

ABHANDLUNGEN

Human Rights in the Indian Tradition – Alternatives in the Understanding and Realization of the Human Rights Regime

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Relevance of Tradition

One of the major concerns in the ongoing discourse on human rights is the search for a common basis for them in all traditions and cultures around the world. The absence of such a basis has obstructed the universally agreed content of these rights as well as the process of their interpretation and implementation. Although the International Bill of Rights and a few other UN Conventions seem to represent a consensus in this regard, not all countries have ratified them all.¹ Some of those who have ratified them have also expressed several reservations. Some others also express their difference of opinion collectively as, for example, some of the Asian countries did in the Bangkok Declaration before the Vienna World Conference on Human Rights in 1993.² Although the claims in the name of Asian values expressed in the Bangkok Declaration or otherwise have been refuted, the controversies raised under the rubric of cultural diversities persist.³ Serious doubts are expressed

* Professor of Law, University of Delhi, India. I wrote this paper as Fellow at the Institute for Advanced Study, Berlin 2002-03. As the subject matter of the paper is part of the ongoing research initiated at the Institute, a paper on that theme also appeared in 1 Indian Journal of Juridical Sciences, 137 (2003) under the title: Tracing the Human Rights to Ancient Indian Tradition – Its Relevance to the Understanding and Application of the International Bill of Rights. Pursuing the same theme the present paper picks up a few new issues not taken up in the previous one. I am grateful to the Institute for Advanced Study Berlin for giving me the opportunity to think of and work on the theme and to the University of Delhi for sparing me to pursue my research in Berlin. I am also grateful to my colleagues at the Institute and at the University as well as several former students who helped in the preparation of the previous paper and have contributed to the inputs in this paper.

¹ The International Bill of Rights refers to the UN Declaration of Human Rights and the two International Covenants – ICCPR and ICSECR. Among the other conventions are: The International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Elimination of All Forms of Discrimination against Women; and the Convention on Rights of Children.

² The Bangkok Declaration 1993 is available on <<http://www.thinkcentre.org/article.cfm?ArticleID=830>> (8 February 2003). For a representative writing on Asian values, see Bilahari Kausikan, *Asia's Different Standard*, 92 Foreign Policy, 24 (1993); also reproduced in Philip Alston (ed.), *Human Rights Law*, 1996, 201.

over the universality of the current model of human rights, which is alleged to be based on the historical experience of the industrially advanced West, but not shared by the large section of the humanity inhabiting the rest of the world, particularly Asia and Africa.⁴ The concerns of this section of the world, it is argued, are different from the concerns of the West and need to be given due consideration.⁵ For the realization of the idea of universal human rights, it is pleaded that the approach to human rights must be reconsidered, rethought and redrawn.⁶

³ As representative writings refuting the assumptions in the Bangkok Declaration see Yash Ghai, *Human Rights and Governance: the Asia Debate*, 15 *Australian Yearbook of International Law*, 1 (1994) reproduced in: Alston, preceding n. at 219; Amartya Sen, *Human Rights and Asian Values*, Sixteenth Morgenthau Memorial Lecture on Ethics and Foreign Policy, 1997; Amartya Sen, *Development as Freedom*, 1999, 231 ff. For more writings see Michael Jacobsen/Ole Brunn (eds), *Human Rights and Asian Values*, 2000; Joanner R. Bauer/Daniel A. Bell, *The East Asian Challenge for Human Rights*, 1999.

⁴ See e.g., Adamantia Pollis/Peter Schwab, *Human Rights: A Western Construct with Limited Applicability*, in: Pollis/Schwab (eds), *Human Rights Cultural and Ideological Perspectives*, 1980, 1. At p. 8 they say:

... in essence the Universal Declaration of Human Rights is a document whose underlying values are democratic and libertarian, based on the notion of atomized individuals possessed of certain inalienable rights in nature. These political values, as distinct from economic rights or communal rights, can be traced directly to the experience of France, England and the United States. The Declaration is predicated on the assumption that Western values are paramount and ought to be extended to the non-Western world. ... Traditional cultures did not view the individual as autonomous and possessed of rights above and prior to society. Whatever the specific social relations, the individual was conceived of as an integral part of a greater whole, of a "group" within which one had a defined role and status.

Also see Abdullahi Ahmed An-Na'im (ed.), *Human Rights in Cross-cultural Perspectives*, 1992, particularly his Introduction and Conclusion at 1 ff. and 427 ff. respectively; Christina M. Cerna, *Universality of Human Rights and Cultural Diversity: Implementation of Human Rights in Different Socio-cultural Contexts*, 16 *Human Rights Quarterly* (1994); Fali S. Nariman, *The Universality of Human Rights*, 50 *The Review International Commission of Jurists*, 8 (1993); Alain Supiot, *The Labyrinth of Human Rights Credo or Common Resource?*, 21 *New Left Review*, 118 (2003).

⁵ *Id.*, Pollis/Schwab, at 9-10:

The irrelevance of the Western conception of human rights founded on natural rights doctrines is not rooted solely in traditional cultural patterns, but is also a consequence of the articulated and modernized goals of Third World countries. The ideology of modernization and development that has attained universal status has come to be understood primarily in terms of economic development. The colonial experience of economic exploitation gave credence to the notion of human dignity as consisting of economic rights rather than civil or political rights. Freedom from starvation, the right for all to enjoy the material benefits of a developed economy, and freedom from exploitation by colonial powers became the articulated goals of many Third World countries. The strategies that evolved for the attainment of these goals incorporated an admixture of old concepts and values frequently reinterpreted and redefined in light of contemporary realities and goals. Thus the state was to replace traditional group identities but was to retain the same supremacy as traditional groups. By the same token the state's responsibility is to free its people from colonial exploitation and to attain economic betterment. Essentially this is the conceptual framework that has structured the worldview of many Third World countries and within which human rights and human dignity are understood. Democratic government is perceived as an institutional framework through which the goals of the state are to be achieved, and if it fails or becomes an impediment it can be dispensed with impunity.

⁶ *Id.* at 14:

In summary then, it is evident that in most states in the world, human rights as defined by the West are rejected or, more accurately, are meaningless. Most states do not have a cultural heritage of

The situation is further complicated by the claim of some Western scholars that the idea of human rights arises from Christianity.⁷ Such claim creates indifference or even opposition to the idea of human rights in the followers of other religions. It also sets in motion the search of the idea in other religions traditions such as Judaism, Islam, Confucianism, Buddhism and Hinduism.⁸ Some studies on human rights demonstrate the relevance and influence of religious tradition in understanding and application of the idea of human rights.⁹ While the establishment of the idea in different religious traditions may or may not help its promotion, claim of its existence in one religious tradition to the exclusion of others retards its acceptance and growth. It is not necessary that the idea of human rights must be based in religion.¹⁰ In view of the fact that religion inflames emotions and carries the history of many wrongs in its name in the past and is not free from those wrongs even in the present, it is rather unsafe and inadvisable to base the idea of human rights in religion. The issue of religion raised to undermine the idea of human rights may, however, need to be explained in the interest of that idea.

Intermixing the issue of religion with the social and cultural traditions, conflicting views are expressed about the human rights tradition in India. Some of them find that the Indian tradition is not averse to the idea of human rights but at the same time it does not contain the concept of human rights as known today emer-

individualism, and the doctrines of inalienable human rights have been neither disseminated nor assimilated. ... The cultural patterns, ideological underpinnings, and developmental goals of non-Western and socialist states are markedly at variance with the prescriptions of the Universal Declaration of Human Rights. Efforts to impose the Declaration as it currently stands not only reflect a moral chauvinism and ethnocentric bias but are also bound to fail.

[T]he conceptualization of human rights is in need of rethinking. It should be recognized that the Western notion of human rights evolved historically, under a particular set of circumstances, in the most highly industrialized and developed areas of the world – areas that subsequently have dominated the remainder of the world. ... Hence, rather than focusing on additional legal mechanisms for imposing the West's philosophic doctrines of the individual and inalienable human rights on the non-Western world, discussion of the issue of human rights should begin with the differing historical and contemporary circumstances of non-Western societies. Given differences in historical experience and contemporary conditions, what was a "natural" evolution in the West may not appear so "natural" in the Third World.

⁷ See e.g., Michael Perry, *The Idea of Human Rights*, 1998; Matthew A. Ritter, *Human Rights: the Universalist Controversy*, 30 *California Western International Law Journal*, 71 (1999); also some writings making similar claims cited in Sen, *Development as freedom*, n. 3 above, at 232-234 and 245; Barnett R. Rubin, *India*, in: Jack Donnelly/Rhoda E. Howard (eds), *International Handbook of Human Rights*, 1987; Supiot (note 4), at 121.

⁸ See e.g., Arlane Swidler (ed.), *Human Rights in Religious Traditions*, 1982. Besides, many other books on different traditions such as Buddhist, Chinese, Japanese and Islamic have appeared.

⁹ See e.g., R. S. Khare, *Elusive Social Justice, Distant Human Rights: Untouchable Women's Struggles and Dilemmas in Changing India*, 198 ff. and other essays in Michael R. Anderson/Sumit Guha (eds), *Changing Concepts of Rights and Justice in South Asia*, 1998; John B. Carman, *Duties and Rights in Hindu Society*, 113 ff., in: Leroy S. Rouser (ed.), *Human Rights and the World's Religions*, 1988; R. C. Pandeya, *Human Rights: an Indian Perspective*, 267 ff., in: Unesco (ed.), *Philosophic Foundations of Human Rights*, 1986.

¹⁰ See Rolf Kuennemann, *Food and Freedom*, 27 Progress Trust, Madurai, 1999, for the proposition that it is not necessary to base the human rights on any moral or ethical concept.

ging primarily from the West since the closing decade of the nineteenth century.¹¹ Some others say that the Indian tradition is fully in line with the modern concept of human rights and supports it as much as the Western or any other tradition does.¹² Finally, an emerging view inspired by the recent Hindu wave projects that the idea of human rights is opposed to the Indian tradition, which is based on the concept of duty and not of rights.¹³ This view does not reject the concerns at the back of the idea of human rights, but it seems to be aiming at creating a new approach to the idea specifically attributable to the Hindu traditions. Some Western writers also seem to support this approach.¹⁴ Even if this last category of literature cannot be brushed aside as Hindu chauvinism, its tendency to monopolize the vast Indian tradition as Hindu is not free from difficulties in the present day India. Firstly, today the expression "Hindu" generally denotes the follower of a particular religion different from the followers of other religions. Secondly, India is not a theocratic state and should not therefore be identified with any particular religion even if that religion is the most dominant one. Thirdly, as a corollary to the foregoing, not only the religious overtones antagonize the followers of other religions but they also convert an otherwise secular issue into a religious issue to be opposed and rejected by the followers of these other religions. That defeats the purpose of the exercise and the cause of human rights in its present or any modified version. Such approach can and should not, therefore, be pursued.

The purpose of the current enquiry is to examine the Indian tradition in the light of our current understanding of the idea of human rights and to see whether it is supportive of that idea and could contribute towards its strengthening and realization. Even though the idea of human rights need not be based on any tradition, reliance on tradition, particularly to deny the existence of the idea in the Indian tradition, requires an investigation into that tradition. If tradition in any way influ-

¹¹ See Pandeya (note 9), Kanta Mitra, Human Rights in Hinduism, in: Swidler (note 8), at 77, also in: 19 Journal of Ecumenical Studies, 77 (1982) and the studies cited in note 9 above.

¹² See e.g., Surya P. Subedi, Are the Principles of Human Rights "Western" Ideas? An Analysis of the Claims of the "Asian" Concept of Human Rights from the Perspective of Hinduism, 30 California Western International Law Journal, 45 (1999); Yogesh K. Tyagi, Third World Response to Human Rights, 21 Indian Journal of International Law, 119 (1981); Yogindra Khushalani, Human Rights in Asia and Africa, 4 Human Rights Law Journal, 403 (1983); to some extent also S. V. Puntambekar, The Hindu Concept of Human Rights, in: Unesco (ed.), Human Rights, 195, 1949.

¹³ To some extent that idea is reflected in the letter of Mahatma Gandhi of 25 May 1947 to the Director-General of Unesco in which he wrote that "all rights to deserved and preserved came from duty well done" reproduced in: Unesco (ed.) in the preceding note and other writings cited in note 9 and the preceding note 12 above as well as in Pandurang Vaman Kane, History of Dharmasastra, vol. V, Part II, 1962, at 1665, but its current form is better represented in writings such as Bharat Jhunjhunwala (ed.), Governance and Human Rights, 2002.

