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Globalization, Market Ideology and Human Rights

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The main purpose of this paper is to explore, in the contemporary context, the relationship between globalization, which would be taken to stand for myriad and enormously powerful economic processes which are currently going on in the world with their associated social and political processes, and the fulfilment of human rights. For this purpose we carry out an analysis of the values underlying the process of globalization. The normative analysis shows that the values underlying the process of globalization are not always compatible with human rights; and that as the domain of application of these values expands their incompatibility with human rights also increases. As the process of globalization can fundamentally be regarded as the process of expanding the domain of the values embodied in the idea of globalization, it follows that the incompatibility of the process with human rights will increase

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as its progression unfolds.

The most significant aspect of the contemporary international order is the predominance in it of the complex of economic rules having extraordinary reach. The proclaimed purpose or rationale of most of these economic rules is to increase wealth or enhance economic efficiency. The notion or rather notions of economic efficiency, though deceptively simple to state, are in fact exceedingly intricate. It is not easy to see their negative implications; and consequently as normative values they seldom raise controversy. Considering the nature and scale of economic processes in the contemporary context, involving massive negative externalities, particularly through the degradation of the environment, it should be clear that the deterioration in the living conditions for large numbers of people must inevitably result. This of course implies that, in the absence of action by the state or some other agency nullifying these negative effects, basic rights of anyone with a subsistence or marginal existence whose living conditions deteriorate would be violated.

The commonly held conception of basic rights, suitably interpreted for appropriate treatment of externalities, then would entail a duty on the part of the state or the international order to regulate these processes, at least to the extent so as to remove the threats to others' basic rights or alternatively nullify their negative effects. Wealth-enhancing efficiency considerations, as they are understood nowadays, however do not in general favour regulating economic processes and activities or undertaking of actions by the state to nullify their negative effects. In the absence of required regulation or action, there would be violation of the rights of those with subsistence existence whose material and environmental conditions deteriorate as a consequence of these processes. It should be noted that apart from impinging on basic rights

of the marginal and the marginalized people, the economic processes which result in the degradation of the environment imperil the basic rights of the future generations as well.

The paper is divided into four sections. Section 1 contains a formal analysis of the conception of human rights. The analysis focuses on the three constitutive and defining elements of the conception of human rights: state-centricity, inviolability and inalienability. It is argued that as in the contemporary world the state is not the only source of rules, regulations and laws which have relevance from the perspective of basic rights, the idea of basic rights being defined in relation to the state needs reformulation so as to include the relevant international organizations and transnational corporations among those with the power to violate human rights. In human rights literature a distinction is made between those rights fulfilment of which requires action by the state and those for the fulfilment of which the state has to merely refrain from doing anything which would be violative of them. The reason for the importance of this distinction lies in the fact that while for the rights in the former category something akin to a welfare state might be necessary the latter category of rights are consistent even with a minimal role for the state. It is contended in the paper that this way of classifying rights is fundamentally problematic and that analytically the correct position is that every right has both positive and negative aspects; positive aspects requiring action by the state for their realization and the negative aspects requiring merely refraining by the state from doing anything against those aspects for their realization. Consequently, a welfare state might turn out to be essential for the protection of rights if the positive aspects are such as to require substantial action on the part of the state. From this it follows that

in the contemporary context, because of multifarious, pervasive, persistent, massive and widely diffused negative externalities of the economic processes, a welfare state would be essential for the protection of even rights like the right to life and liberty.

An important implication of the inviolability element of the conception of human rights is that normative considerations, no matter how persuasive, cannot be invoked to scuttle basic rights. The respect for basic rights must be treated as a prior constraint for the purpose of determining the domain of application of normative considerations other than those relating to basic rights. In particular, normative criteria of an aggregative character, like maximization of general welfare or social wealth, cannot be invoked over domains where their application might result in violations of basic rights.

In section 2 we discuss the philosophical and legal basis for human rights. In national constitutional law as well as in international law the status of laws and rules guaranteeing human rights is preeminent. In most countries, laws inconsistent with basic rights are treated as void. The situation in international law is analogous. Thus, both national constitutional law and international law are in harmony with the inviolability element of the conception of human rights. From a philosophical point of view it appears that the ideas of autonomy and equality of individuals are crucial for deriving human rights. In some philosophical systems, like Rawls' theory of justice, basic rights like liberty are derived from the core idea of individual rationality. These systems, it is argued, do not provide a firm basis for human rights because of realization problem. It is contended that in the absence of internalization of the values of basic rights or of more fundamental values from which they could be deduced there in general would be no guarantee

that the ideal of basic rights would be realized.

Section 3 contains a detailed analysis of the efficiency criteria, particularly from the perspective of their possible incompatibility with basic rights. Efficiency criteria provide the basis for assertions of the general desirability of free markets, of private ownership of resources over other forms of ownership and of avoidance of governmental controls and regulations. Although there are several efficiency criteria, all of them are at least partly aggregative in character; and some are wholly so. Consequently they can easily conflict with basic rights if the domain of their application is not suitably restricted. An aggregative normative criterion would declare sacrificing the interests of one group of individuals for benefiting another group of individuals ethically desirable if by doing so the latter group can benefit to a greater extent than the extent of loss suffered by the former group. It is not that human rights cannot coexist with aggregative normative criteria; but they certainly cannot exist if normative criteria of aggregative character are allowed to override all other normative criteria. In other words, human rights cannot coexist with aggregative normative criteria if the domain of application of the aggregative criteria is so extensive as to include alternatives which might make the satisfaction of basic rights contingent on whether such satisfaction is in harmony with the aggregative criteria or not; as indeed is the case with the process of globalization. Exclusive reliance on aggregative normative criteria or accordance of preeminent position to a normative criterion of an aggregative character is inconsistent with any conception of human rights.

The next section of the paper is devoted to a consideration of the market ideology. An attempt is made to show that the market ideology, as it has developed, together with the expansion of ideas underlying the ideology to

non-market institutions and systems like law, is fundamentally destructive of the values for the preservation, advancement and realization of which these institutions were designed in the first place. We conclude with some remarks on the implications for democratic governance of a reduced role for the state.

## 1 The Conception of Human Rights

In this section an attempt would be made to delineate the fundamental constitutive elements of the conception of human rights, as the notion is generally understood. An important and defining element of the traditional conception of human rights is that it is state-centric. The human rights are defined in relation to the state. Only the state can violate an individual's human rights. If an individual is tortured by another individual in his official capacity then the act of torture would be violative of the victim's human right to be free from torture. An act of torture by a private individual, in general, would merely constitute a crime and not a violation of human rights.

The state can violate human rights in many different ways. Violations of human rights can take place in accordance with the laws of the state as well as against them. For instance, the state laws may permit torture of suspects for eliciting information or of convicts as punishment. Even if the laws prohibit torture it might be illegally resorted to and tolerated by the state officials. There might be no laws permitting torture and no instances of illegal torture by state officials, nevertheless the state would still be responsible for violation of the human right to be free from torture if the laws enacted by the state are or their enforcement is such that they result in sanctioning torture of some individuals by other individuals or that they fail to protect individuals from

being tortured by other individuals. It would be incorrect in this context to make a distinction between actions and omissions by the state.

