



**THE TAMIL NADU  
Dr. AMBEDKAR LAW UNIVERSITY**

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# **HUMAN RIGHTS LAW**

**FIRST YEAR – SECOND SEMESTER**

## **STUDY MATERIAL**

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## **PREFACE**

This material is intended to assist the students of human rights law to gain basic understanding about the subject. It is developed as per the unitized syllabus of the Tamil Nadu Dr. Ambedkar Law University. The topics are reshaped to assist the students for consistency and coherence. The material has the fortune of incorporating amendments to SC and ST Act which are just notified during January 2016. Unit 3 of the material contains cases and opinion of the courts in applying international standards in India. A chart is included to survey India's acceptance to international instruments in relation to UN core conventions.

It is a privilege to draft this material. I thank Prof (Dr) N. Narayana Perumal, Director, School of Excellence in Law for assigning this work to me. This material is a brain child of the Hon'ble Vice-Chancellor Prof (Dr) P. Vanangamudi. I thank him for his encouragement and inspiration in bringing this material to the present shape. I thank my teacher and the Registrar of TNDALU, Prof (Dr) M. S. Soundrapandian for his encouragement. I thank all my students who participated in the classroom discussions and assignment preparation which shaped this material, and specifically Geraj, Nivedha, Sahana, Shanmugam and Shreya for the present work. I am equally indebted to my colleagues and family for their encouragement and assistance.

**P. Sakthivel**

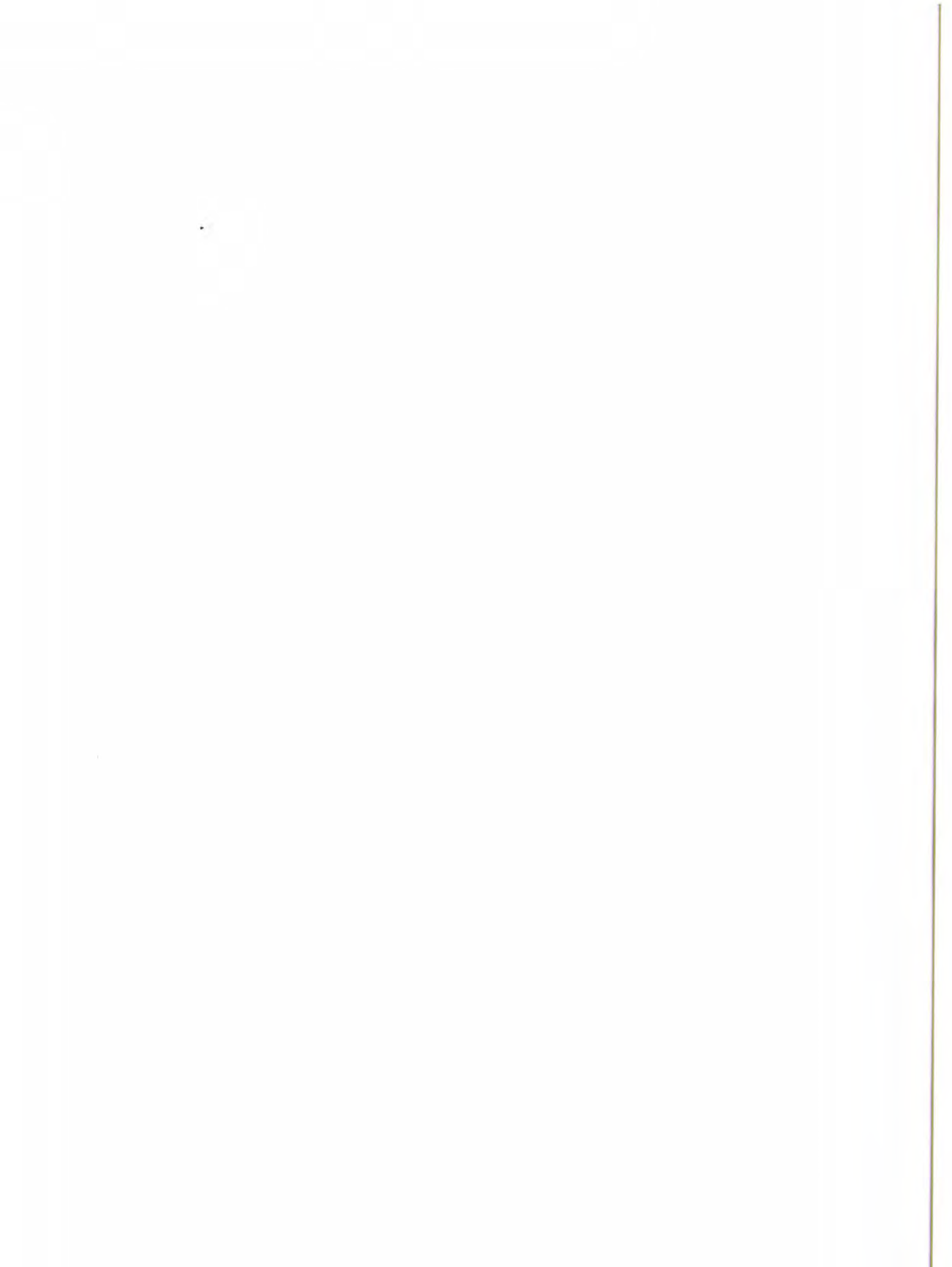
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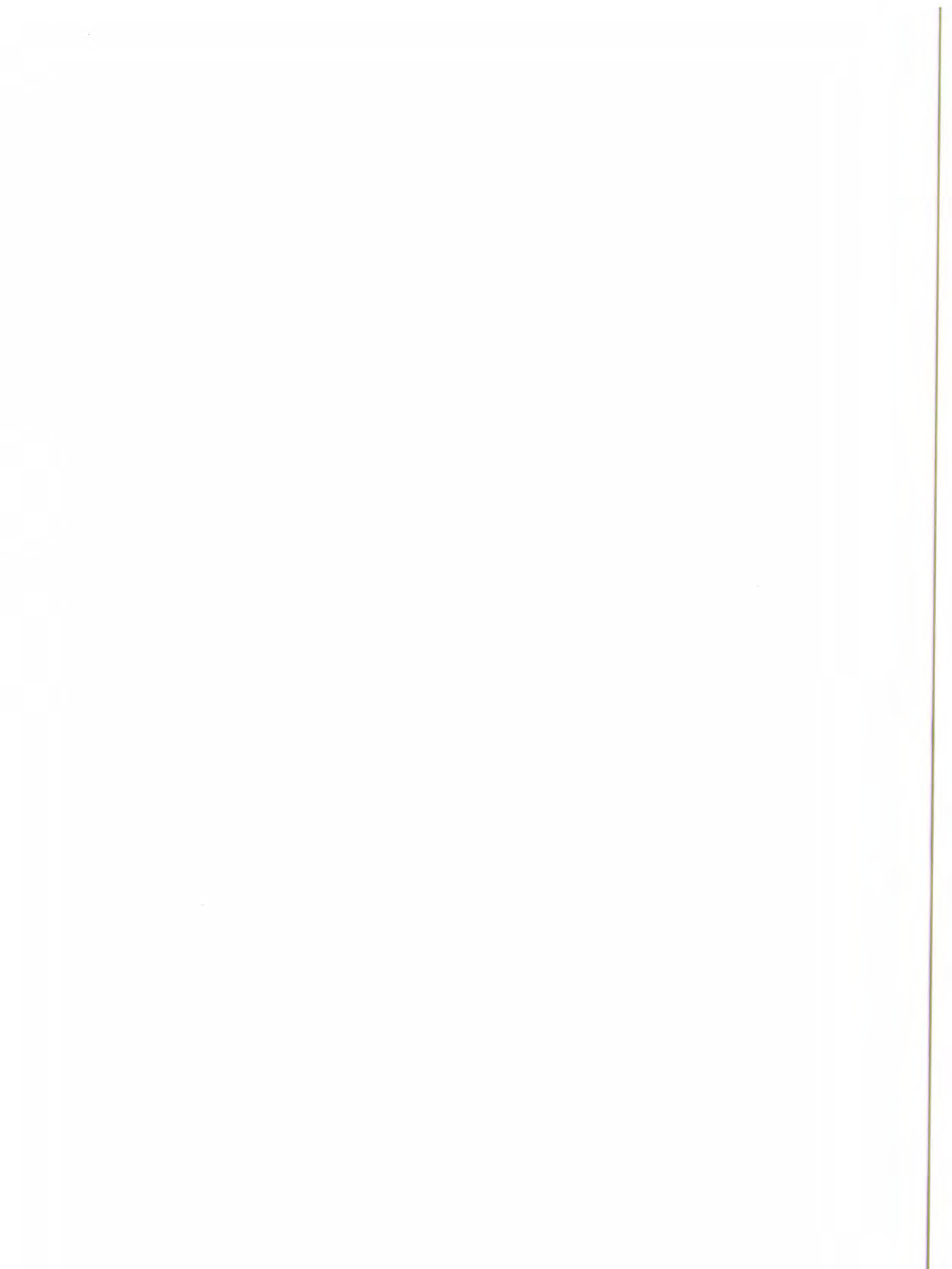
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# UNIT I

## Origin and Development of Human Rights

*Origin and Development General – Concept of Human Rights – The Middle Ages – The Magna Carta – Bill of rights – American Revolution – French Revolution – Classification of Human Rights – Interdependence of three categories of Human rights.*

### 1. Origin of Human Rights

#### 1.1. Historical Evidences

History informs us that there were many instances of recognition of basic human rights in many national jurisdictions and international transactions. Also, they have inspired and shaped the modern human rights law. Some important instances are discussed below.

#### Cyrus Cylinder

Known today as the Cyrus Cylinder, this ancient record has now been recognized as the world's first charter of human rights. In 539 B.C., the armies of Cyrus the Great, the first king of ancient Persia, conquered the city of Babylon. He freed the slaves, declared that all people had the right to choose their own religion, and established racial equality. These and other decrees were recorded on a baked-clay cylinder in the Akkadian language with cuneiform script.

#### Code of Hammurabi 1780 BC

Code of Hammurabi may be considered as barbarous. It is one of the oldest deciphered legal writings of significant length in the world. The code deals with matters of contracts, conditions for valid transactions and issues relating to household and family relationships. Yet, one may consider the importance given to persons and property as an effort to respect the human interest.

#### Edicts of Asoka - 269 BCE to 232 BCE

More than any other instrument in the known history, Edicts of Asoka assumes importance in the context of making it wider law within the realm of his Kingdom. These edicts are present in the modern day India, Nepal, Bangladesh, Pakistan and Afghanistan which were ruled by Asoka to reach the message across his kingdom. These edicts describe about the treatment of prisoners, right behaviour, kindness to animals and other living things. In some instances, these edicts directly reflect modern human rights thinking, "*It is my desire that there should be uniformity in law and uniformity in sentencing.*"

#### Thirukural, BC 50

*Thirukural* assumes importance amongst other human rights historical documents in the context of its establishment of uniformity amongst all Tamil nations of those times. It lays down secular philosophy for the respect of human rights during the times of religion based legal systems across the world. *Thirukkural* deals with many facets of governance, personal rights and the right to dignity of individuals and communities. In one such couplet, it states, "*Let the king, who desires that his prosperity may long remain, commence his preliminary enquires with strictness, and then punish with mildness*"

(தக்காங்கு நாடித் தலைச்செல்லா வண்ணத்தால்; ஒத்தாங்கு ஒறுப்பது வேந்து 561).

## 1.1. Philosophical Traditions

Greek philosophy has developed the idea of natural law including equal respect for all citizens, equality before the law, equality in political power and suffrage, and equality of civil rights.

John Locke in his *Second Treatise of Government* (1690) stated that every individual person in the state of nature possesses certain natural rights prior to the existence of any organized government. People are born in a state of perfect equality and enjoy all rights equally. Societies and governments are formed to preserve these rights, not to surrender them. Jean-Jacque Rousseau said that Man is born free with intrinsic worth.

Thomas Paine introduced the expression “human rights” in his best seller *The Rights of Man* (1791). He ascribed inspiration to the religious traditions that all observed the unity of humankind and the equality of all individuals. Olympe de Gouge (nom de plume of Marie Gouze) has said in the Declaration of the Rights of Woman and Citizen (France 1791): “woman is born free and remains equal to man in her rights”. In 1793, de Gouge was beheaded.

## 1.2. Religion

Hinduism (texts: *Vedas, Agamas, Upanishads*) address the necessity for moral behaviour, the importance of duty (*dharma*) and good conduct toward others suffering in need. Practice clarity and compassion for the hungry, the sick, the homeless, and the unfortunate. All life is sacred, to be loved and respected. “Non-injury (*ahimsa*) is not causing pain to any living being at any time through the actions of one’s mind, speech or body.” (*Veda*)

Judaism: sacredness of the individual endowed with worth and equal value. Isaiah 58:6-7: “undo the tongs of the yoke, let the oppressed go free. . . share your bread with the hungry, and bring the homeless poor into your house.”

Buddhism: Respect for all life and duties of compassion and charity; urged renunciation of differences of caste and rank in favour of universal brotherhood and equality.

Confucianism: (texts: *Analects, Doctrine of the Mean, and Great Learning*) Harmony and cooperation exist when duty and responsibility towards others leads to treating all human beings as having equal work and recognizing that “within the four seas, all men are brothers.”

Christianity: A message of equality: “there is neither Greek nor Jew, nor slave nor free, nor man nor woman, but we are all one in Christ.” Gal. :28. Respect for others: “Do unto others as you would have them do unto you.”

Islam: Charity or lifting the burdens of those less fortunate is one of the pillars of belief. The Quran speaks to justice, the sanctity of life, freedom, mercy, compassion and respect for all human beings. All races are equal and religious toleration should be guaranteed.

## 1.3. National Laws

### England

Magna carta: In 1215, after King John of England violated a number of customs by which England had been governed, his subjects (elite!) forced him to sign the Magna Carta, which enumerates what later came to be thought of as human rights. Among them was the right of the church to be free from governmental interference, the rights of all free citizens to own and inherit property and to be protected from excessive taxes. It established the right of widows who owned property to choose not to remarry, and established principles of due process and equality before the law. It also contained provisions forbidding bribery and official misconduct.

Petition of Right (1628) and Habeas Corpus Act (1679): Both of these instruments contained some early forms of recognition of human rights under the English legal system.

Spain, Kingdom of Leon (1188): Confirmation of the rights of the assembly including the rights of an accused to a trial and the inviolability of life, honour, home and property.

Hungary: The Golden Bull (Aranybulla, 1222): During the reign of King András, the Golden Bull recognized the “Hungarian Nation” and created the framework for an annual meeting of the Diet. The text, considered the first written Hungarian constitution, was issued at the insistence of the nobility to safeguard their rights. The last item of the Golden Bull assures the right of individuals to disobey royal acts not conforming to the law, in effect creating a constitutional monarchy.

### United States

American Revolution: On July 4, 1776, the United States Congress approved the Declaration of Independence. Its primary author, Thomas Jefferson, wrote the Declaration as a formal explanation of why Congress had voted on July 2 to declare independence from Great Britain. Declaration of Independence (1776): “We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable rights, that among these are life, liberty and the pursuit of happiness; That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; That whenever any form of government becomes destructive of those ends, it is the right of the people to alter or to abolish it, and to institute new government. Later, Bill of Rights to the U.S. Constitution approved by the States. (1791)

The Declaration stressed two themes: individual rights and the right of revolution. These ideas became widely held by Americans and spread internationally as well, influencing in particular the French Revolution.

### France

The French Revolution broke out in 1789 as a result of the rise of Enlightenment ideals inspired by few philosophers. A series of events similar to that of American Revolution resulted in the codification of moral rights into the laws of France.

The French National Assembly drafted the Declaration of the Rights of Man and the Citizen in 1789. The French Declaration was intended as part of a transition from absolute monarchical rule to a form of constitutional or representative government. The French Declaration also appealed to Enlightenment principles such as popular sovereignty, equal rights, and equal opportunity. The French Declaration also encompassed many of the insights of the philosopher Jean-Jacques Rousseau and his important book, *The Social Contract*, which argues that the law should be an expression of the “general will” that is intended to promote equality of rights and to forbid “only actions harmful to the society”.

The French Declaration was not itself considered to be law, but its principles nevertheless formed the basis of subsequent French constitutions, which emphasizes basic human rights principles such as the presumption of innocence, freedom of speech, freedom of the press, freedom of religion, and the right to property.

### Why traditions of tolerance and national laws were insufficient?

For each person favouring human rights throughout the world there were powerful opponents who sought to retain privilege, hierarchy, hereditary rule, property, continuity and caste. Human rights proponents were challenging and in turn challenged by vested interests: Thomas Paine was hung in effigy in English cities; Voltaire’s writings were banned. Conservative authors referred to the “monstrous fiction” of human equality. Jeremy Bentham rejected the idea of natural law, calling it “simple nonsense”. Therefore, human rights discourse is inevitably universalised.



## **2. International Dimensions**

### **2.1. Early developments**

On October 24, 1648, the Articles of the Treaties of Peace signed at Munster and Osnabruck, in Westphalia, ended the Thirty Years War between Protestant and Catholic areas of Europe. The treaty included Freedom of religion, movement and trade.

Congress of Vienna (1814-1815) acknowledged that religious intolerance could jeopardize international peace and security. Thus, the participating states pledged to maintain religious equality and assure equal protection and favour to every sect.

### **2.2. Abolition of Slavery and the Slave Trade**

As early as 1807, public opinion forced votes in the US Congress and British Parliament to end the participation of both countries in slave trading. The Treaty of Ghent signed by the US and Britain the same year declared that traffic in slaves “irreconcilable with the principles of humanity and justice”. By 1890 governments were prepared to take effective international action. They negotiated the 1890 General Act for the Repression of the African Slave Trade, which referred to the “crimes and devastations engendered” by trafficking in humans. Agreements on abolition of slavery and repression of the slave trade were concluded in 1919, 1926, and 1956

### **2.3. International humanitarian law**

In Europe in 1859, Henry Dunant witnessed the Battle of Solferino, where three hundred thousand troops battled for fifteen hours, leaving thousands of wounded among the dead. The Geneva International Conference met in 1863 and attracted 30 delegates from 14 countries, as well as four funding agencies. They left the meeting having created a Geneva-based private international organization, the International Committee of the Red Cross. In 1899 the Hague Peace Conference could conclude a broad Convention on the Laws and Customs of War on Land that explicitly spoke of the “rights” of the wounded to receive medical treatment, of prisoners of war to be given food and clothing and protection under the law, of individuals to be considered inviolable when surrendering.

### **2.4. Labour Conventions**

International Labour Organisation is one of the specialised agencies to focus on the individual rights during the beginning of the 20<sup>th</sup> Century. Around 1933, the ILO had adopted forty conventions, covering the hours of work, maternity leave, unemployment, and conditions of work at night for women and children, equality of pay, minimum age at sea, forced labour, and freedom of association.

Also, a 1933 Convention on the Nationality of Women (1933) was the first to provide binding guarantees. It was followed by the Inter-American Convention on the Granting of Political Rights to Women (1948) and the Inter-American Convention on the Granting of Civil Rights to Women (1948), both preceding UN treaty action by more than 30 years

### **2.5. International Dispute Settlement Forums**

The Permanent Court of International Justice, in one of the first cases, i.e., *Rights of Minorities in Upper Silesia*, concerned the application of racial, linguistic, or religious criteria for admission to school. The court held any such criteria for admission to be unacceptable.

In *Minority Schools in Albania, a 1935 Advisory Opinion*, the court insisted on the necessity of maintaining equality in fact as well as in law in educational institutions. In this respect, the closing of minority schools was deemed incompatible with equal protection because it would destroy the means of preserving cultural uniqueness.

### **3. UN Evolves Human Rights**

In August 1941 the Atlantic Charter proclaimed Freedoms. The Charter also proclaimed the right of self-determination. These principles were reaffirmed in the Declaration of the 26 United Nations on 1 January 1942.

Conferences of the American States became increasingly vocal about human rights prior to and during World War II, expressing their concern through resolutions: 1936: Humanization of War; 1938: Defense of Human Rights and Persecution for Racial or Religious Motives; 1945: International Protection of the Essential Rights of Man. UN Charter contains more than a dozen references to human rights, from the Preamble to the end. The very purposes of the United Nations include cooperation in promoting respect for human rights and fundamental freedoms for all. Many of the provisions were included due to pressure from non-governmental organizations and smaller states, especially those of Latin America. The original Dumbarton Oaks proposals for the United Nations prepared by the great powers contained only one general provision about human rights.

#### **3.1. Commission on Human Rights and Standard Setting**

Truman said, "Unless we can attain those objectives for all men and women everywhere – without regard to race, language or religion – we cannot have permanent peace and security."

The Commission on Human rights was established in the year 1946. The commission undertook extensive efforts to draft Universal Declaration of Human Rights (UDHR), the Declaration called itself "a common standard of achievement for all peoples and all nations." Eleanor Roosevelt said it might well become "the Magna Carta of all mankind." The same resolution that approved the Universal Declaration also mandated the work on a binding treaty on human rights. While the initial work of the Commission devoted attention to civil and political rights, the General Assembly in 1950 decided in favour of including economic, social and cultural rights as well. In 1952, based on a proposal of India and Lebanon, the General Assembly decided that there should be two separate Covenants.

The Commission on Human Rights completed its work on the draft Covenants in 1954 and submitted them to ECOSOC. From there the Covenants went to the Third Committee of the UNGA, where they were debated for more than ten years. It was only in 1966 that the General Assembly voted and approved the Covenants, one year after the adoption of the International Convention for the Elimination of All Forms of Racial Discrimination (in force 1969). The efforts of the commission culminated in the international bill of rights and other UN conventions for the protection and promotion of human rights. The commission was substituted by United Nations Human Rights Council (UNHRC) in 2006.

#### **3.2. Regional development**

##### **Europe**

Article 3 of the European Council's Statute provides that every member state must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms. Membership in the Council is de facto conditioned upon adherence to the European Convention on Human Rights and its Protocols. The most significant texts are the 1950 European Convention on Human Rights and Fundamental Freedoms (ECHR) and its eleven protocols.

## Americas

The Inter-American system as it exists today began with the transformation of the Pan American Union into the Organization of American States (OAS). The OAS Charter proclaims the “fundamental rights of the individual” as one of the Organization’s basic principles. The American Convention of Human Rights, signed in 1969, conferred additional competence on the Commission to oversee compliance with the Convention. It created the Inter-American Court of Human Rights. The Court has jurisdiction over contentious cases submitted against states that accept its jurisdiction and the Court may issue advisory opinions.

### 3.3. Compliance mechanism

The Commission on Human rights under UN system did not accept any individual petitions at the early stages. Slowly, Commission started studying worst human rights violations such as apartheid, slavery and genocide. From 1950s to end of 1990s the international human rights mechanism, the international human rights system evolved with strengthened treaty monitoring bodies. These treaty monitoring bodies observed violations; developed detailed compliance procedure from the establishment of national bodies, national reports and alternative reports; it accepted individual and inter-state complaints.

## 4. Generations of Human Rights

This division of human rights into three generations was introduced in 1979 by Czech jurist Karel Vasak. The traditional categorization of three generations of human rights, used in both national and international human rights discourse, traces the chronological evolution of human rights as an echo to the cry of the French revolution: Liberté (freedom, “civil and political” or “first generation” rights), Egalité (equality, “socio-economic” or “second generation” rights), and Fraternité (solidarity, “collective” or “third generation” rights)

### First Generation: Civil and Political

Civil-political human rights include two subtypes: norms pertaining to physical and civil security (for example, no torture, slavery, inhumane treatment, arbitrary arrest; equality before the law) and norms pertaining to civil-political liberties or empowerments (for example, freedom of thought, conscience, and religion; freedom of assembly and voluntary association; political participation in one’s society).

### Second Generation: Socio-economic

Socio-economic human rights similarly include two subtypes: norms pertaining to the provision of goods meeting social needs (for example, nutrition, shelter, health care, education) and norms pertaining to the provision of goods meeting economic needs (for example, work and fair wages, an adequate living standard, a social security net).

### The discrepancy between the two sets of rights

During the period of the cold war, “first generation” rights were prioritized in Western democracies, while second generation rights were resisted as socialist notions. In the developing world, economic growth and development were often regarded as goals able to trump “civil and political” rights.

“Civil and political” rights were said to be of immediate application, while “second generation” rights were understood to be implemented only in the long term or progressively. Another point of division was the supposed notion that “first generation” rights place negative obligations on States while “second generation” rights place positive obligations on States. The division of fundamental rights and directive principles in the Indian Constitution is an example.



## **Third Generation: Collective or Community Rights**

Third generation human rights constitute a broad class of rights that have gained acknowledgment in international agreements and treaties but are more doubted than the first two generations of rights. They have been expressed largely in documents advancing an aspiration such as the 1992 Rio Declaration on Environment and Development, and the 1994 Draft Declaration of Indigenous Peoples' Rights. Also, they found reference in the judicial opinions of few developing nations such as India and Pakistan. Yet, one should restrain to perceive a uniform global recognition for the adoption of third generation rights. Fourth generation rights are theorised by few scholars, by referring to instruments such as the UNESCO Declaration on human genome from 1997: but it has not found any support from academics and law making bodies.

## **5. Definitions for Human Rights**

### **5.1. What do we mean by 'human rights'?**

Human rights refer to the concept of human beings as having universal rights, or status, regardless of legal jurisdiction or other localizing factors, such as ethnicity and nationality, as is evident in the Universal Declaration of Human Rights. Human rights, at least in the post world war period, are conceptualized as based on inherent human dignity, retaining their universal and inalienable character.

The existence, validity and the content of human rights continue to be the subject of debate in philosophy and political science. Legally, human rights are defined in international law and covenants, and in the domestic laws of many states. However, for many people the doctrine of human rights goes beyond law and forms a fundamental moral basis for regulating the contemporary global order. For them, they are democratic ideals. However, within the legal arena, human rights have gained universal acceptance by the criterion set to classify a norm as binding.

### **5.2. Some Definitions**

#### Vienna Declaration and Programme of Action

Recognizing and affirming that all human rights derive from the dignity and worth inherent in the human person and that the human person is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary and should participate actively in the realization of these rights and freedoms.

#### The New Oxford Companion to Law, 2008, Oxford University Press

The term human rights contains a multitude of meanings. To the philosopher it is about the essential qualities of the human that lead us to an understanding of our duties towards others; to the specialist in international relations, it connotes a force in the management of relations between states; while to the political scientists, human rights are a tool in the construction of a liberal community.

#### Oxford Dictionary of Law, 2009, Oxford University Press

Human rights: Rights and freedom to which every human being is entitled. Protection against breaches of these rights by a state (including the state of which the victim is a national) may in some cases be enforced in international law. It is sometimes suggested that human rights (or some of them) are so fundamental that they form part of natural law, but most of them are best regarded as forming part of treaty law.

#### Lord Bingham (former Senior Law Lord), The Rule of Law, 2010

The rule of law requires that the law affords adequate protection of fundamental human rights. It is a good start for public authorities to observe the letter of the law, but not enough if the law within a particular country does not protect what are their regarded as the basic entitlements of a human being.

## Office of the High Commissioner for Human Rights

Human rights are rights inherent to all human beings, whatever our nationality, place of residence, sex, national or ethnic origin, colour, religion, language, or any other status. We are all equally entitled to our human rights without discrimination. These rights are all interrelated, interdependent and indivisible.