¹⁴ See e.g. Carman (note 9); J. Duncan M. Derrett, Law and the Social Order in India Before the Muhammadan Conquests, 8 Journal of the Economic and Social History of the Orient, 73, 119 (1964); also J. Duncan M. Derrett, The Concept of Duty in Ancient Indian Jurisprudence: the Problem of Ascertainment, in: Wendy D. O'Flaherty/J. Duncan M. Derrett (eds), The Concept of Duty in South Asia, 1978, 18. Derrett's writings are inferential and not direct on human rights. On Derrett's lines also see Werner F. Menski, Comparative Law in a Global Context: the Legal Systems of Asia and Africa, 2000).

ences the effectiveness and realization of any idea, as it certainly does, a tradition supportive of human rights must definitely promote them.¹⁵

Indian Tradition

The current enquiry is confined to the Indian tradition. But is there anything like the Indian tradition and, if so, what is it? The answer to this question may be controversial. I am aware of some of those controversies, but I do not find them relevant to my enquiry. India is an ancient land with an ancient surviving civilization whose antiquity is not shared by any other existing civilization except perhaps the Chinese.¹⁶ In the course of its recorded history of over four thousand years India, besides having its pre-Aryan inhabitants of different racial and ethnic origins commonly called the Dravidians, has attracted different people from around the world starting perhaps with the Aryans. The dominant history of ancient India, which is now being subjected to doubt, considers Aryans as the earliest and the most dominant group to make India their home and to shape its identity.¹⁷ Others, who joined them later, include Iranians, Greeks, Parthians, Bactrians, Scythians, Huns, pre-Islamic Turks, early Christians, Jews and Zoroastrians.¹⁸ They entered either from the north-west by land or from the west by sea and became part of the rest of the population. The major influx of Islam from the north starting in the twelfth century established the Mogul Empire in the sixteenth century, which formally lasted until 1857 when the British replaced it. In 1947 India regained its independence from the British rule and acquired its current identity.

Despite or because of the mixing of so many racial, ethnic, religious and other identities, India was able to create and maintain an identity, which may safely be called the Indian identity and which the Constitution designates as "the rich heritage of our composite culture".¹⁹ Apart from its territorial and demographic dimensions, the identity started taking shape in the four Vedas, whose antiquity is variously estimated between 6000 to 1000 BCE. But it is generally agreed that all the four of them had been composed by 1000 BCE.²⁰ From then onwards a contin-

¹⁵ See Harold J. Berman, *Law and Revolution*, 1983, 33.

¹⁶ See Georg Feuerstein/Subhash Kak/David Frawley, *In Search of the Cradle of Civilization*, 12 Quest Books, Ill., 1995: "India antedates European (or Western) civilization by thousands of years and is in fact the oldest known continuous civilization on Earth."

¹⁷ *Id.* at 1 ff. doubting the existing view that the Indian civilization started with the arrival of Aryans from middle-Asia after the demise of Mohenjo-daro and Harappa and arguing that the later civilization is the continuation of the previous civilization which has simply moved from one place to another. Also see Romila Thapar, *Ancient Indian Social History*, 1978 doubting the full authenticity of the ancient Indian history.

¹⁸ See Jawaharlal Nehru, *The Discovery of India*, 1946, 1981, 73.

¹⁹ The Constitution of India, art. 51A(f).

²⁰ For the antiquity of Vedas see any standard work on ancient Indian history. For example Kane (note 13), in: vol. II, Part I at xi and in subsequent volumes in his chronological table, shows the age of Vedas and some other literature between 4000-1000 BCE; Nagendra Singh, *India and*

ual flow of rich literature from *Brahmanas*, *Upnisads*, *Smritis*, *Puranas*, commentaries to digests preserved and strengthened that identity by weaving into it all the existing and acquired diversities of India. No other ancient civilization in the world has so much contemporary literature about it. More than five thousand authors are said to have produced this literature before the British came to India in the eighteenth century.²¹ The enormity of the literature can be gauged from the fact that only one of the epics, the *Mahabharata*, is seventeen times the length of Iliad and Odyssey put together and is considered to be the longest book in the world.²² Though the Indian identity, as expressed in its literature and otherwise, was continuously influenced by the arrival and settling in of different people from different parts of the world and by the developments in and outside India, it was not destroyed or discontinued either by the Islamic or the British rule. At an early time in history the inhabitants of India came to be called as Hindus and their land as Hindustan by others. While Hindustan continues to be one of the names of India, towards the end of Islamic rule and particularly after the arrival of British the word Hindu started acquiring a religious connotation initially distinguishing all the pre-Islamic inhabitants as an identity different from Islamic identity of the new entrants but finally as a monolithic religious group, which it is not.²³ Hindustan and its people, however, constitute one identity with its distinct tradition, which the present enquiry designates as the Indian tradition.²⁴

The present enquiry is not, therefore, an enquiry into any religious tradition. It proceeds on the assumption that India has a socio-cultural tradition, which is unique in some ways. One of its uniqueness is that it has never arrested or prevented the birth, growth or entry of new religions, ideologies, or opinions.²⁵ It is not dogmatic, static or inflexible. It has given immense freedom to a person to believe,

International Law, vol. I, 1973, 6 also estimates the same age while A. L. Basham, *The Wonder That Was India*, 1963, 32 after mentioning that one historians estimate the age of around 6000 BCE comes to the conclusion that they came into existence between 1500 to 1000 BCE.

²¹ J. Duncan M. Derrett, *Hindu Law*, in: J. Duncan M. Derrett (ed.), *An Introduction to Legal Systems*, 1968, 80 ff. At p. 83 he says: "Hindu law has always been a book law" and at p. 85: "Some five thousand authors worked prior to the British period and shortly after it commenced, but not all their texts have survived." For a list of authors and their works see appendix to Kane (note 13), vol. I, pt. II.

²² See Sen (note 3), 19 and Feuerstein/Kak/Frawley (note 16), at 18.

²³ On the origins of word Hindu and Hindustan see Nehru (note 18), at 76; S. Radhakrishnan, *The Hindu View of Life*, 1927, 12; Kane (note 13), vol. V, pt. II, 1613.

²⁴ See N. C. Sen-Gupta, *Evolution of Ancient Indian law*, 1953. At p. 13 he notes: "India was then, as it is more applicable now, a land of multitude of races and cultures. ... Hindu law givers of early days concerned themselves primarily with the cultured classes and left to the rest their own laws, usages and institutions." Similarly, at p. vi he says: "The evolution of Ancient Indian law has not been a single development from within a single culture, viz., the Aryan, but has at all stages been influenced by various cultures. ...The other cultures [non-Aryan] have contributed to the development of law."

²⁵ Cf. Basham (note 20), at 267; Gail Omvedt, *Pseudo-secularism*, *The Hindu*, 20-21 Jan. 2003, 10 holding the view that Buddhists were persecuted by Hindus in ancient India. Comp. Kane (note 13), vol. V, Pt II 1003 ff. who finds internal defects of Buddhism the cause for its decline in India.

practice, preach and propagate whatever one considers appropriate for self and for others including the acceptance or non-acceptance of God.²⁶ This is the tradition to which Tagore and Iqbal have paid glowing tributes and of which Akbar is as much part as Ashoka.²⁷

The enquiry is not about the existence or non-existence in the Indian tradition of the human rights, as we know them now. The current idea of human rights, as we have already noted, is attributed to the West and goes only as far back as the end of the eighteenth century.²⁸ If the realization of this idea is the talisman for the removal of human misery and restoration and protection of human dignity around the world, it must be related to all people so as to make it universally understandable and acceptable. Until and unless that process is gone through mere declaration of human rights in the international and national documents will not be enough to achieve their stated goals. India's record in the participation and ratification of international declarations and their incorporation in its laws and the Constitution is appreciable. It has been making all possible efforts towards the realization of these rights at every level. It has, however, not yet been able to secure the desired results; the ground realities are far from satisfactory. This hiatus between theory and practice in India is often attributed to the Indian tradition.²⁹ Let us, therefore, examine the validity of such an attribution.

Rights in Indian Tradition

The antiquity, evolution and complexity of the Indian tradition outlined above require special consideration for finding out in it concepts and notions that are recent. We cannot expect the same vocabulary or form for these concepts as they have today. Therefore, it is no wonder if the initial language of the Indian tradition, i.e. the Sanskrit, does not have an expression corresponding to "human rights" or even "rights" as known to us.³⁰ Perhaps we may not find in any tradition, including

²⁶ See generally, Radhakrishnan (note 23).

²⁷ For contribution of Ashoka and Akbar to the human rights, see Sen (note 3). For the proposition that the society and its traditions in India did not change during Muslim rule see Ravinder Kumar, *Essays in the Social History of Modern India*, 1983, 131: "It would be true to say that during the centuries of Muslim predominance over India, the social reality of 'feudal' society and the intellectual reality of Hindu orthodoxy, as interpreted by the advocates of devotional theism, continued to characterize social structure and intellectual belief in the country."

²⁸ It starts with the French Declaration of the Rights of Man and Citizen 1789 and the Bill of Rights in the Constitution of the United States. The only earlier expression of the current model of human rights was the English Bill of Rights 1689, though one could extend it as far back as the Magna Charta 1215.

²⁹ For example, Khare gives us a glimpse of how the long held tradition of Karma and faith in God's justice leads the untouchable women to suffer violations of their rights notwithstanding the declaration and provision for enforcement of their rights in the Constitution and other laws. Khare (note 9). See also, Ritter (note 7), Jhunjhunwala (note 13), Ghai (note 3), Kane (note 13), vol. V, pt. II at 1613 ff.

³⁰ See Ritter (note 7), at 80.

the most recent one, an exact expression corresponding to the expression “human rights” as known to us today. We must, therefore, examine the traditional literature by its intention and not literally and philologically.³¹ We must look at the spirit and core of the human rights and see whether we can have their traces in the corresponding traditional literature. If the spirit and core of the human rights lies in the securing of human dignity and creation of a society in which each and every one could have the opportunity of self-fulfillment, we must examine whether the Indian tradition recognizes and supports that idea. If it does, it inheres human rights, irrespective of the language it uses for its expression. Following such approach to religious traditions, for example, Paul Lauren concludes that “[d]espite their vast differences, complex contradictions, internal paradoxes, cultural variations, and susceptibility to conflicting interpretation and fierce argumentation, all of the great religious traditions share a universal interest in addressing the integrity, worth, and dignity of all persons and consequently, the duty toward other people who suffer without distinction”.³² Precisely in the context of the present enquiry, he states:

In Hinduism, the world’s oldest religion, for example, the ancient texts of the Vedas, Agamas, and Upanishads, among others partly written over three thousand years ago, continually stress that divine truth is universal and that religious belief must be a way of life. These scriptures address the existence of good and evil, wisdom, the necessity for moral behavior, and especially the importance of duty (*dharma*) and good conduct (*sadachara*) toward others suffering in need. They enjoin believers to fulfill faithfully their earthly responsibilities to all people beyond the self or family without distinction by practising selfless concern for their pain, particularly charity and compassion for the hungry, the sick, the homeless, and the unfortunate, as discussed in the *Manava Dharma Sutra* (Treatise on Human Duties). All human life, despite the vast differences among individuals, is considered sacred, to be loved and respected without distinction as to family member or stranger, friend or enemy. For this reason, the foremost ethical principle of Hinduism – and one ... that became so important to Mahatma Gandhi who in the twentieth century regarded himself as a deeply traditional and orthodox Hindu – is non-injury to others. The edict is stated directly and universally: “Non-injury (*ahimsa*) is not causing pain to any living being at any time through the actions of one’s mind, speech, or body.”³³

Expressing similar views about other traditions such as Judaism, Buddhism, Confucianism, Christianity and Islam,³⁴ he argues that together they make three

³¹ Mitra (note 11), at 78.

³² Paul G. Lauren, *The Evolution of International Human Rights*, 1998, 5. Apart from Kane and Vivekananda, *The Complete Works of Swami Vivekananda*, particularly vol. III, 12th reprint, 1979, 116 ff. and Swami Abhedananda, *Hindu Philosophy in India*, in: S. Radhakrishnan/J.H. Muirhead (eds), *Contemporary Indian Philosophy*, 1936, 55 ff. For a general overview and principles of Hinduism also see Satguru Sivaya Subramuniyaswami, *Dancing with Siva*, 1993.

³³ Lauren (note 32), at 5.

