KLE LAW ACADEMY BELAGAVI

(Constituent Colleges: KLE Society's Law College, Bengaluru, Gurusiddappa Kotambri Law College, Hubballi, S.A. Manvi Law College, Gadag, KLE Society's B.V. Bellad Law College, Belagavi, KLE Law College, Chikodi, and KLE College of Law, Kalamboli, Navi Mumbai)

STUDY MATERIAL

for

HUMAN RIGHTS LAW

Prepared as per the syllabus prescribed by Karnataka State Law University (KSLU), Hubballi

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SYLLABUS - Optional - I

HUMAN RIGHTS LAW ANDPRACTICE

OBJECTIVES : The objectives of the course are to prepare for responsible citizenship with awareness of the relationship between Human Rights, democracy and development; to foster respect for international obligations for peace and development; to impart education on national and international regime of Human Rights; to sensitize students to human suffering and promotion of human life with dignity; to develop skills on human rights advocacy and to appreciate the relationship between rights and duties and to foster respect for tolerance and compassion for all living creatures.

Course contents:

UNIT – I

Jurisprudence of Human Rights; Nature, definition, origin and theories of human rights.

UNIT – II

Universal protection of human rights- United Nations and Human Rights- *Universal Declaration of Human Rights, 1948; International Covenant on Civil and Political Rights, 1966; International Covenant Economic, Social and Cultural Rights,1966.*

UNIT – III

Regional Protection of Human rights- European system- Inter American System- African System

UNIT – IV

Protection of Human Rights at national level; Human rights and the Constitution; The Protection of Human rights Act, 1993.

UNIT – V

Human Rights and Vulnerable Groups: Rights of Women, Children, Disabled, Tribals, Aged and Minorities - National and International Legal Developments.

HUMAN RIGHTS LAW AND PRACTICE

UNIT I – JURISPRUDENCE OF HUMAN RIGHTS

Synopsis

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Introduction

The philosophy of Human Rights is reflected in the following popular version *"Loka Samastha Sukhino Bhawanthu*" which means that the entire humanity be happy. The greatest gift of classical and contemporary human thought to culture and civilization is the notion of Human Rights. The struggle to preserve, protect and promote basic Human Rights continues in every generation in every society. New rights arise from the womb of the old. Today we widen the sphere of Human Rights thought and action to new areas andconstituencies.

Human Rights are rooted in the culture and values of every nation of the world. To understand the true significance of the concept of Human Rights, we must know its historical context. The development of Human Rights and then recognition and protection at the international level can be divided into different periods. It would therefore be logical to start with the concept of natural right which eventually led to the formulation of HumanRights.

Natural Law and Natural Rights

Natural Law and Natural Rights in Ancient times

The idea of Natural Rights is very old. In the classical literature of Ancient Greece from 5th century B.C. we come across a striking expression of the belief in the power exercised by the gods on human society, based on law. According to the Ancient Greece writers, the god establishes a law which stand above the obligations and interdictions imposed by the rules of the community.In Roman law there was a distinction between national law (jus civile) and the law which is actually common to all nations (Jus gentium). Jus natural was the law of nature which is fixed and immutable, higher to all human laws derived from the dictates of right reason.

Marcus Tullius Cicero (104-43 B.C), the great Roman jurist declared that there is one eternal and immutable law which will apply to all people at all times and which emanates from the God is NaturalLaw.

The higher moral law and above the positive law embodying certain values of universal validity like Dharma (righteousness) Artha (wealth), Kama (desires), Moksha (salvation) were expounded by ancient Indian Philosophers and thinkers 5000 years ago with a view to establish a harmonious social order by striking a balance between inner and outer, spiritual and material aspect of life.

Natural Law and Natural Rights in Middleages

Natural law acquired a new role and phase during medieval period in the works of the Christian theologians in the forms of a belief in a law of God, above all human laws. According to St. Thomas Aquinas (1225-1274) the law of nature is the foundation of all human law. The state is subject to that higher law which determines the relation of the individual to the state. This idea led to the establishment of doctrine of natural rights and by the end of Middle Ages the concept of natural rights of man became well established. All this led to the formulation of right to revolt against a tyrannicalruler.