Universal human rights are often expressed and guaranteed by law, in the forms of treaties, customary international law, general principles and other sources of international law. International human rights law lays down obligations of Governments to act in certain ways or to refrain from certain acts, in order to promote and protect human rights and fundamental freedoms of individuals or groups.

### Human Rights Act, 1993

S.2(d) 'human rights' means the rights relating to life, Liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.

## **6. Theories of Human Rights**

### **Do we need a theory for Human Rights?**

Human Rights theories help us understand the philosophical and legal justifications for the moral and legal validity of human rights. These theories expound the larger role played by human rights in the lives of individuals, society, state and the interface between all the institutions. Many human rights theories justify universal ideas about human rights and its expansions. A study on the theories of human rights would make a student of law to understand human rights as universal laws capable of regional/national applications. Further, human rights dimension at every conflicting or contentious or vulnerable situation faced by human beings may be explained from a theoretical understanding on human rights.

#### **6.1. Human Rights as Moral Rights**

Traditional theories of human rights consider human rights to be essentially moral rights. Human rights are essentially moral rights that all persons possess in virtue of some valuable aspect of their humanity. It is to say that the existence of a human right does not depend on it being established by law. As moral rights, human rights are held by all human beings irrespective of whether they live under a government which recognises those rights. To put the link plainly, all human rights are moral rights, but not all human rights are legal rights. An understanding that human rights emanates from morals helps us; to understand the validity of Human Rights law and Practice; it supports our ordinary understanding about human rights; it reminds our commitment to human rights obligations even in the absence of a legal duty.

#### **6.2. Natural Rights**

Natural rights and law are also older, and they are based on morals, reasoning and logic and scientific temper. Natural rights theories inspired revolutionary ideas and democratic struggles. It forced politics to protect the rights of citizens. Natural rights theories assert that all human beings are equal and should be treated equally. The demand for equality before the law in individual states is synonymous with the development of international human rights law. A statement made by Mahatma Gandhi is an example of natural law thinking,

*“An unjust law is itself a species of violence. Arrest for its breach is more so. Now the law of nonviolence says that violence should be resisted not by counter-violence but by nonviolence. This I do by breaking the law and by peacefully submitting to arrest and imprisonment.”*

### 6.3. Dignity

'Dignity' is considered to be one of the major human interest in the religious and philosophical traditions. It has played a significant role in several social and political movements of the 20th century. It has been shaped by the reaction against Nazi ideology, culminating in the horrors of the Holocaust. It is a central organising concept in the civil rights movements across the nations, and in narrating the feminist demands concerning the role of women. Dignity is playing a major role in discussions on the ethics of biomedical research. Especially, it has been made as a central issue in discussions of reproductive rights, in campaigns on the issue euthanasia, and in the issue of genetic manipulation, and also due to the influence religious institutions. The incorporation of the concept of 'human dignity' in the Universal Declaration was the culmination of a significant historical evolution of the concept. We may witness the call for 'dignity' in every human rights document.

*"We have human rights not to the requisites for health but to those things 'needed' for a life of dignity, for a life worthy of a human being, a life that cannot be enjoyed without these rights" (Jack Donnelly)*

### 6.4. Human Interest

The 'interest theory' approach argues that the principal function of human rights is to protect and promote certain essential human interests. Securing human beings' essential interests is the principal ground upon which human rights must be morally justified. The interests approach is thus primarily concerned to identify the social and biological prerequisites for human beings leading a minimally good life.

The interests approach provides a defence of the idea of human rights. It has the apparent advantage of appealing to human commonality, to those attributes human beings share, and it offers a relatively broad-based support for all the human rights which are considered as fundamental and inalienable. The interests approach enlarges the scope for resolving inter-rights conflicts by establishing hierarchy of interest. For instance, human interest theory may be used to reason a decision for resolving the conflict between women rights and juvenile rights.

*Human rights are not just a product of morality but protect the basic freedom and well-being necessary for human agency (Gewirth)*

### 6.5. Human Subsistence

Human rights would guarantee the provision of the food, clothing, and shelter without which anyone would perish. In addition, basic health care assures human survival. It may not be argued that beyond 'subsistence' there could not be any right.

### 6.6. Will Theory

In contrast to the other theories, the will theory attempts to establish the philosophical validity of human rights upon a single human attribute: the capacity for freedom. Will theorists argue that what is distinctive about human agency is the capacity for freedom and this ought to constitute the core of any account of rights.

Will theorists also attempted to establish the validity of human rights upon the model of personal autonomy. They claim that rights are a manifestation of the exercise of personal autonomy. In so doing, the validity of human rights is necessarily tied to the validity of personal autonomy. The criticisers of human rights even pre-suppose the existence of such rights.

## 6.7. Criticism

Moral relativism (against universalism): Moral relativists argue that universally valid moral truths do not exist. For moral relativists, there is simply no such thing as a universally valid moral doctrine. Relativists view morality as a social and historical phenomenon.

Utilitarianism Bentham did not attribute legal status to moral rights. In his opinion, natural rights are “*simple nonsense; natural and imprescriptible rights, rhetorical nonsense, — nonsense upon stilts*”

However, one needs to understand that these statements have lost temporal validity due to constitutional and legal recognition accorded to human rights in the national laws. Basic norms of human rights have universally achieved a firm legal status in the modern international law.



## UNIT 2

### International Human Rights Law

*International Human Rights Law United Nations Charter based Human Rights obligations – Principles of Human Rights and that of jus cogens status and their related instruments –*

*Prohibition of the Use of Force to resolve International Disputes – Right to Self-determination of People – Prohibition of Genocide – Prohibition of Torture – Prohibition of Racial Discrimination – Prohibition of Slavery – Prohibition of Traffic in persons for Prostitution – Prohibition of Terrorism – Enforced disappearances – Prolonged arbitrary detention –*

*International Bill of Human Rights – Universal Declaration of Human Rights – International Covenant on Civil and Political Rights – International Covenant on Economic, Social and Cultural Rights – and their Additional Instruments –*

*Human Rights and Vulnerable groups – Rights of Women, Children, Disabled, Tribals, Aged and Minorities – United Nations Charter based Human Rights Institutions –*

*Commission on Human Rights, Human Rights Committee - Human Rights and International Judicial bodies.*

#### **International Human Rights Law**

#### **1. United Nations Institutions and Human Rights**

##### **1.1. UN General Assembly**

As a plenary organ, it establishes commissions and committees on Human Rights violations. It adopts various Human Rights treaties for signature and ratification. General Assembly passes resolutions on various HR situations and recommends actions. UNGA forwards recommendations to Security Council to take actions including sanctions.

##### **1.2. UN Security Council**

As an executive organ of international community, it may take action against states violating human rights. It may decide on the assistance to affected population. UNSC may refer the violations to an international criminal tribunal.

##### **1.3. Other organs**

ECOSOC monitors certain treaties and treaty bodies (ICESCR). It has established and monitored Commission on Human Rights. It supports activities through institutions like UNESCO.

Secretariat houses UN High Commissioner for Human Rights and fulfills the mandates of UNGA and Security council. 3. Facilitates field studies and reports.

##### **1.4. Commission on Human Rights**

The Preparatory Commission of the United Nations, which met immediately after the closing session of the San Francisco Conference, recommended that the Economic and Social Council should, at its first session, establish a commission for the promotion of human rights. Accordingly, the Commission on Human Rights was established early in 1946.

At its first session, in 1946, the General Assembly considered a draft Declaration on Fundamental Human Rights and Freedoms and transmitted it to the Economic and Social Council “for reference to the Commission on Human Rights for consideration . . . in its preparation of an international bill of rights”.

The Commission, at its first session early in 1947, authorized its officers to formulate what it termed “a preliminary draft International Bill of Human Rights”.

Very early on the Commission focused on elaborating various human rights standards. It drafted the Universal Declaration of Human Rights and the two Covenants, on civil and political rights, and on economic, social and cultural rights. Soon, the main challenge before the Commission came to be how to respond to human rights violations.

In 1947, the Economic and Social Council passed a resolution stating that the Commission had “no power to take any action in regard to any complaints concerning human rights”.

### **South African situation and new approach**

In 1965, however, the Commission was faced with a number of individual petitions from South Africa. This forced it to grapple with the elaboration of procedures to deal with issues connected to racism. In 1967, the Commission established an ad hoc working group of experts to investigate the situation of human rights in southern Africa.

In Chile against President Allende by General Augusto Pinochet, the Commission established in 1975 an ad hoc working group to inquire into the situation of human rights in Chile.

In 1980, the Commission established the Working Group on Disappearances to deal with the question of enforced disappearances throughout the world. Since then, there have been several expert mechanisms to deal with human rights challenges in various parts of the world.

### **1.5. UN Human Rights Council (UNHRC)**

UNHRC was established in 2006 by UNGA replacing Commission on Human Rights. It was established as a subsidiary of UNGA. It was given a mandate “address situations of violations of human rights, including gross and systematic violations, and make recommendations thereon. It should also promote the effective coordination and the mainstreaming of human rights within the United Nations system”

#### Composition and Functions

UNHRC Council shall consist of forty-seven member States, which shall be elected directly by the majority of the members of the General Assembly with an equitable geographical representation. The Council shall meet regularly throughout the year and schedule no fewer than three sessions per year, and shall be able to hold special sessions.

#### Work of the Council

Work of the council is politically organized. Hence, Israel-Palestine conflict has consumed a lot of time in comparison to Somalia or Srilankan issues. Council acts as a supportive mechanism for UNGA to understand the HR issues with expertise and dialogue by UN members. One of its main purposes is to review the human rights record of every UN member state once every four years and to make recommendations for improvement.

## Instances of Interference: Srilanka

Resolution adopted by the Council at its eleventh special session in Assistance to Sri Lanka in the promotion and protection of human rights (2009, June). It stated “*Condemning all attacks that the Liberation Tigers of Tamil Eelam launched on the civilian population and its practice of using civilians as human shields... Welcoming also the recent reassurance given by the President of Sri Lanka that he does not regard a military solution as a final solution, as well as his commitment to a political solution with implementation of the thirteenth amendment to bring about lasting peace and reconciliation in Sri Lanka.*” However, the situation has changed in the subsequent years and one can find recognition of victimization of Tamils in Srilanka: A 2015 resolution called for an investigation into the alleged violation of human rights in Srilanka and the investigation... “*should include independent judicial and prosecutorial institutions led by individuals known for their integrity and impartiality.*” Thus, Geopolitical interests may override facts based assessments.

### **1.6. Office of the United Nations High Commissioner for Human Rights**

It was established following the World Conference on Human Rights in 1993. Its role is to prevent human rights violations and secure respect for human rights by promoting international cooperation and coordinating the United Nations’ human rights activities. The OHCHR conducts a very broad range of activities from its headquarters in Geneva. It also works directly in areas where there are severe human rights violations through field offices and as a part of UN peace missions.

### **1.7. UN Specialized Agencies and Funds**

The following specialized agencies work on human rights within their sphere of specialization and expertise,

Food and Agriculture Organization of the United Nations; International Labour Organization; Office for the Coordination of Humanitarian Affairs; Joint United Nations Programme on HIV/AIDS; United Nations Development Programme; United Nations Educational, Scientific and Cultural Organization; United Nations Population Fund; United Nations Human Settlements Programme; Office of the United Nations High Commissioner for Refugees; United Nations Children’s Fund; United Nations Entity for Gender Equality and the Empowerment of Women; World Health Organization

## **2. International Bill of Rights**

### **2.1. Background**

The International Bill of Human Rights consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights and its Optional Protocols.

The General Assembly considered a draft Declaration on Fundamental Human Rights and Freedoms and transmitted it to the Economic and Social Council “for reference to the Commission on Human Rights for consideration . . . in its preparation of an international bill of rights” in resolution No. 43(I). The Commission, at its first session early in 1947, authorized its officers to formulate what it termed “a preliminary draft of International Bill of Human Rights”.

In the beginning, different views were expressed about the form the bill of rights should take. The Drafting Committee decided to prepare two documents: one in the form of a declaration, which would set forth general principles or standards of human rights; the other in the form of a convention, which would define specific rights and their limitations.



At its second session, in December 1947, the Commission decided to apply the term “International Bill of Human Rights” to the series of documents in preparation and established three working groups: one on the declaration, one on the convention (which it renamed as “covenant”) and one on implementation.

The declaration was therefore submitted through the Economic and Social Council to the General Assembly, meeting in Paris. By its resolution on 10 December 1948, the General Assembly adopted the Universal Declaration of Human Rights as the first of these projected instruments.

## 2.2. Preparation

On the same day that it adopted the Universal Declaration, the General Assembly requested the Commission on Human Rights to prepare, as a matter of priority, a draft covenant on human rights and draft measures of implementation.

The Assembly thus decided to include in the covenant on human rights economic, social and cultural rights and an explicit recognition of the equality of men and women in related rights, as set forth in the Charter. In 1951, the Commission drafted 14 articles on economic, social and cultural rights. It also formulated 10 articles on measures for implementation of those rights under which States parties to the covenant would submit periodic reports.

Later, General Assembly requested the Commission “to draft two Covenants on Human Rights . . . one to contain civil and political rights and the other to contain economic, social and cultural rights”. The Assembly specified that the two covenants should contain as many similar provisions as possible. It also decided to include an article providing that “all peoples shall have the right of self-determination”.

## 2.3. Universal Declaration of Human Rights

The Universal Declaration of Human Rights was adopted and proclaimed by the General Assembly “*as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among, the peoples of Member States themselves and among the peoples of territories under their jurisdiction.*”

Forty-eight States voted in favour of the Declaration, none against, with eight abstentions.

### Significance of UDHR

1. It was the first occasion on which the organized community of nations had made a Declaration of human rights and fundamental freedoms.
2. In recent years, there has been a growing tendency for United Nations organs, in preparing international instruments in the field of human rights, to refer the Universal Declaration, and also to other parts of the International Bill of Human Rights.
3. Since 1948 it has been and rightly continues to be the most important and far-reaching of all United Nations declarations, and a fundamental source of inspiration for national and international efforts to promote and protect human rights and fundamental freedoms.
4. It has set the direction for all subsequent work in the field of human rights and has provided the basic philosophy for many legally binding international instruments designed to protect the rights and freedoms which it proclaims.



5. In the Proclamation of Teheran, adopted by the International Conference on Human Rights held in Iran in 1968, the Conference agreed that “the Universal Declaration of Human Rights states a common understanding of the peoples of the world concerning the inalienable and inviolable rights of all members of the human family and constitutes an obligation for the members of the international community”.
6. The Universal Declaration is truly universal in scope, as it preserves its validity for every member of the human family, everywhere, regardless of whether or not Governments have formally accepted its principles or ratified the Covenants.
7. Convention for the Protection of Human Rights and Fundamental Freedoms, adopted by the Council of Europe at Rome in 1950 stated “*Being resolved, as the Governments of European countries which are like-minded and have a common heritage of political traditions, ideals, freedom and the rule of law, to take the first steps for the collective enforcement of certain of the rights stated in the Universal Declaration*” (African charter and OAS HR convention)
8. The World Conference on Human Rights, held at Vienna in June 1993, adopted by acclamation the Vienna Declaration and Programme of Action, in which it welcomed the progress made in the codification of human rights instruments and urged the universal ratification of human rights treaties.

### **UDHR: Salient Provisions**

The Declaration consists of a preamble and 30 articles, setting forth the human rights and fundamental freedoms to which all men and women, everywhere in the world, are entitled, without any discrimination.

Article 1, which lays down the philosophy on which the Declaration is based, *All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.*

Article 2 explains the basic principle of equality and non discrimination as regards the enjoyment of human rights and fundamental freedoms. It forbids “distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status”.

Article 3, the first cornerstone of the Declaration, proclaims the right to life, liberty and security of person –a right essential to the enjoyment of all other rights. This article introduces articles 4 to 21, in which other civil and political rights are set out

Articles 4-21 consist of: freedom from slavery and servitude; freedom from torture and cruel, inhuman or degrading treatment or punishment; the right to recognition everywhere as a person before the law; the right to an effective judicial remedy; freedom from arbitrary arrest, detention or exile; the right to a fair trial and public hearing by an independent and impartial tribunal; the right to be presumed innocent until proved guilty; freedom from arbitrary interference with privacy, family, home or correspondence; freedom of movement and residence; the right of asylum; the right to a nationality; the right to marry and to found a family; the right to own property; freedom of thought, conscience and religion; freedom of opinion and expression; the right to peaceful assembly and association; and the right to take part in the government of one’s country and to equal access to public service in one’s country.

Article 22, the second cornerstone of the Declaration, introduces articles 23 to 27, in which economic, social and cultural rights -the rights to which everyone is entitled are set out. The article characterizes these rights as indispensable for human dignity and the free development of personality, and indicates that they are to be realized “through national effort and international cooperation”. At the same time, it points out the limitations of realization, the extent of which depends on the resources of each State.

The economic, social and cultural rights recognized in articles 22 to 27 include the right to social security; the right to work; the right to equal pay for equal work; the right to rest and leisure; the right to a standard of living adequate for health and well-being; the right to education; and the right to participate in the cultural life of the community.

The concluding articles, articles 28 to 30, recognize that everyone is entitled to a social and international order in which the human rights and fundamental freedoms set forth in the Declaration may be fully realized, and stress the duties and responsibilities which each individual owes to his community.

Article 29 states that “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”. It adds that in no case may human rights and fundamental freedoms be exercised contrary to the purposes and principles of the United Nations. Article 30 emphasizes that no State, group or person may claim any right, under the Declaration, “to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth” in the Declaration.

#### **2.4. International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR)**

The preambles and articles 1, 3 and 5 of the two International Covenants are almost identical. The preambles recall the obligation of States under the Charter of the United Nations to promote human rights; remind the individual of his responsibility to strive for the promotion and observance of those rights; and recognize that, in accordance with the Universal Declaration of Human Rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights.

Article 1 of both Covenants states that the right to self-determination is universal and invite upon States to promote the realization of that right and to respect it. The article provides that “All peoples have the right of self-determination” and adds that “By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development”.

Article 3, in both cases, reaffirms the equal right of men and women to the enjoyment of all human rights, and enjoins States to make that principle a reality. Article 5, in both cases, provides safeguards against the destruction or undue limitation of any human right or fundamental freedom, and against misinterpretation of any provision of the Covenants as a means of justifying infringement of a right or freedom or its restriction to a greater extent than provided for in the Covenants.

#### **ICCPR**

In its articles 6 to 27, the International Covenant on Civil and Political Rights protects the right to life (art. 6) and lays down that no one is to be subjected to torture or to cruel, inhuman or degrading treatment or punishment (art. 7); that no one is to be held in slavery; that slavery and the slave-trade are to be prohibited; and that no one is to be held in servitude or required to perform forced or compulsory labour (art. 8); that no one is to be subjected to arbitrary arrest or detention (art. 9); that all persons deprived of their liberty are to be treated with humanity (art. 10); and that no one is to be imprisoned merely on the ground of inability to fulfill a contractual obligation (art. 11).

The Covenant provides for freedom of movement and freedom to choose a residence (art. 12) and for limitations to be placed on the expulsion of aliens lawfully in the territory of a State party (art. 13). It makes provision for the equality of all persons before the courts and tribunals and for guarantees in criminal

and civil proceedings (art. 14). It prohibits retroactive criminal legislation (art. 15); lays down the right of everyone to recognition everywhere as a person before the law (art. 16); and calls for the prohibition of arbitrary or unlawful interference with an individual's privacy, family, home or correspondence, and of unlawful attacks on his honour and reputation (art. 17).

The Covenant provides for protection of the rights to freedom of thought, conscience and religion (art. 18) and to freedom of opinion and expression (art. 19). It calls for the prohibition by law of any propaganda for war and of any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence (art. 20). It recognizes the right of peaceful assembly (art. 21) and the right to freedom of association (art. 22). It also recognizes the right of men and women of marriageable age to marry and to found a family, and the principle of equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution (art. 23). It lays down measures to protect the rights of children (art. 24), and recognizes the right of every citizen to take part in the conduct of public affairs, to vote and to be elected, and to have access, on general terms of equality, to public service in his country (art. 25). It provides that all persons are equal before the law and are entitled to equal protection of the law (art. 26). It also calls for protection of the rights of ethnic, religious and linguistic minorities in the territories of States parties (art. 27).

Finally, article 28 provides for the establishment of a Human Rights Committee responsible for supervising implementation of the rights set out in the Covenant.

### **Optional Protocols**

The first Optional Protocol to the International Covenant on Civil and Political Rights enables the Human Rights Committee, set up under that Covenant, to receive and consider communications from individuals claiming to be victims of violations of any of the rights set forth in the Covenant.

A summary of the Committee's activities under the Optional Protocol is included in the report which it submits annually to the General Assembly through the Economic and Social Council. The Second Optional Protocol to the International Covenant on Civil and Political Rights aims at the abolition of the death penalty.

### **ICESCR**

It recognize the rights to work (art. 6); to the enjoyment of just and favourable conditions of work (art. 7); to form and join trade unions (art. 8); to social security, including social insurance (art. 9); to the widest possible protection and assistance for the family, especially mothers, children and young persons (art. 10); to an adequate standard of living (art. 11); to the enjoyment of the highest attainable standard of physical and mental health (art. 12); to education (arts. 13 and 14); and to take part in cultural life (art. 15). An optional protocol to ICESCR is made to improve the institutional mechanism.

## **3. Human Rights Treaties**

In becoming party to a treaty, States undertake binding international legal obligation. State must ensure conformity of national law with treaty provisions. Certain NGOs, OHCHR, Bilateral Aid Donors can assist States in drafting national laws to give effect to treaty provisions.

### **3.1. Human Rights Committees**

Implementation of many core human rights treaties is monitored by committees. Legal basis for the establishment of most treaty bodies can be found in the treaties themselves. Exceptionally, the ICESCR's Committee was later established by an ECOSOC resolution.



## UN core conventions

The following list of human rights treaties are known as UN core conventions for human rights. India is a party to both ICCPR and ICESCR with certain declarations, and it has not accepted any additional protocol to ICCPR and ICESCR. The treaty monitoring body of ICCPR is known as Human Rights Committee (CCPR) and ICESCR's committee is named as Committee on Economic, Social and Cultural Rights (CESCR). India's ratification status with the core convention is given below with the names of the committees.

- The International Convention on the Elimination of All Forms of Racial Discrimination; (Signature: 1967, Ratification/Accession: 1968): Committee on the Elimination of Racial Discrimination (CERD)
- The Convention on the Elimination of All Forms of Discrimination against Women; (Signature: 1980, Ratification/Accession: 1993) Committee on the Elimination of Discrimination against Women (CEDAW)
- The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; (Signature: 1997, Ratification/Accession: NA): Committee against Torture (CAT)
- The Convention on the Rights of the Child; (Signature: NA, Ratification/Accession: 1992) India is a party to two additional protocols prohibiting, 1. Involvement of children in the armed conflicts (2005) 2. Sale of children for prostitution and Pornography (2005): Committee on the Rights of the Child (CRC)
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families; Committee on Migrant Workers (CMW)
- The Convention on the Rights of Persons with Disabilities; (Signature: 2007, Ratification/Accession: 2007): Committee on the Rights of Persons with Disabilities (CRPD)
- The International Convention for the Protection of All Persons from Enforced Disappearance. (Signature: 2007, Ratification/Accession: NA): Committee on Enforced Disappearances (CED)

### 3.2. HR Treaties which have Committees

Treaty bodies are composed of independent experts of recognized competence in the field of human rights who are elected by State parties. The treaty bodies generally meet at the United Nations Office at Geneva, although the Human Rights Committee and the Committee on the Elimination of Discrimination against Women usually hold one of their sessions in New York every year. All the treaty bodies receive support from the Human Rights Treaties Division of OHCHR in Geneva

#### What does the Committee do?

Committee never formally pronounces State in violation of Convention to enable constructive dialogue with States in the place of adversarial process. The committees reports annually on its activities to the GA through ECOSOC. It may invite UN specialized agencies and NGOs to submit reports.

#### Purpose of Reporting

1. The reporting process ensures state party undertakes comprehensive review of national legislation, administrative rules and procedures to assure conformity with treaty.
2. State parties regularly monitor actual situation to assess the extent to which the various rights are being enjoyed by individuals.
3. Provide governments a basis for elaboration of policies for implementing treaties.

4. The reporting mechanism facilitates transparency of governmental policies
5. It encourages involvement of civil society in formulation, implementation and review of policies
6. The mechanism provides a basis for State party and Committee to evaluate progress on the realization of treaty obligations

### **CEDAW and ICCPR Reporting**

For instance, under CEDAW mechanism, the report requirements are provided in Art.18. It mandates the member states to submit report on the legislative, judicial, administrative or other measures adopted to give effect to the provisions of the Convention and the progress made in this respect. The report is submitted to the Secretary General for consideration of the Committee. The parties must submit a report within 1 year after the entry into force of the Convention for the State. Thereafter a report to be submitted at least every 4 years, and whenever the Committee so requests. Reports may indicate factors and difficulties affecting the degree of fulfillment of obligations under the present Convention

ICCPR Reporting mechanism is stated in Art.40 of the covenant. It describes that the report must consist on measures adopted to give effect to the rights recognized under the provisions of the Convention and the enjoyment of those rights. The report to be submitted to the secretary general for the consideration of the Committee. First report to be submitted within 1 year of the entry into force of the Covenant for the State. Thereafter, a report to be submitted whenever the Committee so requests.

### **How does a State party report to the Committee?**

By ratifying/acceding to a Convention, State parties accept a legal obligation to submit timely and complete reports. The guidelines for submission are provided in the guidelines of the review committee. But many states including India failed to discharge this obligation.

### **Human Rights Treaty Reporting Problems**

There are two core issues involved in the human rights monitoring process under treaty bodies. Firstly, the whole human rights monitoring systems is complex and reporting obligations are perceived as burden. It strains resources of member states and of secretariat. Current structure of human rights committees imposes difficult reporting demands on treaty parties. Problems arise from a lack of personnel, experience and resources within the relevant ministry or department of the governments. An independent expert in 1997 stated: "Non-reporting has reached chronic proportions ... States ... either do not report at all, or report long after the due date."

### **What else does the Committee do?**

Ensure that States are implementing the provisions of the Convention by Hearing and examining State-to-State communications. For instance, see articles, CERD Art.11, ICCPR Art.41, CAT Art. 21, MWC Art. 76. They hear and examine communications from individuals who claim to be victims of a violation by a State party, OPICCPR Art.1, OPCEDAW Art.2, CAT Art.22, CERD Art.14.

### **State-to-State Communications**

Optional Declarations recognizing the competence of the Committee to hear State-to-State communications under ICCPR Art. 41. This communication must be sent by "...a State party which has made a declaration recognizing...the competence of the Committee." It will be received and considered. However, "No communication shall be received by the Committee if it concerns a State party which has not made such a declaration".