Whether the almost universally acknowledged state-centricity aspect of the conception of human rights is appropriate depends on whether the state has more or less a monopoly of coercive powers in domains having relevance to human rights. If the state can be realistically assumed to have a monopoly of coercive powers in domains having relevance to human rights, then the rationale for state-centricity is immediate. On the other hand, if such is not the case then clearly entities other than the state have to be included among those with power and potential to violate human rights. If the state, voluntarily or otherwise, has surrendered some of its decision-making powers to international organizations or some other organizations together with a commitment to implement the decisions of these organizations; and if the implementation of these decisions results in violations of human rights, it is clear that the responsibility for violations of human rights must devolve upon the organizations in question in addition to falling upon the state. In fact, from the rationale of state-centricity of the traditional conception of human rights a general principle can be extracted, namely: Any entity, collective or otherwise, which has the power to make rules, in domains relevant to human rights, and has the power to enforce these rules, directly or through the state apparatus, must be held responsible for violation of human rights if the implementation of the rules framed by the entity is the cause of the violation.

While this principle, implicit in the traditional conception of human rights, generalizes the idea because of which in the traditional conception human rights are considered in relation to the state, application of it need not result

in a complete identification of the entities responsible for violations of human rights. In the contemporary world the power of transnational corporations to profoundly affect the lives, in myriad spheres, including those pertaining to human rights, of millions of people, is so great that any principle for identifying the violators of human rights which fails to hold them responsible for violations, even when the violations can be directly linked to their actions and decisions, cannot be regarded as satisfactory.

It should be noted that the principle, extracted from the traditional or classical conception of human rights and stated above, linking power to make coercive rules in domains relevant to human rights with responsibility for violations of human rights in cases of their arising from the implementation of rules made using the coercive powers in question, always results in identifying the violators correctly; and consequently the shortcoming of the principle lies only in its possible incompleteness. To use a somewhat different language, the extracted principle states a sufficient condition for identifying violators of human rights. For completeness what is required is a principle which states a condition both necessary and sufficient for identifying violators of human rights. As transnational corporations by themselves do not have power to make coercive rules the principle in question cannot take them into reckoning; even when the rules and laws causing violations of human rights are framed or enacted because of or under their influence. It is a cardinal principle of criminal law to hold an individual who induces, motivates or instigates another to commit a crime guilty along with the actual perpetrators, conspirators, aiders and abettors. The relevance of criminal law principles for the purpose of locating an additional principle which together with the extracted principle can accurately and completely identify human rights violators should be

obvious in view of the fact that all acts which constitute violations of human rights if committed by the state, are regarded, almost universally, as crimes if committed by individuals. Transnational corporations by their actions can cause serious damage to the environment and bring about deterioration in the living conditions of large numbers of people rendering continuance of enjoyment of human rights by the affected individuals precarious or impossible. The laws and regulations under which the transnational corporations are able to inflict these harms in many instances are enacted at their behest and in their interests only. And, it is clear that although transnational corporations are not coercive rule-making entities they must be held responsible for violations of human rights which result from their actions. The following modification of the principle under discussion, perhaps, can bring about the desired inclusion of such entities: If the implementation of a rule or action sanctioned by the rule is the cause of violation of some human right and if the rule has been framed by an entity, collective or otherwise, which has the power to make rules, in domains relevant to human rights, and has the power to enforce these rules, directly or through the state apparatus, then the entity and those responsible for implementing the rule or responsible for taking the action sanctioned by the rule, if any, must be held accountable for the violation in question.<sup>2</sup>

One important implication of linking responsibility for violations of hu-

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<sup>2</sup>The state enacting laws under which transnational corporations can violate human rights with impunity or the state failing to enact laws to prevent transnational corporations from violating human rights implies non-neutrality of the state. The principle has been defined in such a way that whenever the state is non-neutral, the beneficiaries of acts or omissions of the state, as the case may be, are held responsible for violations of human rights, along with the state, if obtaining of benefits results in human rights violations.

man rights with rule-making power is that in situations where the state has abdicated most of its rule-making powers to international organizations, it is the latter which primarily must bear the responsibility for violations caused by the rules framed by them.

Perhaps the most important human right is that of life and liberty. As far as this right is concerned, at one level, it seems that the state has only to refrain from doing anything for individuals to go on enjoying this right. It is actions by the state, not non-actions or omissions, which might imperil the continued enjoyment of the right. In other words, if one focuses on this human right then one might be tempted to conclude that violation of the right implies some action on the part of the state, that is to say, that non-action on the part of the state implies that the right is not violated. Although this assertion is widely believed, it is not true as should be clear from the examples dealing with the right to be free from torture given at the beginning of this section. It might be helpful to consider another set of examples to clarify what is involved.

If a person dies of hunger because the state has confiscated all his property then the state would be responsible for violating the person's right to life. But if the person starves to death because all his property is destroyed in a natural calamity, the responsibility for his demise under the traditional conception of human rights does not lie with the state. The traditional conception of human rights is not as broad as some of the modern conceptions articulated in some of the international human rights instruments. Regardless of the entailment relations that might exist between deprivation and non-realization of rights, under the traditional conception of human rights, as long as deprivation has not been caused by the state or the social order, a violation of basic rights

cannot be deduced. One may fault the state for not doing anything towards ameliorating the situation; but that is not the same thing as accusing it of violating human rights. Some care, however, is necessary while determining the causation. If the deprivation, material or environmental, threatening the right to life, is being caused as a consequence of activities undertaken by private individuals, with negative externalities for the affected directly or through environmental degradation, and the state or the social order fails to restrain these individuals from undertaking these activities or fails to make them undertake these activities with full compensation for the affected then the state or the social order cannot evade the responsibility for the violations of basic rights caused by the deprivation in question. The case is analogous to the example considered earlier in the context of right to be free from torture. If there is torture of some individuals by other individuals and the state fails to provide the necessary protection and deterrence, the state is bound to be considered to be in violation of its duty to guarantee the people the right to be free from torture. The state's failure to stop or regulate activities which would result for some in deprivation of an order leading to attenuation or violation of some or all of basic rights, would render it in violation of its duty to uphold human rights.

In the human rights literature rights are often classified as negative or positive rights. A right is defined to be negative if and only if no action on the part of the state is required for enjoyment of the right. Negative rights are violated only when the state takes actions to violate them. The most important example that is cited of a negative right is that of right to liberty. If the state does not deprive a person of his liberty then the person can go on enjoying his right to liberty. A violation of the right will take place only if the

state acts to deprive the individual of his liberty. On the other hand, a right is defined to be positive if and only if some action on the part of the state is required for the right to be enjoyed by all in different possible circumstances. An example of such a right would be the right to food. It should be noted that a positive right does not necessarily require some action on the part of the state for realization of the right in every individual's case. If the right to food is guaranteed then for its implementation the state would have to take action only with respect to those individuals whose right to food would be in danger of being violated in the absence of such action by the state. Furthermore, for enjoyment of a positive right some action on the part of the state is required not in every possible circumstance, but in some circumstances only. Even if the right to food is guaranteed no action on the part of the state might be required for its realization if all inhabitants happen to have incomes much above the poverty level. Thus the essential difference between the two types of rights lies in negative rights never requiring any action by the state for their fulfilment while positive rights requiring action by the state at least for some individuals in some circumstances.

Although the negative rights-positive rights distinction, corresponding to philosophical distinction between non-acts and acts, is quite pervasive and rather important in the human rights literature, analytically it does not seem to be a correct one as should be clear from the examples already considered. Analytically correct position is that every right has both positive and negative aspects. Whether one considers a right like the right to liberty, universally regarded as a negative right or a right like the right to food, considered a positive right, enjoyment of it by everyone in every circumstance would involve on the part of the state both refraining from certain acts (negative aspects)

and performing certain actions (positive aspects). For the realization of right to free speech for all, for instance, the state must refrain from censorship (a negative aspect) as well as ensure that no group of individuals in the society for whom certain ideas might be anathemas is able to enforce non-articulation of these ideas by others (positive aspect).