³⁴ Id. at 5-9. About Buddhism, which is part of ancient Indian tradition, he writes at 6:

Buddhism, founded approximately 2,500 years ago in India by Siddhartha Gautama, also began by addressing the universal issues of human relationships, profound respect for the life of each person, and compassion in the face of pain suffered by fellow human beings. He explicitly attacked the rigid caste system of his day, democratically opening his order to all, stressing the worth of each individual regardless of their social or political position, and urging his followers to renounce differences ‘of

significant contributions to the evolution of international human rights. Firstly, they established “values, normative standards, and ideals that proved to be enormously important sources of inspiration and strength for those who campaigned for human rights.” Secondly, “by seeking to develop a moral imperative or universal sense of obligation toward humankind, these religious traditions helped establish an ingredient essential for any and all international human rights: a concept of responsibility to common humanity”. And thirdly, “by developing concepts of duties, these religious traditions provided an inherent beginning for discussions about rights”. Quoting Gandhi that “[t]he true source of rights is duty” he concludes that the “ideas about human duties led quite naturally to ideas about human rights”.³⁵

I quote Paul Lauren extensively primarily to demonstrate that the seeds of human rights exist as much in the ancient Indian tradition as in any other even though their expression may have different form. Secondly, there is nothing unique about the Indian tradition if it speaks of duties rather than of rights. In all traditions duties have led to rights.³⁶ It is alleged and generally admitted that Sanskrit did not have an expression exactly corresponding to the English expression “right”.³⁷ In the current Hindi usage the Sanskrit word “*adhikara*” is used for “right” and “*manavadhikara*” for “human rights” coined by the combination of Sanskrit words “*manava*” for human and “*adhikara*” for rights. But it is unclear whether the early Sanskrit or Hindi language always used the word “*adhikara*” to express a right or claim, as we understand it today. Giving due weight to the time gap between the current understanding of right and the Sanskrit or Hindi literature using the word “*adhikara*” further research may be needed. As examined so far, the word “*adhikara*” carries a positive connotation of right when it speaks of upper castes or classes and a negative connotation of liability when it speaks of the lower castes or classes including women.³⁸ Such use of the word apparently goes against our no-

caste and rank and become the members of one and the same society’ practicing universal brotherhood and equality. Scriptures like Triptika and Anguttara-Nikaya pay considerable attention to the enduring problem of human suffering (*dukha*), and stress that one’s duty is to overcome selfish desires and private fulfillment by practicing charity and compassion (*karuna*) towards those in need. This ethic forms a part of Buddhism’s Noble Eightfold Path that includes right thought, right speech, right action, and right effort toward “all beings”. It also creates a religious tradition necessary to appreciate the Dalai Lama’s more contemporary pronouncement that the world’s problems will be solved only by showing kindness, love, and respect “for all humanity as brothers and sisters” and “if we understand each other’s fundamental humanity, respect each other’s rights, share each other’s problems and sufferings”.

³⁵ Id. at 9.

³⁶ See Bhikhu Parekh, *The Modern Conception of Right and Its Marxist Critique*, in: U. Baxi (ed.), *The Right to Be Human*, 1987, 1, 4.

³⁷ See e.g., Mitra (note 11), at 78 and Pandeya (note 9), at 267; also Ritter (note 7), at 80.

³⁸ See Mitra (note 11), at 78-79. At 79 note 6 reads: “Manu used the word ‘Adhikara’ in the context of Brahamanas – e.g., 1:100 – in a positive sense, but in the context of women – e.g., 9:3 – in a negative way.” The infamous verse from Ramcharitmanasa of Tulsidasa – *Dhol, Ganwar, Sudra, Pashu, Nari; yeh sab taadan ke adhikari* – uses the word “*adhikari*” in the sense of liability or disability. Also Pandeya (note 9), at 267. Admitting that classic Sanskrit has no word corresponding

tion of right even though, as we will note below, it is sometimes defended as proportional equality. Even in its positive sense "*adhikara*" carries the meaning of earning a right by one's action – Karma – and not possessing it as a natural attribute of being a human.³⁹ The word "*adhikara*" also denotes power, authority, competence or qualifications.⁴⁰ Thus, until further research is done, the word "*adhikara*" does not take us far enough to build a theory of rights.

As the *dharmasastra* is basically a code of conduct, it speaks more of human duties than of rights. Therefore, it uses the word "*adhikara*" only infrequently while it uses the word "*dharma*" frequently. Those who have tried to look for the human rights in the Indian tradition find the word *dharma* closest equivalent to right. "*Dharma*", says Mitra "implies justice and propriety as does the word "right" of the UN Declaration, although the connotation of a "just claim" is not explicitly present."⁴¹ Similarly, Panikkar finds *dharma* as "the most fundamental word in the Indian tradition which could lead us to the discovery of a possible homeomorphic symbol corresponding to the Western notion of Human Rights".⁴² I am

to right and that the idea of "just claim" is expressed by word "*adhikar*", he says:

The word is hardly used in isolation but rather in the context either of the performance of some act or of an acquisition of some kind. Thus the word *adhikarin*, meaning a person having *adhikara*, almost always suggests that the person has either performed some *dharma* (prescribed duty) or has come to possess something, value or status.

³⁹ See Pandeya (note 9), at 267:

This connotation of *adhikara*, which is the nearest Indian equivalent to "right", is based on two very interesting and philosophically significant interrelated ideas. To the Indian every right is acquired, i.e. it is not natural; secondly the acquisition of any right is the result of one's action or one's status. Of these two basic ideas ... the first may be called the idea of historicity and the second that of causality.

Further, at 268 he says that "Every right originates and terminates. ... [R]ights are earned and efforts made in acquiring them confer certain privileges upon persons who take the trouble to exert themselves." It is supported by *karma* philosophy "that a man gets what he works for". So this is the moral basis for the rights. The modern theory of rights that one has certain rights by virtue of being human is based on status and if that be so the animals must also have rights by being so. But animals don't have rights because they do not have volition. Thus comes the element of rationality in rights. It means all rights are only human. The adjective "human" is redundant. Also Sen (note 3), Development as freedom, at 228-229.

⁴⁰ See e.g. Kane (note 13), at 1317 denoting the use of word "*adhikara*" for qualifications; Pandeya in the preceding note expressing its use for authority and the often quoted verse from Bhagavadgita – *Karmanyevadhikaraste* – (ch. 2, verse 47) carries the meaning of power or capacity in the word "*adhikara*".

⁴¹ Mitra (note 11), at 79. Also R. Panikkar, *Is the Notion of Human Rights a Western Concept?*, (1982), 75, 7, reproduced in: Alston (note 2), at 161.

⁴² Panikkar (note 41), at 95. Carman (note 9), at 121 also seems to be saying the same thing:

What is one's right is what is one's due, whether because of who one is by birth or because of what one has accomplished. It is one's fair share even if it is not an equal share. That notion of right is certainly deeply embedded in the Hindu social system. In the traditional village economy in which very little money changed hands, different labourers and artisans received a prescribed amount or share of the harvest. Their share or "rights" were usually unequal, but they were supposed to be appropriate. The basic right was not a matter of community decision; it was an expression of the particular nature of one's *dharma* as the producer of particular goods (for example, the potter) or the performer of particular services (for example, the washerman).

also convinced that *dharma* is not only the basis of human rights in the Indian tradition but it is also a model of universality of those rights.

Let us, therefore, turn to *dharma*. “*Dharma*”, says P.V. Kane – the legendary creator of the History of Dharmasastra –, “is one of those Sanskrit words that defy all attempts at an exact rendering in English or any other tongue”.⁴³ After examining the use of the word *dharma* in different works on *dharmasastra* at different stages and the transitions of meaning it took in early Indian history, he concludes that “ultimately its most prominent significance came to be ‘the privileges, duties and obligations of a man, his standard of conduct as a member of the Aryan community, as a member of one of the castes, as a person in a particular stage of life’”.⁴⁴

The Encyclopedia of Religion helps us further in grasping the meaning of *dharma* in the following words:

Derived from the Sanskrit root *dhr*, “sustain, support, uphold”, *dharma* has a wide range of meaning: it is the essential foundation of something or of things in general, and thus signifies “truth”; it is that which is established, customary, proper, and therefore means “traditional” or “ceremonial”; it is one’s duty, responsibility, imperative, and thereby “moral obligation”; it is that which is right, virtuous, meritorious, and accordingly “ethical”; and it is that which is required, precepted, or permitted through religious authority, and thus “legal”.

The aggregate connotation here suggests that in South Asian cultures *dharma* represents “correctness”, both in descriptive sense (“the way things are”) and in a prescriptive one (“the way things should be”), and reflects the inextricable connection in the religious thought of India between ontology, ritual ideology, social philosophy, ethics and canon law.⁴⁵

In the specific context of human rights, Panikkar finds *dharma* “multivocal: besides element, data, quality and origination, it means law, norm of conduct, character of things, right, truth, ritual, morality, justice, righteousness, religion, destiny, and many other things”.⁴⁶ For him *dharma* is primordial and “the order of the entire reality, that keeps the world together.” In this order “individual’s duty is to maintain his ‘rights’; it is to find one’s place in relation to Society, to the Cosmos,

⁴³ Kane (note 13), vol. 1, part 1 at 1.

⁴⁴ Id. at 3.

⁴⁵ Mircea Eliade (ed.), The Encyclopedia of Religion, vol. 4, 1987, 329. Emphasis added. Compare the definition of “right” or “*das Recht*” in the Western philosophy and jurisprudence. On the meaning of *dharma* also see Robert Lingat, The Classical Law of India, 3 (translation by J.D.M. Derrett, 1998):

The most general sense is provided by its root, *dhr*, which signifies the action of maintaining, sustaining, or supporting *Dharma* is what is firm and durable, what sustains and maintains, what hinders fainting and falling.

Applied to the universe, *dharma* signifies the eternal laws which maintain the world.

Further at 4:

In internal terms, *dharma* signifies the obligation, binding upon every man who desires that his actions should bear fruit, to submit himself to the laws which govern the universe and to direct his life in consequence. That obligation constitutes his duty: and that is a further sense of the word.

⁴⁶ Panikkar (note 41), at 95.

and to the transcendental world".⁴⁷ Accordingly, *dharma* is not just an equivalent of human rights; it subsumes the entire reality known and unknown to us.⁴⁸

Dharma contains elements of law, but it is much wider than positive law.⁴⁹ It is not the creation of the king or the state; it is over and above them and king of the kings.⁵⁰ If ever a king deviated from his *dharma* he was compelled to abdicate.⁵¹ *Dharma* is based not on divine will but on reason; its sanction is derived not from any extrinsic or occidental agency, but from its internal logic that obedience to it will lead to welfare and its violation to misery.⁵² Perhaps its rationality, lack of dogmatism and absence of claim for divine origin obviated the conflicts between the religious and secular powers which took place in some other traditions but remained unknown in the ancient or even later Indian tradition.

Dharma, has always been in an evolutionary process. It has evolved with the evolution of the society. From its early Vedic stage of determining the obligations of gods and cosmic order it moved to human beings creating *varna* and *ashrama* systems as early as the *Brahmanas* (c. 900-600 BCE) classifying the society into four groups (*varnas*) and the life of each individual into four stages (*ashramas*). Simultaneously it also incorporated the idea that every person who observed one's *dharma* not only helped the preservation of social order but also gained fame in this world and absolute bliss after death. "From this sacerdotal and eschatological stance arises a normative dimension to *dharma* in which the term comes to mean the sum total of one's obligations by which one 'fits in' with the natural and particularly the social world."⁵³ Although these obligations are not univocally laid down at one place forever, the predominant of them are drawn from *Manavadharma-sastra* or *Manusmriti* which determined them according to one's *varna* and *ashrama*. One's location in a particular *varna* depended upon his *karma* or acts in the present and the past lives. Therefore, one's obligation or *dharma* (*svadharma*) got merged into *varnashramadharma*. Acquisition of *varna* depended upon one's birth and birth in turn depended on one's performance in the past life. Thus emerged the birth-based division of the four classes or *varnas*. *Varnashramadharma* was, however, not inflexible and without exceptions. The *apaddharma* or obligations determined by emergency could supersede *varnashramadharma*. The *varnashram* and *apad dharma* did not exhaust the entire *dharma*. *Dharma* also included *sadharana* (pertaining to everybody), *samanya* (common) or *sanatana* (eternal) *dharma*. According to this *dharma* all people, regardless of their *varna* and *ashrama*, should

⁴⁷ Id. at 96.