## **Individual Communications Mechanism**

Four treaty bodies have established procedures by which individual communications may be submitted for examination. They are, Human Rights Committee, Committee on the Elimination of All Forms of Racial Discrimination, Committee Against Torture, and Committee on the Elimination of discrimination Against Women. Individual communications mechanism is applicable to the individuals who are within the jurisdiction of States that have formally accepted these procedures. Individual communications to be respected only if certain conditions are fulfilled such as, all domestic remedies must have been exhausted; the communication must not be anonymous; the communication must be about a violation of a specific right provided for in the treaty under which it is submitted; Communications cannot be considered if the same matter is being examined under another international procedure of investigation or settlement

## **General Comments and Recommendations**

General Comments are comprehensive statements explaining specific treaty provisions. They develop the content of treaty provisions which are accepted by the committees. Some examples are given below,

- Committee on Economic, Social And Cultural Rights: General comment No. 4: The right to adequate housing (article 11 (1) of the Covenant)
- Human Rights Committee: General comment No. 12: Article 1 (Right to self-determination)
- Committee On The Elimination Of Racial Discrimination: General recommendation XI on non-citizens

General comments or general recommendations are adopted by the Committee on Economic, Social and Cultural Rights, the Human Rights Committee, the Committee on the Elimination of Racial Discrimination, the Committee on the Elimination of Discrimination against Women(recommendations), the Committee against Torture and the Committee on the Rights of the Child.

## **Powers of independent investigation of the Committee**

Article 20 of CAT states that committee can receive information and institute inquiries on allegations of systematic practice of torture in States Parties. This right may be reserved by the states by refusing to accept the obligations regarding independent investigation. It is optional and has confidential character with the cooperation of States Parties. After inquiry, the Committee may include a summary of the results in its annual report; otherwise, all the work and documents are confidential

## **State of Emergency**

International Covenant on Civil and Political Rights provides, “*any State Party to the present Covenant availing itself of the right of derogation (due to state of emergency) shall notify immediately the other States Parties to the present Covenant, through the intermediary of the Secretary-General of the UN, of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication shall be made, through the same intermediary, on the date it terminates such derogation.*”

### **4.1. Prohibition of the Use of Force to resolve International Disputes**

- The use of force by states is controlled by both customary international law and by treaty law. The UN Charter reads in article 2(4):

“*All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations.*”



## **4.2. Right to Self-Determination of People**

Right to Self-Determination confers that nations based on respect for the principle of equal rights and fair equality of opportunity have the right to freely choose their sovereignty and international political status without external compulsion or interference. This right arises from customary international law and accepted in Article 1 of the ICCPR & ICESCR.

-The right to self determination is understood into two kinds:

- a) Internal RSD - Rights of people of a state to govern them without outside interference.
- b) External RSD - Right of people to determine their own political status and be free of alien domination.

## **4.3. Prohibition of Genocide**

- Polish philosopher Raphael Lemkin first defined the word 'Genocide' in 1944, to describe the atrocities committed by the Nazis during WWII. It is governed by the Convention on the Prevention and Punishment of the Crime of Genocide. The convention was adopted by the UN General Assembly on December 9th, 1948. It came into force on 12th January 1951.

Art.2 defines Genocide as "Acts committed with the intent to destroy, in whole or in part, a national, ethnical, racial, religious group, as such". Art 3 defines crimes that can be punished under the convention, such as a) Genocide, b) Conspiracy to commit genocide, c) Direct and public incitement to commit genocide, d) Attempt to commit genocide e) Complicity in genocide.

ICJ considers prohibition of genocide as a peremptory norm. The convention was established to outlaw actions similar to Armenian genocide by the Ottoman Empire during WWII and the Holocaust, by Nazi Germany.

## **4.4. Prohibition of Racial Discrimination**

Racial discrimination is prohibited by the International Convention on the Elimination of all forms of Racial Discrimination (CERD). It requires parties to i) Outlaw hate speech and ii) Criminalize membership in racist organizations. It is monitored by Committee on Elimination of all forms of Racial Discrimination. Its main objective is to eradicate, remove and prevent racial discrimination. Art 2 of the CERD imposes obligations on state parties to take necessary steps to eliminate racial discrimination. Art 3 particularly condemns racial segregation and apartheid. Art 2 of the UDHR states that rights and freedoms provided in the declaration shall be available to all persons irrespective of race, colour, sex and religion.

## **4.5. Prohibition of Traffic in persons for Prostitution**

Trafficking is prohibited by the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others. It was approved by the General Assembly and came into force on 25th July 1951. The convention supersedes a number of earlier conventions that covered some aspects of forced prostitution. Its signatories are charged with 3 obligations. a) Prohibition of trafficking b) Specific administration and enforcement measures c) Social measures aimed at trafficked persons. Art 1 requires State parties to "punish any person who 'procures, entices or leads away' for purposes of prostitution another person, even with consent, of the person". Art 2 requires State parties to punish any person who runs a brothel or rents accommodations for purposes of prostitution. The convention also establishes procedure to combat international trafficking.

#### 4.6. Prohibition of Torture

The Universal Declaration of Human Rights adopted by the United Nations in 1948 states in Article 5, “No one shall be subjected to torture, or to cruel, inhuman or degrading treatment or punishment.” The ICCPR was the first universal human rights treaty to explicitly include prohibition of torture and other cruel, inhuman or degrading treatment (Art 7).

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (commonly referred to as the UNCAT) is an international human rights treaty, which aims to prevent torture and other cruel, inhuman or degrading treatment or punishment around the world. The text of the convention was adopted by the United Nations General Assembly on the 10<sup>th</sup> of December 1984 and came into force on the 26<sup>th</sup> of June, 1987. The Committee against Torture is one of the United Nations treaty bodies created to supervise the implementation by State Parties of their obligations under the respective parent convention.

#### 4.7. Abolition of Slavery

Slavery can be defined as “a condition in which individuals are owned by others, who control where they live and at what they work.” Slave trade refers to the ‘procuring, transporting and selling of human beings as slaves’ UDHR Article 4 states that ‘No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms.’

- 1926, Convention to suppress slave trade and slavery (By the League of Nations)
- 1930, Forced Labour Convention
- 1956, Supplementary Convention on Abolition of Slavery, Slave trade, institutions and practices similar to slavery. The convention has... a) Abolished debt bondage, serfdom, servile marriage and child servitude; b) Criminalized slave trafficking; c) Refugee slaves ipso facto get freedom; d) Criminalization of branding and mutilation; e) Prohibited reservations.

#### 4.8. Prohibition of Terrorism

There is no generally accepted definition in international law for terrorism. The Secretary General of the UN, in 2004, described terrorism as ‘any act intended to cause death or serious bodily harm to civilians or non-combatants, for the purpose of intimidating a population or compelling a government or international organisation to do or abstain from doing an act’. The common forms of terrorism are bombing, suicide bombing, hostage taking, hijacking and shootings.

International instruments relating to combating or prohibiting terrorism are...

- Suppression of Unlawful Acts relating to International Civil Aviation, 2010.
- Conventions on Suppression of Unlawful Seizure of Aircraft, 1971.
- Convention on the Marking of Plastic Explosives for the Purpose of Detection, 1991
- Terrorist Bombings Convention, 1997.

The Special rapporteur on promotion and protection of human rights and fundamental freedoms while countering terrorism laid down certain principles to follow:

- i) Integrate gender perspective
- ii) Identify, exchange and promote best practices on measures to combat terrorism
- iii) Observe violation of human rights in countering terrorists



## UN Global Counter-Terrorism Strategy

- i) Peaceful resolution of conflicts - strengthens global fight against terrorism
- ii) Use UN to promote tolerance, mediation, peacekeeping and conflict prevention.
- iii) Extradition of terrorists
- iv) Party to Convention on Transnational Organised Crime
- v) Counter internet terrorism

### **4.9. Prolonged Arbitrary Detention**

Under international human rights law, no one can be detained without a legitimate reason and, anyone accused of a crime has the right to a fair trial. -But in many countries throughout the world, no proper process is followed and no safeguards are in place. -Detainees are entitled to the rights and standards enshrined in international law. At the universal level, the main protections are contained in UN core conventions and the following instruments...

- UN Convention for the Protection of All Persons from Enforced Disappearance
- UN Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment
- UN Standard Minimum Rules for the Treatment of Prisoners
- UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders ('the Bangkok Rules').
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("the Beijing Rules")
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty
- UN Standard Minimum Rules for Non-custodial Measures (the 'Tokyo Rules').

## **5. HUMAN RIGHTS AND VULNERABLE GROUPS**

### **5.1. RIGHTS OF WOMEN**

International Instruments and Treaties protecting rights of women...

- CEDAW (Convention on the Elimination of All Forms of Discrimination of Women), 1979, and its optional protocol.
- Convention on Nationality of Married Women (1957)
- Convention against Discrimination in Education (1960)
- Beijing Declaration (platform for action)
- Declaration on the Protection of Women and Children in Emergencies and Armed Conflict
- Convention for the Suppression of the Traffic in persons and of the Exploitation of the Prostitution of Others (1951)
- Equal Remuneration Convention (1951)
- Convention on the Consent of Marriage, Minimum Age for Marriage & Registration (1962)

Convention on the Elimination of All Forms of Discrimination of Women was adopted on December 18th, 1979.

- **Part I** (Articles 1-6) focuses on non-discrimination, sex stereotypes, and sex trafficking.
- **Part II** (Articles 7-9) outlines women's rights in the public sphere with an emphasis on political life, representation, and rights to nationality.
- **Part III** (Articles 10-14) describes the economic and social rights of women, particularly focusing on education, employment, and health. Part III also includes special protections for rural women and the problems they face.
- **Part IV** (Article 15 and 16) outlines women's right to equality in marriage and family life along with the right to equality before the law.
- **Part V** (Articles 17-22) establishes the Committee on the Elimination of Discrimination against Women as well as the states parties' reporting procedure.
- **Part VI** (Articles 23-30) describes the effects of the Convention on other treaties, the commitment of the states parties and the administration of the Convention.

## 5.2. RIGHTS OF CHILDREN

Children's rights are the human rights of children with particular attention to the rights of special protection and care afforded to minors. The Convention on the Rights of the Child (1989) (CRC) defines a child as any human person who has not reached the age of eighteen years. Children's rights includes their right to association with both parents, human identity as well as the basic needs for physical protection, food, universal state-paid education, health care, and criminal laws appropriate for the age and development of the child, equal protection of the child's civil rights, and freedom from discrimination on the basis of the child's race, gender, sexual orientation, gender identity, national origin, religion, disability, colour, ethnicity, or other characteristics. Child rights are specialized human rights that apply to all human beings below the age of 18. The compliance to this convention is monitored by the UN Committee on the Rights of the Child. The committee submits a report to the Third Committee of the United Nations General Assembly annually. The committee is a body of 18 Independent experts that monitors implementation of the Convention on the Rights of the Child by its State parties.

There are two types of rights exist for children.

1. General rights - the right to security of the person, to freedom from inhuman, cruel, or degrading treatment, and the right to special protection during childhood.

2. Particular rights - the right to life, the right to a name, the right to express his views in matters concerning the child, the right to freedom of thought, conscience and religion, the right to health care, the right to protection from economic and sexual exploitation, and the right to education.

### OPTIONAL PROTOCOL ON THE SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY

It was adopted by the UNGA in 2000. It entered into force on 18 January 2002. Article 1 of the protocol requires parties to protect the rights and interests of child victims of trafficking, child prostitution and child pornography, child labour and especially the worst forms of child labour. Article 2 defines the prohibition:

Sale of children – Act whereby child is transferred between persons for remuneration/consideration.

Child prostitution - Use of a child in sexual activities for remuneration or any other form of consideration.

Child pornography - Any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.

The remaining articles in the protocol outline the standards for international law enforcement covering diverse issues such as jurisdictional factors, extradition, mutual assistance in investigations, criminal or extradition proceedings and seizure and confiscation of assets as well.

## UNIT 3

### Indian Perspectives of Human Rights Law

*Indian Perspectives of Human Rights Law Constitution of India related Human Rights obligations – Role of Indian Judiciary in the development of Human Rights Law. India and International Human Rights Law.*

#### 1. International Human Rights and Indian Legal System

India has the longest written constitution in the world. It also is one of the foremost Constitutions to have a separate chapter on Fundamental Rights signifying sovereign obligations to uphold human rights and freedoms to its citizens and foreigners. The drafters of Indian Constitution had undertaken a careful reading of the Constitution of the United States, United Kingdom, Ireland and other countries. Fortunately, UDHR and other international instruments were available to Constituent assembly members, and they had greater respect for international obligations. Subsequently, Supreme Court of India referred many provisions of international instruments. Further, international instruments are widely cited by courts to provide a philosophical justification and to reason out the conclusions reached by the judge.

#### The UDHR and Indian Constitution

The Indian Constitution drew on the principles enshrined in UDHR, not only because of their philosophical value but also the founders of the country realized that the social-political-economic rights enumerated in UDHR must be expressly reflected in a written Constitution. The following table provides a comparison of UDHR and Indian Constitution.

S.No	UDHR (Articles)	Indian Constitution(Articles)
1	All people are entitled to rights without distinction based on race, color, sex, language, religion, opinion, origin, property, birth or residency.	Art. 14, 15, 16, 17 (equality, access to public sources, access to employment and abolition of caste discrimination)
2	All Human beings are free and equal in dignity and rights	Art.14, 15 (on the basis of religion, race, caste, sex, or place of birth) Art. 17 (abolition of untouchability); and Art. 16 (employment opportunities for all)
3	Right to life, liberty and security of person.	Art. 21, (Right to life). Art. 23 (prohibition of forced labor); Art. 24 (prohibition of hazardous labor by children);
4	Freedom from slavery	Art 17 and Art 23, 24
5	Freedom from torture	Art 20, 21, 22
6	Right to be treated equally by the law	Art 14
7	Right to equal protection by the law	Art 14, Art 39A
8	Right for all to effective remedy by competent tribunal	Art 14, 20, 21,22
9	Freedom from arbitrary arrest.	Art. 20, 21, 22

S.No	UDHR (Articles)	Indian Constitution(Articles)
10	Right to a fair public hearing by independent tribunal	Art 20, 21, 22, 39A
11	Right to presumption of innocence until proven guilty at public trial with all guarantees necessary for defense	Art 20, 21,22
12	Right to privacy	Art 21
13	Freedom of movement inside country and the right to leave and return to any country	Art 19, 21
14	Right to political asylum in other countries	N/A
15	Right to nationality	Art. 19; Citizenship- Art 5-11
16	Right to marriage and family and to equal rights of men and women during and after Marriage	Art.14, 21 and 44
17	Right to own property	Art 300A
18	Freedom of thought and conscience and religion	Art 19, 25, 26, 27, 28
19	Freedom of opinion and expression and to seek, receive and impart information	Art.19, 25
20	Freedom of Association and assembly	Art. 19(1) (b)
21	Right to take part in and select government	Part XII, Chapter II and XV; and other provisions relating to elections.
22	Right to social security and realization of economic, social and cultural rights	Art 29, 30, 43
23	Right to work, to equal pay for equal work and to form and join trade unions	Art 19, 39, 42
24	Right to reasonable hours of work and paid holidays	Art 42, 43
25	Right to adequate living standard for self and family, including food, housing, clothing, medical care and social security	Part IV of Constitution
26	Right to education	Art. 21A, 45
27	Right to participate in cultural life and to protect intellectual property rights	Art 29, 30
28	Right to social and international order permitting these freedoms to be realized	Art 38,51
29	Each person has responsibilities to the community and others as essential for a democratic society	Art 48A, 51A
30	Repression in the name of rights is unacceptable.	Art 32, 33-35,226



## 1. India's Response to International Instruments

Indian constitution mandates the states to respect international instruments. India, from the times of independence has been committed to international peace and respect for human rights. India supported Universal Declaration of Human Rights when it was passed at the UN General Assembly. Subsequently, India has accepted instruments such as ICCPR and ICESCR. However, India accepted some instruments with certain clarifications. India did not agree to the protocols of many instruments and some core instruments due to political and economic reasons. The political reasons include the India's struggle with regional and religious divide. The economic reasons may be understood in the background of a developing nation attempting to fulfill socio-economic needs of its citizens and foreigners. Subsequently, Supreme Court of India referred to many provisions of international instruments. Further, international instruments inspired many enactments. The annexed chart exhibits India's response to international human rights instruments.

## 2. Indian Judiciary and Human Rights

### A. Intellectual Property Rights

#### 1. Entertainment Network Vs. Super Cassette Industries (JT 2008 (7) SCC 11)

The case relates to recognition of copyright and intellectual property as a human right within the constitutional fold. The disputing parties are in the music industry, one having a FM station and another is holding music rights. The music was broadcasted without proper rights. Yet, there were also other issues between parties in relation to reasonable cost for broadcasting. The court had remanded the substantive valuation issues to expert boards. It has ruled that intellectual property is a human right by referring to international conventions relating to copyright, UDHR and other instruments. It has also described the standard policy of appreciation of international law by SC.

*"...An owner of a copyright indisputably has a right akin to the right of property. It is also a human right. Now, human rights have started gaining a multifaceted approach. Property rights vis-à-vis individuals are also incorporated within the 'multiversity' of human rights. As, for example, any claim of adverse possession has to be read in consonance with human rights..."*

*"...In interpreting the domestic/municipal laws, this court has extensively made use of International law inter alia for the following purposes : (i) As a means of interpretation; (ii) Justification or fortification of a stance taken; (iii) To fulfill spirit of international obligation which India has entered into, when they are not in conflict with the existing domestic law; (iv) To reflect international changes and reflect the wider civilization; (v) To provide a relief contained in a covenant, but not in a national law; (vi) To fill gaps in law..."*

*Furthermore, as regards the question where the protection of human rights, environment, ecology and other second-generation or third-generation rights is involved, the courts should not be loathe to refer to the International Conventions..."*

#### 2. Life Insurance Corpn. Of India Vs. Prof. Manubhai D. Shah (1992 SCR (3) 595)

Whether a piece of work could be compelled to be published? This question was decided in two connected appeals in relation to state institutions. Firstly, on the publication of a rejoinder to an explanation in the LIC magazine, secondly over a documentary to be telecasted on Doordarshan. The SC relied human rights documents to publish materials and to rule in favor of content producers.

*"...Speech is God's gift to mankind. Through speech a human being conveys his thoughts, sentiments and feelings to others. Freedom of speech and expression is thus a natural right which a human being acquires on birth. It is, therefore, a basic human right. "Everyone has the right to freedom of opinion and expression; the right includes freedom to hold opinions without interference and to seek and receive and impart information and ideas through any media and regardless of frontiers" proclaims the Universal Declaration of Human Rights..."*

## **B. Education**

### **1. Miss Mohini Jain vs State Of Karnataka (AIR 1992 SC 1858)**

The petitioner challenged a Karnataka notification relating to collection of capitation fee in the medical admissions. The court analyzed right to education as a Constitutional and human right by referring to UDHR. The court ruled that capitation fee should be abolished.

*“...They were also hopeful that within a period of ten years illiteracy would be wiped out from the country. It was with that hope that Articles 41 and 45 were brought in Chapter IV of the Constitution. An individual cannot be assured of human dignity unless his personality is developed and the only way to do that is to educate him. This is why the Universal Declaration of Human Rights, 1948 emphasises “Education shall be directed to the full development of the human personality... The directive principles which are fundamental in the governance of the country cannot be isolated from the fundamental rights guaranteed under Part III. These principles have to be read into the fundamental rights. Both are supplementary to each other...”*

### **2. Unni Krishnan, J.P. And Ors. Etc Vs. State Of Andhra Pradesh (1993 SCR (1) 594)**

The court tested the validity of Mohini Jain case in relation to higher education too. The SC accepted fundamental right to education upto the age of 14. Higher education must be subjected to economic conditions of the state. However, the private institutions should not be permitted to charge exorbitant fees. The opinion of Mohan, J slightly differs and justifies higher education for a legally justifiable fee. Mohan, J's opinion refers to UDHR and ICESCR to justify right to basic education and the economic limitations of higher education.

*“...Article 26(1) of the Universal Declaration of Human Rights states...ICESCR Art.13...The status of this Article is a useful reminder of the problems inherent in any attempt to create a ‘social’ right of this kind for individuals against their states....”*

## **C. Criminal Law and Human Rights**

### **1. Francis Coralie Mullin Vs. The Administrator (AIR 1981 SC 746)**

A detenu was restrained by authorities to have interview with a lawyer and the members of his family. The Supreme Court referred various provisions of UDHR and ICCPR to include right to access to family and lawyer as a component of right to live with dignity.

*“... There is implicit in Article 21 the right to protection against torture or cruel, inhuman or degrading treatment which is enunciated in Article 5 of the Universal Declaration of Human Rights and guaranteed by Article 7 of the international Covenant on Civil and Political Rights. ...The prisoner or detenu obviously cannot move about freely by going outside the prison walls nor can be socialise at his free will with persons outside the jail. But, as part of the right to live with human dignity and therefore, as a necessary component of the right to life, he would be entitled to have interviews with the members of his family and friends ...”*

### **2. Madhav Hayawadanrao Hoskot Vs. State Of Maharashtra (1979 SCR (1) 192)**

The petitioner was convicted by the High Court. He was unable to present his appeal to the Supreme Court as his order of conviction was delivered to him by the prison authorities. He appealed (SLP) after completing his 3 years prison term. The court has dismissed his appeal on merits. However, it has directed the courts to deliver copies of judgments and provide legal assistance to accused. The court relied on UDHR and ICCPR for this rationale.



*“...The Indian social legal milieu makes free legal service, at trial and higher levels, an imperative processual piece of criminal justice where deprivation of life or personal liberty hangs in the judicial balance...The widespread insistence on free legal assistance, where liberty is in jeopardy? is obvious from the Universal Declaration of Human Rights Art. 8. Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted by the Constitution or by law...Art. 14(3) of the International Covenant on Civil and Political Rights guarantees to everyone:”the right to be tried in, his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of his right; and to have legal assistance assigned to him in any case where the interests of justice shall require, and without payment by him in any such case if he does not have sufficient means to pay for it”...*”

### **3. Kubic Darusz v. Union of India ((1990) 1 SCC 568)**

A Polish national was arrested for smuggling gold. He was kept in prison for about a year. The SC quoted UDHR and ICCPR to set him liberty on the ground of his continued detention in violation of Constitutional rights.

*“...In this context it may not be out of place to bear in mind that the fundamental rights guaranteed under our Constitution are in conforming line with those in the Declaration & The Covenant on Civil and Political Rights and the Covenant, Economic, Social and Cultural Rights to which India has become a party by ratifying them...Preventive justice requires an action to be taken to prevent apprehended objectionable activities. In case of punitive detention the person concerned is detained by way of punishment after being found guilty of wrong doing where he has the fullest opportunity to defend himself, while preventive detention is not by way of punishment at all...”*

### **4. Selvi Vs. State Of Karnataka ((2010) 7 SCC 263)**

The legal questions in this batch of criminal appeals relate to the involuntary administration of certain scientific techniques, namely narcoanalysis, polygraph examination and the Brain Electrical Activation Profile test for the purpose of improving investigation efforts in criminal cases. The court has ruled against involuntary administration of such techniques. It has relied on ICCPR and other international instruments.

*“...The interrelationship between the ‘right against self-incrimination’ and the ‘right to fair trial’ has been recognised in most jurisdictions as well as international human rights instruments... In the International Covenant on Civil and Political Rights, Article 14(3)(g) enumerates the minimum guarantees that are to be accorded during a trial and states that everyone has a right not to be compelled to testify against himself or to confess guilt. In the European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 6(1) states that every person charged with an offence has a right to a fair trial and Article 6(2) provides that ‘Everybody charged with a criminal offence shall be presumed innocent until proved guilty according to law...”*

### **5. Prem Shankar Shukla v. Delhi Administration, [(1980) 3 SCC 526, AIR 1980 SC 1535]**

This case deals rights against handcuffing. In this the Supreme Court issued guidelines with regard to handcuffing of persons remanded to judicial custody. This was a case taken cognizance by the Court upon a telegram from a prisoner complaining of forced handcuffs on him and other prisoners, protesting against the humiliation and torture held in irons in Public. As under-trials kept in custody in the Tihar Jail, they were taken to Delhi Courts for trial.

*“Handcuffing of undertrials without adequate reasons in writing has also been found against Article 21 of Constitution of India.”*



*“Handcuffing is prima facie inhuman and, therefore, unreasonable, is over-harsh and at the first flush, arbitrary. Absent fair procedure and objective monitoring, to inflict ‘irons’ is to resort to zoological strategies repugnant to Article 21 of Constitution of India.”*

*“Justice Iyer stated that in interpreting the constitutional and statutory provisions the Court must not forget the core principle found in Art. 5 of the Universal Declaration of Human Rights, 1948: “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.” And Article 10 of the International Covenant on Civil and Political Rights: “All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person.””*

#### **6. D.K. Basu Vs. State Of West Bengal [AIR 1997 SC 610]**

The judgment on PIL on the issue of death in police custody and “custody jurisprudence” and modalities for awarding compensation to the victim and/or family members of the victim for atrocities and death caused in police custody and also the question of accountability. In this case the Supreme Court laid down guidelines in case of arrest.

*“The Universal Declaration of Human Rights in 1948, which mark the emergence of worldwide trend of protection and guarantee of certain basic human rights, stipulates in Article 5 that “No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment.””*

*“Article 9(5) of the International convention on civil and Political Rights, 1966 (ICCPR) provides that “anyone who has been the victim of unlawful arrest or detention shall have enforceable right to compensation”. of course, the Government of India as the time of its ratification (of ICCPR) in 1979 had made a specific reservation to the effect that the Indian legal system does not recognise a right to compensation for victims of unlawful arrest or detention and thus did not become party to the Convent. That reservation, however, has now lost its relevance in view of the law laid down by this Court in number of cases awarding compensation for the infringement of the fundamental right to life of a citizen.”*

Article 9(5) of ICCPR provides that “anyone who has been the victim of unlawful arrest or detention shall have enforceable right to compensation”.

#### **7. Jolly George Varghese v. Bank of Cochin [(1980) 2 SCC 360]**

The appellants were the judgment-debtors while the respondent-bank was the decree-holder. In execution of the decree a warrant for arrest and detention in civil prison was issued to the appellants under section 51 and order 21, rule 37 of the Code of Civil Procedure. The point involved was whether a right incorporated in the Covenant on Civil and Political Rights, which is not recognised in the Indian Constitution, shall be available to the individuals in India. The concept of dualism was reiterated in this case. The standards laid down in Article 11 of ICCPR were referred in this case.

Article 11 of ICCPR : No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation.

*“The high value of human dignity and the worth of the human person enshrined in Article 21, read with Articles 14 and 19, obligates the State not to incarcerate except under law which is fair, just and reasonable in its procedural essence.”*

*“The positive commitment of the States Parties ignites legislative action at home but does not automatically make the Covenant an enforceable part of the corpus juris of India.”*

*“It is too obvious to need elaboration that to cast a person in prison because of his poverty and consequent inability to meet his contractual liability is appalling. To be poor, in this land of daridra Narayana, is no crime and to ‘recover’ debts by the procedure of putting one in prison is too flagrantly violative of Article.*

21 unless there is proof of the minimal fairness of his wilful failure to pay in spite of his sufficient means and absence of more terribly pressing claims on his means such as medical bills to treat cancer or other grave illness.”

#### D. Privacy

##### 1. **PUCL Vs. Union of India** ((1997) 3 SCC 433)

This PIL highlighted the incidents of telephone tapping in the past. The petitioner has challenged the constitutional validity of Section 5(2) of the Indian Telegraph Act, 1885. In the alternative it is contended that the said provisions be suitably read-down to include procedural safeguards to rule out arbitrariness and to prevent the indiscriminate telephone-tapping. The court relied on UDHR to uphold the privacy rights of individuals.