Notwithstanding the fact that the negative rights-positive rights distinction suffers from logical infirmities, it might still be argued by some that the distinction, although not watertight, is nevertheless important in the sense that for enjoyment of negative rights little action, if at all, on the part of the state, or for that matter, by any other entity is required, while for the realization of positive rights, in general, considerable activity on the part of the state or other organizations would be necessary. It would be argued in this paper that this line of argument is quite misleading; and indeed is an important building block for a set of ideas acceptance of which results in derecognition of violations of human rights of certain kinds as violations.

If the idea that every right has both negative and positive aspects put forward here is accepted then a very important inference can be made. Namely, that the scope and extent of the role of the state necessary for preservation of basic rights is not independent of the societal circumstances, particularly those relating to threats to human rights emanating from actions of non-state actors. If threats emanating from actions of non-state actors are massive and persistent, as we would argue is the case in the contemporary context, then very substantial role on the part of the state might be necessary for warding off of these threats or alternatively for taking measures for nullifying or ameliorating the negative effects of these actions. If it so happens that warding off of threats is not, by and large, a feasible option, as it would be argued is

the case in the contemporary context, then the only way for preserving basic rights might be for the state to be a welfare state. From this it follows that the theories which establish the desirability of a minimal role for the state must be neglecting consideration of positive aspects of even so-called negative rights like the right to life and liberty. Normally the idea of welfare state is associated with so-called positive rights. But from what has been said here it should be clear that even if one exclusively focuses on rights like the right to life and liberty the welfare state might still be necessary for ensuring rights.

Possibly the most important defining element of the conception of human rights is that in relation to the state they are considered inviolable; that is to say that no violation by the state is regarded as legitimate or justifiable. The normative considerations, no matter how compelling, cannot be invoked by the state in justification of abridgment, attenuation, denial or violation of human rights. In particular, normative considerations of an aggregative character appealing to the greater good or prosperity of the society cannot be used in support of constraining or denying human rights. The inviolability of basic rights is a prior constraint which must be satisfied by any legal or social order to be eligible for being considered for adoption by the society. Another and equivalent way to state this characteristic of human rights is to say that in relation to the state human rights or fundamental rights are unconstrainable or illimitable. Unconstrainability or illimitability of basic or fundamental rights seems to be rooted in the philosophical premise of equality of all human beings and their autonomy. We will see later that it is because of this crucial characteristic of basic rights that the market ideology is inherently incompatible with human rights.

At one level, unconstrainability aspect of the conception of basic rights

is an idealization. Even international human rights instruments committing state parties to respecting basic rights routinely permit derogation from obligation to respect basic rights in cases of the obligation conflicting with public order, morality etc. It is interesting, however, that International Covenant on Civil and Political Rights, while permitting derogation '*In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed*' (Article 4), does not permit derogations from Articles dealing with right to life, prohibition of torture, prohibition of slavery, and freedom of thought, conscience and religion, among others. It is rather remarkable that in the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment the prohibition against torture is absolute. Paragraph 2 of Article 2 says:

*No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.*

Similarly, the Convention for the Protection of Human Rights and Fundamental Freedoms while allowing derogation '*in time of war or other public emergency threatening the life of the nation*', does not permit derogation from certain articles or parts thereof. The articles or sections thereof from which no derogation is allowed deal with right to life, prohibition of torture, prohibition of slavery and the right not to be punished without an act or omission which constitutes a criminal offence under national or international law at the time of its being committed.

The Universal Declaration of Human Rights in contrast does not seem

to be so unequivocally against making tradeoffs between human rights and general welfare. The Article 29(2) of the Declaration reads:

*In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society.*

In the context of analysis of the defining elements of the conception of basic rights, in theory there are at least four different ways to rationalize differences amongst different international human rights instruments. One could argue that the idea of inviolability of basic rights in relation to the state is essentially an idealization, although impossible to realize completely, towards which it is desirable for the society to move; and that the different international human rights instruments incorporate the ideal to different degrees. Alternatively, it could be argued that not all human rights can be treated on the same footing and that the notion of inviolability is relevant to only some of the rights which are included among human rights. The differences among instruments then could be reflective of this difference among human rights. It is also possible to contend that the idea of inviolability has been evolving progressively over the last six decades or so since the coming into existence of the United Nations; and that the differences among international instruments could be reflective of this evolutionary process.

While in relation to the state basic rights possessed by an individual are conceptualized, at least as an idealization, as illimitable; such is not the case

in relation to other individuals. The clause *'In the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others...'* appearing in The Universal Declaration of Human Rights in this connection is of great significance. One person's exercise or enjoyment of his or her rights can easily result in a situation which is not conducive for another to realize his or her rights. In fact it is easy to construct examples where one person's enjoyment of rights can be downright detrimental to another person's realization of rights. The question therefore arises as to what limitations require to be introduced in the conception of rights to take care of this problem. It would be convenient in this context to introduce a technical term called 'externality'. If an action by a person has consequences for another person and these consequences are irrelevant to the former, an externality is said to exist. Externalities can be of both positive and negative kinds. If an action by a person has negative consequences for another person and these consequences are not a cost to the former, a negative externality is said to exist. Analogously, if an action by a person has positive consequences for another person and these positive consequences are not a benefit to the former, a positive externality is said to exist. The very existence of a society implies that in general there would be externalities. And the existence of negative externalities implies that individuals cannot treat rights in relation to each other as if there were no limits on them. In the context of conceptualizing the right to liberty it is well recognized that without appropriate restrictions one person's right to liberty can easily be inconsistent with another person's right to liberty. The ideal way to deal with the problem seems to be that : (i) The rights should not be limited in

any way whatsoever when the exercise of rights does not impinge negatively on other persons' rights, i.e., when there are no negative externalities (ii) When the exercise of rights does impinge negatively on other persons' rights, the rights should be limited in a way such that they can be enjoyed to the maximum possible extent consistent with like and equal enjoyment by others of their rights. The classical conception of rights, in so far as it relates to basic rights like the right to life and liberty is essentially along these lines. The harmony of the above resolution with the philosophical premise of equality of all human beings and their autonomy should be noted.

The expressions like public order, morality etc. appearing in clauses limiting rights are capable of being interpreted in a way that the limitations on account of them refer to only those limitations which are necessitated by the requirement that the exercise of rights by some does not result in denial of rights for some others. Under this kind of interpretation there would not be any conflict between the inviolability feature and the limitations on account of interpreted objectives. However, these expressions can also be interpreted in a manner which would not be consistent with the inviolability feature. The expression 'general welfare', essentially connoting an aggregative idea, is unlikely to have an interpretation consistent with the inviolability feature.

Inalienability<sup>3</sup> is another fundamental and defining characteristic of basic

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<sup>3</sup>The preamble of 1948 Universal Declaration of Human Rights begins as:

*Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,...*

Preambles of both International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights begin as:

rights. Human rights cannot be renounced, divested or bartered away. In this context, voluntariness or otherwise of the act of renunciation, divestment or barter is completely irrelevant. From this it follows that if an individual delegates some of his powers to another individual; such delegation of powers can never include authorization for alienating basic rights. The claims of having people's mandate by elected representatives would be invalid if such claims were made for actions which in any way had the effect of curtailment, attenuation or abrogation of rights.