⁴⁸ See id. at 97.

⁴⁹ Priyanathe Sen, *The General Principles of Hindu Jurisprudence*, 1998, 26.

⁵⁰ Derrett (note 21), at 99; Radhabinod Pal, *The History of Hindu Law*, 1958, 180.

⁵¹ For details on this issue see Sen (note 49), at 8, 10, 26; Sen-Gupta (note 24), at 336; Pal (note 50), at 80, 138, 144, 180, 188, 259; Derrett (note 21), at 99, 103; Lingat (note 45), at xii-xiii; Rama Jois, *Seeds of Modern Public Law in Ancient Indian Jurisprudence*, 1990, 8, 13 ff. For the examples of kings who were compelled to abdicate see G. Buehler, *The Laws of Manu*, VII, 1886, 41.

⁵² Pal (note 50), at 259.

⁵³ *The Encyclopedia of Religion*, note 45, at 330.

observe some common obligations. While a more comprehensive enumeration of such *dharma* drawn from the *Dharmasastra* literature is available in Kane⁵⁴, the enumeration in *Arthasastra* (c. 300 BCE) includes refraining from injuring others (non-violence or *Ahimsa*), telling truth (*satya*), living purely, practising goodwill, being forgiving, and exercise of patience at all times. While in general, but with clear exception of *Mahabharata*, the Brahmanic tradition gave precedence to *varnashramadharma* over *sadharandharma*, the Vedanta, Buddhism and Jainism taught that the demands of *sadharnadharma* always overrule those of *varnashramadharma*.⁵⁵ The Bhakti movement also added the dimension of submission to God for guidance in case of conflict between the *varnasharama* and *sadharana dharma*.⁵⁶ In this connection it must also be noted that out of the four sources of *dharma* two are *sadachara* and *conscience*, which means respectively the actions of the honoured members of the society and the voice of one's conscience.⁵⁷ Under this category *dharma* could be transformed to suit the changing conditions and advancement of the society.⁵⁸

Dharma is not laid down in any single book as is religion in other traditions; it did not have an organization like church with monopoly to enunciate and enforce it; it does not have any fixed dogma or a set of dogmas and it has not only grown freely from within but has also borrowed liberally whatever was good and conducive for human well being in other traditions around the world in whose contact it came. Therefore, it promoted the creation of immense literature referred to above and let different religions and ideologies such as Jainism, Buddhism, Sikhism, Charvaka, and Lokayata emerge, grow and survive.⁵⁹ Its most important religious and philosophical wing – the Vedanta –, birth of Sikh religion, and interpretation of Indian tradition by great saints from Shankara, Ramanuja, Kabir, Raidas, Sufis, Ram Mohan Roy, Dayananda, Ramatirtha, Vivekananda, to Arobindo Ghosh and others was influenced by the contacts with Christianity, Islam and other religious traditions.⁶⁰ By its very nature *dharma* being different for different people, it did not claim superiority over other religions and traditions. Not only did it not advocate its spread over other people and territories, it also advocated following one's own *dharma* even if it was inferior to those of others.⁶¹

Unfortunately the *varnashrama* aspect of *dharma*, which invoked universal logic, somehow degraded into the vagaries of birth-based discriminations and even the practice of untouchability.⁶² Unlike some other traditions, however, it did not

⁵⁴ Note 1,3, vol. II, pt. I, 3-11.

⁵⁵ For the exception of Mahabharata, see Kane (note 13), vol. II, pt. I, 101.

⁵⁶ See The Encyclopedia of Religion, note 45, at 330-331.

⁵⁷ Cf. Menski (note 14), at 155-56, who rejects the dominant meaning of *sadachara* as the actions of the honoured members of the society and considers it equivalent to "custom, better perhaps 'good' custom".

⁵⁸ See Kane (note 13), vol. V, pt. II, 1699 ff. and vol. II, pt. I, 3 ff.

⁵⁹ On Charvakas and Lokayatas see among others, the immense literature produced by D. Chattopadhyaya such as Debiprasad Chattopadhyaya (ed.), *Carvaka/Lokayata*, 1990.

⁶⁰ See Radhakrishnan (note 23), at 18.

⁶¹ See The Bhagvadgita, ch. XIII, verse 47, also 45.

go to the extent of excluding any class or classes of people from the category of humans, but that is no consolation or justification for the unequal and ill treatment, which a large section of Indian society met and continues to meet in its name. The blame for such degradation and discrimination is attributed to the priestly or Brahmin class who did not rule the state but guided its rulers by the exposition of *dharma*. Although this separation of powers between the ruler and the enunciators of norms for ruling prevented the emergence of tyrants and totalitarian regimes and also the religious wars in Indian history, it has left an indelible blot on the face of its tradition that cannot be justified under our current notion of human rights. Subject to this blot, the unorthodoxy of the Indian tradition and the historical evidence of its letting the diverse and even opposite faiths, beliefs, ideologies, opinions and so on to grow and flourish is fully in line with the spirit of the human rights. Because of such tradition India could easily take the decision to have a democratic republic with a progressive bill of rights, including the social and economic rights and affirmative action, when the opportunity came in 1947 to have a constitution and polity of its own choice. In the international arena too it has been second to none. For India:

Tradition is something which is forever being worked out a new and recreated by the free activity of its followers. Whatever is built forever is ever building. If a tradition does not grow, it only means that its followers have become spiritually dead. Throughout the history of Hinduism the leaders of thought and practice have been continually busy experimenting with new forms, developing new ideals to suit new conditions.⁶³

Interpretation of Tradition

1. Varnashrama and Sadharana Dharma:

The caste system and the discriminations practised and justified in its name have so much overshadowed the discussion of Indian tradition that it has acquired the notoriety of preaching nothing but inequality, injustice and human indignity. Any enquiry into it is so much prejudiced in advance that it ends up only in finding the causes and consequences of caste system and any effort to examine it objectively and to arrive at any different conclusion is dubbed as promotion of a rotten and anti-human tradition. We refuse even to accept the fact that though *prima facie* the *varana* system from which the caste system is supposed to have originated preaches inequality in human beings, it accepted the origin of every human being from the same source and did not exclude any of them from the category of human beings. Nor is it so rigid as not to admit any exceptions. The progressive and liberal nature of the Indian tradition is eminently suitable to accommodate and assimilate any new ideas and notions and definitely the idea of human rights. The difference it

⁶² For this degradation see Kane (note 13), vol. II, pt. I, 164 ff.

⁶³ Radhakrishnan (note 23), at 17-18.

draws between the *varnashrama* and *sadharana dharma*, noted above, could be fully utilized for removing any obstacles in the realization of the idea of human rights. Elaborating the two Kane concludes that “all *dharmasastra* writers attached the highest importance to moral qualities (*sadharana* or *samanya dharma*) and enjoined them upon all with all the emphasis they could command; but as their main purpose was a practical one, viz, to guide people to right acts in everyday life, they dealt more elaborately with the acts, rites and ceremonies that each person had to do with reference to his station in society”.⁶⁴ Only for that reason the *dharmasastra* writers are “found principally concerning themselves with *varnashrama dharma* and not with *sadharana dharma*”.⁶⁵ Kane, however, bases his work on *sadharana dharma*.⁶⁶

Like any other aspect of *dharma*, *sadharana dharma* is not laid down at one place forever but is spread over the entire *dharmasastra* literature. We noted above its description in the *Arthashastra*. Using it for deriving the notion of law from *dharma*, Derrett says that the “moral qualities of the nation, the ultimate virtues”, which included “truth, abstention from injuring, freedom from anger, humanity, self-control, uprightness, abstention from theft, ritual purity, restraint of the appetites, generosity, compassion, discrimination, forbearance, absence of envy, abstention from violence, patience, freedom from meanness, regard for the interests of others”, must always be sub served.⁶⁷

Puntambekar specifically uses them in connection with the preparation for the Universal Declaration of Human Rights. Calling them as “ten essential human freedoms and controls or virtues necessary for a good life” propounded by Manu and Buddha, he enumerates five social freedoms as “(1) freedom from violence (*Ahimsa*), (2) freedom from want (*Asteya*), (3) freedom from exploitation (*Aparigraha*), (4) freedom from violation or dishonour (*Avyabhichara*), and (5) freedom from early death and disease (*Armitava* and *Aregya*)”. Similarly the five individual possessions or virtues are “(1) absence of intolerance (*Akrodha*), (2) Compassion or fellow feeling (*Bhutadaya*, *Adreha*), (3) Knowledge (*Jana*, *Vidya*), (4) freedom of thought and conscience (*Satya*, *Sunrta*), and (5) freedom from fear and frustration or despair (*Pravrtti*, *Abhaya*, *Dhriti*)”.⁶⁸ Aware of the fact that the Indian tradition does not express them as freedoms, he explains that “[h]uman freedoms require as counterparts human virtues or controls” and thinking “in terms of freedoms without corresponding virtues would lead to a lopsided view of life and a stagnation or even a deterioration of personality, and also to chaos and conflict in society”.⁶⁹ As he was writing when India was not yet free, he also pleaded for freedom from for-

⁶⁴ Kane (note 13), vol. II, part I at 11.

⁶⁵ Id.

⁶⁶ Kane (note 13), vol. I, pt. I at 4.

⁶⁷ J. Duncan M. Derrett, *History of Indian Law (dharmasastra)*, 1973, 22.

⁶⁸ Puntambekar (note 12), at 195, 197. Also see copy of the same idea in Khushalani (note 12), at 406.

⁶⁹ Puntambekar (note 12).

eign rule because such “rule is a damnable thing”⁷⁰ which is now reflected in the human right to self-determination.

Arriving at similar conclusion from the views of Gandhi and other Indian reformers, Carman says that in Indian tradition “both priests and rulers have duties to all that can be the basis of universal rights, and all people have, in addition to their particular occupational duties, a common *dharma* of fundamental duties, of which the most important are truth telling (*satya*) and not harming living beings (*ahimsa*)” and adds that “[m]ost educated modern Hindus would agree theoretically with the emphasis of the common *dharma*, not only of Hindus but of all human beings.”⁷¹ We find similar expression in Khare when he says: “Hindu culture increasingly emphasizes one’s ‘common *dharma*’ (*sadharana dharma*) over the ‘specialized *dharma*’ (*visesa dharma*) of caste rules, rituals and duties.”⁷² For him the “first *dharma*, based on the spiritual sameness of all creatures, traditionally promotes activities for public welfare and attracts progressive reformers” in which the human rights advocates could “locate a convergent indigenous Indian impulse”.⁷³ His following lines are worth quoting in full:

Despite its rather anemic social history, “common *dharma*” still provides the strongest ideological plank from within the tradition to all those marginal, weak, exploited, and protesting. Many major reformers (from Buddha and Kabir to Raidas) made this *dharma* their moral terra firma for attacking the birth-based jati or caste *dharma* and its inequities, while modern reformers like Ambedkar and Gandhi tried to render common *dharma* the soil for sowing the seeds of modern India’s tolerant and civic public culture.⁷⁴

Some people find adequate support for human rights even in the *varnashramadharma* or *svadharmas*. For example, Mitra finds that the “idea of *svadharmas*, if not understood as rigid code of law, can be a contribution in the field of human rights in its suggestion that differences be taken seriously” and that different people may have different rights and duties, “each human being deserves and should have equal consideration and equal concern”.⁷⁵ Such interpretation of equality is the universal norm, which could very well be employed for the humanization of *varnashramadharma* in the Indian tradition.⁷⁶

⁷⁰ Id. at 198.

⁷¹ Carman (note 9), at 126-127. Taking *dharma* to be law, Pal says: “The end of law then is to ensure order in the society, in the universe. It was indeed designed to keep peace at all events and at any price. ... Observance of *dharma* was in one’s self interest, therefore one must observe it.” Pal (note 50), at 144.

⁷² Khare (note 9), at 204.

⁷³ Id.

⁷⁴ Id. at 205.

⁷⁵ Mitra (note 11), at 83.

⁷⁶ For a convincing discussion on this aspect see Dietrich Conrad, *The Influence of Western Liberal Ideas on Gandhi’s Constitutional Philosophy*, in: M.P. Singh (ed.), *Comparative Constitutional Law*, Festschrift in Honour of Professor P.K. Tripathi, 1989, 43. Also Radhakrishnan (note 23).