*“...Article 12 of the Universal Declaration of Human Rights, 1948 is almost in similar terms...International law today is not confined to regulating the relations between the States. Scope continues to extend. Today matters of social concern, such as health, education and economics apart from human rights fall within the ambit of International Regulations. International law is more than ever aimed at individuals...”*

##### 2. **Kharak Singh v. State of Uttar Pradesh** [ AIR 1963 SC 1295, (1964) 1 SCR 332]

This is a case relating to right to privacy. The petitioner was challenged in a dacoity case but was released as there was no evidence against him. The police opened a history sheet against him. He was put under surveillance as defined in Regulation 236 of the U. P. Police Regulations. Surveillance involves secret picketing of the house or approaches to the houses of the suspects, domiciliary visits at night, periodical enquiries by officers not below the rank of Sub-Inspector into repute, habits, association, income, expenses and occupation, the reporting by constables and chaukidars of movements and absences from home, the verification of movements and absences by means of inquiry slips and the collection and record on a history sheet of all information bearing on conduct.

*“...the entire Regulation is unconstitutional on the ground that it infringes both Article 19 (1) (d) and Article 21 of the Constitution of India.”*

*“It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty.”*

It was held by the Supreme Court that the domiciliary visit is an infringement of the right to privacy and is violative of the citizen’s fundamental rights of personal liberty guaranteed under Article 21.

#### E. Labour Law

##### 1. **Daily Rated Casual Labour Vs. Union of India** (1988 SCR (1) 598)

The petitioners have been working for the last ten years as casual labourers, the wages paid to them were very low and far less than the salary and allowances paid to the regular employees of the Posts and Telegraphs Department belonging to each of the categories and secondly no scheme has been prepared by the Union of India to absorb them regularly in its service and consequently they have been denied the benefits, such as increments, pension, leave facilities etc. etc. which are enjoyed by those who have been recruited regularly. The SC held that the classification is bad in light of Constitutional provisions and ICCPR.

*“... We are of the view that on the facts and in the circumstances of this case the classification of employees into regularly recruited employees and casual employees for the purpose of paying less than the minimum pay payable to employees in the corresponding regular cadres particularly in the lowest rungs of the department where the pay scales are the lowest is not tenable... There is clearly no justification for doing so. Such a classification is violative of Articles 14 and 16 of the Constitution. It is also opposed to the spirit*

*of Article 7 of the International Covenant on Economic, Social and Cultural Rights, 1966 which exhorts all States parties to ensure fair wages and equal wages for equal work...*"

**2. Air India Statutory Corporation Vs. United Labour Union (1997-I-LLJ-1113) (SC)**

The appellants engaged, as contract labour the respondent union's members, for sweeping, cleaning, dusting and watching of the building owned and occupied by the appellant. The contract labour system for the above mentioned work was abolished by central government with some exemptions. The workers questioned the scope of one such exemption. The SC decided in favour of workers by citing a UN Convention on Right to Development besides other Constitutional provisions.

*"...The Directive Principles in our Constitution are fore-runners of the U.N.O. Convention on Right to Development as inalienable human right and every persons and all people are entitled to participate in, contribute to and enjoy economic, social cultural and political development in which all human right, fundamental freedoms would be fully realized.... Therefore, the Directive Principles now stand elevated to inalienable fundamental human rights... Right to health and medical care to protect health and vigour, while in service or after retirement, was held a fundamental right of a worker under Article 21, read with Articles 39(e), 41,43,48 - A and all related constitutional provisions and fundamental human rights to make the life of the workman meaningful and purposeful with dignity of person..."*

**3. Kapila Hingorani Vs. State of Bihar ((2003) 6 SCC 1)**

The case concerning the rights of workmen in certain establishments of the state of Bihar and Jharkand. These workmen were not paid salary due to financial position of the Jharkhand establishments. The court has ordered a scheme of amount to be paid on the basis of Constitutional and human rights. The court has simply referred the term 'human rights' and it has not explicitly relied on any instrument.

*"...they are bound to pay the salaries of the employees of the public sector undertakings but on the ground that the employees have a human right as also a fundamental right under Article 21 which the States are bound to protect..."*

**4. Central Inland Water Transport Corporation Ltd. Vs. Brojo Nath Ganguly (AIR 1986 SC 1571)**

Two employees of a state owned institution challenged an order of termination from service. The service contract was signed to the previous private management which owned the company before state appropriation. The SC dealt many issues relating to contractual terms, concept of state and the idea of welfare state. It has mentioned UDHR and human rights history while tracing the welfare mandate prescribed by Constitution. The court ruled in favor of the terminated workers.

*"...The framers of our Constitution did not, however, want to frame for the Sovereign Democratic Republic which was to emerge from their labours a Constitution in the strict legal sense. ... They were aware that the Universal Declaration of Human Rights had been adopted by the General Assembly of the United Nations, for India was a signatory to it. They were aware that the Universal Declaration of Human Rights contained certain basic and fundamental rights appertaining to all men. ... They were aware that these rights had at last found universal recognition in the Universal Declaration of Human Rights. ... They were aware that the major traditional functions of the State have been the defence of its territory and its inhabitants against external aggression, the maintenance of law and order; the administration of justice, the levying of taxes and the collection of revenue. They were also aware that increasingly, and particularly in modern times, several States have assumed numerous and wide ranging functions, especially in the fields of education, health, social security, control and maintenance of natural resources and natural assets, transport and communication services and operation of certain industries considered basic to the economy and growth*



of the nation. ... Part III of the Constitution gives a Constitutional mandate for certain Human Rights - called Fundamental Rights in the Constitution — adapted to the needs and requirement of a country only recently freed from foreign rule and desirous of forging a strong and powerful nation capable of taking an equal place among the nations of the world. It also provides a Constitutional mode of enforcing them. . .”

**5. Randhir Singh Vs. Union Of India [(1982) 1SCC 618]**

The petitioner is a driver constable in the Delhi Police Force under the Delhi Administration and due to difference in fixation of scales between various departments this petition has been filed.

The Supreme Court has held that although the principle of 'equal pay for equal work' is not expressly declared by our Constitution to be a fundamental right, it is certainly a constitutional goal under Articles 14, 16 and 39 (c) of the Constitution. This right can, therefore, be enforced in cases of unequal scales of pay based on irrational classification.

*“The preamble of the Constitution of the International Labour Organisation recognizes the principle of 'equal remuneration for work of equal value' as constituting one of the means of achieving the improvement of conditions “involving such injustice, hardship and privation to large numbers of people as to produce unrest so great that the peace and harmony of the world are imperilled”. Construing Articles 14 and 16 in the light of the Preamble and Art. 39(d) we are of the view that the principle 'Equal pay for Equal work' is deducible from those Article and may be properly applied to cases of unequal scales of pay based on no classification or irrational classification though these drawing the different scales of pay do identical work under the same employer.”*

**6. People's Union For Democratic Rights Vs. Union Of India & Others [(1982) 3 SCC 235, AIR 1982 SC 1473]**

This is the case relating to working conditions of various workmen connected with Asiad Projects. This case laid down the definition for forced labour.

*“It is interesting to find that as far back as 1930 long before the Universal Declaration of Human Rights came into being, International Labour organization adopted Convention No. 29 laying down that every member of the International Labour organization which ratifies this convention shall “suppress the use of forced or compulsory labour in all its forms” and this prohibition was elaborated in Convention adopted by the International Labour organization in 1957. Article 4 of the European Convention of Human Rights and Article 8 of the International Covenant on Civil and Political Rights also prohibit forced or compulsory labour. The court stated that Article 8 of the International Covenant on Civil and Political Rights also prohibit forced or compulsory labour.”*

*“International Human Rights Conference in Tehran called by the General Assembly in 1968 declared in a final proclamation: “Since human rights and fundamental freedoms are indivisible, the full realisation of civil and political rights without the enjoyment of economic, social and cultural rights is impossible.”*

**F. Right to claim compensation**

**1. Nilabati Behera Vs. State of Orissa (1993 SCR (2) 581)**

Nilabati Behera, a distressed mother, wrote a letter to the Supreme Court asking that she be monetarily compensated for the death of her 22 year old son in police custody. She said that her son, Suman Behera was beaten to death at a police post after being detained in connection with a theft. The Supreme Court immediately admitted a writ petition on her behalf and took up the case. The court relied on post mortem report which clearly mentioned about physical injury. The Court held that Nilabati Behera had a right to claim compensation for the wrongful acts of the policemen who caused her son's death. It relied on ICCPR in relation to compensation.



"...The power available to this Court under Article 142 is also an enabling provision in this behalf... the guarantee that deprivation of life and personal liberty cannot be made except in accordance with law, is to be real, the enforcement of the right in case of every contravention must also be possible in the constitutional scheme, the mode of redress being that which is appropriate in the facts of each case. This remedy in public law has to be more readily available when invoked by the have not, who are not possessed of the wherewithal for enforcement of their rights in private law, even though its exercise is to be tempered by judicial restraint to avoid circumvention of private law remedies, where more appropriate... We may also refer to article 9(5) of the International Covenant on Civil and Political Rights, 1966 which indicates that an enforceable right to compensation is not alien to the concept of enforcement of a guaranteed right. Article 9(5) reads as under:- "Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation." The above discussion indicates the principles on which the Court's power under Articles 32 and 226 of the Constitution is exercised to award monetary compensation for contravention of a fundamental right..."

## 2. Rudul Shah Vs. State of Bihar [(1983) 4 SCC 141]

Rudul Shah's case was a public interest litigation (PIL) case filed in the Supreme Court under Article 32 of the Indian Constitution. The petition sought the release of Rudul Shah from illegal detention, and also ancillary relief such as rehabilitation and compensation.

*"The emergence of the right to compensation has implicitly nullified one of the reservations made by India in its instrument of accession to the human rights Covenants, which stated that the Indian law did not recognize such a right in the event of right deprivation."*

## G. Acquisition of Land and Housing Rights

### 1. P.K.Koul vs Estate Officer & Another. (W.P. (C) No. 15239/2004 & CM No. 11011/2004, High Court of Delhi, November 30, 2010)

The petitioners have all contended that they are permanent residents of Jammu & Kashmir and have no desire whatsoever to reside in Delhi. However, on account of the prevailing circumstances and the inability of the Government to secure their lives and properties in their home state, they are unable to return to the state. They sought allotment of land in a particular locality. The court accepted their right to housing by citing various SC judgement which referred to Guiding Principles on Internal Displacement, UDHR, ICESCR and General Comments relating to housing.

*"...The international human rights law thus establishes a legal obligation for ensuring minimum welfare guarantees. The conventions, treaties and declarations as well as the guiding principles manifest the international consensus that every nation has a duty to ensure and provide these guarantees including, inter alia shelter and basic general assistance to every person on its soils...The afore noticed international conventions which exist as well as the Guideline Principles for IDPs therefore recognize that shelter and housing is a basic human right of every individual which is the bare minimum to be provided to internally displaced persons..."*

### 2. J.P.Ravidas and others Vs. Navyuvak Harijan Uthapan Multi Unit Industrial Co-op. Society Ltd. and others ((1996) 9 SCC 300)

A land allotment criteria set for housing Scheduled Castes was not followed in a project. A few allottees only belonged to SCs while rules prescribe a minimum of 80% should be from SCs. The Court has held that such an allotment is not valid. The court referred ICESCR and UDHR to declare the right to housing for everyone, especially deprived classes.

“... The very object of providing two acres of prime land belonging to the Government is to ameliorate the economic conditions of the dalits providing right of residence, which is one of the fundamental and human rights to those persons who cannot afford to purchase the site and construct the flats thereon. Article 19(1)(e) read with Article 21 of the Constitution provide right to residence and settlement to live with dignity of person - a fundamental and human right. Articles 46, 39 and 38 enjoin the State to provide facilities and opportunities of construction of houses by the Dalits, Tribes and poor to enable them to live with dignity in permanent abode. Article 25(1) of the Universal Declaration of Human Rights and Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, 1966 provides that everyone has the food, clothing and right to housing as a part of human right...”

### 3. **Chameli Singh Vs. State Of U.P** (1995 Supp (6) SCR 827)

The lands of the petitioners were acquired for the purpose of housing facilities for Scheduled Castes. These petitioners challenged the order of notification on the ground that it will affect their agricultural livelihood. The court rejected that contention while finding factual merits in the compensation procedure. It relied on many human rights documents besides Constitutional provisions.

“... Article 25(1) of the Universal Declaration of Human Rights declares that “everyone has the right to a standard of living adequate for the health and well-being of himself and his family including food, clothing, housing, medical care and necessary social services”.... Article 11(1) of the International Covenant on Economic, Social and Cultural Rights, 1966 laid down that State parties to the Covenant recognise “the right to everyone to an adequate standard of living for himself and his family including food, clothing, housing and to the continuous improvement of living conditions”... The State parties will take appropriate steps to ensure realisation of this right... Right to live guaranteed in any civilised society implies the right to food, water, decent environment, education, medical care and shelter. These are basic human rights known to any civilised society. All civil, political, social and cultural rights enshrined in the Universal Declaration of Human Rights and Convention or under the Constitution of India cannot be exercised without these basic human rights. Shelter for a human being, therefore, is not a mere protection of his life and limb. It is home where he has opportunities to grow physically, mentally, intellectually and spiritually. Right to shelter, therefore, includes adequate living space, safe and decent structure, clean and decent surroundings, sufficient light, pure air and water, electricity, sanitation and other civic amenities like roads etc. so as to have easy access to his daily avocation. The right to shelter, therefore, does not mean a mere right to a roof over one’s head but right to all the infrastructure necessary to enable them to live and develop as a human being. Right to shelter when used as an essential requisite to the right to live should be deemed to have been guaranteed as a fundamental right...”

### 4. **Keshavananda Bharati v. State of Kerala** [(1973) 4 SCC 225, AIR (1973) SC 1461]

This case is popularly known as the fundamental rights case. In this case the petitioners have challenged the validity of the Kerala Land Reforms Act 1963 but during the pendency of the petition the Kerala Act was amended in 1971 and was placed in the Ninth Schedule by the 29th Amendment Act. The petitioners were permitted to challenge the validity of 24th, 25th and 29th amendment to the constitution.

“The Universal Declaration of Human Rights may not be a legally binding instrument but it shows how India understood the nature of human rights at the time the Constitution was adopted.”

“Most of the essential features of the Constitution are basic Human Rights, sometimes described as “Natural Rights”, which correspond to the rights enumerated in the “Universal Declaration of Human Rights”, to which India is a signatory.”

“In view of Article 51 of the directive principles, this Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the



solemn declaration subscribed to by India. Article 51 reads: 51. The State shall endeavour to- (a) promote international peace and security;(b) maintain just and honourable relations between nations;(c) foster respect for international law and treaty obligations in the dealings of organised peoples with one another; and (d) encourage settlement of international disputes by arbitration.”

## H. Right to Medical Aid

### 1. **Parmanand Katara v. Union of India** ((1989) 4 SCC 286)

Public interest litigation was filed by a human rights activist based on a newspaper report. The report stated that the injured person was taken to the nearest hospital but the doctors there refused to attend on him and they told that he may be taken to another hospital, located some 20 kilometers away, which was authorised to handle medico-legal cases; and the victim succumbed to his injuries before he could be taken to the other hospital. The petitioner has prayed the directions be issued to the Union of India that every injured citizen brought for treatment should instantaneously be given medical aid to preserve life and thereafter the procedural criminal law should be allowed to operate in order to avoid negligent death, and in the event of breach of such direction, apart from any action that may be taken for negligence, appropriate compensation should be admissible. The court recognized the right to health. It has relied solely on Constitutional rights and the professional ethics of doctors.

“...Article 21 of the Constitution casts the obligation on the State to preserve life. The provision as explained by this Court in scores of decisions has emphasised and reiterated with gradually increasing emphasis that position. A doctor at the Government hospital positioned to meet this State obligation is, therefore, duty-bound to extend medical assistance for preserving life. Every doctor whether at a Government hospital or otherwise has the professional obligation to extend his services with due expertise for protecting life...”

## I. Rights relating to Children

### 1. **M.C.Mehta v. State of Tamil Nadu** ((1996) 6 SCC 772)

A PIL was filed by M.C.Mehta about the presence of child labour in the hazardous match industry at Sivakasi. The Court then noted that the manufacturing process of matches and fireworks (for the manufacture of which also Sivakasi is a traditional centre) is hazardous, giving rise to accidents including fatal cases. The SC gave certain directions as to how the quality of life of children employed in the factories could be improved. The court passed various directions to all state governments in relation to abolition of child labour. It has relied on Convention on the Rights of Child.

“...It would be apposite to apprise ourselves also about our commitment to world community. For the case at hand it would be enough to note that India has accepted the Convention on the Rights of the Child, which was concluded by the UN General Assembly on 20th November, 1989. This Convention affirms that children’s right require special protection and it aims, not only to provide such protection, but also to ensure the continuous improvement in the situation of children all over the world, as well as their development and education in conditions of peace and security. Thus, the Convention not only protects the child’s civil and political right, but also extends protection to child’s economic, social, cultural and humanitarian rights..”

### 2. **Gaurav Jain vs Union Of India** (1997 (8) SCC 114: Overruled in the review petition cited as 1998 (4) SCC 270)

The Supreme Court has dealt with public interest litigation on the plight of children of prostitutes. The court has extensively relied on various Constitutional provisions and international human rights instruments.

Many directions were passed by Ramasamy, J without taking note of the dissenting opinion of Wadhwa, J in the division bench (two judges) regarding the applicability of Art.142 in this matter as well as suitability of the order. (Ramasamy, J considered that PIL is not adversarial, therefore, the need for a larger bench is not warranted). But, this was rejected later in a review petition.

### 3. **Lakshmi Kant Pandey vs Union Of India** (AIR 1984 SC 469)

The petitioner, an advocate of the Supreme Court addressed a letter in public interest to the Court, complaining of malpractices of some social organisation engaged in the work of offering Indian Children in adoption to foreign parents. He also exposed the possibility of children being sent for begging and prostitution. The petitioner, accordingly, sought relief restraining Indian based private agencies “from carrying out further activity of routing children for adoption abroad.” The court extensively referred to child related human rights materials including draft declarations and guidelines beside Indian laws.

*“... There has been equally great concern for the welfare of children at the international level culminating in the Declaration of the Rights of the Child adopted by the General Assembly of the United Nations on 20th November, 1959... (draft articles are referred)... “Draft declaration on social and legal principles relating to the protection and welfare of children with special reference of foster placement and adoption, nationally and internationally”... the draft Declaration at its 26th Session and expressed agreement with its contents and the Economic and Social Council approved the draft Declaration and requested the General Assembly to consider it in a suitable manner... But the draft Declaration is a very important document in as much it lays down certain social and legal principles which must be observed in case of inter-country adoption. Some of the relevant principles set out in the draft Declaration may be referred to with advantage... (provisions quoted)... Thereafter at the Regional Conference of Asia and Western Pacific held by the International Council on Social Welfare in Bombay in 1981, draft guidelines of procedure concerning inter-country adoption were formulated and, as pointed out above, they were approved at the workshop held in Brighton, U.K. on 4th September, 1982. These guidelines were based on the Draft Declaration and they are extremely relevant as they reflect the almost unanimous thinking of participants from various countries who took part in the Regional Conference in Bombay and in the Workshop in Brighton, U.K. There are quite a few of these guidelines which are important and which deserve serious consideration by us...”*

### 4. **Bachpan Bachao Andolan vs Union of India** [2011 5 SCC 1]

The Petitioner filed this petition following a series of incidents where the Petitioner came in contact with many children who were trafficked into performing in circuses. The activities that are undertaken in these circuses deprive the children of their basic fundamental rights. Most of them are trafficked from some poverty-stricken areas of Nepal as well as from backward districts of India. This case defined the term “Missing Children”. Further, this case laid down guidelines for prohibition of trafficking of children in Circuses.

*“The concerns of child and the paradigm of child rights have been addressed suitably in various international conventions and standards on child protection including the UN Convention on the Rights of the Child (UNCRC), 1989, the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), 1985, the UN Rules for the Protection of Juveniles Deprived of their Liberty, 1990, the Hague Convention on Inter Country Adoption, 1993. India has ratified the UN Convention on the Rights of the Child in 1992. The Convention inter alia prescribes standards to be adhered by all state parties in securing the best interest of the child.”*

## J. **Rights relating to women**

### 1. **Sahyog Mahila Mandal and Anr. vs State Of Gujarat** ((2004) 2 GLR 1764)

The petitioners sought quashing of certain orders of police prohibiting commercial sex work in certain areas of Gujarat. The court referred to human rights instruments for prohibiting prostitution. The court has held that Immoral Traffic laws are not in violation of Constitution and passed many orders, directing the officials to prohibit prostitution and rehabilitate girls.



*“... The fact that prostitution is a practice derogatory to the dignity of women is universally recognized and is clearly reflected from the “Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others”... where under prostitution and the accompanying evil of traffic in persons for the purpose of prostitution are declared to be incompatible with the dignity and worth of the human person and as endangering the welfare of the individual, the family and the community. Under Article 253 of the Constitution, the Parliament has power to make any law for implementing any Treaty, Agreement or Convention with other countries or any decision made at any International Conference, Association or Body. Therefore, when the power is exercised under such law by the State executive or the judiciary, even the relevant covenants, agreements or decisions can provide useful guidelines for exercise of the powers under the Act in the matter of implementation of the statutory provisions so enacted...”*

**2. Apparel Export Promotion Council v. A.K. Chopra ((1999) 1 SCC 759)**

A superior was charged with sexual harassment of a women staff. As the facts suggested, the superior was held guilty as decided in the first proceedings. The court stressed the importance of international human rights approach.

*“...In cases involving violation of human rights, the Courts must for ever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between the international norms and the domestic law occupying the field. In the instant case, the High Court appears to have totally ignored the intent and content of the International Conventions and Norms while dealing with the case...”*

**3. Sakshi Vs Union Of India [(2004) 5 SCC 218]**

Sakshi, an NGO focusing on violence against women, petitioned the Supreme Court of India to declare that “rape” under India’s criminal rape law (Indian Penal Code, or “IPC”, section 375) includes all forms of forcible penetration.

In this connection, international instruments namely United Nations Convention On the Elimination of All Forms of Discrimination Against Women, 1979 and Convention On the Rights of the Child adopted by the General Assembly of the United Nations on 20th February, 1989 (Article 17 and 19) were referred. The petitioner also referred to Statute of International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia.

The court declined to enlarge the definition of rape in Section 375 of IPC because such enlargement may violate the guarantee enshrined in Article 20(1) of the Constitution of India.

**4. Suchita Srivastava Vs. Chandigarh Administration [2009 (11) SCALE 813]**

The recent Supreme Court judgment reversing a Punjab and Haryana High Court order directing the medical termination of pregnancy of a young adult woman without her consent, on grounds of “mental retardation”, is a landmark decision in the area of reproductive rights.

*“Our conclusions in this case are strengthened by some norms developed in the realm of international law. For instance one can refer to the principles contained in the United Nations Declaration on the Rights of Mentally Retarded Persons, 1971 [G.A. Res. 2856 (XXVI) of 20 December, 1971].”*

**5. Sheela Barse Vs. Secretary, Children Aid Society [(1987) 3 SCC 96, AIR 1987 SC 378]**

In this case appropriate directions have been given by the Courts to inmates of protective and remand homes for women and children for providing suitable humane conditions in the homes and for providing appropriate machinery for effective safeguard of their interests.

*"In 1959, the Declaration of all the rights of the child adopted by the General Assembly of the United Nations and in Article 24 of the International Covenant on Civil and Political Rights 1966. The importance of the child has been, appropriately recognised. India as a party to these International Charters having rectified the Declarations, it is an obligation of the Government of India as also the State machinery to implement the same in the proper way."*

**6. Vishaka Vs. State of Rajasthan [(1997) 6 SCC 241]**

The litigation resulted from a brutal gang rape of a publicly employed social worker in a village in Rajasthan during the course of her employment. The primary basis of bringing such an action to the Supreme Court in India was to find suitable methods for the realisation of the true concept of "gender equality" in the workplace for women.

*"In the absence of domestic law occupying the field, to formulate effective measures to check the evil of sexual harassment of working women at all work places, the contents of International Conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality, right to work with human dignity in Articles 14, 15 19(1)(g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein."*

Article 11 and 24 of CEDAW has been referred while deciding this case.

The International Covenant on Economic, Social and Cultural Rights contains several provisions particularly important for women. Article 7 recognises her right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at the place of work which may vitiate working environment. These international instruments cast an obligation on the Indian State to gender sensitise its laws and the Courts are under an obligation to see that the message of the international instruments is not allowed to be drowned.

**7. Chairman, Railway Board and others Vs. Mrs.Chandrima [ AIR 2000 SC 988]**

In this case a Bangladeshi woman was gang raped by Railway Employess at Railway premises. The High Court of Calcutta allowed compensation inter alia, to her for having been gang raped upholding the decision of the High Court, the Supreme Court held that as a national of another country, she could not be subjected to a treatment which was below the dignity nor could she be subjected to physical violence at the hands of Government employees who outraged her modesty. The right available to her under Article 21 of the Constitution of India was thus violated.

*"The International Covenants and Declarations as adopted by the United Nations have to be respected by all signatory States and the meaning given to the words in those Declarations and Covenants have to be such as would help in effective implementation of those Rights."*

*"The domestic application of international human rights and norms was considered by the Judicial Colloquia (Judges and Lawyers) at Bangalore in 1988. It was later affirmed by the colloquia that it was the vital duty of an independent judiciary to interpret and apply national Constitutions in the light of those principles. Further Colloquia were convened in 1994 at Zimbabwe, in 1996 at Hong Kong and in 1997 at Guyana and in all those colloquia, the question of domestic application of international and regional human rights specially in relation to women, was considered. The Zimbabwe Declaration 1994, inter alia, stated:*

*"Judges and lawyers have duty to familiarise themselves with the growing international jurisprudence of human rights and particularly with the expanding material on the protection and promotion of the human rights of women."*

The case refers to various articles and objectives of UDHR and CEDAW

*“Our Constitution guarantees all the basic and fundamental human rights set out in the Universal Declaration of Human Rights, 1948, to its citizens and other persons. The chapter dealing with the Fundamental Rights is contained in Part III of the Constitution. The purpose of this Part is to safeguard the basic human rights from the vicissitudes of political controversy and to place them beyond the reach of the political parties who, by virtue of their majority, may come to form the Govt. at the Centre or in the State.”*

**K. Rights relating to property:**

**1. C. Masilamani Mudaliar v. Idol of Sri Swaminathaswami Thirukoil, ((1996) 8 SCC 525),**

This case is about the property rights of Hindu widow. Her right to alienate the property through a will granting limited rights was in question. The court reread S.14 (1) of Hindu Succession Act, a liberal meaning was accorded to support the cause of inheritance of women. The court referred many provisions of CEDAW and UDHR.

*“...Human Rights and fundamental freedom have been reiterated by the Universal Declaration of Human Rights. Democracy, development and respect for human rights and fundamental freedoms are inter-dependent and have mutual reinforcement. The human rights for woman, including girl child are, therefore, inalienable, integral and indivisible part of universal human rights. All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights...”*

**2. John Vallamattom v. Union of India, ((2003) 6 SCC 611)**

The property rights of Christian women under the personal laws were challenged on constitutional validity. These provisions were obstacles for equal rights to women in succession. The court extensively referred to many provisions of ICCPR to uphold the rights of women. Consequently, the court has held some provisions of Christian Succession enactment is constitutionally invalid.