To sum up, in the stylized form, the conception of human rights, which we have been discussing and which has been variously called as classical, traditional or general conception of human rights, can be defined in terms of the following characteristics: (i) The rights are state-centric; and inviolable or unconstrainable in their relation to the state. The state-centricity entails both the absence of rules and practices leading to infringements of rights as well as existence of rules and practices to protect rights and to deter their infringements. The distinction between acts and omissions in this context is irrelevant. (ii) The rights should not be constrained in any way whatsoever when the exercise of rights does not impinge negatively on other persons' rights; and when the exercise of rights does impinge negatively on other persons' rights, the rights should be constrained in a way such that they can be enjoyed to the maximum possible extent consistent with like and equal enjoyment by others of their rights. (iii) The basic rights are inalienable and

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*Considering that, in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world,...*

consequently claims of mandates for curtailment, attenuation or abrogation of rights must be construed as invalid.

## **2 Philosophical and Legal Basis of Human Rights**

Because of the inviolability characteristic of human rights, it is difficult to accommodate them within the framework of theories which exclusively employ normative criteria of an aggregative character; not to speak of deriving them from ideas and assumptions on which such theories rest. Utilitarianism is an example of a normative theory of an exclusively aggregative kind. Under utilitarianism social alternatives are evaluated by comparing totals of utilities of all individuals under different alternatives. It is immediate that in general utilitarianism cannot be consistent with basic rights. When only a normative criterion of an aggregative character is used, violation of basic rights of an individual would be considered better than not violating his or her rights if such violation results in benefit to others of a larger magnitude than the magnitude of loss to the victim of the violation. The normative criteria used in economics are wholly or partly aggregative in character. A large part of law also makes use, although implicitly, of normative criteria of an aggregative character. Theories emphasizing the ideas of equality and autonomy of individuals on the other hand are in greater harmony with the notion of human rights. It is important to note that the premises of equality and autonomy of human beings do not rule out normative criteria of aggregative kind altogether. What is ruled out by the two premises taken together is the exclusive reliance on normative criteria of aggregative kind.

Although it is possible to argue that basic rights like liberty can be derived from the core idea of individual rationality by hypothesizing a primordial position, as Rawls does, it is not clear what significance is to be attached to such a derivation because of possible non-internalization of the derived principles. If individuals are solely motivated by self-interest, as they are in the Rawlsian construction, they might agree on a set of rules in a situation of complete ignorance as that of the Rawlsian initial situation; there is, however, no guarantee that these agreed upon rules would be implemented when the situation of complete ignorance no longer prevails. Agreeing to a normative principle in a collective context does not entail internalizing the principle as well. From the postulate of individual rationality it might be possible to derive basic rights; but it is unlikely that one would be able to demonstrate their realizability as well. There is a fundamental difference between individuals agreeing upon a principle because the principle is part of every individual's value-system; and everyone agreeing on the principle because it is the best that serves one's interests among those on which general agreement is possible. While in the former case there would be no realization problem; in the latter case because of divergence between the course of action dictated by one's interests and the course of action dictated by the agreed upon principle in most instances it is highly unlikely that the principle would in practice be realized. In any case, in the absence of internalization of the principle, the core postulate of individual rationality would be contradicted if the agreed upon principle does get realized in all eventualities. It seems that for a satisfactory theory of rights what is required is that the individuals constituting the society must be committed to the normative idea of rights directly or must be committed to a set of normative ideas from which human rights

could be obtained as derived norms.

In the contemporary world almost all countries have constitutions laying down the rules by which they are to be governed. And almost invariably these constitutions guarantee and catalogue the fundamental rights to be enjoyed by everyone. This practice, however, does not mean that human rights are legally created. The dominant thinking, for some time, has been that human rights exist regardless of whether they are guaranteed by the constitution or some other law; or not. The state does not create rights; it can only transgress them. In the modern context it is doubtful if a state can claim legitimacy for itself if it does not constitutionally or legally respect basic rights. Spelling out in detail all the basic rights seems to have become a necessary condition for a constitution to be accepted as a legitimate instrument for governance.<sup>4</sup> In theory, it is now widely recognized that laws inconsistent with fundamental rights cannot be regarded as valid laws even though their enactment might have followed the procedure as laid down in the constitution and other relevant laws determining the procedure for making of laws. There is of course great divergence between the theory and practice in this respect; as indeed is the case with almost every aspect of human rights.

In this connection it is of interest to note that the Indian constitution in its original form specifically mentioned that all laws inconsistent with fundamental rights were to be treated as void, whether in existence prior to the commencement of the constitution or enacted after the commencement. Although this feature is still there; it is no longer as categorical as it was in the original formulation as constitutional amendments are now excluded from its

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<sup>4</sup>Some uses of expression 'basic rights' are more inclusive than some others; therefore, it would be appropriate to interpret the expression 'basic rights' here in its minimalist sense.

scope.

The theoretical position that has evolved with respect to political legitimacy of state can be summarized by saying that the state must be governed according to laws consistent with human rights defined broadly enough to include right to democratic governance. Respect for human rights is a necessary condition for legitimacy of the state.

In international law<sup>5</sup> also the developments relating to human rights which have taken place since the inception of the United Nations are along the same lines as those in the context of constitutional law. There is a large number of declarations, treaties, covenants, and conventions dealing with human rights. In most instances these instruments have been assented to, entered into, acceded to or ratified by a large number of countries. In addition, there is a large number of United Nations General Assembly resolutions dealing with human rights and related matters which were passed by acclamation or by overwhelming majorities. The most important instruments of international law relating to human rights include Charter of the United Nations, Universal Declaration of Human Rights, International Covenant on Civil and Political Rights, and International Covenant on Economic, Social and Cultural Rights, among others. The rights dealt with in these instruments can be classified into three broad categories: (i) civil and political rights, (ii) economic, social and cultural rights and (iii) collective rights.

The civil and political rights are usually described as negative rights and economic, social and cultural rights as positive rights. While most of the rights are defined in relation to individuals, the rights like the right of self-

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<sup>5</sup>On international law relating to human rights generally see Crawford (2000), Brownlie (2003), Jennings (1992), Lauterpacht (1945) and Meron (1986).

determination and the right to permanent sovereignty over resources are defined for collectives. A collective right has the property that it is either satisfied for everyone or violated for everyone in the collective. In this respect, collective rights rather differ from individual rights where it is possible to violate rights of some individuals without necessarily violating them for all. Although the difference between individual rights and collective rights in the sense just described is quite sharp, it is not absolute. If one reflects on the nature of human rights one realizes that even individual rights have a collective dimension. Freedom to express one's opinions does not amount to much if most individuals in the society are denied this right. Most civil rights also would lose much of their significance if denied to most people. The collective aspect of the individual right to vote in elections is so strong that it loses all meaning if denied to all others.

Human rights are an integral part of contemporary<sup>6</sup> international law<sup>7</sup>; any state violating human rights would be in breach of international law. Not only do human rights occupy an important place in international law, they are in fact part of *jus cogens* or peremptory international law.

*Jus cogens* is that part of international law from which no derogation is possible. While states may, by and within the limits of agreement, between themselves, vary or dispense with most rules of international law, they are not allowed to derogate from those rules of international law which consti-

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<sup>6</sup>Prior to the adoption of the Charter of the United Nations, international law did not recognize human rights.