2. Rights and Duties

Absence of reference to rights and presence of meticulous details of duties in the Indian tradition is as much emphasized by its supporters as by its critics to deny the existence of human rights in it.⁷⁷ We have already noted that this is not a unique feature of the Indian tradition. All ancient traditions speak of duties and hardly of any rights.⁷⁸ The Indian tradition may be unique in its detailed enunciation of *varnashrama dharma*, which lays down the duties of different classes of people at different stages of life. Beyond that it shares the tradition of duties with other traditions.⁷⁹ We have also noted that the duties have given birth to rights in all traditions.

Even in the Western tradition long after the French and US declarations of rights, not all thinkers supported the idea of rights. "The idea that the rights of man could be a starting-point for political morality ..." was regarded by Jeremy Bentham and other utilitarians as "wild and pernicious nonsense".⁸⁰ Expectedly, Karl Marx said, "none of the so called rights of man goes beyond egoistic man, ... an individual withdrawn behind his private interests and whims and separated from the community".⁸¹ Even until today intense discussions continue on the justification of a rights-based world.⁸² In order to bring precision in the rights-based argument and theories only as late as in 1919 Hohfeld drew a chart of jural relations distinguishing rights from privileges, powers and immunities.⁸³ It is in that relationship that a right in strict sense in one person imposes duty on another against whom he has the right. But in other situations duties are not imposed though absence of right, disability and liability may arise. In this strict sense freedom is not right and, therefore, subjects no one to duty, though it creates absence of duty in the subject of freedom. If a right so defined always creates a corresponding duty, could it not be argued that existence of duty in one person towards another is as good as the creation of right in the latter. The main objection to such argument is that what happens if the person on whom duty is imposed does not perform it. The answer is that in either case it is a breach of law, which could be

⁷⁷ See e.g., Ritter (note 7), and Jhunjhunwala (note 13). Also see Gandhi (note 13), Pandeya (note 9), and Kane (note 13), vol. I pt. II, 980.

⁷⁸ See Parekh (note 36).

⁷⁹ For detailed discussion of duties in the Western tradition see the writings mentioned in notes 93 and 94 below.

⁸⁰ Jeremy Waldron (ed.), *Theories of Rights*, 1984, 1.

⁸¹ Id. at 2. See also Harold J. Laski, *Towards a Universal Declaration of Human Rights*, in: *Unesco* (note 12), 78 at 84:

Nothing is more difficult than to keep an open mind about the ultimate principles of social organization. Yet an anthropologist who studied the habits say, of a society in Western civilization, would frequently find that many of the "rights" that we regard as "sacred" are not more rational than the taboos regarded with religious veneration by a savage tribe at a fairly primitive stage of social development.

⁸² See among others, various essays in Waldron (note 80).

⁸³ Wesley N. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 1919.

corrected by legal action. Just as legal action could be instituted for the enforcement of rights, it could also be instituted for the enforcement of duties. But because in the West the concept of human rights developed against the state, perhaps theoretically and strategically state could not be subjected to duties unless the existence of rights was recognized in the individual preceding the creation of the state. Therefore, the rights theory developed the way it has done. It is now being pursued in spite of several difficulties being faced in its operation in respect of human rights of individuals *inter se* such as of children against parents or of spouses between them or of old parents against their earning and able children.⁸⁴ In such situations, unless the people are taught to perform their duties, rights model fails and transfers the realization of rights to the state. As in India the stage of state monopolizing the power and using it absolutely was not reached, its tradition concentrated on teaching people to perform their duty well according to their station in society and stage in life. Even against the ruler who failed to perform his duties, it spoke in terms of duty of the people to remove such ruler rather than letting him rule subject to the rights of the people. It is worth probing whether such approach is more appropriate for the realization of rights in a society like India than the one based on rights model.

That tradition must have led G a n d h i to stick to the idea of duties rather than rights. C o n r a d imaginatively explains G a n d h i's views on the preparation for Universal Declaration of Human Rights.⁸⁵ At the time of his writing to the Director General of Unesco, India was still under the British rule. G a n d h i firmly believed in *swaraj* (*lit.* self rule) and did not see any justification for any country or people to rule others. He believed that so long as a person or nation is under the rule of another or lacks *swaraj*, it is incapable of enjoying any rights. In such situation there are only duties to be performed and no rights to be claimed – duty of the foreign ruler to withdraw its rule and of the ruled to overthrow that rule. If both sides thus performed their duties, the rights of the ruled get realized automatically. In the absence of performance of that duty, no rights could be expected. In his statement G a n d h i must have been angling at the future rulers of independent India too that in order to justify their rule they had to perform their duties, as it was every ruler's *dharma*.⁸⁶

An additional reason is also adduced to explain the absence of rights and presence of duties in the Indian tradition. The Western declarations of rights such as of the United States or France are manifestos of liberation, "an insistence that rights previously denied now be recognized";⁸⁷ they imply reclamation of the lost ground. In India, on the other hand "there is also the accumulated tradition of the

⁸⁴ For some of these issues see e.g., Matthew H. Kramer, *On the Nature of Legal Rights*, (2003) 4 *Supreme Court Cases (Journal)*, 45 ff.

⁸⁵ Dietrich Conrad, *Schwierigkeiten beim Schreiben der Wahrheit – ein Brief Gandhis zur Universalen Menschenrechtsdeklaration der UN*, in: Wissenschaftskolleg zu Berlin Jahrbuch 1987-88, at 191 ff. Also reproduced with summary in English in: Dietrich Conrad, *Zwischen den Traditionen*, 1999, (J. Luett & M.P. Singh, eds).

⁸⁶ For the ruler's *dharma* see Kane (note 13), vol. III, 56 ff., 96-97, and Jois (note 51).

language of the British courts, in which thousands and thousands of litigants sought preservation or restoration of inherited rights and privileges, not least the symbolic honors supposedly awarded, not by the British, but by the Sovereign of the Universe enshrined in the temple".⁸⁸ As there were "no Indian counterparts of Henry VIII" or of any other absolute ruler and *dharma* was king over kings, which imposed on them the duty to uphold it and prescribed penalties for its violations, the occasion to make a demand for rights never arose.⁸⁹ Such occasion was created for the first time by the British rule against which the people of India for the first time began to make the demand for rights towards the end of the nineteenth century.⁹⁰

Radhabinod Pal gives an apparently idealistic explanation for the presence of duties and absence of rights in the Indian tradition. According to him assertion of a right becomes necessary only when in the realization of one's desires one comes in conflict with the interest of others. "Such an assertion would scarcely be necessary in a society where everyone will do only that which at the same time inures to the benefit of all else."⁹¹ The social order based on *dharma* excluded all possibilities of such conflict because no one's *dharma* was expected to come into conflict with the *dharma* of another and, therefore, so long as everyone observed one's *dharma* there were no social or individual conflicts. Only for taking care of any deviations from *dharma* by any one a ruler bound by *dharma* was conceived. In the social order so conceived the individual was expected to refrain from evil and intruding upon the will of others and to rise above the ego. Such order may not be consistent with the culture of rights as is advanced by the West but definitely it provides a conception of good society and good human being with every possibility of common good and self-fulfillment.⁹²

In the background of human rights as claims against the state the West at the moment seems to be dominated by the notion of rights. But this has not always been the case and may not remain to be so for ever. The West, especially Europe, also has a tradition of duties which, among others, is also incorporated in the constitutional documents and declarations.⁹³ The relationship between the rights and

⁸⁷ Panikkar (note 41), at 88. He further says: "Something has been lost when it has to be explicitly declared."

⁸⁸ See Carman (note 9), at 126.

⁸⁹ See Derrett (note 21), at 98-100.

⁹⁰ Before the British the only occasion was created by the Mughul Emperor Aurangzeb during the later seventeenth and early eighteenth centuries against whom there were several revolts including the creation of Sikh army by Shri Guru Gobind Singh, and fights by Chhatrapati Shivaji and even by Aurangzeb's son. With Aurangzeb also started the fall of the mighty Mughul Empire in India. For the history of claim of rights see the developments from the Constitution of India Bill 1895 onwards in B. Shiva Rao (ed.), *The Framing of India's Constitution*, 1966, 5 ff.

⁹¹ See Pal (note 50), at 171 and also at 255. He says:

The metaphysical basis of this duty perhaps lies in the principle which would rationally lead to a certain abstention to the conscious will of one in so far as that conscious will refrains from intruding upon that of others. This abstention will indeed be a limit imposed upon the indefinite expansion of our egoism, that is to say, of our material strength and palpable interest.

⁹² See Ritter (note 7), at 83.

duties seems to be acquiring growing importance in the public discourse and intellectual exercises.⁹⁴ The draft of the Universal Declaration of Human Responsibilities for adoption by the United Nations is the most notable example of such growth.⁹⁵

Following the West the Constitution of India initially provided only for the fundamental rights of the individual. Kane, the legal explorer of the Indian tradition, was critical of ignoring the Indian tradition of duties in the Constitution.⁹⁶ Later in 1976 the Constitution incorporated a short chapter of duties of the citizens.⁹⁷ It is difficult to say whether the Indian tradition or the socialist model of the West led to this change in the Constitution. But in view of the fact that the socialist model is now almost non-existent and the West is also preparing for a universal declaration of human duties, the Indian tradition of duties is not as inimical or irrelevant to the realization of human rights as it is generally projected to be. In view of its unsatisfactory record of human rights based on the Western model, India needs to seriously examine its tradition of duties and explore the possibilities of employing that tradition for improving that record. The tradition of duties is thus no excuse for the denial of human rights.

3. The Individual

Some Western scholars attribute the emergence and growth of the current notion of human rights to the unique position of the individual in the Judeo-Christian religious tradition, which according to them is not found in other religious traditions. Ritter, for example, says that in the Judeo-Christian tradition God created the human being in his own image and, therefore, the human being acquires a divinely ordained unique place in the universe. "Human rights language within the Chris-

⁹³ Dieter Grimm, Rector, Institute for Advanced Studies Berlin, told me that until the French Revolution, Europe had only the tradition of duties and not of rights. He referred to relevant literature in this regard, particularly to Niklas Luhmann, *Subjektive Rechte*, vol. 2, (1981); Helmut Coing, *zur Geschichte des Privatrechtssystems*, (1962) and Dieter Grimm, *Recht und Staat der bürgerlichen Gesellschaft*, 11 (1987). See also the books cited in the next note and *The American Declaration of Human Rights and Duties 1948*, the Weimar Constitution of 1919, references to some duties in the German Constitution of 1949 and specific chapters in some of the state constitutions in Germany such as of Bavaria, Bremen, Saarland. Also see the African Charter of Human Rights and Rights of the People 1981.

⁹⁴ See e.g., David Selbourne, *The Principle of Duty*, 1994; Thorsten Ingo Schmidt, *Grundpflichten*, 1999; Florian Duehr, *Prinzip und System der Grundpflichten*, 2002 and the literature in the bibliography attached to the latter two works.

⁹⁵ For further information and extracts of the Declaration see Henry J. Steiner/Philip Alston, *International Human Rights in Context*, 2nd ed., 2000, 351 ff. The idea was not absent even at the beginning of discourse of drawing a charter of human rights. See e.g., Unesco (note 12) generally and at 267 especially. Panikkar (note 41), also argues for the drawing of a balanced charter of human rights and duties based on the fundamentals of different traditions.

⁹⁶ See Kane (note 13), vol. V, part II, 1664-1667.

⁹⁷ See the Constitution of India, pt. IVA.

tian religious tradition”, he says “addresses itself to this divine regard, and is accordingly dictated by the Word of God revealed through Jesus Christ”.⁹⁸ Hindu religious tradition, according to him, does not accord similar place to the human being.

If it were so, one wonders why this aspect of the Judeo-Christian tradition was not discovered until the end of the nineteenth century and even after it was so discovered why the human rights within that tradition continued and still continue to be violated in many ways. Without entering into those questions let us, however, enquire into the Hindu tradition in this regard. It is true that unlike the Judeo-Christian tradition the Hindu tradition does not speak of original sin and subsequent redemption or of divine law and “Words of God” uttered at the initiation of the creation or later. Even if some words incorporating such tradition are said to be uttered by the prophets or God incarnates such as Lord Krishna in the *Bhagavadgita*, they are attributed to that prophet or incarnate and not to anyone beyond. Describing the origins of universe the *Manavadharmasastra*, however, says: “Dividing his own body, the Lord became half male and half female; with that (female) he produced Virag” and thus the creation and continuance of human being started.⁹⁹ The *Rigveda* also states that God produced all human beings from his body.¹⁰⁰ Similar versions may be found in other sacred books too. None of them says that either the human being was the product of sin or that female was created out of male. Both male and female share the divinity equally and are sacred. The process of human procreation is not an act of sin abetted by devil.¹⁰¹ Devil has no place in the Indian tradition which assigns and attributes everything to God.