*“...I find that Section 118 of the Act being unreasonable is arbitrary and discriminatory and, therefore, violative of Article 14 of the Constitution... Furthermore, India being a signatory to the Declaration on the Right to Development adopted by the World Conference on Human Rights and Article 18 of the United Nations Covenant on Civil and Political Rights, 1966, the impugned provision may be judged on the basis thereof...”*

**3. Madhu Kishwar v. State of Bihar ((1996) 5 SCC 125)**

The rights to property and succession rights of tribal women were in question. The worst situation of tribal women were considered by the Supreme Court in relation to non-application of Hindu laws to these tribal communities. However, the Court has held that Hindu Succession laws will be applicable to those tribal women. The court relied on UDHR, CEDAW and ICCPR to arrive at this rationale along constitutional provisions.

*“...The human rights for woman, including girl child are, therefore, inalienable, integral and indivisible part of universal human rights... All forms of discrimination on grounds of gender is violative of fundamental freedoms and human rights. Vienna Convention on the Elimination of all forms of Discrimination Against Women, the Preamble of CEDAW reiterates that discrimination against women, violates the principles of equality of rights and respect for human dignity; Poverty of women is a handicap... The Parliament has enacted the Protection of Human Rights Act, 1993... Thereby the principles embodied in CEDAW and the concomitant Right to Development became integral parts of the Indian Constitution and the Human Rights Act and became enforceable...”*



## L. Rights against forced Labour

### 1. **Safai Karamchari Andolan vs Union Of India** (2014)

This petition was filed by the petitioner to strictly enforce the implementation of the Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993 and seeking for enforcement of fundamental rights guaranteed under Articles 14, 17, 21 and 47 of the Constitution of India.

*“Apart from the provisions of the Constitution, there are various international conventions and covenants to which India is a party, which prescribe the inhuman practice of manual scavenging. These are the Universal Declaration of Human Rights (UDHR), Convention on Elimination of Racial Discrimination (CERD) and the Convention for Elimination of all Forms of Discrimination Against Women (CEDAW).”*

## M. Right to travel

1. **Maneka Gandhi Vs. Union of India** [(1978) 1 SCC 248, AIR 1978 SC 597] Maneka Gandhi's passport was impounded by Regional passport officer under Section 10(3)(c) of the Passport Act 1967. The grounds for such an impounding, as told to her, were “public interest.” Article 13 of UDHR was referred in this case.

*“No person can be deprived of his right to, go abroad unless there is a law made by the State prescribing the procedure for so depriving him and the deprivation is effected strictly in accordance with such procedure.”*

*“The expression ‘personal liberty’ in Article 21 is of widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have raised to the status of distinct fundamental rights and given additional protection under Article 19.”*

*“Moreover, it may be noted that only a short while before the Constitution was brought into force and whilst the constitutional debate was still going on, the Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations on 10th December, 1948 and most of the fundamental rights which we find included in Part III were recognised and adopted by the United Nations as the inalienable rights of man in the Universal Declaration of Human Rights.”*



## UNIT 4

### Human Rights and Institutional Mechanisms in India

*Human Rights and Institutional Mechanisms in India The Protection of Civil Rights Act, 1955 The National Commission for Women Act, 1990 The National Commission for Minorities Act, 1992 The Protection of Human Rights Act, 1993 The Person's with Disabilities (Equal opportunities, Protection of Rights and full participation) Act, 1995 and Rules 1996 National Charter for Children, 2003 The Commission for Protection of Child Rights Act, 2005*

Indian human rights mechanisms encompass a set of constitutionally envisaged institutions and organizations, necessitated by international commitments and needs. The constitutionally envisaged institutions include commissions relating Scheduled Castes (SCs) and Scheduled Tribes (STs). National Human Rights Commission (NHRC) represents the institutions created out of international commitments. These institutions broadly have advisory, fact finding, data collection, dissemination of knowledge and research, investigating, intervening and recommendatory functions. Human rights mechanisms in India are quasi-independent bodies with significant influence from the executive.

All the above mentioned institutions are created by legislation. They may not directly execute or enforce the laws relating to the subject. However they broadly oversee the functioning of various enactments relating to the vulnerable group. Most of the human rights institutions have both state and central level agencies. The appointment of members, jurisdiction and powers are mostly divided in consonance with the constitutional scheme of executive powers. Presently, India has separate agencies for protecting the rights of SCs, STs, Women, minorities and Children. Apart from those specific mechanisms, National and State Human Rights Commissions have broader legislative mandate to oversee all human rights situations which are also addressed by specific commissions.

#### 1. Paris Principles on National Human Rights Institutions (NHRI) and United Nations

The **Paris Principles** were defined at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights, 1991. They were adopted by the United Nations Human Rights Commission in 1992 and the UN General Assembly in 1993. The Paris Principles relate to the status and functioning of national institutions for the protection and promotion of human rights. Human rights institutions are also referred in international instruments such as Convention on the Rights of Persons with Disabilities and Vienna Declaration and Programme of Action. The Paris Principles require NHRIs to have a wide role with the following broad guidelines,

- I. Human rights promotion, i.e., creating a national culture of human rights where tolerance, equality and mutual respect thrive. The legal roles of NHRIs will always come from the enabling statutes or constitutional mandate, or both.
- II. Human rights protection, i.e., helping to identify and investigate human rights abuses, to bring those responsible for human rights violations to justice, and to provide a remedy and redress for victims. National human rights institutions should have a legally defined mandate to undertake these functions and to issue views, recommendations or even seek remedies before the courts. In all cases, reference should be made to the enabling law.
- III. Advising the Government and the Parliament;
- IV. Cooperating with: – National stakeholders, civil society, NHRIs from other countries, and with regional bodies; – The international human rights system, e.g., presenting independent reports and

documentation to human rights treaty bodies, special procedures mandate holders and to the Human Rights Council and its processes, notably the universal periodic review;

V. Protecting and promoting the rights of specific groups, including those who are vulnerable because of their gender, age, disability, sexual orientation, migrant or other minority status. These rights are often controversial and NHRIs are frequently the only ones that can speak out in defence of those who have no voice;

VI. Linking human rights to development initiatives through human rights-based approaches and especially through economic, social and cultural rights.

VII. NHRIs have an emerging and growing role in working with and monitoring business, recognizing the crucial and relevant role of the private sector in national, regional and multinational contexts.

The Paris principles provide six main criteria for a successful national human rights institution,

- a. A broad mandate based on universal human rights standards
- b. Autonomy from Government
- c. Independence guaranteed by statute or constitution
- d. Pluralism, including through membership and/or effective cooperation
- e. Adequate resources
- f. Adequate powers of investigation.

National Human Rights Institutions' compliant with the Paris Principles were formally recognized as important actors in the promotion and protection of human rights. In 2005 the Commission on Human Rights, reaffirmed the importance of establishing and strengthening independent, pluralistic NHRIs consistent with the Paris Principles and of strengthening cooperation among them. Indian National Human Rights Commission has been accredited to be in compliance with Paris principles by the International Coordinating Committee of National Institutions for the Promotion and Protection of Human Rights.

In general, NHRIs enable States to meet their international responsibility "to take all appropriate action" to ensure that international obligations are implemented at the national level. They receive their authority from the State: this official capacity lends them legitimacy and powers that are particular to statutory institutions, although legitimacy can be squandered through ineffectiveness and failure to meet international standards. National human rights institutions may have access to the Government and policymakers, and their recommendations are usually heard, even if they are not always acted upon. Clearly, Governments bear the prime responsibility for human rights, but they cannot always find a neutral space in which to interact and exchange ideas with other actors, especially civil society. In fact, the two are, regrettably, often seen at opposing sides of the human rights debate. As independent entities, but established by the Government, NHRIs occupy a unique terrain, one that can link civil society to the Government. Providing a neutral meeting point and focal point for human rights encourages dialogue and facilitates cooperation.

## **2. National and State Human Rights Commissions**

The National Human Rights Commission was established by the Protection of Human Rights Act, 1993. The Commission is an embodiment of India's concern for the promotion and protection of human rights. NHRC is committed to provide independent views on issues within the parlance of the Constitution or in law for the time being enforced for the protection of human rights. The Commission takes independent stand. NHRC has a very wide mandate and it has unique mechanism with which it also monitors implementation of its various recommendations.



## An overview of Human Rights Act, 1993

Human Rights Act creates human rights commissions at state and central level. It sets out the powers and functions of the commission along the composition and appointment procedures for its members. It establishes/designates a set of human rights courts for the purpose of speedy trial of human rights violations. It defines the term 'human rights' for the purpose of the commissions. Though the definition given under the Act seems to be narrow, it can be liberally understood in the context of broader meaning already accorded by the higher courts.

### Some Definitions

The definitions under this Act are relevant in the context of NHRC and SHRCs' understanding and functioning. The term 'human rights' is defined in S.2(d), it "*means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.*" This first part of the definition represents the universal understanding of human rights as discussed in the first chapter. The terms 'life, liberty, equality and dignity' encompass a broader meaning applicable to every basic right. Similarly, Constitution embodies every human right through fundamental rights; some parts of directive principles and other constitutional rights are elevated to the status of human rights. The final part 'enforceable by courts in India' may require a specific adoption of international covenant in India through a law. However, Indian higher courts have liberalized and adopted human rights instruments with a broader and liberal approach. In *Entertainment Network v. Super Cassette Industries* the SC has held, "... as regards the question where the protection of human rights, environment, ecology and other second-generation or third-generation rights is involved, the courts should not be loathe to refer to the International Conventions..." The term 'international covenants' under S.2 (d) is defined under S.2 (f), "*International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural rights adopted by the General Assembly of the United Nations on the 16<sup>th</sup> December, 1966 and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify.*" Apart from the above mentioned instruments, the Government has notified the Convention on the Elimination of all forms of Racial Discrimination. Thus, the limitations set out in the definition may not affect a broader approach if human rights Commissions choose to adopt.

### NHRC: Composition and Appointment

National commission is composed of credible independent members with its chairman and two members from the background of judiciary. They are appointed by a committee comprising opposition leader and speaker of Parliament.

#### S.3 Composition of the Commission

Judicial and Independent members	Ex officio members
(a) A Chairperson who has been a Chief Justice of the Supreme Court	The Chairperson of the National Commission for Minorities,
(b) One Member who is or has been, a Judge of the Supreme Court	The Chairperson the National Commission for the Scheduled Castes,
(c) One Member who is, or has been, the Chief Justice of a High Court	The Chairperson the National Commission for the Scheduled Tribes
(d) Two Members to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights	The National Commission for Women (These members do not have inquiry powers conferred under S.12 (a) of the Act)

Appointment of Judicial and independent members are made by the President of India by the recommendation of the following committee consisting of high profile dignitaries as mandated under S.4,

Composition of committee for recommendation of NHRC members: (a) The Prime Minister — Chairperson (b) Speaker of the House of the People — Member (c) Minister in-charge of the Ministry of Home Affairs in the Government of India — Member (d) Leader of the Opposition in the House of the People — Member (e) Leader of the Opposition in the Council of States — Member (f) Deputy Chairman of the Council of States

### **NHRC: Term of Office, Resignation and Removal of Chairman and Members**

S.6 of the Act provides that a person appointed as Chairperson shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of seventy years, whichever is earlier. Further, a person appointed as a Member shall hold office for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment for another term of five years. Provided that no Member shall hold office after he has attained the age of seventy years. Chairman and other members are ineligible for further employment under the Government of India or under the Government of any State.

S.5 provides about the resignation and removal of office bearers; the Chairperson or any Member may, by notice in writing under his hand addressed to the President of India, resign his office. The President may, by order, remove from office the Chairperson or any Member if the Chairperson or such Member, as the case may be— (a) is adjudged an insolvent; or (b) engages during his term of office in any paid employment outside the duties of his office; or (c) is unfit to continue in office by reason of infirmity of mind or body; or (d) is of unsound mind and stands so declared by a competent court; or (e) is convicted and sentenced to imprisonment for an offence which in the opinion of the President involves moral turpitude. Other grounds of removal involve a procedure. The Chairperson or any Member shall only be removed from his office by order of the President of India on the ground of proved misbehaviour or incapacity after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chairperson or the Member, as the case may be, ought on any such ground to be removed.

### **SHRCs: Composition and Appointment**

S.21 provides on the composition of SHRCs, it shall consist of,

(a) a Chairperson who has been a Chief Justice of a High Court; (b) one Member who is, or has been, a Judge of a High Court or District Judge in the State with a minimum of seven years experience as District Judge; (c) one Member to be appointed from amongst persons having knowledge of, or practical experience in, matters relating to human rights.

The SHRC members appointed by the Governor with the recommendations of high profile state dignitaries to ensure neutrality. The recommending committee under S. 22 shall consist of, a) the Chief Minister — Chairperson (b) Speaker of the Legislative Assembly — Member (c) Minister in-charge of the Department of Home, in that State — Member (d) Leader of the Opposition in the Legislative Assembly — Member, provided further that where there is a Legislative Council in a State, the Chairman of that Council and the Leader of the Opposition in that Council shall also be members of the Committee.

### **SHRCs: Term of Office, Resignation and Removal of Chairman and Members**

According to S. 24, the chairman and other member of the commission shall hold office for a term of 5 years on which he enters upon his office or until he attains the age of seventy years, whichever is earlier; A person appointed as a Member shall be eligible for re-appointment for another term of five years; Provided



that no Member shall hold office after he has attained the age of seventy years. The chairperson and others are disqualified from holding any post in the Indian or state government after retirement.

The resignation and removal of office bearers of provided in S.23; the Chairperson or any Member may, by notice in writing under his hand addressed to the Governor, resign his office. The President may, by order, remove from office the Chairperson or any Member if the Chairperson or such Member, as the case may be— (a) is adjudged an insolvent; or (b) engages during his term of office in any paid employment outside the duties of his office; or (c) is unfit to continue in office by reason of infirmity of mind or body; or (d) is of unsound mind and stands so declared by a competent court; or (e) is convicted and sentenced to imprisonment for an offence which in the opinion of the President involves moral turpitude. Other grounds of removal involve a procedure. The Chairperson or any Member shall also be removed from his office by order of the President of India on the ground of proved misbehaviour or incapacity after the Supreme Court, on reference being made to it by the President, has, on inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chairperson or the Member, as the case may be, ought on any such ground to be removed. (S.23 and S.5 are similar)

### **Jurisdiction of NHRC and SHRCs**

- National commission shall have powers to inquire into any human rights violation set out in the Act. Complaints against armed forces shall undergo a special procedure by NHRC. (S.19)
- The State Commission may inquire into violation of human rights only in respect of matters relatable to any of the entries enumerated in List II and List III in the Seventh Schedule to the Constitution.(S.21)
- The Commissions shall not inquire into any matter after the expiry of one year from the date on which the act constituting violation of human rights is alleged to have been committed. S.36(2)
- The NHRC and SHRCs shall not inquire into any matter which is pending before other human rights commission or any other commission constituted under any other law.S.36 (1)
- NHRC shall have the powers to transfer its cases to relevant SHRC. (S.13).

### **Powers and Functions of NHRC and SHRCs**

The powers given to NHRC are extended to SHRCs in respect of the following aspects as per S.29 of the Act.

1. Functions of the Commission (S.12)
  - a) *inquire, suo motu or on a petition* presented to it by a victim or any person on his behalf or on a direction or order of any court into complaint of (i) violation of human rights or abetment thereof; or (ii) negligence in the prevention of such violation, by a public servant;
  - (b) *intervene* in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court;
  - (c) *visit*, notwithstanding anything contained in any other law for the time being in force, any jail or other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection, for the study of the living conditions of the inmates thereof and make recommendations thereon to the Government; in order to -
  - (d) *review the safeguards* provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation;

- (e) *review the factors*, including acts of terrorism that inhibit the enjoyment of human rights and recommend appropriate remedial measures;
- (f) *study* treaties and other international instruments on human rights and make recommendations for their effective implementation; (*this power is accorded only to NHRC*)
- (g) *undertake and promote research* in the field of human rights;
- (h) *s* *pread* human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means;
- (i) *encourage* the efforts of non-governmental organisations and institutions working in the field of human rights;
- (j) such other functions as it may consider necessary for the protection of human right

## 2. Powers relating to inquiries (S.13)

- The Commission shall, while inquiring into complaints under this Act, have all the powers of a civil court trying a suit under the Code of Civil Procedure, 1908, and in particular in respect of the following matters, namely : (a) summoning and enforcing the attendance of witnesses and examining them on oath; (b) discovery and production of any document; (c) receiving evidence on affidavits; (d) requisitioning any public record or copy thereof from any court or office; (e) issuing commissions for the examination of witnesses or documents; (f) any other matter which may be prescribed.
- The Commission shall have power to require any person, subject to any privilege which may be claimed by that person under any law for the time being in force, to furnish information on such points or matters as, in the opinion of the Commission, may be useful for, or relevant to, the subject matter of the inquiry and any person so required shall be deemed to be legally bound to furnish such information within the meaning of section 176 and section 177 of the Indian Penal Code.
- The Commission or any other officer, not below the rank of a Gazetted Officer, specially authorised in this behalf by the Commission may enter any building or place where the Commission has reason to believe that any document relating to the subject matter of the inquiry may be found, and may seize any such document or take extracts or copies there from subject to the provisions of section 100 of the Code of Criminal Procedure, 1973, in so far as it may be applicable.
- The Commission shall be deemed to be a civil court and when any offence as is described in section 175, section 178, section 179, section 180 or section 228 of the Indian Penal Code is committed in the view or presence of the Commission, the Commission may, after recording the facts constituting the offence and the statement of the accused as provided for in the Code of Criminal Procedure, 1973, forward the case to a Magistrate having jurisdiction to try the same and the Magistrate to whom any such case is forwarded shall proceed to hear the complaint against the accused as if the case has been forwarded to him under section 346 of the Code of Criminal Procedure, 1973.
- Every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196, of the Indian Penal Code, and the Commission shall be deemed to be a civil court for all the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.



- Where the Commission (National) considers it necessary or expedient so to do, it may, by order, transfer any complaint filed or pending before it to the State Commission of the State from which the complaint arises, for disposal in accordance with the provisions of this Act; Provided that no such complaint shall be transferred unless the same is one respecting which the State Commission has jurisdiction to entertain the same. Every complaint transferred under shall be dealt with and disposed of by the State Commission as if it were a complaint initially filed before it.

### 3. Investigation (S.14)

- The Commission may, for the purpose of conducting any investigation pertaining to the inquiry, utilise the services of any officer or investigation agency of the Central Government or any State Government with the concurrence of the Central Government or the State Government, as the case may be.
- Powers of Investigating Officer: subject to the direction and control of the Commission: - (a) summon and enforce the attendance of any person and examine him; (b) require the discovery and production of any document; and (c) requisition any public record or copy thereof from any office.

4. Statements given to commission are protected and it should not be used against them in any civil or criminal proceedings (except false evidence) (S.15).

Persons presumably affected by the proceeding should be given audience by the commission. (S.16)

### 5. Inquiry Procedure

S.17 authorises the commissions to seek reports or information while inquiring into the complaints of human rights violations. The complaint may be closed if it receives a satisfactory response from the appropriate government. However, the commission may initiate an inquiry without seeking a report from the government, if it considers necessary.

### 6. Measures to be taken by Commissions during/after inquiry

S.18 describes the steps during and after inquiry: The Commission may take any of the following steps during or upon the completion of an inquiry,

- where the inquiry discloses the commission of violation of human rights or negligence in the prevention of violation of human rights or abetment thereof by a public servant, it may *recommend* to the concerned Government or authority – (i) to make payment of compensation or damages to the complainant or to the victim or the members of his family as the Commission may consider necessary; (ii) to initiate proceedings for prosecution or such other suitable action as the Commission may deem fit against the concerned person or persons; (iii) to take such further action as it may think fit;
- approach* the Supreme Court or the High Court concerned for such directions, orders or writs as that Court may deem necessary;
- recommend* to the concerned Government or authority at any stage of the inquiry for the grant of such immediate interim relief to the victim or the members of his family as the Commission may consider necessary;

The commission shall provide a copy of the same to the petitioner and send a copy of recommendations to the concerned government. It may also publish the recommendations including the inputs given by government. (S.18 (d) and (e))



A report of the human rights commission shall be furnished by the commission to the government. The government shall present the action taken report to the legislature including reasons for non acceptance of recommendations (S.28 (2)).

In, Rajesh Das, I.P.S., v. Tamil Nadu State Human Rights Commission, 2010 (5) CTC 589, the court has summarised the law relating to the 'recommendations of human rights commissions'

- (i) What is made under Section 18 of the Protection of Human Rights Act by the State Human Rights Commission is only a recommendation and it is neither an order nor an adjudication. (ii) Such a recommendation made by the State Human Rights Commission is not binding on the parties to the proceeding, including the Government.
- (iii) But, the Government has an obligation to consider the recommendation of the Commission and to act upon the same to take forward the objects of the Human Rights Act, the International Covenants and Conventions in the back drop of fundamental rights guaranteed under the Indian Constitution within a reasonable time.
- (iv) In the event of the Government tentatively deciding to accept the recommendation of the State Human Rights Commission holding any public servant guilty of human rights violation, the Government shall furnish a copy of the report of the Commission to the public servant concerned calling upon him to make his explanation, if any, and then pass an appropriate order either accepting or rejecting the recommendation of the Commission.
- (v) Until the final order is passed by the Government on the recommendation of the Commission, neither the complainant(s) nor the respondent (s) in the human rights cases can challenge the recommendation of the commission as it would be premature except in exceptional circumstances.
- (vi) On the recommendation of the Human Rights Commission, if the Government decides to launch prosecution, the Government have to order for investigation by police which will culminate in a final report under Section 173 of the Code of Criminal Procedure.
- (vii) On the recommendation of the Human Rights Commission, if the Government decides to pay compensation to the victims of human rights violation, the Government may do so. But, if the Government proposes to recover the said amount from the public servant concerned, it can do so only by initiating appropriate disciplinary proceeding against him under the relevant service rules, if it so empowers the Government.

However, this proposition has not been accepted by an another single bench of the same court in T.Vijayakumar vs. Madhavi and State Human Rights Commission, Tamil Nadu in W.P.(MD) No.12316 of 2010, judgement dated 29.09.2010,

*"If Rajesh Das's case is accepted, then it will become a paradise of remedies for the delinquent Government servant not once, but three times. First before the Commission, second before the State Government which had accepted the Commission's report and third before any amount were to be recovered pursuant to acceptance of report of the Commission by the State Government. On the other hand, neither the Protection of Human Rights Act, 1993 nor the relevant service rule contemplated such multiple opportunities that too for a person who had violated law with impunity. Such undue sympathies or liberal approach on this issue will only further embolden a delinquent Government servant to commit further human right violations with impunity. The concept of natural justice is not immune from restrictions nor is it an inscrutable concept. It has to be applied to fact situation. It is not clear as to how the petitioner can be said to be aggrieved about the Government order and the consequent recovery when he had the full opportunity of placing his case before the SHRC which is a statutory body mandated to protect the human rights of its citizens."*

This provision has been subjected to the above discussed conflicting single bench opinions of High Court of Madras, and now it is referred to a larger bench in Abdul Sathar Vs. Principle Secretary to Government (LAWS (MAD) -2013-7-33). The matter is still pending in Madras High Court.

7. Vacancies, etc., not to invalidate the proceedings of the Commission (S.9)

No act or proceedings of the Commission shall be questioned or shall be invalidated merely on the ground of existence of any vacancy or defect in the constitution of the Commission

8. Procedure to be regulated by the Commission (S.10)

(i) The Commission shall meet at such time and place as the Chairperson may think fit.

(ii) The Commission shall have the power to lay down by regulations its own procedure.

### **Complaints against Armed Forces**

Special Procedure to be adopted by NHRC while dealing with complaints against armed forces:

NHRC shall seek a report from the government after providing due notice to the central government in case of any human rights violations by armed forces. It can adopt recommendations which would be forwarded to the government. The government response along the recommendations shall be published. (S.19) This section limits the scope of NHRC in relation to complaints against armed forces.

### **Rule Making Powers**

The central government, state governments and NHRC are provided with rule making powers to carry out the provisions of the Act. (S.40, 40A, 40B and 41)

### **Guidelines Issued by NHRC**

NHRC has issued many guidelines in relation to human rights situations. These guidelines are in the form of rules, formats and communication to governments. These guidelines were referred by the Supreme Court on few instances. It has issued guidelines on the following human rights issues and situations,

- o Medical Examination of Prisoners on Admission to Jail
- o Death During the course of Police Action
- o Custodial Deaths/Rapes
- o Cases of Encounter Deaths
- o Visits to Police Lock-ups/Guidelines on Polygraph Tests and Arrests
- o Measures to Improve Police-Public Relationships
- o Human Rights in Prisons
- o Instructions regarding videography of post-mortem examinations in respect of deaths in jail
- o Instructions to be followed while sending post-mortem reports in cases of custodial deaths
- o Format of post-mortem examination in case of death in police custody
- o Women's Rights



- o Rights of Children
- o Ending Manual Scavenging
- o Illegal Trade in Human Organs
- o Guidelines for the Media in addressing the issue of child sexual abuse
- o Guidelines regarding conducting of Magisterial Enquiry in cases of Death in Custody or in the course of police action
- o Guidelines on Clinical Trial of Drugs Framed By Committee Constituted By The National Human Rights Commission

The Supreme Court referred the guidelines issued by NHRC in relation to safety of sewerage workers in *Delhi Jal Board v. National Campaign for Dignity & Rights of Sewerage & Allied Workers* (2011) 8 SCC 568. This case relates to compensation for the families of deceased sewerage worker. The Supreme court has upheld the compensation.

*“...The claiming work was being done in complete violation of the National Human Rights Commission guidelines. The victims worked without any helmet or gas masks, which are mandatory, as stated by NHRC, for the kind of work, they were doing. Neither there was any first aid kit with the workers nor artificial respirators and portable ladders were made available to them by the contractors. Apparently contractors violated all the rules and guidelines...”*

Further, Supreme Court relied and improved the guidelines issued by NHRC in *PUCL Vs. State of Maharashtra* (Judgment dated 24 September 2014) regarding police encounters. *“...In light of the above discussion and having regard to the directions issued by the Bombay High Court, guidelines issued by NHRC...we think it appropriate to issue the following requirements to be followed in the matters of investigating police encounters in the cases of death as the standard procedure for thorough, effective and independent investigation...”*

### **Importance of Human Rights Commissions**

Karnataka SHRC was not established by the state government during 2006. The High Court has passed an order to establish a commission; it also explained the importance of human rights institutions. The court has observed, *“...it is no doubt true that the Human Rights Commission will examine the grievance of such complaints, violation of the rules and may provide for suitable relief and suggest remedial measures, as in fact it happened in the case of the very petitioner but for whose directions, perhaps the case of the petitioner would not have drawn the attention that it deserves and resulted in his release from the prison. The very existence of an institution of this nature, will act as a deter as against erring officials and it may provide relief even before any person is compelled to file a complaint before the Human Rights Commission. The very existence of any institution if it can reduce the commission of atrocities and human light violations it is very desirable and it is very necessary that the State Government bestows its attention in this regard and takes steps to establish a State Human Rights Commission at the earliest...State to give effect to the provisions of Section 21 of the Protection of Human Rights Act, 1993, and to constitute a State Human Rights Commission at the earliest and at any rate to ensure that such a Commission will be in place within a period of 6 months from the date of this order...”* (*P. Hanumanthappa Vs. The State Of Karnataka*; Judgement dated 5 December, 2006)



## Human Rights Courts

'Human Rights Courts' may have contextual understanding. High Courts and Supreme Court are sometimes referred as 'human rights courts' as they have wider jurisdiction to interpret and enforce basic human rights through the mechanism established to protect fundamental rights and other rights. However, under Human Rights Act, 'human rights courts' refers to a set of courts established to conduct trial of offences in violation of human rights.