<sup>7</sup>The widespread acceptance of the authority of the Universal Declaration of Human Rights since its adoption has led to the opinion that notwithstanding the fact that the Declaration is not a treaty, its provisions must be regarded as embodiment of international law in the matter of human rights. See Jennings (1992).

tute the jus cogens. Vienna Convention on the Law of Treaties<sup>8</sup> defines jus cogens as: ‘accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.’<sup>9</sup>. Although the boundary between jus cogens and the rest of international law is not finely drawn there is very little doubt that fundamental human rights, right of self-determination<sup>10</sup>, prohibition of geno-

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<sup>8</sup>On the Vienna Convention on the Law of Treaties see Reuter (1995) and Sinclair (1984).

<sup>9</sup>See Article 53 of the Convention on the Law of Treaties.

<sup>10</sup>The right of self-determination figures prominently in most important instruments relevant to human rights including the United Nations Charter; International Covenant on Civil and Political Rights; and International Covenant on Economic, Social and Cultural Rights. In the United Nations Charter the right of self-determination is mentioned in clause 2 of Article 1 which lays down the purposes of the organization. The clause reads:

*To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;*

International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights have identical Article 1 which read:

*All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*

Right to self-determination also figures in the Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States 1970, GA Res 2625 (XXV). This declaration was adopted by the General Assembly of the United Nations by acclamation; and it authoritatively elaborates some of the basic principles embodied in

cide, prohibition of aggression and crimes against humanity, among others, certainly belong to the category of jus cogens<sup>11</sup>.

If a rule of customary international law conflicts with a rule of jus cogens, it cannot continue to exist as a rule of international law. According to the law of treaties, treaties inconsistent with a rule of jus cogens, are void to the extent of inconsistency. As derogation from jus cogens rules is not permitted, no act done in contravention of such a rule can be legitimated by any means including those of consent and acquiescence.

Thus, the status of human rights in international law is very similar to their status in most national legal systems. Just as laws inconsistent with basic rights are treated null and void in most national legal systems; so are the rules of international law inconsistent with human rights treated in international law.

There is another important characteristic of international human rights law, apart from being part of jus cogens; namely that it gives rise to obligations erga omnes, i.e., obligations to all states. One can distinguish between those rules of international law which, even though they may be of universal application, do not give rise to rights and obligations erga omnes, and those which do. Since the obligations of the law of human rights are erga omnes,

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the United Nations Charter. The seven principles contained in the declaration are of pre-eminent value in the international law. The principles embodied in the Declaration were declared by the General Assembly to constitute 'basic principles of international law'. One of the seven principles lays down the right to self-determination. See Jennings (1992).

<sup>11</sup>Although the International Law Commission did not give any examples of jus cogens in its draft Articles on the Law of Treaties, it did record that in this context mention had been made of the prohibition of trade in slaves, prohibition of genocide, the observance of human rights, and the principle of self-determination, among others.

violations of basic rights are violations of obligations to all other states and any state may therefore invoke the remedies available to a state when its rights under international law are violated. In particular, a state may invoke and pursue remedies for human rights violations, even if the individual victims were not nationals of the complaining state and the violations did not affect any interests whatsoever of the complaining state.

Thus, we see that both in international law and municipal law human rights occupy a preeminent position; rules inconsistent with basic rights being void in international law and laws inconsistent with basic rights being void in most legal systems. This in effect means that in national as well as international legal system human rights are considered inviolable. This indeed is as it should be. The concept of human rights, having an intimate connection with the core idea of autonomy of individuals, would not have much of a meaning if the rights could be sacrificed for considerations of an aggregative character.

### **3 Normative Criteria of Efficiency and Human Rights**

Globalization and the associated processes of liberalization and privatization find their ultimate justification in the normative criteria of efficiency. Notions of efficiency relate to social states, alternatives or outcomes. The social outcomes may come about as a consequence of individual actions in the context of some specific institutional setting or rules of the game. In social sciences, particularly economics, individuals are generally assumed to be rational. And, being rational generally includes having well-defined preferences. The indi-

viduals, however, are constrained to act in accordance with the rules of the game defined by the institutional setting. Market provides an example of an institutional setting in which individuals are constrained in their actions by private property rights. In economics several different, though somewhat related, notions of efficiency are used.<sup>12</sup> The most important notion of efficiency is that of Pareto-optimality, also called Pareto-efficiency, which is based on the Pareto-criterion. A social state  $x$  is defined to be Pareto-superior to another social state  $y$  if and only if it is the case that every individual in the society or the collective considers  $x$  to be at least as good as  $y$  and at least one individual considers  $x$  to be better than  $y$ . According to the Pareto-criterion, alternative  $x$  is to be regarded socially better than alternative  $y$  if  $x$  is Pareto-superior to  $y$ . A social state is defined to be Pareto-optimal or Pareto-efficient if and only if there is no state which is Pareto-superior to it. In other words, a state of affairs is Pareto-efficient if and only if it is not possible to make some individual better-off without making anyone worse-off.

If alternative  $x$  is Pareto-superior to alternative  $y$  then, if the society moves from  $y$  to  $x$ , improvement would be unambiguous. As moving to a Pareto-superior position does not involve deterioration in the well-being of any individual, it follows that moving to a Pareto-superior position would not involve deterioration in the situation of any individual with respect to enjoyment of basic rights unless the individual herself or himself is willing to forego partly or wholly the enjoyment of basic rights in exchange for something else. From this it follows that, if individuals are assumed to value basic rights so much that they themselves would never be willing to forego them in exchange

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<sup>12</sup>On notions of economic efficiency see Arrow (1963), Jain (2003), Kaldor (1939), Scitovsky (1941) and Sen (1970), among others.

for other things, moving to a Pareto-superior position would not involve deterioration in the position of individuals with respect to basic rights. In particular, if the initial position from which a movement is being contemplated is such that everyone's basic rights are being respected fully, then they would continue to be fully respected even after a move has been made to a Pareto-superior position. In this context, the assumption that individuals value basic rights so much that they themselves would never be willing to forego them in exchange for other things is crucial. In the absence of this assumption one cannot conclude that moving to a Pareto-superior position would not involve any deterioration with respect to basic rights. Pareto-criterion is based on individuals' subjective judgments; and the notion of human rights is based on fulfilment of certain objective criteria. It is this divergence because of which in general there is no entailment of non-deterioration in the status of individuals with respect to basic rights from movement to a Pareto-superior position. Thus, we see that, although Pareto-criterion is in harmony with the ideas of equality and autonomy of individuals, it fails to be consistent, excepting under stringent conditions, with the inalienability aspect of human rights.

From the definition of Pareto-efficiency it is immediate that Pareto-inefficient alternatives are those corresponding to which Pareto-superior alternatives exist. If we agree to infer from the statement that 'x is Pareto-superior to y', the statement that 'x is socially better than y', then, if an alternative is Pareto-inefficient it implies that among the feasible alternatives there is an alternative which is socially better than the Pareto-inefficient alternative in question. However, it would be erroneous to think that every Pareto-efficient alternative is better than every Pareto-inefficient alternative. An alternative

can be Pareto-efficient and at the same time socially highly undesirable. It is clear that if one subscribes to the Pareto-criterion, one can recommend moving to a Pareto-superior alternative; but one cannot in general make a recommendation in favour of any arbitrary Pareto-efficient alternative.