The *Vedanta* tradition in India, the most powerful among all, bases itself on non-duality (*advaita*) between God and his creation, including of course the human being.¹⁰² God did not simply created the human beings and other creatures

⁹⁸ Ritter (note 7), at 84-87. Also see his preceding statement: The primordially controlling religious concept for the Jewish understanding of human being is its creation in the image of God By virtue of reflecting the divine image, absolute worth is accorded to human being. ...

From this Jewish heritage, Western rights acquired their absolute character as attendant to the human being of every individual. ...

Within its Christian heritage, however, divine regard for human being was perfected by the Son of God in the person of Jesus Christ. Through Christ, humanity is freed from sin, redeemed before God, and exists in a state of grace. ...

The Christian understanding of human rights is entirely a function of the extraordinary value divinely granted to human being through the person of Jesus Christ. This value is not only absolute; it is *fait accompli*.

⁹⁹ See Buehler (note 51), at 14.

¹⁰⁰ See Lingat (note 45), at 34.

¹⁰¹ Christianity considers human being as sinners and a product of sin. Leroy S. Rouner considers the Christian idea of original sin as the most unpopular idea in the history of human thought and approves of its disapproval by Vivekananda in the light of Hindu tradition. See Leroy S. Rouner, *Why Good People Do Bad Things: Kierkegaard on Dread and Sin*, in: Leroy S. Rouner (ed.), *Is There a Human Nature?*, 1997, 182. For Vivekananda's disapproval of it see note 32, vol. I, 11. For an advancement on the idea of original sin see Berman (note 15), at 165 ff.

¹⁰² For a summary of core Vedanta principles see Kane (note 13), vol. V, pt. II, 1624-1626.

but he himself takes those forms. Therefore, the Upanishads proclaim: *tat-tvamsi, brahma-asmi* or *sarvam-khalvidam-Brahma* – I am God or the entire universe is God. Such being the reality, the ancient Indian tradition exhorts each and every human being to realize this reality and to love and respect all existence in the universe.¹⁰³ If creation of human being in the image of God is the basis of the idea of human rights, the Indian tradition does not lack it.

Ritter, however, seems to be explaining the Vedanta and *advaita* concepts as of selflessness rather than of self-interestedness which is different from Judeo-Christian tradition. “Hindu rights”, says he “are attendant to right action by virtue of distinctly religious duties toward self-renunciation and the special benefit of others; Western rights are attendant to being human by virtue of distinctly secular motives toward self-realization and the autonomy of the individual”.¹⁰⁴ His observation is profound and deserves deep contemplation and thorough examination. Even though the dominant ancient Indian tradition recognizes self-interestedness and desire as the basis or motivating force of all human action it teaches the individual to control and rise above them.¹⁰⁵ Although that tradition also produced *Charvaka* and *Lokayata*, who believed in materialism and sensual enjoyment, it did not let them dominate. It laid down four goals of human life – *dharma*, *artha* (wealth), *kama* (pleasure) and *moksha* (salvation) – in that order but the last one acquired dominance in association with the first. Spirituality, not materialism, became its ideal. Therefore, in spite of *Bhagavadgita*’s strong message to fight for one’s rights, the dominant goal of such fight turns into *moksha* rather than material gains. To be indifferent to this worldly and to be concerned about the otherworldly gains became an ideal for the individual. Perhaps, for that reason, the individual cared more for the freedom to make speculations about the other world and another life rather than the recognition of his material interests in this life.¹⁰⁶ To a considerable extent,

¹⁰³ See e.g., Kane (note 13), vol. II, pt. I at 7 and Vivekananda (note 32). Also the verse from *Ramacharitamansa: Siya Rama maya jag jaani, karahun pranaam jor yug pani* (realizing that the entire universe is made of Sita and Rama, I bow before it with folded hands).

¹⁰⁴ Ritter (note 7), at 84. Further at 88 he says:

The difference between Indic and Western rights run as deep as the theological differences between Hinduism and Judeo-Christianity. Hindu rights are attendant to right action by virtue of a distinctly religious duty toward self-renunciation and the spiritual benefit of others; Judeo-Christian rights are attendant to being human by virtue of a distinctly religious attribution of absolute, universal, and egalitarian worth to all individuals. Contrary, then, to the claims of Subedi, the roots of Hindu and Western rights diverge quite profoundly. The absolute, universal, and egalitarian character of Western rights of the individual is simply not constant with the character of Hindu rights acquired through *dharmic* action.

On the primacy of Moksha in Hinduism and also Buddhism also see Kumar (note 27), at 126-131.

¹⁰⁵ For self-interestedness and desire see Buehler (note 51), at 29. Also the verse in *Ramacharitamansa: sur, muni, santan ki yah riti, swarath laag karabin sab priti*.

¹⁰⁶ Cf. Kane (note 13), vol. II, pt. I at 2 where he says:

The writers on *dharmasastra* meant by *dharma* not a creed or religion but a mode of life or a code of conduct, which regulated a man’s work and activities as a member of society and as an individual and was intended to bring about the gradual development of a man and to enable him to reach what was deemed to be the goal of human existence.

it is true, these traditions still guide the life of an average Indian in matters of claims of his rights.¹⁰⁷

But besides this otherworldly and spiritual aspects of the Indian tradition, its other aspects such as those expressed in *sadharana dharma*, living in harmony with nature and other beings, not being guided all the time by self-interest but also caring for the interest of others, keeping one's needs and desires within limits as Gandhi did in our own times, performance of one's obligations religiously instead of putting forward one's real and imaginary claims perpetually, are some of the fundamental issues for the understanding and application of the human rights. They raise the foundational question about the model of human rights. Should that model lead to further conflicts and clashes or should it lead to peace and harmony? There are cultures and traditions that promote conflicts and clashes and others that promote peace and harmony. The Indian tradition falls in the latter category. One may ask: if the present model of the human rights falls in the former, is it worth pursuing?

For assigning a special place to human rights in Christianity Ritter also quotes two commandments from the Bible: "You shall love the Lord your God with all your heart, and with all your soul, and with all your mind" and "You shall love your neighbour as yourself".¹⁰⁸ In the Indian tradition volumes of literature on *Bhakti* starting from the *Pauranas* and including the *Bhagvadgita* and subsequent epical works of Chaitanya, Sur, Tulsi, Mira, Nanak, Kabir, Raskhan and so many others are full of the first commandment and more. And equally the second commandment is expressed at more than one place such as "Do not do to others what you do not like to be done to yourself."¹⁰⁹ I think what is conveyed in the two commandments can find its reflection in almost every religious tradition. The commandments do not take us too far in knowing the position of human rights.

To deny the conception of individual autonomy and to establish the subordination of the individual to the community in the Indian tradition reliance is also placed on the often-quoted verse from the *sastric* literature, which says: "for the family sacrifice the individual; for the community the family; for the country the community; and for the soul the whole world."¹¹⁰ The verse, however, expresses the supremacy of the self over everything else.¹¹¹ Nothing can and must come in the way of realization of one's self.¹¹² The core of the verse does not contradict the rest of the Indian tradition, nor does it promote ego or self-interest. It simply am-

¹⁰⁷ See Khare (note 9) and Nilanjan Dutta, From Subject to Citizen: Towards a History of the Indian Civil Rights Movement, in: Anderson and Guha (eds) (note 9), at 275 ff.

¹⁰⁸ Ritter (note 7), at 87.

¹⁰⁹ See Pal (note 50), at 257.

¹¹⁰ See Bharat Jhunjhunwal, A Sanatana Critique of UN Declaration of Human Rights, in: Jhunjhunwal (note 13), at 180.

¹¹¹ Radhakrishnan (note 23), at 64. He says:

Family and country, nation and the world cannot satisfy the soul in man. Each individual is called upon at a certain stage of his life to give up his wife and children and his caste and work. The last part of life's road has to be walked in single file.

The verse is quoted in Sanskrit in Jois (note 51), at 2.

plifies the importance of the self of every human being, which every other human being must respect. "Everyman from the simple fact of his manhood (*purusamatra sambandhibhibh*) is capable of reaching perfection."¹¹³ His or her goal is and must be to get liberated.¹¹⁴ One must accept this principle for oneself and for every other human being.¹¹⁵

The current idea of human rights need not be founded on any religion. Any claim for founding the idea on any particular religion to the exclusion of others simply leads to religious animosity and consequently harms the cause of human rights. We must accept, as we have already noted, that in the evolution of the idea of human rights every religion has something to contribute. As religion plays a significant role in the lives of the people, connecting the idea of human rights to their religion helps them in its acceptance, internalization and implementation. Beyond that like most other ideas in the modern world it must be founded on rationality. If India's record of human rights is dismal, the foregoing discussion must help in realizing that it is not entirely due to its religious traditions. Religious traditions have of course been manipulated to introduce evils like birth-based discrimination and practice of untouchability. But they are the aberrations, though serious, caused by their beneficiaries. These aberrations must be clarified and removed. I have undertaken this exercise only to do that. I hope it helps in realizing that the Indian tradition is not inherently opposed to the idea of human rights.

Human Rights in India

The foregoing discussion should leave no doubt about the compatibility of the Indian tradition with the idea of human rights. All those who are familiar with that tradition arrive at that conclusion.¹¹⁶ The demand for a bill of rights during the British rule and its fulfillment in the Constitution along with India's support to the human rights at the national and international forums also leads to the conclusion of India's supportive tradition of human rights. The lack of effective realization of the human rights, however, leads people to find fault with the tradition. Even if the current idea of human rights is a product of the West, it does not mean that the Indian tradition is opposed to it.

May be a few practices in the Indian tradition were not consistent with the idea of human rights. But its leaders and true followers have successfully denounced

¹¹² See Brian Brown, *The Wisdom of the Hindus*, 1973, 170. For details see Vivekananda (note 32).

¹¹³ Radhakrishnan (note 23), at 87.

¹¹⁴ Vivekananda (note 32), vol. I, 16, 332.

¹¹⁵ Unlike the Western tradition, which talks of human nature as members of human species, Hindu tradition talks of distinct individual natures. See Bhikhu Parekh, *Is There a Human Nature?*, in: Rouner (note 101), at 22.

¹¹⁶ See e.g., Ved P. Nanda, *Hinduism and Human Rights*, in: Ved P. Nanda/Surya Prakash Sinha (eds), *Hindu Law and Legal Theory*, 1996, 237 and the works cited in note 12 above.

such practices as corruption of the tradition. To take only recent examples, Swami Dayananda, a firm believer in the Vedic tradition, denounced the caste system and subordination of women as manipulation of that tradition. Rammohan Roy, Vivekananda, Gandhi and many others did the same. Gandhi even threatened to renounce Hinduism if anyone could prove that untouchability was one of its tenets. That such practices were corruptions of the tradition is evident from their rejection in the Constitution, which not only prohibits the caste and sex based discriminations and the practice of untouchability but also provides for the remedying action against their past impacts.¹¹⁷ If caste or sex based discriminations and practice of untouchability still continue, the blame could not be assigned to the tradition. They are not part of any authoritative and binding tradition either past or present. If any justifications are cited for them in the tradition, they are the same as the privileged and powerful in any society find in their self-interest. Compared to similar justifications in many other traditions and societies, they are, however, much milder. Examples of religious traditions not treating non-believers as human beings and of traditions excluding human beings from that category in the name of slaves or even treating women as less than human beings are not unknown.¹¹⁸ The Indian tradition never went to that extent. Therefore, tradition is no excuse for the poor record of human rights in India. It could at the most be a pretence not to face a much more complex issue. Blaming the tradition serves no purpose either. Tradition can neither be created retrospectively nor can it be disowned or even discarded overnight.¹¹⁹ Experiments such as change from Hinduism to Christianity, Sikhism, Buddhism or Islam to overcome the caste system or untouchability yield no results because the same practices become part of these latter religions too. The only possible solution could be the unearthing of the best in the tradition, which has been buried deep by the vested interests, and to use it to the realization of the human rights of each and every one of us as the Constitution does and the persons named above and many others before and after them have done or are doing.