In middle ages, a number of Acts were enacted to show the superiority of Natural law and Natural Rights. The principle of the Habeas Corpus Acts latent in the 39th clause of Magna Carta was acknowledged already in 1188 by Alfonso IX at the certes of Leon. The great Charter of the liberties of England or the Magna Carta of 1215was imposed on King John by the prelates, Earls and barons of his realms after his defeat by the king of France in 1214. Charters of liberty are steps towards the realization and implementation of Human Rights. Magna Carta of 1215, Petition of Rights of 1628; Habeas corpus Act of 1679, Bill of Rights of 1689 are some of such steps taken in England.

Natural Law and Natural Rights in 17th and 18thCentury

The key notion of the social contract theory implied the existence of rights which the individual possessed before entering organised society. The contributions of Hugo Grotius, Vattel, Pufendorfand Wolff in the development of the concept of natural rights arecommendable.

There were other factors which emphasised the vitality of the natural rights of man. Milton's appeal to the natural freedom of man was the basis of his claim to beruled by law and not by the arbitrary whim of man; the insistence in the course of the puritan revolution, on natural rights in support of political freedom, social equality and universal suffrage; the place which Blackstone assigned to the natural rights of man are some of the examples of the factors which gave force to the doctrine of natural rights in 16th century.

The Virginian Declaration of Rights of 1776; other similar Constitutional enactments in the same year; the Constitution of New York and of New Georgia of 1777, and that of Marsacheselts of 1780; the declaration of independence of 1776 and the Bill of Rights in the form of the first ten Amendments to the Constitution of America; the declaration of the Rights of Man and of the Citizen adopted in 1789 by the French National Assembly and prefixed to the Constitution of 1793 and 1795: all these expressly acknowledged the inherent rights of Man. All these enactments, the formal incorporation of the inherent Human Rights and the possibility of their consequent protection not only against the tyranny of kings but also against the intolerance of democratic majorities were a new idea. This was the first attempt to derive Human Rights from natural rights.

Natural Rights and Doctrine of Humanitarian Intervention in 19thCentury

At the turn of the century after the French revolution the doctrine of natural law was a doctrine of abstract and immutable principles and of eternal and inviolable Human Rights. In England, Burke launched his attack against the assertion of the Natural Law doctrines.

In Germany, reaction against the philosophy of natural law emerges with "*Historical School*" of jurisprudence. But we come across the occasions in this century on which the doctrine of humanitarian intervention has been involved on behalf of countries. Such, for example was the intervention in 1827 by great Britain, France and Russia on behalf of the Greek revolutionaries, the numerous interventions protecting Turkish treatment of Armenians and other Christians and the protests by the United States in 1891 and 1905 against anti-Semitic outrages in Russia. From the beginning of the 19th century, attention was directed more to the rights of the individual than to the objective norms. But states have persistently claimed supreme authority over all persons with in their respective territories.
Traditional international law recognized only states as the appropriate subjects of international law.

In consequence, subject to permissible exception, relation between a state and its subject according to traditional prescriptions are a matter of domestic concern of law, not covered by rules of international law. Under this prescription, therefore an individual can not claim international rights as against his own state and in the absence of international agreements, he has no locus standi before an international court for demanding redress against the violation of rights by his home states. It is pertinent to note here that in spite of the inadequacies of traditional international law an increasing number of treaties were entered into the purpose of which was to protect the rights of certain classes of persons. Then there was A.V. Dicey's concept of Rule of law as opposed to the influence of arbitrary power or wide discretionary powers. These developments of 18th and 19th century culminated the idea of HumanRights.

Definition on Human Rights

Although volumes have been written about human rights for ages, yet it is hard to define the term as it is a dynamic concept and endeavors to adopt itself to the needs of the day. It is for this reason that understanding and definition of the term depend heavily on the opinions and conditions prevailing in the given society at a given time. Since the socio-economic environment with which the question of and

content of human rights.