Thus, recommending moving from a Pareto-inefficient status-quo to a Pareto-efficient situation, regardless of whether it is Pareto-superior or not, and regardless of any other considerations involving other values, involves a logical jump completely unjustified although frequently made. If one invariably recommends moving from a Pareto-inefficient state to a Pareto-efficient state, regardless of whether it is Pareto-superior or not, and regardless of any other considerations involving other values, then in effect one is making a value-judgment which would regard all Pareto-efficient states to be superior to all Pareto-inefficient states. This in turn is tantamount to saying that the normative criterion of efficiency has precedence over all other values. Such an approach to social change, according preeminence to a single criterion universally, is bound to conflict with observance of basic rights in an essential way, indeed is bound to conflict in an essential way with any other societal value as well.

A very important implication follows from the point that one cannot in general make a recommendation in favour of moving to any arbitrary Pareto-efficient alternative which is that: Even if institution A invariably gives rise to Pareto-efficient outcomes and institution B by and large, or even invariably, yields Pareto-inefficient outcomes, simply on this basis one cannot infer that institution B is inferior to institution A. An institution which invariably gives rise to Pareto-efficient outcomes can be termed a Pareto-efficient institution; or simply an efficient institution. An institution which does not invariably

gives rise to Pareto-efficient outcomes would be called a Pareto-inefficient institution or simply an inefficient institution. A large part of the contemporary economics is devoted to analyzing Pareto-efficiency or otherwise of institutions. The preoccupation with efficiency analysis of institutions seems to be based on the erroneous belief that acceptance of Pareto-criterion implies that Pareto-efficient institutions are better than those institutions which are not Pareto-efficient. Thinking of efficient institutions as better than inefficient ones requires the same logical jump which was discussed above. From the Pareto-criterion alone no such conclusion can be derived. What is needed for such a conclusion is something much stronger namely the value-judgment asserting the equally good character of all Pareto-efficient alternatives and their superiority over all Pareto-inefficient alternatives. In other words, for the conclusion that any efficient institution is better than any inefficient one, exclusion of all values other than efficiency is required.

It is important to note that, while the Pareto-criterion, being based on unanimity, is in harmony with the fundamental ideas of autonomy and equality of persons underlying the conception of human rights, the same cannot be said of Pareto-efficiency in so far as autonomy aspect is concerned. The idea of Pareto-efficiency is not compatible with the notion of autonomy, as it is understood in the context of basic rights. Another important point relates to the fact that, unlike the notion of Pareto-superiority, the Pareto-efficiency idea is independent of the status-quo. In the context of making distinctions between acts and omissions, the distinguished nature of the status-quo should be evident.

In connection with the idea of Pareto-efficiency it is important to remember that the idea relates to particular sets of individuals and social states.

From the definition of Pareto-efficiency, it is clear that the answer to the question as to which alternatives are Pareto-efficient crucially depends on what the set of feasible alternatives is and which individuals constitute the society. It would be a serious error if one were to conclude the Pareto-inefficiency of an alternative by comparing it with an infeasible alternative. This point is particularly important in contexts where sociopolitical constraints make the set of feasible alternatives much smaller than what it would be in the absence of such constraints. The inefficiency of existing state of affairs inferred under the assumption that sociopolitical constraints do not exist when in fact they do, needless to say, ought not to be of any significance. The usefulness of discourse however is often marred by an over-emphasis on the Pareto-inferiority of existing affairs in relation to some infeasible state of affairs. Pareto-inefficiency of an alternative when one is considering the preferences of a particular set of individuals, does not imply that it would remain Pareto-inefficient when one takes into account the preferences of a more inclusive set of individuals. In the context of environmental issues, the importance of this point cannot be overemphasized. If the set of individuals is enlarged to include future generations, many pro-environment but supposedly inefficient alternatives would in fact turn out to be efficient.

The Pareto-criterion is almost universally regarded as non-controversial. The non-controversial nature of the Pareto-criterion is explicated by asking the rhetorical question: Is there any sense in which one can say that a change is not better which makes some people better-off and none worse-off? Pareto-criterion, however, is non-committal if one has to make a choice from mutually exclusive Pareto-optimal social states. Such indeed is the case in most contexts, because of the basis of the Pareto-criterion lying in unanimity,

a rather stringent requirement. In many contexts, therefore, the notion of efficiency that is used in economics is that of wealth-maximization. A change is considered better if it is wealth-increasing, i.e., if the gainers can compensate the losers and still be better-off. Actual compensation, however, need not be paid. It should be noted that if actual compensation is not paid then there is no longer any unanimous basis to the change. The underlying, though often implicit, premise in using this notion of efficiency is that the questions of total wealth and its distribution can somehow be separated. Apart from the fact that there is no theoretical justification for this premise, the problems of incentives which are invariably raised whenever the issue of redistribution is brought in not only undermine the premise on which the notion is based but further mar the consensual basis for the criterion.

Wealth-maximization is of course an aggregative criterion<sup>13</sup>; and consequently can easily conflict with basic rights. Whether in a particular social context it would conflict with basic rights or not depends on the scope of the criterion. If the criterion is applied to only that subset of social alternatives which guarantee basic rights for all there would not be any conflict between wealth-maximization and observance of basic rights. On the other hand, if it is applied over a set of social alternatives not all of which guarantee basic rights then it is immediate that the wealth-maximization criterion can easily conflict with the requirement of universal observance of basic rights. Application of the criterion of wealth-maximization over the entire set of social alternatives is tantamount to relying on the criterion to the exclusion of all

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<sup>13</sup>The evaluation of social states on the basis of wealth-maximization involves serious logical difficulties which we do not discuss here. See Kaldor (1939), Scitovsky (1941), Arrow (1963) and Sen (1970), among others.

other normative considerations for evaluations of social states with differing total wealth. Other normative criteria can play a role, if at all, only with respect to social states with equal total wealth.<sup>14</sup>

Consider an activity which individual A can undertake and which has a negative externality for individual B. If undertaking of the activity on the part of individual A would result in a gain of 100 to him and a loss of 10 to B, then according to the criterion of wealth-maximization, the undertaking of the activity by individual A is socially better than his not undertaking the activity. The consequence of individual B suffering a loss of 10 without any fault of his might be regarded by some as unjust and therefore unacceptable. On the other hand it might be argued by some others that while it is true that the undertaking of the activity in question by A involves harm for B without any fault of his, the fact remains that for the society as a whole the undertaking of the activity is enriching. The situation under consideration in-

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<sup>14</sup>A particularly explicit statement advocating the use of the criterion of wealth-maximization over the entire set of social states is to be found in Coase's enormously influential paper 'The Problem of Social Cost' (1960). The paper concludes with the following passage:

*'It would clearly be desirable if the only actions performed were those in which what was gained was worth more than what was lost. But in choosing between social arrangements within the context of which individual decisions are made, we have to bear in mind that a change in the existing system which will lead to an improvement in some decisions may well lead to a worsening of others. Furthermore we have to take into account the costs involved in operating the various social arrangements (whether it be the working of a market or of a government department), as well as the costs involved in moving to a new system. In devising and choosing between social arrangements we should have regard for the total effect. This, above all, is the change in approach which I am advocating.'*

volves a trade-off between fairness considerations on the one hand and wealth considerations on the other. In social contexts such trade-offs are inevitable.

In the context of trade-offs between values, it is important to remember that by their very nature basic rights do not permit any trade-offs. Willingness to make a trade-off between wealth and fairness in some situations does not imply willingness to make a trade-off between wealth and basic rights. This follows from the fact that while every violation of basic rights implies a violation of norms of justice; not every violation of justice is a violation of basic rights. One may countenance the loss of 10 to B, for the sake of much bigger gain of 100 for A, if this loss of 10 is merely a material loss without any other serious consequences for B. If B is living a precarious existence, bordering on starvation, where a loss of 10 can make a difference of life or death, then obviously the situation is radically different and not at all appropriate for making any trade-off. One cannot make a recommendation for A undertaking the activity in a such a scenario.