- The state government may specify a court of session as human rights court for the purpose of providing speedy trial of offences arising out of violation of human rights. S.(30)
- The government shall receive the concurrence of Chief Justice of High Court for the specification of 'human rights courts.' (S.30)
- A special public prosecutor to be appointed to the human rights courts by the state government (S.31)
- Human Rights Court is deemed to be a Sessions Court, the Said Court cannot take cognizance of any offence without the case being committed to it. The Government cannot straightway prosecute the matter before the jurisdictional Magistrate. On the basis of the Commission's report the matter has to be further investigated by the Police on the directions of the Government and thereafter a final report is to be submitted before the jurisdictional Magistrate. There upon the learned Magistrate will have to commit the case to the Human Rights Court for trial. (Dr.Sourubarani v. C.Selvi, 2005 L.W. [Crl.] 139)

### 1. Women Rights and Institutions

The constitutional protection available to women is extended through the institutional mechanisms created to protect women and rule of law in India. National commission for women plays a vital role in protecting and promoting the women rights in India. Apart from the women commission, the human rights commissions also take cognizance of human rights violations against women. The higher courts in India progressively recognise the rights of women and the importance of these institutions.

#### Constitutional Provisions and Relevant Enactments relating to women in India

##### A. Fundamental Rights

Art 14: Equality before law for women (Article 14) It says that the state shall not deny any person equality before law and equal protection of law in the territory of India. While this article is general in nature, it forms the bedrock for all other provisions.

Art 15: The State not to discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them (Article 15 (i)). The State to make any special provision in favour of women and children (Article 15 (3)). It is imperative for the state to make laws as per the social condition of various peoples. Art 15 merely elaborates that same concept and acknowledges that women need special treatment for their upliftment.

In the case of Yusuf Abdul Aziz vs State of Bombay, AIR 1954, SC held that section 497 of IPC is valid even though it punishes only the man for adultery and not the woman even if she has abetted the crime.

Art 16: Equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State (Article 16) and 16(2) explicitly prohibits any discrimination on the ground of sex among other grounds.

In the case of State of AP vs P B Vijayakumar AIR 1995, SC held that a rule 22A introduced by AP govt. that gave preference to women over men was valid. It further noted that art 15(3) is a recognition of the fact that for centuries the women of this country are socially and economically handicapped. As a result they are unable to participate in the socio-economic progress of the country on an equal footing. Thus, making special provisions for women in employment is an integral aspect of Art.15 (3).

Art 21: The courts have interpreted very widely the right to life and personal liberty. In several cases, this article has come to the rescue of women who have been wronged.

In the case of Bodhisatva Gautam vs Subhra Chakrabarti AIR 1996, SC awarded interim compensation to the rape victim. Soon after that in the case of Vishaka vs State of Rajasthan, AIR 1997, due to lack of any specific law, SC gave certain guidelines to prevent sexual harassment of women in workplace.

Art 23: Prohibits traffic in human beings and forced labor. It also prohibits trafficking of women and children.

### **B. Directive Principles**

The constitution secures for men and women equality for the right to an adequate means of livelihood (Article 39(a)); and equal pay for equal work for both men and women (Article 39(d))

In the case of Randhir Singh vs Union of India AIR 1982, SC held that equal pay for equal work is a constitutional goal and is capable of being enforced.

Art 39 (e) proclaims that state should ensure that men, women, and children are not forced into work that is unsuitable to their age or strength due to economic necessity.

Art 40/Art 243 D provides that 1/3 seats in panchayats shall be reserved for women.

The State to make provision for securing just and humane conditions of work and for maternity relief (Article 42)

The State to promote with special care the educational and economic interests of the weaker sections of the people and to protect them from social injustice and all forms of exploitation (Article 46)

Art 44: Due to absence of a uniform civil code, women are routinely exploited in the name of personal laws promulgated by religions. This fact was known to the makers of constitution and they urged the states to implement UCC.

In the case of Sarla Mudgal vs Union of India, 1995, SC urged the implementation of UCC by states.

### **C. Fundamental Duties**

To promote harmony and the spirit of common brotherhood amongst all the people of India and to renounce practices derogatory to the dignity of women (Article 51(A))

### **D. Local Self government**

Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total number of seats to be filled by direct election in every Panchayat to be reserved for women and such seats to be allotted by rotation to different constituencies in a Panchayat (Article 243 D(3)): Not less than one-third of the total number of offices of Chairpersons in the Panchayats at each level to be reserved for women (Article 243 D (4)): Not less than one-third (including the number of seats reserved for women belonging to the Scheduled Castes and the Scheduled Tribes) of the total

number of seats to be filled by direct election in every Municipality to be reserved for women and such seats to be allotted by rotation to different constituencies in a Municipality (Article 243 T (3)): Reservation of offices of Chairpersons in Municipalities for the Scheduled Castes, the Scheduled Tribes and women in such manner as the legislature of a State may by law provide (Article 243 T (4))

### **Legislation for the benefit of women**

Several Acts have been passed for the improving the condition of women from time to time to realize the constitutional protection available to them. The following list is not exhaustive,

1. Dowry Prohibition Act 1961
2. Contract Labor Act 1970
3. Factories Act 1948.
4. Equal Remuneration Act 1976
5. The Employees State Insurance Act
6. The Indecent Representation of Women (Prohibition) Act 1986
7. The Commission of Sati (Prevention) Act 1987
8. The Family Courts Act, 1954
9. The Special Marriage Act, 1954
10. The Hindu Marriage Act, 1955
11. The Hindu Succession Act, 1956
12. Protection of Women from Domestic Violence Act 2005
13. Maternity Benefits Act 1961
14. The Medical Termination of Pregnancy Act, 1971
15. Child Marriage Prohibition Act 1929
16. Immoral Traffic (Prevention) Act, 1956
17. The Indecent Representation of Women (Prohibition) Act, 1986

### **Policy Measures to protect women**

There are many policies and schemes that are announced for the welfare of women. In 2001, National Policy for the Empowerment of women was adopted. Its main points are,

1. To create an environment so that women feel involved in the making of economic and social policies.
2. To give equal share in social, economic, and political aspects.
3. To remove discrimination against women by enacting various laws.
4. To encourage equal treatment of women in the society.



## National Commission for Women

The National Commission for Women was set up as statutory body in January 1992 under the National Commission for Women Act, 1990 to review the Constitutional and legal safeguards for women; recommend remedial legislative measures, facilitate redressal of grievances and advise the Government on all policy matters affecting women. The state commissions are established by a separate state enactment. In Tamil Nadu, the Tamil Nadu State Commission for Women Act, 2008 establishes state commission.

National Commission for Women shall consist of a Chairperson who is committed to the cause of women, to be nominated by central government. It will have another five members who have experience in law, trade unionism, management of an industry or organisation committed to increasing the employment potential of women, women's voluntary organisations, administration, economic development, health, education or social welfare. At least one member shall belong to Scheduled Caste and Scheduled Tribes. It shall also have an officer from the state service as its Member-secretary who shall be an expert in the field of management, organisation structure or social movement (S.3).

The chairperson and members are appointed for a period of three years. They may be removed from office if he/she is convicted of offence involving moral turpitude, insolvent, unsoundmind, and in the opinion of the government it is not desirable to hold the position in the interest of public. An opportunity must be given before such removal (S.4).

### Functions of the Commission (S.10)

*Investigate* and examine all matters relating to the safeguards provided for women under the Constitution and other laws;

- *Present* to the Central Government, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards;
- *Make* in such reports recommendations for the effective implementation of those safeguards for improving the conditions of women by the Union or any state;
- *Review*, from time to time, the existing provisions of the Constitution and other laws affecting women and recommend amendments thereto so as to suggest remedial legislative measures to meet any lacunae, inadequacies or shortcomings in such legislations;
- *Take up* cases of violation of the provisions of the Constitution and of other laws relating to women with the appropriate authorities;
- *Look into* complaints and take suo moto notice of matters relating to,
  1. Deprivation of women's rights
  2. Non-implementation of laws enacted to provide protection to women and also to achieve the objectives of equality and development.
  3. Non-compliance of policy decisions, guidelines or instructions aimed at mitigating hardships and ensuring welfare and providing relief to women, and take up the issues arising out of such matters with appropriate authorities;
- *Call for studies* into specific atrocities against women; undertake promotional research to improve representation to women; participate in the planning process of socio-economic development of women;

- *Inspect* Jails, remand home, women's institution or other place of custody where women are kept as prisoners or otherwise and take up with the concerned authorities for remedial action;
- *Fund litigation* involving issues affecting a large body of women;

The commission shall have the following powers of civil court while investigating; summoning and enforcing attendance of any person; requiring discovery and production of any document; receiving evidence on affidavits; requisitioning any public record; issuing commissions for the examination of witnesses and documents; any other matter.

The central government shall consult on all matters relating to women. (S.16)

### **Intervention of Women Commission**

Women commission has intervened in many cases pending and decided on human rights issues, for instance,

I. In the matter of Y Abraham Ajith Vs. Inspector of Police , Chennai and Anr 2004 III AD (CRL) SC 468 , The Supreme Court on hearing the contention of the parties and examining the relevant Sections of the Cr. P. C i.e. Section 177 ordinary places of inquiry and trial /section 178 places of inquiry and trial , held that no part of cause of action arose in Chennai and therefore, the magistrate at Chennai had no jurisdiction to deal with the matter particularly when the alleged offences are not continuing offences and accordingly quashed the proceedings with liberty to the complainant to file the complaint in the appropriate court. the decision of the Supreme Court raises a relevant issue, particularly in cases of marital discords, as to whether the case should be heard in the place of occurrence of the offence or where the woman erred against is residing. Ordinarily, matrimonial discords and animosity, leads to the wife being forced to reside at the residence of her parents, which may be located at other place and unconnected with the place of occurrence of alleged offences. Therefore in cases where the woman is thrown out of her matrimonial home and / or forced to reside with her parents at some other place, then the requirement that the complainant may file the complaint only at the place where the alleged offence was committed, appears to be harsh and may also in cases subject her to insecurity besides the unnecessary expenditure.

II. In the matter of Smt Seema Vs Ashwani Kumar, transfer petition (civil) No 291 of 2005, the Hon'ble Supreme Court, issued notice to the commission, for placing its views on the registration of marriages and the proposed legislation prepared by the commission. The commission filed its reply along with the draft law on compulsory registration of marriages and the Hon'ble Court in its judgment dated 14th February 2006 observed that " as rightly contended by the national commission for women , in most cases non registration of marriages affects the women the most—— and directed the states and central government to initiate steps including framing of the rules for registration of marriages"

III. Judgement of the Honble High Court of Delhi wherein, the marriage of two young girls of 15 and 16 was held to be valid. While the judgement took into account the peculiar facts and circumstances of that case and the fact that no purpose would be served if the case of rape proceeded and keeping a lawfully wedded husband in judicial custody, it brought into open the wide disparities within various legislations dealing with the minimum age for marriage, the definition of a child, the age to give sexual consent and the effect of child marriage in certain cases. The Hon'ble High Court of Delhi in two petitions for habeas corpus, basing on the existing provisions of law, a young girl of 15-16 was allowed to bear a child and her marriage was legalized. This judgement, though protested by many, was passed within the realms of the existing law. However, it raised larger questions of public interest and particularly the health of the girl child keeping in mind the high rate of maternal mortality especially in the age group of 15-22. The petition seeks to highlight the disparities in various legislations, particularly the Child Marriage (Restraint) Act 1929, The Hindu Marriage Act 1955, and the explanation to Section 375 of the Indian Penal Code, 1890 as



the well as the Shariat law, the Indian Divorce Act, 1869 and the Juvenile Justice (care and protection of children) Act 2000. The petition raises the following questions of law of general public importance which needs to be adjudicated. A. Whether the provisions of Section 375 and 376 of the Indian Penal Code are in conformity with the Child Marriage (restraint) Act. B. Whether the Hindu Marriage Act is in conformity with the Child Marriage (restraint) Act? C. Whether allowing sexual intercourse by a man with a girl as young as 15 years contravene the principles of the Juvenile Justice (care and protection of children) Act, 2000 as well as the Child Marriage (restraint) Act, 1929 in certain cases.

#### IV. Bhateri Gang Rape Case ( Rajasthan )

The Commission suo moto took up the case of Ms. Bhanwari Devi and extended its full support in going for appeal and also providing security to the victim and appointment of a special public prosecutor to argue her case. Bhanwari Devi was a "Sathin" associated with WDP in Rajasthan who was raped in retaliation for her intervention in a child marriage in September 22, 1992.

#### V. Capital Punishment/ Death Penalty (Ramshree's Case)

Due to the timely intervention of the National Commission for Women in the Supreme Court, the order of death sentence was temporarily stayed and the Hon'ble Court, later on commuted the death sentence into life imprisonment.

#### VI. Obscenity Cases

The Hon'ble High Court of Delhi put an injunction on the launching of +21 adult channel by the Ministry of Information & Broadcasting, Govt. of India.

The NCW had moved the Hon'ble High Court of Delhi against Star TV, Zee TV, etc for showing obscene pictures on television and other media.

#### VII. Against Out Dated Customs & Traditions Maimon Baskari's Nuh ( Haryana ) Case

The NCW took up the case of Ms. Maimon Baskari who was allegedly a victim of torture and rape for marrying a person of her choice. The Supreme Court has united the couple.

#### VIII. Divorced Muslim Women's Entitlement To Maintenance Beyond The Iddat Period

In the matter of Fakhruddin Mubarak Shaik Vs. Jaitunbi Mubarak Shaik, The NCW has intervened in the Supreme Court of India to support the stand of Jaitunbi. The case is pending.

### 4. Institutional Protection for Children

The Constitutional protection regarding children has been broadened since the adoption of Convention on the Rights of the Child and other instruments. India's adoption to these instruments has been specifically acknowledged by the Parliament in the Commissions for the Protection of Child Rights Act, 2005. The enactment refers to Declaration on Survival, Protection and Development of Children, 1990 and a general assembly document titled as "A World Fit for Children" adopted in 2002. The enactment cites National Charter for Children, 2003 as a national policy goal to be achieved through the commission.

#### Constitutional Provisions relating to Children

The basic rights of every human being is covered under Articles 14, 19 and 21. They are also used for the cause of children many a times. For instance, in *Bijo Immanuel* case, the constitutional articles 19 and 25 were used as tools to protect the rights of children. There are many instances where the courts have referred to these articles along international instruments.



Art.15(3) of the Constitution enables the state to make special provisions for the welfare of children. In another provision, the right of socially backward communities to get protective discrimination is secured. There are two important provisions of the constitution that expresses the rights of children directly,

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

Article 24: No child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.

Further, in the directive principles of state policy, Art.39 (e) states that the children should not be employed in unsuitable places and Art. 39 (f) declares that “children are given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and that childhood and youth are protected against exploitation and against moral and material abandonment.” The amended Article 45 protects the early childhood care and 51 A (j) imposes a duty on the citizens to ensure primary education. The relevant provisions are produced below,

Art.45 The State shall endeavour to provide early childhood care and education for all children until they complete the age of six years.

Art. 51. A (k) who is a parent or guardian to provide opportunities for education to his child or, as the case may be, ward between the age of six and fourteen years.

### **Commissions for the Protection of Child Rights Act, 2005**

The enactment establishes National Commission and State Commissions for Protection of Child Rights and Children’s Courts for providing speedy trial of offences against children. The term ‘child rights’ is defined under S.2 (b), adopting the rights guaranteed under the Convention on the Rights of the Child, 1989.

### **National and State Commissions for Protection of Child Rights**

The commissions shall consist of a chairperson who has done outstanding work for promoting the welfare of children and six more members who are eminent in the fields of education, child care, child development, disability, juvenile justice, elimination of child labour, child psychology or sociology and child laws.

The chairperson and members are appointed for a period of three years. They may be removed from office if he/she is convicted of offence involving moral turpitude, insolvent, unsoundmind, and in the opinion of the government it is not desirable to hold the position in the interest of public. An opportunity must be given before such removal. (National: S.4-7, State: S.17-19)

### **Functions of the Commissions** (National: S.13-14) (State: S. 24, 13-14)

1. Examine and review the safeguards provided by or under any law for the time being in force for the protection of child rights and recommend measures for their effective implementation;
2. Present to be central government, annually and at such other intervals, as the commission may deem fit, reports upon working of those safeguards;
3. Inquire into violation of child rights and recommend initiation of proceedings in such cases;
4. Examine all factors that inhibit the enjoyment of rights of children affected by terrorism, communal violence, riots, natural disaster, domestic violence, HIV/AIDS, trafficking, maltreatment, torture and exploitation, pornography and prostitution and recommend appropriate remedial measures;

5. Look into the matters relating to the children in need of special care and protection including children in distress, marginalized and disadvantaged children, children in conflict with law, juveniles children without family and children of prisoners and recommend appropriate remedial measures;
6. Study treaties and other international instruments and undertake periodical review of existing policies, programmes and other activities on child rights and make recommendations for their effective implementation in the best interest of children;
7. Undertake and promote research in the field of child rights;
8. Spread child rights literacy among various section of society and promote awareness of the safeguards available for protection of these rights through publications, the media, seminar and other available means;
9. Inspect or cause to be inspected any juveniles custodial home, or any other place of residence or institution meant for children, under the control of the Central Government or any State Government or any other authority, including any institution run by a social organization; Where children are detained or lodged for the purpose of treatment, reformation or protection and take up with these authorities for remedial action, if found necessary;
10. Inquire into complaints and take suo motu notice of matter relating to :
  - o Deprivation and violation of child rights;
  - o Non implementation of laws providing for protection and development of children;
  - o Non compliance of policy decisions, guidelines or instructions aimed at mitigating hardships to and ensuring welfare of the children and provide relief to such children; Or take up the issues rising out of such matters to appropriate authorities.
11. The Commission shall not enquire into any matter which is pending before a State Commission or any other Commission duly constituted under any law for the time being in force.
12. Analyse existing law, policy and practice to assess compliance with the Convention on the rights of the Child, undertake inquiries and produce reports on any aspects of policy or practice affecting children and comment on proposed new legislation related to child rights.
13. Present to the Central Government annually and at such other intervals as the Commission may deem fit, reports upon the working of those safeguards.
14. Undertake formal investigation where concern has been expressed either by children themselves or by concerned person on their behalf.
15. Promote, respect and serious consideration of the views of children in its work and in that of all Government Departments and Organisations dealing with Child.
16. Produce and disseminate information about child rights.
17. Compile and analyse data on children.
18. Promote the incorporation of child rights into the school curriculum, training of teachers or personnel dealing with children.
19. The commission shall also have certain functions under the Protection of Children from Sexual Offences Act, 2012 and the Right of Children to Free and Compulsory Education Act 2009.



## **Children's Courts**

S. 25 provides that for the purpose of providing speedy trial of offences against children or of violation of child rights, the State government may, with the concurrence of the Chief Justice of the High Court, by notification, specify at least a court in the State or specify, for each district, a Court of Session to be a Children's Court to try the offences. This provision permits specification of a court of session to be designated as a special court. A special public prosecutor shall be appointed for every Children's court. (S.26)

## **Important International Instruments specific to Children**

- i. Declaration of the Rights of Child, 1924.
- ii. U.N. Declaration of the Rights of the Child, 1959.
- iii. United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (Beijing Rules).
- iv. Convention on the Rights of the Child, 1989 and its optional protocols (The Optional protocol on the involvement of children in armed conflict and the Optional protocol on the sale of children, child prostitution and child pornography of 2000)
- v. UN Convention for Prevention of Juvenile Delinquency: The Riyadh Guidelines, 1990.
- vi. UN Rules for the Protection of Juveniles Deprived Of their Liberty: Havana Convention, 1990.
- vii. Guidelines for Action on Children in the Criminal Justice System. Vienna Guidelines, 1997.
- viii. The UN Guidelines on Justice In Matters Involving Child Victim And Witnesses of Crime: Adopted By The Economic And Social Council In Its Resolution 2005.
- ix. Children's Rights in Juvenile Policy Adopted by United Nations General Assembly, 2007.
- x. Implementation of SAARC Convention: The Way Forward.

## **Important Indian Legislation relating to children**

- i. Bonded Labour System (Abolition) Act, 1976
- ii. Children (Pledging of Labour) Act, 1933
- iii. Bonded Labour System (Abolition) Act, 1976
- iv. Guardians and Wards act 1890
- v. Immoral Traffic (Prevention) Act, 1956
- vi. Infant Milk Substitutes Feeding Bottles and Infant (Regulation of Production, Supply and Distribution) Amendment Act 2003
- vii. Protection of Children From Sexual Offences Act, 2012
- viii. Juvenile Justice (Care and Protection of Children) Amendment Act, 2006
- ix. Prenatal Diagnostic Techniques (Regulation and Prevention of Misuse) Act, 1994
- x. Prohibition of Child Marriage Act 2006
- xi. Young Persons (Harmful Publication) Act, 1956



## **Recommendations and Guidelines relating to the rights of children**

The national commission has made several recommendations on the matters of child rights including subjects relating to education, housing, health and nutrition, livelihood, discrimination and dignity. The commission also made certain subject specific recommendations on 'railway child, hazardous occupations and on the national policy on Rehabilitation. The commission, government and courts issued several guidelines on the issues of abolition of corporal punishment, children in TV shows, child prostitution and abandoned bore wells.

## **Important Judgements relating to the rights of child**

(See Unit 3)

## **National Charter for Children, 2003**

The National Charter for Children, 2003 adopted on 9th February 2004, underlines the intent to secure for every child its inherent right to be a child and enjoy a healthy and happy childhood, to address the root causes that negate the healthy growth and development of children, and to awaken the conscience of the community in the wider societal context to protect children from all forms of abuse, while strengthening the family, society and the Nation. To affirm the Government's commitment to the rights based approach in addressing the continuing and emerging challenges in the situation of children, the Government of India has also adopted the National Policy for Children, 2013.

## **5. Rights of Disabled**

The legal protection for disabled is subsequent to the protection of women and children in India. However, an enactment is passed on disability to adhere international commitments. And an activist higher judiciary brought forth positive discussions and effects on the rights of disabled in the legal circles and courts.

### **Constitutional Provisions**

As per the Constitution of India, Article 14 guarantees equality, and Article 15 and 16 require the States to afford equality in practice, which prohibits discrimination on the grounds of "religion, race, caste, sex, place of birth or any of them. Disabled persons must have the same basic rights as the non-disabled enjoy. Directive Principles of State Policy have to secure a social order in promotion of the welfare of the people. The State shall make provisions for ensuring the right to work, education and public assistance in case of unemployment, old age, sickness and disablement and in other cases of under-served want under Article 41. Indeed, Art.41 is the only direct reference to disability under Indian Constitution. The State shall endeavour to provide for free and compulsory education for all children until they complete the age of 14 years which is a part of Art.21A and expanded under Right to Education Act. The State has also the responsibility of promoting with special care the educational and economic interests of the weaker sections of the people.

### **The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995**

This enactment provides a medical-illustrative definition on identifying a disabled (PWD), and this is contrary to international convention which sets out a broad philosophical criteria. The Act calls for the government to take necessary steps to ensure the prevention of disabilities. In accordance with this mandate, the state must screen all the children at least once a year determine the risk factors that lead to disability.

It is also necessary for the state to take measures to reduce risks to prenatal and post natal mother and child. The PWD Act is focused more on rights. The substantive provisions of the Act relate to prevention and

early detection, education, employment, affirmative action, non-discrimination/barrier free access, research and manpower development, institutions for persons with severe disabilities. The government is responsible for making the public environment non-discriminatory towards PWD by various measures to be adopted in railways, buses, road signals, pavement slopes, warning signals, building ramps, Braille signs and auditory signals, etc.

### **Education for Disabled**

It is the responsibility of governments to ensure that every child with a disability has access to free education in an appropriate environment till he attains the age of eighteen years; Endeavor to promote the integration of students with disabilities in the normal schools; Promote setting up of special schools in Government and private sector for those in need of special education, in such a manner that children with disabilities living in any part of the country have access to such schools; Endeavor to equip the special schools for children with disabilities with vocational training facilities (S.26).

The governments shall make schemes for part-time classes in respect of children with disabilities who having completed education up to class fifth and could not continue their studies on a whole-time basis; Conducting special part-time classes for providing functional literacy for children in the age group of sixteen and above; Imparting non-formal education by utilizing the available manpower in rural areas after giving them appropriate orientation; Imparting education through open schools or open universities; Conducting class and discussions through interactive electronic or other media; Providing every child with disability free of cost special books and equipments needed for his education (S.27).

The government shall initiate research on designing and developing new assistive devices, teaching aids, special teaching materials or such other items as are necessary to give a child with disability equal opportunities in education (S.28). It shall also setup adequate number of teachers' training institute (S.29).

The governments shall prepare a comprehensive education scheme which shall make Provision for-

- (a) Transport facilities to the children with disabilities or in the alternative financial incentives to parents or guardians to enable their children with disabilities to attend schools.
- (b) The removal of architectural barriers from schools, colleges or other institution, imparting Vocational and professional training;
- (c) The supply of books, uniforms and other materials to children with disabilities attending school.
- (d) The grant of scholarship to students with disabilities..
- (e) Setting up of appropriate fora for the redressal of grievances of parent, regarding the placement of their children with disabilities;
- (f) Suitable modification in the examination system to eliminate purely mathematical questions for the benefit of blind students and students with low vision;
- (g) Restructuring of curriculum for the benefit of children with disabilities;
- (h) Restructuring the curriculum for benefit of students with hearing impairment to facilitate them to take only one language as part of their curriculum (S.30)
- (i) All educational institutions shall provide or cause to be provided amanuensis to blind students and students with or low vision (S.31)



## **Employment of Disabled**

The governments shall identify posts and review it periodically for providing reservation to persons with disability (S.32). The governments shall reserve not less than three percentage of vacancies for persons with the following disabilities, (i) Blindness or low vision; (ii) Bearing impairment; (iii) Loco motor disability or cerebral palsy, in the posts identified for each disability (S.33). All government and aided institutions shall reserve not less than three per cent seats (S.39), similarly social welfare schemes must also reserve three per cent of seats for disabled beneficiaries (S.40). Private and public sector employers must be encouraged to appoint disabled by providing incentives (S.41). An employee who acquires a disability during his service shall be permitted to continue to work with the same rank; promotion shall not be denied to disabled employees (S.47).

S.35 to S.37 narrates the methods and procedure for appointment of persons with disability in various establishments. The governments shall formulate schemes for training and welfare of persons with disability to secure employment; upper age limit may be relaxed, health and safety measures may be prescribed, an authority may be constituted to administer the schemes, and disability employment may be regulated (S.38). The governments shall make schemes to provide aids and appliances to persons with disabilities (S.39) in relation to housing, setting up business, setting up recreational centers, establishment of special schools, establishment of research centers (S.43).