Following such an approach to human rights in India, I find historians doubting the authenticity of the social history of India drawn entirely on the *dharmasastra* and other extant literature.¹²⁰ The lived history is yet to be known from the archaeological surveys and other findings made possible by the scientific and technological innovations in the research methods. However, the consideration of human rights cannot be postponed until the availability of such findings. They must be attended with whatever information we have. Broadly speaking the available history gives us the picture of the Indian rulers before the establishment of Islamic rule, having been created as a requirement of *dharma* in order to uphold it. Drawing one coherent picture of the society operating under *dharma*, which bound every one including the ruler, the *dharmasastra* did not differentiate between the religious

¹¹⁷ See the Constitution of India, Pts. III, IV, IVA and XVI.

¹¹⁸ See e.g., on caste system, untouchability, status of women and slavery Nanda (note 116).

¹¹⁹ Even revolutions take long time to make a dent in it. See Berman (note 15), at 18 ff.

¹²⁰ See e.g., Romila Thapar, *Ancient Indian Social History*, 1978.

and temporal power beyond creating an additional branch of *dharmā* called *rajadharmā* assigning some special powers and responsibilities to the ruler for the administration of the state.¹²¹ The society in India did not experience the conflict and subsequent separation between these two powers. Nor could the rulers exercise unlimited powers and become autocrats or tyrants.¹²² Beyond taking the law and order matters into their hands, the Islamic rulers also did not disturb this arrangement. The Islamic rulers were not bound by *dharmā* as expounded in the Indian tradition but generally they did not interfere in matters of *dharmā*. The British rulers also did not disturb this arrangement except to the extent necessary for their trade interests or as demanded by the Hindus or Muslims in their own matters respectively. The society in general, mostly rural, did not come much in touch with the state. It also did not pass through the stages experienced by the Western societies, such as the fight for supremacy between the church and the state and their subsequent separation as two independent institutions, religious reformation, feudalism, manorial system, mercantilism, creation of a powerful state, industrial revolution, imperialism and colonialism, and the creation of a civil society primarily representing liberal values.¹²³ All these factors along with the material prosperity made the Western societies rights conscious. In the absence of these factors the Indian society did not develop that consciousness.¹²⁴ Such a consciousness seems to have come for the first time to the leaders of independence movement from their dealings with the British government and contact with the West. But it did not percolate into the masses beyond the consciousness of self-rule and getting rid of the foreign power. Consequently the masses remained unaware of the current idea of human rights. The incorporation of that idea in the Constitution or other laws and the endorsement of the International Bill of Rights also make little difference for them.

As the state, until its independence from the British rule, performed limited functions and the masses did not have much contact with it, their dealings remained confined to themselves perhaps more under the customary practices than even under the norms laid down in *dharmasastra*.¹²⁵ These practices also determined their rights and duties. Any deviation from these practices met social sanctions and excepting rare cases they were enforced through social pressure and not through litigation. If the social pressure did not work in someone's case, primarily because of his weaker position in the society, he also invoked the curse of the divine powers that should punish the wrong doer if not in this life, in the next.¹²⁶ Roughly this is

¹²¹ For details see Kane (note 13), vol. III. 56 ff.; Lingat (note 45), 207 ff. and Rama Jois, *Legal and Constitutional History of India*, vol. I, 1984.

¹²² See Derrett (note 21), at 98.

¹²³ For the details of these developments in the West see Berman (note 15).

¹²⁴ See Rajni Kothari, *Human Rights – A Movement in Search of a Theory*, 5 *Lokayan Bulletin*, 17 (1987) reproduced in: Alston (note 2). Also see Ashutosh Varshney, *Ethnic Conflict and Civil Life*, 2002, 23 ff.

¹²⁵ See Menski (note 14) that people were governed more by *sadachara*, which means custom than by *dharmasastra*.

the background in which the Indian state after its independence from British rule took over the responsibility of protecting the rights of the people on the Western model. Naturally, in this background, the masses either have little idea of these rights or consider the state as their creator and protector and not as their violator. The state appears to them as restorer of their due in the society. In the West on the contrary from the Magna Charta through the Bill of Rights, the French Declaration of Rights of Men and the Citizen, the U.S. Bill of Rights and even later the privileged sections of the society claimed their rights against the state. The position of the individual vis-à-vis the state in India is just the reverse of the West. The individual as a privileged person did not ask the state to refrain from disturbing his privileges but like the ancient ruler consecrated in *dharma* the creators of the Indian state decided to restore to the individual what was his due. They decided that not only the state shall refrain from interfering in his autonomy and dignity but must also take positive steps to secure to him his autonomy and dignity.

Thus the realization of the human rights in India is not as much a question of individual's claim against the state as of the responsibility of the state. Whether the individual asks for his rights or not the state must secure them to him. The state must know that the people have the rights irrespective of their demand for them and that not only it has to honour them by non-interference but has also to secure them to each and every person by positive action. It is not merely an expectation from the state based on any principle of morality, fairness or international law but a constitutional command.¹²⁷ The state and its apparatus can appreciate this command far more easily than the masses appreciating the idea of their claims. Of course such an understanding of human rights may not be consistent with the theories of rights in the West, it is fully consistent with the Indian tradition that the state is subject to its *dharma* and it must observe it. If it does not, it has no justification to exist and must be replaced. We need not invoke tradition for this purpose because the Constitution is the law that binds the state. This kind of understanding of human rights, however, raises the questions: Firstly, why should the state care for the rights of the people unless they demand them? And secondly, what can people do if the state does not care for their rights? The questions are germane and must be answered. My argument is not that the people may sleep over their rights and that it does not matter whether they demand them or not. It matters. Vigilance is the price of liberty. They must be vigilant and keep the state alert that they care for their rights and will not let it deny or curtail them. They must have the provision for legal as well as political action if the state tries to deny them their rights. As the masses in India lack adequate rights consciousness as well as the means to enforce their rights, legal awareness alone is not and cannot be enough and effective. Legality is the *sine qua non* for the rule of law, but it does not mean that it is attained only through court action without regard for it by the state and political action. The rule of law itself is a consequence of and dependent upon the political

¹²⁶ See Khare (note 9).

¹²⁷ See the Constitution of India, *inter alia*, Pts III, IV, IVA and XVI.

action. In India the Constitution clearly sanctions political rather than legal action for the realization at least of the social and economic rights. The Indian tradition, which speaks of the duties and justifications of the state only in terms of the welfare of the people, could also be invoked in support of the Constitution for political action.¹²⁸ Such an action is far more effective in the creation of the rights consciousness as well as the conditions for their realization than the legal action. But as every person is not in a position to invoke the political action, he cannot be left at the contingency of such action. Each and every person must be in the position of defending one's rights all the time. Therefore, effective individual action must also be available to him. The political action is, however, a condition precedent even for the provision of individual action. It cautions the state against the dangers of any infraction of the rights. Political action is also required for the realization of human rights in India through the Western strategy of litigation because firstly, the courts are also part of state machinery and need to be sensitized about the rights of the people and secondly, the existing courts are utterly inadequate and incapable of ensuring the realization of rights.¹²⁹

Further, unlike the West where people in general have reached a level of economic and social well being which they need to defend and promote through civil and political rights, in India most of the violations of these rights occur because of the absence of such well being. Therefore, in India the question is not whether the social and economic rights are rights or not but whether the conditions precedent for the realization of such rights exist. Unless those conditions exist the violations of the rights cannot be effectively dealt with. These violations are not as much by the state as by the privileged and powerful elements within the state. The rights of the people need to be protected more from these elements than from the state. Such protection cannot be afforded just by restraining the state from interference in the affairs of the individual; it requires positive action from the state not just in the form of policing the individual but through his empowerment. The pattern of violations of human rights in India is a clear indicator that empowerment of the weak and the vulnerable is the key to the improvement of the human rights situation. Such an empowerment is not possible without state support and action. Therefore, while there are a few matters in which the state must keep off there are many more matters in which positive state action is required. Unless the state undertakes the responsibility of taking such action human rights situation cannot improve. It does not mean that either the state must be left free to do whatever it likes or that the individual must be made totally dependent upon the state. What is needed is that the individual and the state in close cooperation with each other must work out a strategy that ensures empowerment of the weak and vulnerable and also guards against the misuse of the state by

¹²⁸ For the justification of the state in the Indian tradition, see among others the work cited in note 121 above.

¹²⁹ See e.g., Conrad's lamentation that India does not meet the essential conditions of rule law because it does not provide enough courts for the enforcement of law. Dietrich Conrad, *Zwischen den Traditionen*, (note 85), at 135 ff.

the privileged and powerful. A kind of state which G a n d h i had envisaged before the independence which will not simply be a transfer of power from one ruler to the other but a state that cares for its citizens. This is not an argument of any new theory of human rights but an effort to understand the reasons for the current poor situation of the human rights in India and to find suitable solutions for it. The empowerment of the weak by at least satisfying his basic necessities of life is the most apparent solution, which cannot be brought in just by the strategy of litigation and adversarial action but requires an understanding on the part of the state that it must take certain positive steps.

Again, morality is the basis of all rights.¹³⁰ Every right needs a moral justification. Any claim that lacks such a justification cannot acquire the status of right. Tradition may not supply the moral basis in specific details for all the rights that we have today but it provides the germs for most of them, if not all. Morality has been the basis of all the rights and duties in all the traditions expressed in religious texts, philosophical writings or otherwise. *Dharma* in the Indian tradition supported by the Islamic and Christian traditions, which joined it later, creates the moral base for the rights expressed in legal language today. In a tradition bound society like the Indian the language of morals has greater receptivity than the language of law or rights. Therefore, morals must also be resorted to improve the position of the human rights. Everyone, especially the state and its apparatus as well as the privileged and the powerful in the society must be reminded of their moral obligations towards the underprivileged and deprived masses. This is what the men named above successfully did for securing rights to the people more than any declaration of rights and their legal enforcement has done so far. Among them particularly G a n d h i as political leader at the forefront of the independence movement and visionary of the future India propounded, *inter alia*, the concept of trusteeship in which the haves held material resources of the society in trust for the have-nots and not for their self enjoyment and aggrandizement.¹³¹ Others dug out similar moral bases from the tradition for uprooting the birth and sex based discriminations and other social injustices. In the Indian society where the modern state has been a latecomer and detached from the masses, the moral obligations appeal more effectively than the legal. Even though the moral standards of the common man may not be very high they enjoy a higher place than the legal ones. For him moral duty of compassion, truth, non-injury, non-interference with the person or property of the others or of support and help to the needy and weak as the cherished virtues hailed by the tradition appeal more than mere legal obligations without such a moral base. The moral duty could also be fortified with the religious belief that good deeds in this life lead to *moksba* or better life in the next. The argument of morality is, however, not a substitute for legality; it is a supplement to it for the realization of human rights in India.

¹³⁰ See generally, Ronald Dworkin, *Taking Rights Seriously*, 1977 (reprinted 1996); Waldron (note 80) and *The Law*, 1990, 92 ff.

¹³¹ See Conrad (note 85), *Comparative Constitutional Law*, 51 f.

Finally, though the human rights are conceived primarily as protection against the tyranny of the majority even in a constitutional democracy, the ultimate hope for those rights lies in the democratic process. Apparently India is projected as a Hindu majority state, but neither the Hindus are a monolithic unit nor religion is the basis for the political minorities and majorities. India is famously called a country only of minorities and of no majorities.¹³² There are other bonds stronger than the religion among the Hindus that keep them divided and sometimes also bring in identity with non-Hindus. Even though at times it appears as if the people are getting united along the religious issues, but the political surveys and researches prove that in politics social and economic issues stand above religion.¹³³ As the majority of the people, whose rights are most frequently violated, are poor and deprived sections of the society, democratic process is the most potent and promising weapon for the protection of their rights. A healthy democracy alone can ensure that the privileged and the powerful do not exploit the state and its apparatus in their self-interest. As Rawls suggests, a healthy democracy is also the best assurance of determining the priorities and contents of the rights and justice.¹³⁴

Conclusion

In view of our shared belief that a universal regime of human rights will lead to the creation of a society in which each one of us will have the opportunity of realizing one's best, any and every step towards the realization of that goal is worth taking. In India the state, innumerable NGOs, groups and individuals are seriously engaged in the task of realizing that goal. The goal, however, is not yet in sight. Why is it so? Two types of answers seem to be coming. Firstly, the Indian tradition is not conducive to the idea of human rights. Secondly, the Western model of human rights is not suitable for India. The two answers are interconnected. Unless we have an agreed model of human rights we cannot examine its base in our tradition. Therefore, we must first have a model before we examine its foundations in our tradition. But we cannot have a model founded on our traditions without knowing the traditions. The task is therefore not simple.