This example makes it clear that the unmitigated pursuit of economic efficiency in a context like the contemporary context where large numbers of people live a marginal existence and where economic activities have serious externalities is bound to result in violations of human rights, particularly the right to life. At this juncture, one might interpose to assert that there is no conflict between efficiency and basic rights per se and that the reason why in the above example a conflict is emerging is due to the fact that the compensation for the loss to B due to externality is not being considered. If B is compensated for the loss of 10 the apparent conflict between economic efficiency and basic rights vanishes. Indeed, one might argue that if those affected by negative externalities are fully compensated then a conflict can

never arise between economic efficiency and basic rights. As we show in what follows, in discussing the liability question in relation to economic efficiency, this would be a somewhat hasty conclusion. If the conclusions arrived at by economists in relation to the liability question<sup>15</sup> are correct, then the conflict between economic efficiency and basic rights would seem to be not amenable to any satisfactory resolution.

The question of liability arises in the context of actions involving harmful externalities. If an activity undertaken by individual A harms another individual B, whether individual A would compensate individual B, and if yes then to what extent, depends on what the relevant laws are. Assuming individuals to be rational, as is generally assumed, the compensation to the victims of externalities would not exceed injurers' legal liability. In principle, the relevant laws could be of any kind; they might make the injurers fully liable or partly liable or even not at all liable for the harms inflicted on the victims as a consequence of their actions. The legal rule requiring full compensation to the victims by the injurers is called the rule of strict liability. If no compensation to the victims is required by law then the rule of no liability is said to prevail.

The liability of the injurers could also be made to depend on considerations other than that of causation. One important factor which is quite often taken into consideration is the conduct of the parties prior to the occurrence of harm. One of the most important legal rules for determining liability is that of the rule of negligence. Under the rule of negligence, the injurer is

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<sup>15</sup>On economic analysis of law in general, and tort law in particular, see Barnes and Stout (1992), Burrows and Veljanovski (1981), Calabresi (1980, 1991), Cooter and Ulen (1999), Landes and Posner (1987), Levmore (1994), Miceli (1997), Polinsky (1989), Posner (1975, 1992) and Shavell (1987), among others.

made liable for victim's loss if and only if the level of care that the injurer took in conducting the activity, which gave rise to the harm to the victim, was deficient. The injurer is not liable at all in case the level of care that he took in conducting the activity involving externality was at least equal to a legally specified norm.

Like any rule or set of rules, the legal rules can also be examined as to whether they invariably give rise to wealth-maximizing outcomes or not. That is to say, legal rules can be analyzed to find out whether they have the property of inducing individuals to act in a socially efficient manner. The rules of strict liability and negligence have been analyzed by economists from this perspective. These analyses show that while the rule of negligence is efficient; the rule of strict liability is not.

The inefficiency of the rule of strict liability is easy to see. Consider the example referred to earlier of an activity undertaken by individual A which gives him a gain of 100 with negative externality of 10 for individual B. Suppose furthermore that the harm to individual B can be entirely eliminated if care is taken either by the injurer or by the victim. Also suppose that taking care costs the victim 1 and the injurer 2. From the point of view of efficiency or wealth-maximization, it is clear that it is better that the care is taken by the victim rather than the injurer. Under the rule of strict liability the injurer is legally bound to fully compensate the victim; therefore it would be irrational on the part of the victim to spend anything on taking care. Knowing that a rational victim would not take any care under the regime of strict liability, the injurer in this example would take care to eliminate harm as it costs only 2 which is less than 10 that he would have to pay in case care is not taken and consequently harm to the victim of 10 takes place. It is of

course possible to construct examples where the rule of strict liability would give rise to socially efficient outcomes. What this example shows is that it is possible for outcomes under the regime of strict liability to be inefficient. If choice of the rule is going to be from efficient rules only then the rule of strict liability goes out of reckoning.

If the legal regime is that of the rule of negligence, then the outcome in the context of the example considered above would be socially efficient if the legally specified level of care for the injurer is set at zero. A legally specified care level of zero for the injurer is tantamount to having the rule of no liability and therefore it follows that a rational injurer would undertake the activity without taking any care to eliminate the harm. Knowing this a rational victim would take care which costs only 1 rather than suffer harm of 10 for which he would not receive any compensation. It can be shown that the outcomes under the rule of negligence are always socially efficient. In the example that we have been considering, taking care by either party completely eliminates harm to the victim. One can consider more complicated situations in which taking care while effective in reducing harm does not eliminate harm altogether. It may also be the case that for attaining a socially efficient outcome taking care by both the injurer and the victim might be required. The rule of negligence has the property of always inducing a socially efficient outcome regardless of whether taking care by one individual or both the individuals is required for social efficiency. As long as the legally specified due care level for the injurer is set at the socially efficient level, the rule of negligence would give rise to a socially efficient outcome.

On the relationship between liability rules and economic efficiency the following general result holds: A liability rule invariably gives rise to socially

efficient outcomes if and only if its structure is such that: (i) whenever the injurer is nonnegligent and the victim is negligent, the entire loss in case of accident is borne by the victim, and (ii) whenever the victim is nonnegligent and the injurer is negligent, the entire loss in case of an accident is borne by the injurer. An individual is called nonnegligent if and only if the level of care taken by him or her is greater than or equal to the legally specified level; otherwise he or she is called negligent. It is assumed that the legally specified due care levels are appropriate for social efficiency.<sup>16</sup>

From the general result it is clear that economic efficiency at the very least requires from the victims socially efficient levels of care. If the victims in question are living a precarious existence, then the efficiency requirements would conflict with basic rights in an essential way.

When the negative externalities are pervasive, persistent and diffused over a large number of people, there is another aspect of the social and economic order which deserves special attention. If the social and economic order prohibits inflicting harm without compensation, the victims would not have to undertake measures, including legal ones, for obtaining the compensation due to them. On the other hand, if the social and economic order is such that it is the victims who would have to sue or take other measures for recovering compensation for the harm inflicted on them, as indeed is the case with the contemporary order, then the victims would be forced to expend resources in the undertaking of the required recovery measures. This means that even if the liability rule is that of strict liability, the actual compensation would be less than the harm, unless the recovery costs including legal costs are added to the judgment and there are no possibilities of errors in judgments, i.e.,

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<sup>16</sup>See Jain and Singh (2002).

the probability of obtaining a correct court order awarding full compensation and all recovery costs is one.

Thus, it is clear that it is inherent in the nature of contemporary international order and national legal and social orders that violation of basic rights would take place for those who are living a subsistence existence and are exposed to the negative externalities of immensely powerful economic processes, unless the international community or the state takes countervailing measures. In view of the diffused and almost all-encompassing nature of the negative externalities of the contemporary economic processes, these countervailing measures for the protection of basic rights, at the very least, must consist of all that a welfare state would provide for the general welfare of the people.

## 4 Market Ideology and Basic Rights

The most important theoretical propositions linking competitive markets with efficiency are the fundamental theorems of welfare economics. Given the institutional setting of well-defined private property rights, under certain assumptions, including that of absence of externalities, it can be shown that interaction of self-interested and price-taking consumers and producers results in an equilibrium which is Pareto-efficient. The remarkable aspect of this result is twofold: Not only does the self-interested and decentralized decision-making on the part of numerous individuals not result in chaos, it actually gives rise to an unintended consequence of a positive character in that the outcome is efficient in the sense of Pareto. The elegance and rigour of the theorems establishing existence of competitive equilibrium and link-

ing Pareto-optimality with competitive equilibrium have played a significant role in establishing the pre-eminence of market ideology in the contemporary world, notwithstanding the extremely restrictive character of the assumptions on which these theorems are based.