## **Ensuring Non-Discrimination**

Establishments in the transport sector shall take special measures to adapt rail compartments, buses, vessels and aircrafts in such a way as to permit easy access; adapt toilets in rail compartments, vessels, aircrafts and waiting rooms in such a way as to permit the wheel chair users to use them conveniently (S. 44). The governments shall provide for installation of auditory signals at red lights in the public roads for the benefit of persons with visual handicap; Causing curb cuts and slopes to be made in pavements for the easy access of wheel chair users; Engraving on the surface of the zebra crossing for the blind or for persons with low vision; Engraving on the edges of railway platforms for the blind or for persons with low vision; Devising appropriate symbols of disability; Warning signals at appropriate places (S.45); Ramps in public buildings; Braille symbols and auditory signals in elevators or lifts; Braille symbols and auditory signals in elevators or lifts; Ramps in hospitals, primary health centers and other medical care and rehabilitation institutions(S.46).

## **Central Coordination Committee**

A central coordination committee is established under S.3 of the Act, the function of the Central Coordination Committee shall be to serve as the national focal point on disability matters and facilitate the continuous evolution of a comprehensive policy towards solving the problems faced by persons with disabilities (S.8). The functions include, (a) Review and coordinate the activities of all the Departments of Government and other Governmental and non-Governmental Organizations which are dealing with matters relating to persons with disabilities; (b) Develop a national policy to address issues faced by, persons with disabilities; (c) Advise the Central Government on the formulation of policies, programmes, legislation and projects with respect to disability, (d) Take up the cause of persons with disabilities with the concerned authorities and the international organizations with a view, to provide for schemes and projects for the disabled in the national plans and other programmes and policies evolved by the international agencies; (e) Review in consultation with the donor agencies their funding policies from the perspective of their impact on persons with disabilities; (f) Take such other steps to ensure barrier free environment in public places, work places, public utilities, schools and other institutions; (g) Monitor and evaluate the impact of policies and programmes designed for achieving equality and full participation of persons with disabilities; (h) To perform such other functions as may be prescribed by the Central Government S. 8 (2).



## **State Coordination Committees**

State coordination committees are established at the state level with the same objectives and it performs similar functions that of central coordination committee (S.13 and S.18). (Read the previous paragraph)

## **Chief Commissioner for Persons with Disabilities**

The Office of the Chief Commissioner for Persons with Disabilities has been set up under Section 57 of the Persons with Disabilities (Equal Opportunities, Protection of Rights & Full Participation) Act, 1995 and has been mandated to take steps to safeguard the rights of persons with disabilities. The powers of Chief Commissioner is stated in S.58, the chief commissioner shall coordinate the work of the commissioners; monitor the utilisation of funds disbursed by the central government; take steps to safeguard the rights and facilities made available to Persons with disabilities; submit reports to the central government on the implementation of the Act.

## **Powers of the Commissioners (State)**

The Commissioner within the State shall, co-ordinate with the departments of the State Government for the programmes and schemes, for the benefit of persons with disabilities; monitor the utilization of funds disbursed by the State Government; take steps to safeguard the rights and facilities made available to persons with disabilities; submit reports to the State Government on the implementation of the Act at such intervals as that Government may prescribe and forward a copy thereof to the Chief Commissioner (S.61). The Commissioner may of his own motion or on the application of any aggrieved person look into complaints with respect to matters relating to, deprivation of rights of persons with disabilities; non-implementation of laws, rules, bye-laws, regulations, executive orders, guidelines or instructions made by the appropriate Governments and the local authorities for the welfare and protection of rights of persons with disabilities, and take up the matter with the appropriate authorities (S.62).

## **The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules, 1996**

The rules were made in exercise of the powers conferred by sub-sections (1) and (2) of section 73 of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995. These rules provide for provision relating to issuance of certificates to disabled and its validity (Rule 4). It enumerates extended procedures for identifying posts for the disabled and working of authorities established under the Act. The rules provide for guidelines relating to evaluation and assessment of various disabilities.

## **Other Enactments Relating to Disabled**

- Mental Health Act, 1987 protects the rights of psychologically disabled in relation to education, medical care, right against cruelty, right to property and right to have a legal counsel.
- The National Trust for Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999 sets up a trust for the welfare of the persons with disabilities. The trust shall make arrangements for an adequate standard of living of any beneficiary named in any request received by it, and to provide financial assistance to the registered organizations for carrying out any approved programme for the benefit of disabled.
- The Rehabilitation Council of India Act, 1992 regulates the rehabilitation professionals by a statutory council under the control of the central government. This is to ensure the rights of disabled to be served by trained and qualified rehabilitation professionals whose names are borne on the register maintained by the council.
- The Right of Children to Free and Compulsory Education Act, 2009 incidentally touch upon the rights of disabled children to get access to education.

## Judiciary and the Rights of Disabled

In *Javed Abidi Vs Union of India*, (1999) 1 SCC 467, the Supreme Court directed Indian Airlines to provide concessions for passengers suffering from locomotor disability, the Court held that the true spirit and object of the PWD Act is to create a barrier-free environment for PWDs and to make special provisions for the integration of disabled into the main stream.

In *Death of 25 Chained Inmates in Asylum Fire in T.N., In re Vs. Union of Indi*, (2002) 3 SCC 31, the Supreme Court, took suo motu action relating to the death of chained inmates of a mentally disabled asylum. The court directed the Cabinet Secretary to frame a national policy to address issues faced by the PWDs under Section 8(2)(b) of the Act.

In *LIC of India v. Chief Commissioner for Disabilities*, (2002) 101 DLT 434, the LIC took a stand that a person with 45% disability was incapable of performing his duties as a peon. The Delhi High Court in appeal from the decision of the Chief Commissioner found no substance in it and accordingly directed LIC to employ the PWD.

## The Right of Persons with Disabilities Bill, 2014

Subject matter	PWD Act, 1995	PWD Act, 1995
Extent of disability to be covered under the law	At least 40% of a disability specified in the Act.	At least 40% of a disability specified in the Act.
High support needs	No Provision	No Provision
Reservations	3 % (within that 1% for specific disabilities).	3 % (within that 1% for specific disabilities).
Guardianship	No provision in PWD Act; Personal laws are applicable	No provision in PWD Act; Personal laws are applicable
Institutional Mechanism	Commissioners for persons with disabilities redress complaints and act as Civil Courts.	Commissioners for persons with disabilities redress complaints and act as Civil Courts.

This bill replaces the earlier 1995 Act. The bill provides enhanced definition for the term disabled; increases the scope of disabled reservation; improves the rights based approach; and strengthens the institutional mechanisms available to protect the rights of disabled. However, the unanswered questions are whether it is appropriate for Parliament to impose legal and financial obligations on states and municipalities with regard to disability, which is a State List subject; and the bill is also inconsistent with some existing laws.

### 1. Minorities

The Constitution of India does not define the word 'Minority' and only refers to 'Minorities.' However, the rights of the minorities have been spelt out in the Constitution in detail. The constituent assures the rights of all sorts of minorities such as religious and linguistic minorities. It also protects against racial and caste based discrimination. Also India retains the personal laws of religions and groups. Commissions are established at the national and state level.



## Constitutional Rights

The Preamble to the Constitution declares the State to be 'Secular'. Similarly preamble declares that 'liberty of thought, expression, belief, faith and worship and 'equality of status and of opportunity' to be secured for all its citizens. The following are the constitutional rights guaranteed both directly and indirectly,

- A person's right to 'equality before the law' and 'equal protection of the laws' (Article 14). Prohibition of discrimination against citizens on grounds of religion, race, caste, sex or place of birth (Article 15 (1) & (2)). Citizens' right to 'equality of opportunity' in matters relating to employment or appointment to any office under the State and prohibition in this regard of discrimination on grounds of religion, race, caste, sex or place of birth (Article 16(1)&(2))
- Authority of State to make 'any special provision for the advancement of any socially and educationally backward classes of citizens' (besides the Scheduled Castes and Scheduled Tribes); (Article 15 (4)). Authority of State to make 'any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State (Article 16(4)).
- People's freedom of conscience and right to freely profess, practice and propagate religion – subject to public order, morality and other Fundamental Rights (Article 25(1)). Right of 'every religious denomination or any section thereof – subject to public order, morality and health – to establish and maintain institutions for religious and charitable purposes, 'manage its own affairs in matters of religion', and own and acquire movable immovable property and administer it 'in accordance with law' (Article 26). Prohibition against compelling any person to pay taxes for promotion of any particular religion'; (Article 27). People's 'freedom as to attendance at religious instruction or religious worship in educational institutions' wholly maintained, recognized, or aided by the State (Article 28).
- Restriction on denial of admission to any citizen, to any educational institution maintained or aided by the State, 'on grounds only of religion, race, caste, language or any of them' (Article 29(2))
- Right of all religious and Linguistic Minorities to establish and administer educational institutions of their choice (Article 30(1)). Freedom of Minority-managed educational institutions from discrimination in the matter of receiving aid from the State (Article 30(2))
- Right of 'any section of the citizens' to 'conserve' its 'distinct language, script or culture' (Article 29(1)). Special provision relating to the language spoken by a section of the population of any State (Article 347). Provision for a Special Officer for Linguistic Minorities and his duties (Article 350 B). Provision for facilities for instruction in mother-tongue at primary stage (Article 350 A).
- Sikh community's right of 'wearing and carrying of kirpans (Explanation 1 below Article 25)

## Courts on Minority Rights

### Stainislaus v. State of Madhya Pradesh and Others, AIR 1977 SC 908

The court considered the issue whether the fundamental right to practice and propagate religion includes the right to convert. It was held that the right to propagate does not include the right to convert and therefore upheld the constitutional validity of the laws enacted by Madhya Pradesh and Orissa legislatures prohibiting conversion by force, fraud or allurement.

### General Secretary, Linguistic Minorities vs State Of Karnataka, AIR 1989 Kant 226

A Karnataka government order was quashed on the ground of making Kannada as the first language in all primary schools. However, the government was allowed to introduce Kannada as one of the two languages from that of primary school class; and to make study of Kannada compulsory as one of the three languages for study in secondary schools.



## St. Stephen's College Vs. University of Delhi 1991(4) JT 548

The identity of St. Stephen's College as a minority-run institution was questioned as it was receiving grant-in-aid from the Government. The court ruled that grants could not change the minority character of an institution.

## **National Commission for Minority Educational Institutions Act, 2004**

This enactment regulates the minority institutions in India and secures certain rights of minority institutions. It advises the Central Government or any State Government on any question relating to the education of minorities that may be referred to it; enquire, suo motu, or on a petition presented to it by any Minority Educational Institution, or any person on its behalf into complaints regarding deprivation or violation of rights of minorities; intervene in any proceeding involving any deprivation or violation of the educational rights of the minorities before a court with the leave of such court; review the safeguards provided by or under the Constitution, or any law for the time being in force, for the protection of educational rights of the minorities and recommend measures for their effective implementation; and make recommendations to the appropriate Government for the effective implementation of programmes and schemes relating to the Minority Educational Institutions; (S.11).

## **The National Commission for Minorities Act, 1992**

The commission shall consist of a Chairperson, Vice-chairperson, five members and a secretary (S.3). According to S.9, it has the powers to evaluate the progress of the development of minorities under the union and states; monitoring and working for the minorities provided in the Constitution and in enactments; making recommendations for the effective implementation of safeguards for the protection of the interest of minorities by the governments; taking up the deprivation of minority rights issues to the appropriate authorities; undertake studies and make recommendations in the matters related to discrimination of minorities; preparing reports on its own or as recommended by the governments.

### **Intervention of commission**

- **Visa to Sikhs:** The commission has successfully intervened in the matter of denial of visas to Sikhs. Based on the recommendations, the government has updated its list for denial of visas. This resulted in a very few Sikhs being denied visa on various legitimate grounds.
- **Denial of Appointment:** The commission recommended for the appointment of Dr. Feroz Khan to the position of Director General, Fishery Survey of India. He was not appointed despite his selection by UPSC. His wife raised a complaint to the commission that he was discriminated as minority. The government has accepted the recommendations of the commission and appointed him to the post.
- **Compensation to Riot Victims:** Ms. Harbans Kaur Seghal has complained that her truck was burnt during the 1984 riots against Sikhs. She was paid only Rs.18000 despite an order for Rs.1 lakh as compensation. Based on the recommendations of the commission, the Chhattisgarh government has awarded Rs.1 lakh to her.
- **Linguistic Rights:** A member of the commission visited Sirsa of Haryana and made a recommendation to paint milestones in Punjabi language. The matter was taken up with the Government of Haryana. The Deputy Commissioner, Hisar has issued necessary instructions to put milestones in Punjabi.

## State Commissions for Minorities

There are around 17 states with a state level minority commission and most of them are statutory bodies. There are variations regarding the powers, status and emoluments of Chairman, Vice-Chairman and Members of the State Minorities Commissions and most of the State Governments do not pay any salary to the Chairman and Members of the State Minorities Commission. Some states did not agree to the request of National Commission to set up minority commission.

### Tamil Nadu State Minorities Commission Act, 2010

The Act constitutes a commission with a Chairperson and six members (S.3). It shall have similar powers as that of national commission to examine the working of various safeguards provided in the Constitution and in the laws made by the State Legislature for the protection of minorities; to make recommendations with a view to ensuring effective implementation and enforcement of all the safeguards; to conduct studies, research and analysis on the questions of avoidance of discriminations against minorities; to make a factual assessment of the representation on minorities in the services of the Government undertakings, government and quasi-Government bodies and in case the representation is inadequate, to suggest ways and means to achieve the desired level; to make recommendations for ensuring, maintaining and promoting communal harmony in the State; to make periodical reports at prescribed intervals to the Government; to study any other matter which in the opinion of the Commission is important; and to consider the grievances of the minorities and to suggest appropriate solution, from time to time; to look into specific complaints regarding deprivation of rights and safeguards of minorities.

## 2. Protection of Scheduled Castes and Tribes

Indian society faced a unique discrimination system not known to western law. Hence, the mechanism to remedy caste menace has evolved slowly to substitute the English law on this point. The laws against caste discrimination receive an express constitutional mandate with substantive rights for the oppressed. Also, one can find institutional mechanisms to address the human rights violations against scheduled caste and tribes.

### Constitutional Provisions

Art 14 ensures equality and Art 15 provides that the “*state shall not discriminate against any citizen on grounds only of religion, caste, race, sex, place of birth or any of them, be subject to any disability, liability, restriction, or condition with regards to..access to shops, public restaurants, hotels and places of public entertainment or...the use of wells, tanks, building Ghats, roads and places of public resort maintained wholly or partly out of state funds or dedicated to the use of general public...*” Article 16 mandates equality in employment and citizens should not be discriminated on the grounds of caste and some other discriminating factors, and empowers the state to provide reservation.

Unlike any other constitution, Indian constitution creates an offence for the practice of untouchability under Art.17. It states, “*Untouchability is abolished and its practice in any form is forbidden. The enforcement of any disability arising out of Untouchability shall be an offence punishable in accordance with law.*” Article 330 provides for reservation of seats for Scheduled Castes and Scheduled Tribes in the House of the People. Article 332 provides for reservation of seats for Scheduled Castes and Scheduled Tribes in the Legislative Assemblies of the States. Articles 338 and 338A establish national commissions for SC and ST respectively.

### National Commission for Scheduled Castes

The commission is constituted under Art. 338 of Indian constitution. The Commission shall consist of a Chairperson, Vice-Chairperson and three other Members and the conditions of service and tenure of office of the Chairperson, Vice-Chairperson and other members so appointed are determined in rules.



### Powers and Duties of the Commission

- a. To investigate and monitor all matters relating to the safeguards provided for the scheduled castes.
- b. To inquire into complaints with respect to deprivation of rights and safeguards of the SCs.
- c. To participate and advise on the planning process of socio-economic development of the SCs.
- d. To present reports to President and governments on the welfare of SCs.
- e. To make in such reports recommendations as to the measures that should be taken by the Union or any State for the effective implementation of those safeguards and other measures for the protection, welfare and socio-economic development of the SCs;
- f. To discharge such other functions for the protection, welfare and development and advancement of the SCs.

### **National Commission for the Scheduled Tribes**

The commission is constituted under Art. 338A of Indian constitution. The Commission shall consist of a Chairperson, Vice-Chairperson and three other Members and the conditions of service and tenure of office of the Chairperson, Vice-Chairperson and other members so appointed are determined in rules.

### Powers and Duties of the Commission

- (a) To investigate and monitor all matters relating to the safeguards provided for the Scheduled Tribes under Constitution or under any order of the Government and to evaluate the working of such safeguards;
- (b) To inquire into specific complaints with respect to the deprivation of rights and safeguards of the Scheduled tribes;
- (c) To participate and advise on the planning process of socio-economic development of the Scheduled Tribes and to evaluate the progress of their development under the Union and any State;
- (d) To present to the President, annually and at such other times as the Commission may deem fit, reports upon the working of those safeguards;
- (e) To make in such reports recommendations as to the measures that should be taken by the Union or any State for the effective implementation of those safeguards and other measures for the protection, welfare and socio-economic development of the Scheduled tribes;
- (f) To discharge such other functions insulation to the protection, welfare and development and advancement of the Scheduled tribes.

### **The Protection of Civil Rights Act, 1955**

A civil right is defined under S.2(a), "*civil rights*" means any right accruing to a person by reason of the abolition of "untouchability" by article 17 of the Constitution; Therefore, we understand the definition is restricted to the enforcement of Art.17 of the Constitution. One must also understand that the scope of Art.17 is not restricted to SCs or STs.

### **Punishments for enforcing religious disabilities**

Whoever, on the ground of "untouchability", prevents any ` ` from entering any place of public worship which is open to other persons professing the same religion or any section thereof, as such person; or from



worshipping or offering prayers or performing any religious service in any place of public worship, or bathing or using the waters of, any sacred tank, well, spring or water-course (river or lake or bathing at any ghat of such tank, water-course, river or lake) in the same manner and to the same extent as is permissible to other persons professing the same religion or any section thereof, as such person; shall be punishable with imprisonment. (S.3)

### **Punishment for enforcing social disabilities**

Whoever on the ground of “untouchability” enforces against any person any disability with regard to access to any shop, public restaurant, hotel or place of public entertainment; or the use of any utensils, and other articles kept in any public restaurant, hotel for the use of the general public or of any section thereof; or the practice of any profession or the carrying on of any occupation, trade or business or employment in any job; or the use of, or access to any river, stream, spring, well, tank, cistern, water-tap or other watering place or any bathing ghat, burial or cremation ground, any sanitary convenience, any road, or passage, or any other place of public resort which other members of the public, or any section thereof, have a right to use or have access or the use of, or access to, any place used for a charitable or a public purpose maintained wholly or partly out of State funds or dedicated to the use of the general public or any section thereof; or the enjoyment of any benefit under a charitable trust created for the benefit of the general public or of any section thereof; or the use of, or access to, any public conveyance; or the construction, acquisition or occupation of any residential premises in any locality, whatsoever; or the use of any dharmshala, sarai or musafirkhana which is open to the general public, or to any section thereof; or the observance of any social or religious custom, usage or ceremony or taking part in, or taking out, any religious, social or cultural procession; or the use of jewelry and finery; shall be punishable with imprisonment(S.4).

Similarly S.5 provides punishment for refusing to admit person to hospitals etc.; S.6 for Punishment for refusing to sell goods or render services; and S.7 provides for Punishment for other offences arising out of “untouchability” including persons preventing others from exercising any right accruing to him by reason of the abolition of “untouchability” under article 17 of the Constitution; or by words, either spoken or written, or by signs or by visible representations or otherwise, incites or encourages any person or class of persons or the public generally to practice “untouchability” in any form whatsoever; shall be punishable with imprisonment. The practice of manual scavenging on the ground of untouchability is an offence under S.7A.

### **THE SCHEDULED CASTES AND THE SCHEDULED TRIBES (PREVENTION OF ATROCITIES) ACT, 1989**

As the title of the Act suggests, this enactments protects the SCs and STs against caste based atrocity. This law must be read with the PCR Act which is discussed above. The offender should belong to castes other than SCs and STs. The following atrocities against SCs and STs are punishable under this law if he/she,

- (i) Forces a member of a Scheduled Caste or a Scheduled Tribe to drink or eat any inedible or obnoxious substance;
- (ii) Acts with intent to cause injury, insult or annoyance to any member of a Scheduled Caste, or a Scheduled Tribe by dumping excreta, waste matter, carcasses or any other obnoxious substance in his premises or neighborhood;
- (iii) Forcibly removes clothes from the person of a member of a Scheduled Caste or a Scheduled Tribe or parades him naked or with painted face or body or commits any similar act which is derogatory to human dignity;

- (iv) Wrongfully occupies or cultivates any land owned by, or allotted to, or notified by any competent authority to be allotted to, a member of a Scheduled Caste or a Scheduled Tribe or gets the land allotted to him transferred;
- (v) Wrongfully dispossesses a member of a Scheduled Caste or a Scheduled Tribe from his land or premises or interferes with the enjoyment of his rights over any land, premises or water;
- (vi) Compels or entices a member of a Scheduled Caste or a Scheduled Tribe to do 'begar' or other similar forms of forced or bonded labour other than any compulsory service for public purposes imposed by Government;
- (vii) Forces or intimidates a member of a Scheduled Caste or a Scheduled Tribe not to vote or to vote to a particular candidate or to vote in a manner other than that provided by law;
- (viii) Institutes false, malicious or vexatious suit or criminal or other legal proceedings against a member of a Scheduled Caste or a Scheduled Tribe.
- (ix) Gives any false or frivolous information to any public servant and thereby causes such public servant to use his lawful power to the injury or annoyance of a member of a Scheduled Caste or a Scheduled Tribe;
- (x) Intentionally insults or intimidates with intent to humiliate a member of a Scheduled Caste or a Scheduled Tribe in any place within public view;
- (xi) Assaults or uses force to any woman belonging to a Scheduled Caste or a Scheduled Tribe with intent to dishonour or outrage her modesty;
- (xii) being in a position to dominate the will of a woman belonging to a Scheduled Caste or a Scheduled Tribe and uses that position to exploit her sexually to which she would not have otherwise agreed;
- (xiii) Corrupts or fouls the water of any spring, reservoir or any other source ordinarily used by members of the Scheduled Castes or a Scheduled Tribes so as to render it less fit for the purpose for which it is ordinarily used;
- (xiv) Denies a member of a Scheduled Caste or a Scheduled Tribe any customary right of passage to a place of public resort or obstructs such member so as to prevent him from using or having access to a place of public resort to which other members of public or any section thereof have a right to use or access to;
- (xv) Forces or causes a member of a Scheduled Caste or a Scheduled Tribe to leave his house, village or other place of residence.

#### **The Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2014**

This amendment has been passed and notified by January 2015. The salient features are,

- Forcing an SC or ST individual to vote for a particular candidate in a manner that is against the law is an offence under the Act. Wrongfully occupying land belonging to SCs or STs is an offence under the Act.
- The amendment defines 'wrongful' in this context, which was not done under the Act.



- Assaulting or sexually exploiting an SC or ST woman is an offence under the Act. The amendment adds that; (a) intentionally touching an SC or ST woman in a sexual manner without her consent, or (b) using words, acts or gestures of a sexual nature, or (c) dedicating an SC or ST women as a *devadasi to a temple, or any similar practice* will also be considered an offence. Consent is defined as a voluntary agreement through verbal or non-verbal communication.
- New offences added relating to: (a) garlanding with footwear, (b) compelling to dispose or carry human or animal carcasses, or do manual scavenging, (c) abusing SCs or STs by caste name in public, (d) attempting to promote feelings of ill-will against SCs or STs or disrespecting any deceased person held in high esteem, and (e) imposing or threatening a social or economic boycott.
- Preventing SCs or STs from undertaking the following activities will be considered an offence: (a) using common property resources, (c) entering any place of worship that is open to the public and (d) entering an education or health institution.
- The court shall presume that the accused was aware of the caste or tribal identity of the victim if the accused had personal knowledge of the victim or his family.
- Rights of victims and witnesses: The Bill adds a chapter on the rights of victims and witness. It shall be the duty of the state to make arrangements for the protection of victims, their dependents and witnesses.
- The state government shall make a scheme to ensure the implementation of rights of victims and witnesses.

### **The Employment of Manual Scavengers and Construction of Dry Latrines (Prohibition) Act, 1993**

This enactment prohibits manual scavenging, it states, “*no person shall engage in or employ for or permit to be engaged in or employed for any other person for manually carrying human excreta; or construct or maintain a dry latrine*”(S.3).

### **The Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013**

This Act is enacted by parliament under concurrent list whereas the 1993 Act was passed under Art.252. The Act prohibits all persons, local authority or any agency from engaging or employing, either directly or indirectly, any person for hazardous cleaning of a sewer or a septic tank. Hazardous cleaning for this purpose means manual cleaning of a sewer or a septic tank without the employer fulfilling his obligations to provide protective gear and other cleaning devices and ensuring observance of safety precautions. Section 7 of the Prohibition of Employment as Manual Scavengers and their Rehabilitation Act, 2013 deals with ‘Prohibition of persons from engagement or employment for hazardous cleaning of sewers and septic tanks’.



## UNIT 5

### Regional Mechanisms, National and International Non-Governmental Organisations in the Enforcement of Human Rights

*Regional Mechanisms, National and International Non-Governmental Organisations (NGO's) in the Enforcement of Human Rights Asian, African and European Human Rights Instruments and their enforcement – Regional Judicial bodies. (European Court of Human Rights, Inter-American Court of Human Rights and African Court of Human Rights) Concept of NGO's and International NGO's – their participation in Human Rights issues – Selective case studies.*

Regional human rights mechanisms play a vital role in the process of integrating international human rights with national laws, more specifically in Europe, Americas and Africa. The purpose of establishing regional mechanisms includes political, geographical and cultural reasons. The inadequacy and non-fulfilment of international human rights obligations also necessitated the states to think regionally.

There are many independent and Non-governmental actors in the field of human rights and its institutional and legal mechanisms. These NGOs' role could be traced from to the establishment of International Committee of Red Cross to the environmental activism of our time. NGOs and individual activists participate in evolving public opinion, draft policies and laws, enforcement of laws, creating awareness and litigation. Therefore, it is pertinent to know about the work of NGOs in relation to human rights.

#### 1. Regional Human Rights

There are three significant human rights mechanisms which are considered to be important in the context of their effective functionality. Amongst European, African and American human rights mechanisms, the first one is considered to have better legal and institutional structure. This part discusses about the institutional mechanism associated with these major regional human rights systems along with a brief note on regional efforts to protect human rights in the Commonwealth of Independent States (former USSR), Arab League and South East Asia.

##### 1.1. Europe

The European human rights system emerged from the establishment of Council of Europe during 1949. The council accepts membership across all regions of Europe and its current membership is 49, making European human rights system as the largest regional human rights body. The Council of Europe is an institution independent of the European Union (EU) and it has functions different from those of the Union. The functions of council are limited to the protection of human rights as stated in Article 1 of the founding document, "to achieve a greater unity between its Members for the purpose of safeguarding and realizing the ideals and principles which are their common heritage and facilitating their economic and social progress."

However, the only and important link between Council of Europe and European Union is stated in Article 6 of the Treaty of European Union

*"..The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union... which shall have the same legal value as the Treaties... The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms... Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law..."*

The Council of Europe's has worked to establish standards, charters and conventions to facilitate cooperation between European countries as an institutional mechanism. Its two bodies are the Committee of Ministers, comprising the foreign ministers of each member state, and the Parliamentary Assembly, composed of members of the national parliaments of all member states. The Commissioner for Human Rights is an independent institution within the Council of Europe. It promotes awareness and respect for human rights in the member states. The European Convention for the Protection of Human Rights and Fundamental Freedoms is a product of the Council's work. European Court of Human Rights is a regional human rights court created within the ambit Council of Europe. The following conventions are considered to be important within the European regional human rights system.