Without entering into the more difficult question of developing a model, I have proceeded to examine the Indian tradition in the light of the current model reflected in the International Bill of Rights. The Indian tradition is, however, so complex that any description of it is not free from controversies. To minimize the controversy I have rather confined to the ancient tradition as gathered primarily from the *dharmasastra* literature. That literature is not one book or set of books but rather innumerable books written in a long course of time of over four thousand

¹³² Shashi Tharoor, India, 1997, 112.

¹³³ For a recent survey see Ajit Kumar Jha, NDA On a Slide, in: India Today, 28 (August 25, 2003).

¹³⁴ John Rawls, Political Liberalism, 1993.

years in different parts of the country from north to south and east to west. It is a formidable task to bring it within a uniform tradition. The only unifying force is the authority of the Vedas which this literature acknowledges. The acknowledgement of the Vedas as the ultimate authority associated with the geographical and other factors gives it an identity. The other ancient civilizations, particularly the Greek, at some remote point of time named it Hindu because of its existence around and east of river Sindhu (Indus). Even though initially and for a long time the word "Hindu" continued to cover all people in a geographical area irrespective of their religion such as Jains and Buddhists, or their ideology such as Charvaka and Lokayata, long after the entry of Islam in India, perhaps from the fifteenth century onwards, it started acquiring a religious connotation as a distinguishing feature between the followers of Islam and the rest. That distinction was sanctified in law during the British rule from the end of eighteenth century onwards, which divided the natives into Hindus and Muslims and the rest as British or Europeans. As the gap between the Hindus and Muslims was further widened during the British rule from the beginning of the twentieth century, which ultimately resulted in the division of the country, the use of the word "Hindu" now generates communal links. Therefore, I have avoided its use even though it is mentioned twice in one provision of the Constitution.¹³⁵ Just as the pre-Islamic tradition of India subsumed several sub-traditions the current tradition of India also recognizes and must recognize, as it has done in the past, the existence of other sub-traditions including Islamic and Christian.

The pre-Islamic and pre-Christian tradition which gives India a unique place among the major traditions of the world may be having many notable characteristics, I find only a few of them relevant to the current purpose. Its most relevant and striking characteristic is its freedom from any dogma; freedom to every individual to decide what one considers best for oneself; freedom to say whatever one considers good for the rest of the society and even the freedom to recognize or deny the existence of God or any supernatural power. Even in its belief in God it "believes in the evolution of our knowledge of God".¹³⁶ It "does not distinguish ideas of God as true and false, adopting one particular idea as the standard for the whole human race".¹³⁷ It is an evolutionary tradition building itself constantly all the time. Being so liberal and evolutionary the Indian tradition cannot close its doors to the idea of human rights because it comes from the West. Priyanath Sen sums up its ideal in the following words:

The sun arose in the east and travelled towards the west, and it is the same light which illuminates the whole world; supercilious observers may think that 'east is east, and west is west, and never the twain shall meet', but deeper insight into the institutions of the different countries disclose that it is the same universal reason which permeates the universe, and its touch makes the whole world kin.¹³⁸

¹³⁵ The Constitution of India, art. 25 (2) (b) and Explanation II.

¹³⁶ Radhakrishnan (note 23), at 24.

¹³⁷ Id.

So long as the present conception of human rights can reason out its vision of a better society, Indian tradition does not and shall not come in its way. It is adequately evident from the incorporation of that conception in the Constitution of India and the endorsement of the International Bill of Rights and other human rights conventions by India.

The fact, however, is that such incorporation and endorsement of the human rights idea has not yet produced the desired results. It is not that the human rights record has not improved from what it was in the pre-independence days, but it has not been able to create that hope and determination for pursuing it with which the idea was launched. Therefore, questions arise whether the idea of human rights in its present form suits the Indian tradition or does it need modification or replacement in the light of our tradition and experience. Rarely anyone holds the view that the idea must be totally replaced. But from the very beginning in line with Gandhi people have been tossing with the idea of emphasizing on duties besides or instead of the rights. The idea is not so bizarre or against the current idea of human rights if understood in the spirit in which it was expressed in the ancient Indian tradition. It imposed heavier duties and responsibilities on the rulers and privileged classes of the society than on the others. "The higher the man, the fewer are his rights and the more numerous his duties."¹³⁹ As once the great human rights advocate, Palkhivala, argued before the Supreme Court, in India the common man needed the fundamental rights more than the rich and powerful.¹⁴⁰ The rich and powerful have the resources to take care of their right which the common man lacks. Here lies the difference in the perception of the human rights in the Indian mind. Firstly, unlike in the initial stages in the West the human rights in India were not claimed by and for the privileged and secondly, except during the British rule, they were not perceived and experienced so much in danger from the state as from the privileged sections in the society.¹⁴¹ It is that privileged section of the society whether within or outside the state that continues to disregard the human rights of the masses. This section is also exploiting the current human rights model to its advantage without regard to or against the human rights of the masses.¹⁴² Therefore, the question marks on the current model are not baseless. Could we conceive of a model for India, which instead of or in addition to individual rights imposes legally enforceable duties on the state and other bodies acting under the colour of

¹³⁸ Note 49 above, at 378.

¹³⁹ Radhakrishnan (note 23), at 84.

¹⁴⁰ I cannot trace the citation of the argument but as far as I remember he raised it in *Minerva Mills v. Union of India*, AIR 1980 SC 1789. Also see Soli J. Sorabjee, Palkhivala and the Constitution of India, 4 Supreme Court Cases (Journal) 34 (2003).

¹⁴¹ See also Humayun Kabir, Human Rights: The Islamic Tradition and the Problem of the World Today, in: UNESCO (ed.) (note 12), at 191 ff.

¹⁴² Even the public interest litigation started for the benefit of weak and downtrodden is now being monopolized for the interests of the big and powerful. See among others writings of Parmanand Singh starting, Access to Justice: Public Interest Litigation and the Supreme Court, 10 and 11 Delhi Law Review, 156 (1981-82). Cf. Upendra Baxi, From Human Rights to the Right to Be Human: Some Heresies, in: Smithu Kothari/Harsh Sethi (eds), Rethinking Human Rights, 1989.

state? The question requires urgent attention in the light of privatization and globalization creating imminent chances for the exploitation of the weak by the strong. The answer to this question does not lie merely in the campaign for the awareness of the existing rights of the individual.¹⁴³

The Indian tradition needs to be studied carefully and thoroughly from the point of view of human rights, if not from the original sources at least from works like Kane's History of Dharmasastra and other materials on the social history of India.¹⁴⁴ Such study is more relevant now than ever before because of the false notions being held and spread about the tradition out of ignorance. A careful study may not support the birth-based discrimination and the practice of untouchability as they came to be. Much of what is propagated in the name of Indian tradition may be found baseless and much of it could be explained in the context of social, historical and political changes. *Dharmasastra* expressly tells "one should not observe but give up what was once *Dharma*, if it has come to be hateful to the people and if it would end in unhappiness".¹⁴⁵ Today the Indian tradition does not need to guard itself in isolation against the foreign rulers; it has its own rule, *swaraj*. *Varna* system was a classification of functions not inherently opposed to equality.¹⁴⁶ "One becomes a Brahmin by his deeds not by his family or birth; even a Candala is a Brahmin if he is of pure character", says Manu.¹⁴⁷ "Conduct counts and not birth."¹⁴⁸ The *Mahabharata* elaborates "that man is known as brahmana in whom are seen truthfulness, generosity, absence of hate, absence of wickedness, shame (restraint for avoiding wrong-doing), compassion and a life of austerity; if these signs are observed in a sudra and are not found in a brahmana, then the sudra is not a sudra (should not be treated as a sudra) and the Brahmana is not a Brahmana".¹⁴⁹ Similarly untouchability was initially connected with the impurity of acts and not with birth.¹⁵⁰ The openness of the tradition to rationality must be highlighted and utilized to remove anything that is irrational.

Seen in that perspective the Indian tradition is not only receptive to any notion of human rights, but it can also enrich that notion. Cautioning against the universalizing of the Western notion of human rights, Panikkar draws attention towards a new vision of human rights based in the Indian tradition. He says:

¹⁴³ In this connection see e.g., Khare and Pandeya (note 9). While the former attributes non-realization of rights partly to lack of awareness the latter attributes this lack to the Indian tradition.

¹⁴⁴ For a summary of its major principles and the need for study see Kane (note 13), vol. V, pt. II, 1613 ff. Derrett, a keen student of ancient Indian jurisprudence, laments the fact that the Indian scholars have not undertaken the study of their ancient materials as seriously as they should have done. He emphasizes the importance of these materials for the understanding and development of the country and exhorts the Indian scholars to pursue. See J. Duncan M. Derrett, *Religion, Law and the State in India*, 1968, 20 ff.

¹⁴⁵ Kane (note 13), vol. V, pt. II, 1629.

¹⁴⁶ Conrad (note 85), *Zwischen den Traditionen*, 381 ff.

¹⁴⁷ Radhakrishnan (note 23), at 86.

¹⁴⁸ *Id.*

¹⁴⁹ Kane (note 13), vol. V, pt. II, 1636.

¹⁵⁰ *Id.* vol. II, part 1, 165 ff.

Human Rights are not Human only. They concern equally the entire cosmic display of the universe, from which even the Gods are not absent. The animals, all the sentient beings and the supposedly inanimate creatures, are also involved in the interaction concerning "human" rights. ...

If many traditional cultures are centred on God, and some other cultures basically cosmo-centric, the culture which has come up with the notion of Human Rights is decisively anthropocentric. Perhaps we may now be prepared for a cosmotheandric vision of reality in which the Divine, the Human and the Cosmic are integrated into a whole, more or less harmonious according to the performance of our truly human rights.¹⁵¹

The Indian tradition does not claim superiority over any other tradition. Nor does it lay down universal standards for other traditions. It is so not because of its poverty or weakness but because of its eternal spirit of liberty that it is never too sure to be right.¹⁵² Any tradition that lacks that spirit cannot form a sound basis of universal human rights.¹⁵³ The endeavour to universalize the human rights must, therefore, be based on *Weltanschauung* that takes into account all traditions and demands of all people.¹⁵⁴ Similarly all world traditions without uprooting their cultures and giving up possible solutions to their human rights problems within it must be open to be part of the *Weltanschauung*.¹⁵⁵ Instead of being scared of one another they must be inspired by the spirit of togetherness in the common cause of humanity equally dear to all of us.¹⁵⁶

¹⁵¹ Panikkar (note 41), at 98 and 102.

¹⁵² I take this expression from Learned Hand's Spirit of liberty.

¹⁵³ That is one of the messages in Panikkar (note 39).

¹⁵⁴ For some of the consequences of not doing that, see generally, Upendra Baxi, *The Future of Human Rights*, 2002.

¹⁵⁵ In the context of Indian tradition and its relevance for the realization of human rights, see the insightful comments of Kothari (note 124), at 26-27 where he says:

It is important to understand that the Western conception of civil society (which emerged after several centuries of intellectual, territorial and economic struggles) presumes a homogenous society and, where a fair degree of homogeneity does not exist, the state was supposed to create it. We face a situation in which such a conception of the state is proving inimical to the very diversity that defines our national identity. ... With us, the creation of civil society becomes the task facing leaders of diverse social and cultural entities – in cooperation and communion with each other, drawing upon available and still surviving traditions of togetherness, mutuality and resolution of differences and conflict – in short traditions of a democratic collective that are our own and on which we need to build in a changed historical context. ... For this to happen it will need to give up both its state-centeredness and its Western pedigree, become relevant to the fundamental task of constructing a civil society that is rooted in the unique social and ecological constellation of India, and with this in view, develop a comprehensive strategy. But first it must develop a relevant political theory of democratic transformation that can provide the basis for a movement in a radically different social setting than one that obtains in the west. The imported theory of human rights is already proving counter-productive.

¹⁵⁶ That spirit finds its expression in the following words of Rabindernath Tagore:

Whatever we understand and enjoy in human products instantly becomes ours, wherever they might have their origin. I am proud of my humanity when I can acknowledge the poets and artists of other countries as my own. Let me feel with unalloyed gladness that all the great glories of man are mine.

Rabindernath Tagore, *Letters to a Friend*, 1928, quoted in: Sen, *Development as Freedom* (note 3), at 242. For similar spirit of the Indian tradition also see Wilhelm Halbfass, *India and Europe*, 1981.