people to formulate their claims in the language of rights.⁷⁶ If people have right to nutrition, employment, health care, education and so on, the state has an obligation to invest in basic human capabilities—in primary health care, nutrition, rural employment, essential physical infrastructure such as housing, electricity, roads and so on.⁷⁷ Legal victories may be utilized for promoting drive for social movements, for launching proposals for institutional and legal reforms, and for enhancing governmental accountability. In India where human rights are rarely used as a protracted struggle

71 *Supra* note 62.

72 *Supra* note 65.

73 *Supra* note 65.

74 *Supra* note 67.

75 See "Right to Food Campaign" available at: <http://www.righttofoodcampaign.in> (last visited on Feb. 7, 2015).

76 See P. Singh, "Promises and Perils of Public Interest Litigation in India" 52 *Journal of the Indian Law Institute* 172 (2010); U. Baxi, "Taking Suffering Seriously: Social Action Litigation in the Supreme Court of India" in U. Baxi (ed.), *Law and Poverty: Critical Essays* 387 (N.M. Tripathi Pvt. Ltd., 1988); P. Singh, "Human Rights Protection Through Public Interest Litigation in India" 45 *Indian Journal of Public Administration* 731 (1999); S. Deva, "Public Interest Litigation in India: A Critical Review" 29 *Civil Justice Quarterly* 19 (2009).

77 See P. Singh, "Social Rights and Good Governance: The Indian experience" in C. Raj Kumar and D.K. Srivastava (eds.), *Human Rights and Development: Law, Policy and Governance* 437-454 (Lexis Nexis, Hong Kong 2006).

against domination, deprivation and tyrannies, the judges as unrepresentative elites will remain the leading participants in the national debate on the issues relating to human rights.

V Concluding remarks

The conclusion of this discussion may now be stated in simple terms. The idea of human rights is an expression of respect owed by every human being to every other human being. But there has been a long-running dispute among philosophers as to what should count as respect for persons. Philosophers, such as Robert Nozick, would interpret the idea of respect for persons as respect for individual rights to liberty and property and a belief in a system of what John Rawls calls a systems of 'natural liberty'. There is much truth in Nozick's theory if a society chooses the capitalist path of development. John Rawls who is positively hostile to free market transaction which inevitably results in acquisitive capitalism and encourages domination exploitation of the least well off in society, would interpret the idea of respect for persons as embodying a basic right to equal concern and respect in which natural talents will be treated as common assets of the community. Dworkin argues that Rawl's theory presupposes the existence of a basic right to equal concern and respect which finds expression in the required unanimity of the choice of the principles of justice in the original position. Dworkin says that anyone who talks about rights seriously must accept the basic idea of human dignity which consists in the moral requirement that people have a basic right to equal respect and concern. Amartya Sen would focus on enhancement of human capabilities and freedoms as the measure of human development and good governance. Paying attention to nutrition, health, literacy, self-respect, and political participation and promoting them through coherent public policies would promote justice in society. The Indian Supreme Court has derived a catalogue of human rights from the notion of human dignity implied by right to life. For the Supreme Court of India human dignity can be empirically ascertained by reference to whether a person has adequate nutrition, shelter, clothing, education, health and other bare necessities of life and lack of these things will result in denial of dignity to the people.

We speak glibly of launching wars on poverty, disease, hunger, illiteracy, discrimination, violence, and oppression and every form of lawlessness and misrule. But fighting 'war' on these fronts would require a tight regulation over all aspects of individual and social life. Limited resources will have to be allocated, uses of income and properties will have to be controlled and a sense of obligation will have to be encouraged. And all of these measures will be met with stiff resistance by those who enjoy dominance and power.

The dilemma in which we find ourselves is simple. The realization of right to equal treatment or welfare rights will require the imposition of duties upon the

government and others but the imposition of these duties will be thwarted by a system of market liberties. The only escape from this dilemma is that we treat human rights as a struggle concept. Even Ronald Dworkin seems to have used the idea of rights as a struggle concept, when he says: "In our society a man does sometimes the right, in the strong sense, to disobey the law."⁷⁸ At another place he argues: "It (the government) must dispense with the claim that citizens never have the right to break the law."⁷⁹ The hidden assumption in these statements is that mass protests against morally evil laws and policies are legitimate and just. If we are to take human rights seriously we must be ready to acknowledge that rights can be effectively used to combat repression and as a means of emancipation. The idea of rights provides ideologies and structures which can be used as struggles for equal concern and respect. How long can those in power and dominance mystify the people by dominating through economic force and arbitrary coercion? Those who rule us should also realize that they need to legitimize their powers and moralize their actions. A famous historian E.P. Thompson has very aptly remarked:⁸⁰

People are not so stupid as some structuralist philosophers suppose them to be. They will not be mystified by the first man who puts on a whip...Most men have a strong sense of justice, at least with regard to their own interests. If the law is evidently partial and unjust, it will mask nothing, legitimate nothing, and contribute nothing to any class's hegemony.

78 R. Dworkin, *supra* note 42 at 192.

79 *Id.* at 204.

80 E P Thompson, *Whigs and Hunters : The Origin of Black Act* 262-263 (Allen Lane, London, 1975) quoted in J. Waldron, *The Law*, *supra* note 27 at 22-23 (1990).