- The Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)
- Additional Protocols to the ECHR
- European Social Charter and revised European Social Charter
- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment.
- Framework Convention for the Protection of National Minorities/European Charter for Regional or Minority Languages
- European Convention on the Exercise of Children's Rights
- Council of Europe Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse
- Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine
- European Convention on the Legal Status of Migrant Workers/Convention on the Participation of Foreigners in Public Life at Local Level/European Convention on Nationality
- Council of Europe Convention on Action against Trafficking in Human Beings
- Convention on preventing and combating violence against women and domestic violence

### **Salient Features of the European Convention for the Protection of Human Rights and Fundamental Rights (ECHR)**

The ECHR consists of three parts. The primary rights and freedoms are contained in Section I, consisting of Articles 2 to 18. Section II (Articles 19 to 51) set up the Court and its rules of operation. Section III contains various concluding provisions. Most of the rights stated in Section I, consist of various exception clauses similar to PART III of Indian Constitution. These rights broadly include right to life (Art.2), Prohibition of torture, (Art.3), Prohibition of slavery(Art.4), Right to liberty and security (Art.5), Right to a fair trial (Art. 6), No punishment without law(Art. 7 ), Right to respect for private and family life (Art.8), Freedom of thought, conscience and religion (Art.9), Freedom of expression(Art.10), Freedom of assembly and association(Art.11), Right to marry (Art.12), Right to an effective remedy (Art. 13), and Prohibition of discrimination (Art.14). Additional protocols to the convention also establish certain rights such of Protection of private property, Right to education and Right to free elections (Protocol 1). Only the signatories to these protocols are obliged to protect the rights they contain.

The convention rights are made applicable to non-citizens also. For instance, in *Hirsi Jamaa and Others Vs. Italy*, a group of immigrants turned away from Italy was protected by the Convention rights, even though they were not Italian citizens.



## The European Court of Human Rights

The European Convention on Human Rights is enforced by the European Court of Human Rights. It has the power to hold states responsible for a failure to respect, protect and fulfill the rights contained in the Convention. The Court is comprised of 47 judges, one from each Member State (Art.19-23). Proceedings before the Court are conducted primarily in writing. There is no cost associated with submitting an application and the applicant may apply for legal aid to cover expenses that arise later in the proceeding. Applications to the ECHR go through two phases: admissibility and merits. If the Convention rights have been violated, any person can bring a case to the European Court of Human Rights provided they must have exhausted all domestic remedies available to them. The applicant must be directly and personally the victim of the alleged violation. Anonymous applications will not be entertained. Individual complaints against states, inter-state cases can be brought before the European Court. The court permits interim measures and friendly settlements are also permitted (Art.39). The proceedings are generally conducted in public (Art.40).

### Inter-state Petitions (Art.33)

There are more individual petitions than inter-state petitions. In the first inter-state complaint between Ireland Vs. United Kingdom ((5310/71) (1978) ECHR 1), several members of the Irish Republican Army were arrested and detained in the U.K. The interrogation practices applied to the arrested members included wall-standing, hooding and deprivation of sleep and food. The applicant is the Republic of Ireland which claimed that the extrajudicial detention infringed human right and interrogation practices amounted to torture and inhuman or degrading treatment in violation of the Convention. The court held that the interrogation techniques were applied in combination, with premeditation and for hours at a time, causing at least intense physical and mental suffering and acute psychiatric disturbances, it amounted to violation of the convention.

### Individual Petitions (Art.34)

*"The Court may receive applications from any person, nongovernmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto..."(Art.34)*

The individual complaint system is widely used and stronger compared to any regional/international treaty mechanism. One may write in one of the Court's official languages (English and French) or in an official language of one of the States that have ratified the Convention. The Registry may ask for additional documents, information or explanations relating to their complaints. The complaint form includes a brief summary of the facts and your complaints; an indication of whether Convention rights have been violated; the exhaustion of local remedies; copies of the decisions given by all the national authorities concerned. The court proceeding are usually conducted in writing. The court will look into the admissibility before the commencement of proceedings.

In, Balogun Vs. United Kingdom, the court has held that there was no violation of Article 8 of ECHR. A Nigerian national complained that his deportation would breach his right not to be ill-treated as well as his right to private life. The Court found that, although the applicant was a settled migrant, the seriousness of the multiple drugs-related offences he had committed as an adult, coupled with the carefully considered preventive steps of the UK authorities to mitigate any risk of suicide, were sufficient to justify his deportation.

Mathloom Vs. Greece, an Iraqi national who was kept in detention for over two years and three months with a view to his deportation, although an order had been made for his conditional release. The court found that there were violations of ECHR. The Greek legislation governing the detention of persons whose expulsion had been ordered by the courts did not lay down a maximum period and therefore violates the principles of convention.



## 1.2. Americas

The Ninth International Conference of American States, 1949 transformed the Pan-American Union into the Organization of American States (OAS) when it adopted the OAS Charter. The Charter contained two provisions on human rights. The Charter proclaimed “the fundamental rights of the individual without distinction as to race, nationality, creed or sex. It also declared that each State shall respect the rights of the individual and principles of universal morality in developing freely its cultural, political and economic life. The same Conference also adopted the American Declaration of the Rights and Duties of Man.

The Inter-American System for the protection of human rights is responsible for monitoring and ensuring implementation of human rights guarantees in the Americas. While the Inter-American system of human rights is in force throughout the 35 member states of the OAS. Different levels of commitment towards the common goal of promoting and protecting human rights can be observed in the region. The system consists of an Inter-American Commission on Human Rights, established by OAS during 1959. The system has a basic human rights document in the form of American Declaration of the Rights and Duties of Man. There are selective members to the American Convention on Human Rights who have also accepted the Inter-American Court’s contentious jurisdiction.

There are at least three levels of varied commitments in the American regional human rights mechanism,

Firstly, certain OAS member states that remain subject only to the law of the American Declaration of the Rights and Duties of Man and the OAS Charter, as well as to the recommendations issued by the Inter-American Commission on Human Rights under the American Declaration. Therefore, it is possible to be a part of OAS human rights system without accepting the convention and the contentious jurisdiction of Court.

Secondly, OAS member states that are parties to the American Convention on Human Rights and have also accepted the Inter-American Court’s contentious jurisdiction. These states are subject to the law of the binding judgments issued by the Inter-American Court in cases referred to it by the Inter-American Commission and, concurrently, to the law of the Inter-American Commission’s resolutions and recommendations. States belonging to the second sub-system are committed to honor both the American Declaration and the American Convention.

Thirdly, there are three OAS member states that are parties to the American Convention but have not yet accepted the contentious jurisdiction of the Inter-American Court. They are subjected to the law of the Inter-American Commission’s resolutions with respect to both the American Declaration and the American Convention. The following instruments are part of the American Human Rights System,

- American Declaration of the Rights and Duties of Man
- American Convention on Human Rights
- Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights “Protocol of San Salvador”
- Protocol to the American Convention on Human Rights to Abolish the Death Penalty
- Inter-American Convention to Prevent and Punish Torture
- Inter-American Convention on Forced Disappearance of Persons
- Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women “Convention of Belem do Para”
- Inter-American Convention on the Elimination of All Forms of Discrimination Against Persons with Disabilities

### Inter-American Commission on Human Rights

The commission shall consist of 7 independent members who act in their personal capacity. The Commission holds thematic hearings on specific topical areas of concern and monitors human rights situation in OAS countries. It receives complaints from individuals, groups of individuals, and non-governmental organizations, concerning alleged violations of the American Declaration of the Rights and Duties of Man and other regional human rights treaties. The commission encourages friendly settlements.

In the case of Whitley Dixon against Jamaica (Report No. 29/14), Mr. Dixon was convicted of capital murder in the Home Circuit Court, Kingston, in the course of furtherance of an act of robbery and was sentenced to a mandatory penalty of death. His appeals were also dismissed. It was submitted that the mandatory nature of the death penalty under Jamaican law violated Mr. Dixon's right to life under Article 4(1) of the American Convention. Subsequently, his death penalty was commuted.

### **Inter-American Court of Human Rights (IACHR)**

It is the judicial organ of the Inter-American human rights system. Its mandate is more limited to OAS Member States that have specifically accepted the Court's contentious jurisdiction and those cases must first be processed by the Commission. Additionally, only State parties and the Commission may refer contentious cases to the Court.

As per Chapter VIII of the Convention, the Court consists of seven judges of the highest moral authority from the Organization's member states. These judges are elected to six-year terms by the OAS General Assembly; each judge may be re-elected for an additional six-years. No Member State may have more than one representative judge serving in the Court at any time. In the event a Member State is party to a case as a defendant but does not have a representative judge sitting on the Court, the Member State is entitled to appoint a judge to the court ad hoc for the case.

Currently, 23 OAS Member States (out of 35 OAS countries) have ratified the American Convention on Human Rights, 20 of whom have opted to accept the Court's contentious jurisdiction. The Court began operating in 1979, and soon issued several advisory opinions. There is a steady progress in the case load of the court. There are many States found themselves before the Court. The Court has adjudicated a significant range of rights protected by the American Convention and ancillary agreements, from extrajudicial execution and forced disappearance cases, to labour, land, and freedom of expression.

In *Atala Riffo and Daughters v. Chile*, the rights of a lesbian to hold custody of her child under the convention was upheld. Earlier, the Chilean Supreme Court awarded custody to the father because of the mother's sexual orientation. The IACHR held that laws which discriminate on the basis of sexual orientation are prohibited by IACHR and sexual orientation is an improper classification. Later, the Chilean Supreme Court nullified the laws which discriminate LGBTs.

The court has the power to give advisory opinion at the request of states, to give its opinion on the implementation/understanding of the convention. In *Compatibility of Draft Legislation*, Costa Rica asked the IACHR whether its draft legislation establishing a court of criminal appeals and providing for the right to appeal complied with the requirements of IACHR. However cases were pending before the Human Rights Commission involving the same provision. The IACHR said it had jurisdiction but refused to exercise such jurisdiction because the question presented "could produce, under the guise of an advisory opinion, a determination of contentious matters not yet referred to the Court."



### 1.3. Africa

The African System is the youngest of the three judicial or quasi-judicial regional human rights systems. This was created under the auspices of the African Union. Like the Inter-American System, it is composed of two entities, a commission and a court.

#### **Organization of African Unity (OAU) / African Union (AU) and Human Rights**

The OAU was established in 1963 in Addis Ababa, on signature of the OAU Charter. At the extraordinary OAU Summit in Sirte, Libya in 2001, heads of State declared the establishment of the African Union. By 2001, the Constitutive Act of the African Union had been signed by all OAU member states and ratified by 51 countries. Presently, almost all African states are members of the OAU/AU.

The OAU's mission was to promote the unity and solidarity of African States; promote international co-operation, giving due regard to the Charter of the United Nations and the Universal Declaration of Human Rights and co-ordinate and harmonize members' political, diplomatic, economic, educational, cultural, health, welfare, scientific, technical and defense policies.

The AU's mission, as contained in the constitutive act, is to: achieve greater unity and solidarity between the African countries and the peoples of Africa; defend the sovereignty, territorial integrity and independence of its Member States; accelerate the political and socio-economic integration of the continent; taking due account of the Charter of the United Nations and the Universal Declaration of Human Rights; promote peace, security, and stability on the continent; promote democratic principles and institutions, popular participation and good governance; promote and protect human peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments; establish the necessary conditions which enable the continent to play its rightful role in the global economy and in international negotiations. It contains many references to socio-economic equitable issues involving African nations.

The AU's Constitutive Act's Article 3(h) outlines the objectives of the new African Union states. The Union shall be to "promote and protect human and peoples' rights in accordance with the African Charter on Human and Peoples' Rights and other relevant human rights instruments." The AU, therefore, inherited the African Charter on Human and Peoples' Rights and the Commission on Human and People's Rights.

#### **The African Charter on Human and Peoples' Rights, 1981**

- The Charter recognises the indivisibility of all rights; All 'generations' of rights are recognized by the Charter. Socio-economic rights are considered as justiciable, "Clearly, collective rights, environmental rights and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the African Charter. It welcomes this opportunity to make clear that there is no right in the African Charter that cannot be made effective"
- The African Charter does not contain a derogation clause. Therefore the limitations on the rights and freedoms enshrined in the Charter cannot be justified by emergencies and special circumstances.
- It recognizes peoples' rights such as the peoples' rights to development, free disposal of natural resources, and self determination.

In addition to the charter, there are significant numbers of human rights instruments accepted by African nations. For instance, African Charter on the Rights and Welfare of the Child: Protocol on the African Human and Peoples' Rights Court: Protocol to the African Charter on the Rights of Women in Africa: Convention on the Prevention and Combating of Terrorism 1999: Convention on the Conservation of Nature and Natural Resources 2003: and Convention on the Prevention and Combating Corruption 2003.



## **The African Commission on Human and Peoples' Rights**

The African Commission on Human and Peoples' Rights was established by the African Charter on Human and Peoples' Rights which came into force in 1986 after its adoption in Nairobi, Kenya, in 1981. Articles 30-45 of the Charter established the Commission on Human and Peoples' Rights and entrusted it with the task of promoting, protecting and interpreting the rights in the Charter.

The Charter provides that the Commission shall consist of 11 members chosen from amongst African personalities of the highest reputation and that the members shall serve in their personal capacity (Art. 31). The Charter further provides that the members of the Commission shall be elected for a six year period and shall be eligible for re-election (Art. 36).

### Functions of the Commission

- The commission receives inter-state communications by a state party alleging that another State Party has violated the provisions of the Charter. The commission keeps the communications confidential. Further, Art. 59 of the Charter states that all measures taken under Charter shall remain confidential until such a time as the Assembly of Heads of State and Government shall otherwise decide.
- The Commission also entertains communications from individuals and non-governmental organizations alleging violations of rights in the Charter. The individuals and non-governmental organizations can bring the communications on their own behalf or on another's behalf. (Art.55)
- The individual communications shall be considered only if they are sent after exhausting local remedies. Art. 58(1) provides an exception to the exhaustion of local remedies rule. It provides that "when it appears after deliberations of the Commission that one or more communications apparently relate to special cases which reveal the existence of a series of serious or massive violations of Human and Peoples' Rights, the Commission shall draw the attention of the Assembly of Heads of State and Government to these special cases."
- The Charter requires each State Party to submit a report every two years, on the legislative or other measures taken with a view of giving effect to the rights and freedoms recognized and guaranteed by the Charter (Art. 62). But, the compliance level is relatively low compared to UN systems.
- The Charter provides that the Commission shall submit to each ordinary Session of the Assembly of Heads of State and Government a report of its activities.
- The commission also had thematic rapporteurs, for instance it had a Special Rapporteur on Extrajudicial, Summary or Arbitrary Executions; Special Rapporteur on Prisons and Conditions of Detention.

The commission decided many cases on merits. For instance, in *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya* (ACHPR 2009) In this case, the Kenyan government forcibly removed the Endorois people, an indigenous community, from their ancestral lands around the Lake Bogoria area of Kenya without proper consultation or compensation. As a result, the Endorois people could not access their religious sites located in the Bogoria Lake region. The complainants alleged that this violated the African Charter. The Commission pronounced on the right to development under the African Charter. The Charter is the only international binding human rights instrument to recognize this right. The Commission also elaborated on the rights of indigenous people in Africa.

## **The African Court of Human and People's Rights**

The African Court on Human and Peoples' Rights was established through a Protocol to the African Charter. It was adopted in 1998 and entered into force during 2004. The Court was established in order to complement the protective mandate of the Commission. Its decisions are final and binding on state parties to the Protocol. The Court consists of 11 judges elected by the AU Assembly from a list of candidates nominated by member states of the AU. The judges are elected in their personal capacity but no two serving judges shall be nationals of the same state. Due consideration is also given to gender and geographical representation. The judges are elected for a period of six years and are eligible for re-election only once.

The Court's jurisdiction applies only to the states that have ratified the Court's Protocol. The Court may entertain cases and disputes concerning the interpretation and application of the African Charter, the Court's Protocol and any other human rights treaty ratified by the state concerned. The Court may also render advisory opinion on any matter within its jurisdiction. The advisory opinion of the Court may be requested by the AU, member states of the AU, AU organs and any African organisation recognised by the AU. The Court is also empowered to promote amicable settlement of cases pending before it.

### **1.4. Other Regional Arrangements**

Apart from the three international organizations with established mechanisms, there are significant developments in various regions of the globe. They have not matured to be termed as a regional human rights mechanism with treaties and institutional arrangements. Yet, these arrangements may be considered as a development towards standard setting in future.

#### **Commonwealth of Independent States (CIS)**

CIS is a loose arrangement of former states of USSR. Since its inception, one of the key goals of the CIS is to provide a forum for discussing issues related to the social and economic development of the newly independent states. The 1991 Charter of the CIS established a commission under Article 33. Member States have agreed to promote and protect human rights within the region. The CIS has adopted a Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms in 1995. The treaty includes civil and political as well as social and economic human rights. This treaty has entered into force in 1998. The Human Rights Commission has very vaguely defined institution. The Statute of the Human Rights Commission empowers the Commission to receive inter-state as well as individual communications.

#### **Southeast Asia (ASEAN)**

Human rights are referred in the ASEAN Charter in Articles 1, 2 and 14. The ASEAN Intergovernmental Commission on Human Rights was inaugurated in 2009 as a consultative body of the Association of Southeast Asian Nations. The Commission operates through consultation and consensus, meeting at least twice per year. The mandate of the commission includes the promotion and protection of human rights, capacity building, advice and technical assistance, information gathering and engagement with national, regional and international bodies. Its staff members are currently engaged in conducting thematic studies and preparing capacity building actions,

One of its mandates was to develop an ASEAN Human Rights Declaration which was adopted in November 2012. The Declaration was adopted unanimously by ASEAN. The Declaration details states about the commitment to human rights for its 600 million people. Article 10 directly affirms all the civil and political rights in the Universal Declaration of Human Rights. The ASEAN Human Rights Declaration goes beyond the Universal Declaration by making explicit certain rights such as the right to safe drinking water and sanitation and right to environment. The organisation is yet to adopt a convention for the protection of human rights.



## 2. Non-governmental organizations and Human Rights (NGOs)

NGOs have played a significant role in the overall development of the human rights system since a long time ago. One could possibly begin the understanding about NGOs from the establishment of International Committee of Red Cross (ICRC) as an organization under Swiss law. ICRC was founded in 1859 by Henri Dunant, a Swiss national who had been profoundly affected by his experience at the Battle of Solferino, the very same year. The Anti-Slavery Society, which lobbied actively for the abolition of slavery at the Vienna Congress in 1815, is a notable example from history. NGOs played a significant role against Anti-apartheid regime in south-Africa. The work of NGOs in international human rights law and practice has been increasing. They influence the international law making process by their active work in lobbying and monitoring. In the human rights work of the UN, NGOs have moved from a limited formal role to a proactive role by associating with the treaty bodies with legal capacity.

### Functions of NGOs

As advocacy organizations and pressure groups, human rights NGOs work with or against governments in developing agendas for action. The role of NGOs working on environment and other specific fields perform human rights work as a part of their larger scheme. Through treaty negotiations with governments, they seek to establish international standards at local levels. The following activities of NGOs are related to legal dimensions of human rights protection,

1. Law and Policy Making: NGOs prepare model policies and drafts which could be used to debate over a governmental proposal. The drafts of NGOs may be used by the government, or at least influence the government. NGOs take part in the consultation for new polices and laws to provide inputs and voice their concerns.
2. Execution of Laws: There are many possibilities that a statutory mechanism may not be working effectively. NGOs pressure the governments to implement them through writings, campaigns and agitations. They obtain information through RTIs and also litigate.
3. Investigation: They investigate and report human rights abuses and offer direct assistance to victims of those abuses. These investigations espouse the cause of victims which may not be adequately dealt in governmental inquiry.
4. Litigation: NGOs litigate on human rights violations. They are permitted under Indian and other country laws to file collective applications like Public Interest Litigation. Regional and International forums permit representation of NGOs for the victims of violation of human rights.
5. Capacity Building, Research and Advocacy: NGOs train groups and public workers to sensitize various human rights issues. They write academically and for general readers to improve their human rights understanding.
6. Advice: NGOs advice governments, local bodies and victims groups on policy and legal issues. This would help them to decide further course of action.
7. Campaigning, Lobbying and Agitations: They lobby with political parties, corporations, international financial institutions, intergovernmental organizations, and the media. Campaigning and agitations help them to gather momentum on the issue.
8. Assistance: NGOs provide various assistance of victims of crimes, refugees, disaster affected persons, social protection services such as helping the aged, orphans and others, and natural resources protection.



## NGOs and the UN system

Many NGOs have formal affiliation with intergovernmental organisations (IGOs), such as the United Nations (UN). These organisations may agree to grant NGOs a consultative or observer status, for example the observer status granted by the UN General Assembly to the ICRC and to the International Federation of Red Cross and Red Crescent Societies. Yet there are many NGOs without such formal relationships, in particular at national level. The UN has since its inception sought to define its relationship with NGOs. Article 71 of the Charter provides that the Economic and Social Council (ECOSOC) “may make suitable arrangements for consultations with non-governmental organisations, which are concerned with matters within its competence.” The International Covenant on Economic, Social and Cultural Rights has introduced provisions for NGO briefings to the committees and NGOs can question the states during the examination of state reports. The Convention on the Rights of the Child specifically authorises NGO cooperation with the treaty committee (Article 45). The Committee on the Rights of the Child may invite any NGO to participate in its work. However, the other treaty mechanisms have developed extensive relations with the NGO community on an informal basis.

The conditions and procedures to obtain consultative status are provided in an ECOSOC Resolution of 1996. They are-

- an NGO shall be concerned with matters falling within the competence of ECOSOC and its subsidiary bodies;
- the organisation shall be of representative character and of recognised international standing;
- the aims and purposes of the organisation shall be in conformity with the spirit, purposes and principles of the Charter of the United Nations.

There are three types of consultative status: General, Special and Roster. General and special status NGOs are required to submit a ‘quadrennial report’ every four years. Consultative status provides NGOs with access to ECOSOC, and to its many subsidiary bodies, to the various human rights mechanisms of the United Nations, ad-hoc processes on small arms, as well as special events organized by the General Assembly. Currently, 4,045 NGOs enjoy consultative status with ECOSOC.

### Work of Selected NGOs

#### Amnesty International

Amnesty International is a non-governmental organisation focused on human rights with over 7 million members and supporters around the world. The objective of the organisation is to conduct research and generate action to prevent and end grave abuses of human rights, and to demand justice for those whose rights have been violated. Amnesty International draws attention to human rights abuses and campaigns for compliance with international human rights laws and standards. It works to mobilise public opinion to put pressure on governments that let abuse take place. The organisation was awarded the 1977 Nobel Peace Prize for its “campaign against torture, and the United Nations Prize in the Field of Human Rights in 1978. The core principle of Amnesty International is a focus on prisoners of conscience, those persons imprisoned or prevented from expressing any opinion other than violence. Along with this commitment to opposing repression of freedom of expression, Amnesty International’s founding principles included non-intervention on political questions and a larger commitment to gathering facts about the various cases.

### Anti-Slavery International

Anti-Slavery International is an international non-governmental organization. Founded in 1839, and it is the world's oldest international human rights organization. It owes its origins to the radical element of an older Anti-Slavery Society, known as the "Agency Committee of the Society for the Mitigation and Gradual Abolition of Slavery. In 1990 it was re-founded as Anti-Slavery International, which works to combat slavery and related abuse, drawing attention to the continuing problem of slavery worldwide and campaigning for its recognition, abolition and eradication in the most affected countries today. The main activities of the organisation are lobbying governments of countries with slavery to act against it, aiding research to find out the extent of slavery, and working to increase awareness of slavery.

### People's Union for Civil Liberties (PUCL)

PUCL is a human rights organisation formed during 1976 by the socialist leader Jayaprakash Narayan. The PUCL's constitution does not allow members of a political party to hold any office and hold membership in the PUCL; same party members are not permitted to have significant presence in the organisation. It supports grassroots movements that focus on organizing and empowering the poor. They have brought to light the cases of the bonded labourers, children in prison and violence committed against women under trials.

# Human Rights Law - Model Question Paper

Marks 70

## Part A

Answer any two questions

2\*12=24 Marks

1. Evaluate the human rights framework available to protect Women in India.

Constitutional framework: Art.14,15,16 etc.,

Women commissions: functions and powers to work for women rights

Legislations: Equal remuneration, maternity benefit, equality in personal laws etc.,

Role of Courts: Judgments

2. Examine the functioning of UNHRC to protect human rights. Briefly state the role of UNHRC in Srilankan ethnic issue.

UNHRC: Mandate, Powers and Functions

UNHRC resolutions on Srilanka: Legal aspects

Consequences and effects of UNHRC resolutions on complaints regarding human rights violations

3. What is International Bill of Rights? Explain the legal significance of instruments referred as International Bill of Rights.

The history, content and context of International Bill of Rights

Legal status of UDHR under International and municipal law: India's position

Legal status of ICCPR and ICESCR under International law and Indian laws

Role of Indian Judiciary to protect human rights

## Part B

Answer any two questions

2\*7=14 Marks

4. Briefly provide the legal framework for prohibition of atrocities against SCs and STs.

Constitutional Protection: Art.14-17 and Commissions

PCR and SC & ST Act, amendments and manual scavenging laws

Judiciary on SC & ST rights

5. Explain the role of Supreme Court to protect the disabled in India

Constitution and enactments: fundamental rights and DPSP, disability act and draft bills

Judiciary: cases referring to enactments and international conventions to protect the rights of disabled

6. What is the role of NGOs in the evolution international human rights law?

Role of NGOS before UN bodies

NGOs as pressure groups for law making

NGOs on fact finding, reporting and victim assistance



## Part C

5. Answer any four questions

5\*4=20 Marks

a. Meaning of Human Rights

Definitions provided in dictionary and legal instruments (national and international)

b. Slavery

Meaning: conventions: Modern forms

c. Human Rights Committee

Establishment, composition, powers and functions of HRC; ICCPR provisions

d. UN General Assembly and Human Rights

UN mandate for Human rights; relationship between UNGA and treaty bodies; resolutions and conventions adopted by UNGA

e. Right to self determination and India

Meaning of RSD: India's declaration

f. European Human Rights

European Human Rights Convention and court: Salient features

## Part D

**Answer any two problems**

**2\*6=12Marks**

5. Mr. Raj is an under trial prisoner in a murder case. He was handcuffed during judicial custody. This issue was taken to Supreme Court under Art.32. Decide this case with the support of Human Rights instruments.

Handcuffing as inhuman treatment under Indian criminal law and constitution

International instruments relating to inhuman treatment and standards

Indian Judiciary on Handcuffing: Possibility for compensation and reforms by courts

6. Ms. Rabakea is a foreigner touring India. She was sexually assaulted by a group of police men. She approaches SHRC. Decide.

Right to life and dignity for foreigners under Indian constitution

Decisions of Indian Courts

SHRC jurisdiction to address a foreigner's case

7. Dr. Raj is a municipal commissioner of a state level corporation. He discards complaints about manual scavenging. He did not provide with necessary instruments for sanitation workers. The workers approach High court for appropriate order. Decide

Abolition of Manual Scavenging: Constitutional Perspective

Enactments and punishments for violations

Possible remedies by High Court