Under ideal conditions, i.e., under the conditions which would guarantee that the allocation of resources achieved through the market mechanism would be efficient, there may or may not be a case for intervention in the markets on some ground or the other, but there would be no case for intervention in markets on efficiency considerations. If these ideal conditions do not prevail then in addition to other grounds for intervention, if any, there would be a case for intervention on efficiency considerations as well. The very existence of a society implies that there would be externalities in every domain including the economic domain. Externalities rupture the link between markets and efficiency. One way to restore this link would be through the intervention by the state in the form of taxing the activities with negative externalities and subsidizing the ones with positive externalities.

In an important contribution Coase (1960) showed that state intervention was not necessary even when externalities were present for restoring the link between markets and efficiency. The Coase theorem essentially says that in a setting of zero transaction costs, an efficient use of resources results from private bargaining, regardless of the legal assignment of property rights. Of course, when transaction costs are high enough to prevent bargaining, the efficient use of resources will depend on how property rights are assigned. The fundamental importance of the Coase theorem for the market ideology arises from the fact that according to this formulation state intervention is neither necessary nor desirable for correcting problems associated with ex-

ternalities, whereas prior to its formulation state intervention was considered both necessary and desirable in situations of market failures arising from the presence of externalities.<sup>17</sup> As the efficient use of resources will depend on how property rights are assigned when transaction costs are high enough to prevent bargaining, the Coase theorem has normative implication for legal rules and institutions as well.

We can isolate three distinct, though related, elements of the market ideology. First, the market ideology the way it has evolved does not favour state intervention in the functioning of markets regardless of whether externalities are present or not. This, as has already been discussed in detail, is potentially violative of basic rights.

Second, in the process of studying the institution of market a particular methodology has developed which consists of looking at institutions as ensembles of rules; assuming that individuals are rational, self-interested and constrained to act within the framework defined by the institutional setting; determining what outcomes would result as a consequence of actions undertaken by rational individuals constrained by the rules of the game; and analyzing the character of the outcomes thus generated, in particular asking whether these outcomes satisfy the normative criterion of economic efficiency.

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<sup>17</sup>Although, as we have seen, the ramifications of externalities bear upon issues relating to basic rights and so are not confined only to efficiency-related issues; in economics the term 'market failure' is used exclusively to refer to problems associated with economic efficiency. The necessity and desirability of state intervention which are being talked about here therefore refer only to the efficiency aspect. In fact, under the Pigovian solution to the problem of negative externality the desirable state intervention consisted of the party causing the negative externality being taxed without the victim of the negative externality being necessarily compensated.

It is clear that in principle there is no reason why non-market institutions cannot be studied by using this methodology. Economists for last few decades have been looking at non-market institutions within this broad methodological framework. Two areas where this methodology has been extensively applied to study institutions are law and political science. It is evident that regardless of the values for attainment of which these non-market institutions might have been designed, application of market methodology to study them can only result in substituting efficiency in place of the original values, or confusing the values for which the institutions were designed in the first place with efficiency. This inevitably would result in derecognition of whole classes of violations of basic rights.

Third, like the link between free markets and efficiency, there is also a link between private ownership of property and efficiency. In general, other forms like common ownership are not conducive for attaining efficiency. In the classical conception of human rights, private property was important, not so much for its own sake, but as a necessary enabling condition for realization of rights like the right to life and liberty. Assuming this link between private property and liberty to be a valid one, it is important to see how the efficiency considerations are impinging on this linkage.

It has already been discussed that rights like the right to liberty need constraining if one person's right to liberty is not to result in deprivation of the right to someone else. Such constraining is not only explicitly recognized in human rights discourses but also finds expression in the formulation of laws. It is in the context of the right to property that the treatment of externalities is conspicuous by its absence. As noted above, for the classical conception of human rights, the importance of the right to property arises

from the fact that its existence is considered essential for the realization of the right to life and liberty. Consequently, whether the right to property in itself is considered a basic right or not is immaterial from the point of view of its inclusion in the ensemble of rights. The right to property, like any other right, if unconstrained can result in one person's enjoyment of the right conflicting with another person's exercise of the right. Although in economics the awareness of externalities in the context of economic interactions and their systematic treatment has been there for a long time, surprisingly in the context of human rights the externalities in relation to right to private property have not received any explicit and systematic treatment. This omission is all the more surprising in view of the fact that the right to property after all, at least in part, receives its justification because of its supposed necessity for a meaningful exercise of the right to liberty, in the context of which there is explicit recognition of externalities. It is clear that it is essential that there be provision for constraining the right to property in case it conflicts with basic rights of others. While, right to private property upto a certain level might facilitate or be essential for realization of basic rights, there is very little doubt that if unconstrained it would conflict with the basic rights of others.

Conversion of common property and state property into private property in general results in large numbers of individuals owning so little of private property as to cast serious doubts regarding their ability to continue to hold on to whatever rights they have. Thus efficiency considerations relating to private property seem to be in conflict with basic rights from both ends of the economic spectrum.

To sum up: The market ideology stands in sharp conflict with human

rights both because of efficiency considerations corrupting the character of institutions and by destroying the enabling conditions for fulfilment of human rights. The most important aspect of the mainstream thought lies in the fact that a non-value concept, namely market, occupies a central place both in positive and normative analysis. Apart from the usual justification of market in terms of efficiency criteria, many pro-market philosophers tend to provide justification of market in terms of fundamental values like liberty. However, in contexts that place the market and those values in antagonistic relationships, it is not the market which is made to yield to the values. Rather, the very values which are invoked to justify the market in the first place must yield to it. It is inevitable that when a non-value concept is given centrality both in positive and normative analysis, even the most basic values would cease to be of much relevance in the shaping and designing of institutions, with regrettable consequences for the underprivileged. It is this curious reversal of roles between instruments and values that is characteristic of market ideology.

## **5 Concluding Remarks**

Unlike the case of markets under ideal conditions, interaction of self-interested rational individuals under the institution of the state in general does not produce efficient outcomes. Consequently, giving a preeminent position to the normative criterion of efficiency would tend to favour only a minimal role for the state. This as has been argued at length results in human rights violations in contexts like the contemporary context; and in eventual derecognition of the rights which are continually violated.

There is another profound implication of a minimalist role for the state in

conjunction with widespread violations of human rights. This has to do with how the institutions of democratic governance are affected. If most of laws, rules and regulations of governance are predetermined on the basis of market ideology and the state renounces most of its powers, the elected representatives of the people, regardless of their wishes and interests and regardless of the interests of the electorate they represent would not be able to deliver. The inability of the elected representatives to be effective in any meaningful sense in the long run can only undermine the institutions of democratic governance. It is generally contended that market and democracy are not only compatible with each other; but in fact reinforce each other. If what has been argued in this paper is correct, this view would seem to be mistaken.

The advocacy of a minimalist state goes hand in hand with emphasis on strengthening the civil society through voluntary non-governmental organizations. At a theoretical level this is quite puzzling as there is no established proposition asserting that if rational and self-interested individuals act under the institutional framework of voluntary non-governmental organizations their interactions would produce socially efficient and desirable results. The expression 'desirable' here of course refers to goals, other than that of efficiency, like human rights.

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