It is because of this that it becomes difficult to define this concept in absolute terms. Attempts have been made to comprehend the term despite all the complications. To put it simply, "human rights constitute those very rights which one has precisely because of being a human." Human rights are defined as those rights, which every human being is entitled to enjoy by virtue of being a member of the human species.

Richard Wassertrom: "one ought to be able to claim as entitlements (i.e. as Human Rights) those minimal things without which it is impossible to develop one's capabilities and to have life as human being". That is Human Rights are moral entitlements possessed only by persons.

Tiber Macham: "Human Rights are universal and irrevocable elements in a scheme of justice. Accordingly, justice is the primary moral virtue within human society and all rights are fundamental to justice".

Joel Feinberg: "Human Rights as moral rights held equally by all human beings, unconditionally and unalterably. That is for Feinberg Human Rights are moral claims based on primary human needs".

"Human rights" in the words of *R.J. Vincent*, "are the rights that everyone has by virtue of his very humanity. They are grounded in our appeal to human nature. Writing in the same vein, David Selby says 'Human rights pertain to all persons and are possessed by everybody in the world because they are human beings, they are not earned, bought or inherited, nor are they created by any contractual undertaking.

Kant Baier: "Human Rights as, those moral rights whose moral ground and generating factors are the same, namely being human in some relevant sense".

Cranstan: "Human Rights by definition is a universal moral right, something which all people, everywhere at all times ought to have, something of which no one may be deprived without grave affront to justice, something which is owing to every human being simply because one is human".

D.D. Basu: "Human Rights as those minimal rights which every individual must have against the State or other public authority by virtue of his being a member of the human family, irrespective of any other consideration"

Apart from the definitions provided by scholars, the Universal Declaration of Human Rights, 1948, refers Human Rights as inalienable rights of all members of the human family. The above definitions generally focus upon the idea that Human Rights apply to all human beings because they are human beings.

D.D. Raphael: "Human Rights constitute those very rights which one has precisely because of being a human being".

Marting Golding: "Human Rights as act of claiming, performed on the level of the human community".

New Attitude to the concept of Human Rights in 20th Century

Great importance has been attached in the 20th century to the Human Rights issue in the international arena and tremendous efforts have been made, through the formulation of new principles and procedures to transfer the promotion and protection of basic rights, from the hands of the states to an authoritative super national organization. The uncompromising acceptance of the principle that "all men are born free and equal in dignity" has emerged pragmatically from the crucible of experience as the most valid of all working hypothesis of human relations. By the end of First World War, apart from political and civil rights the concepts of economic, social and cultural rights have also been developed. The idea that workers needed special safeguards was beginning to take hold in many industrial countries. Labour unions were establishing the right to collective bargaining; wages were being increased and hours were being reduced. The idea that the citizens had certain basic economic and social rights had been recognized in the Constitutions and Legislations of democratic countries.

The Leagues of Nations and Human Rights

After the First World, War the provisions of League of National Charter came into force. The covenant of the League of Nations reflected Human Rights. The phrase "Human Rights and Fundamental Freedoms" did not appear in the covenant. The

drafters of the covenant were pre-occupied with the maintenance of international peace and security, the pacific settlement of disputes, the establishments of a mandates system for former German and Ottoman territories and the protection of Minorities in central Europe. Neither the Council nor Assembly of the League subsequently dealt with the question of Human Rights. The wholesale and systematic suppression of Human Liberty in communist Russia, Fascist Italy and Nazi Germany were officially unnoticed by the League, although the implication of these acts of tyranny were recognized by many of its member States

In collaboration with League of Nations the International Labour Organization which was set up in 1919 rendered signal service in the field of Human Rights. The ILO was established on the basis of the realization that universal peace could be achieved only if it were based on social justice. The Assembly of the League endorsed in 1925 the Geneva Declaration of the Rights of the Child. The international action to eliminate the worst social evils like slavery, forced labour, the traffic in narcotics and the traffic in women and children was greatly strengthened under the League. In particular the development of conventions and recommendations by the ILO emphasized a new international concern in labour problems, wages, working hours, working conditions and social security. These activities of the League reflect the growing acceptance of the concept that the affairs of labour were matters of international as well as national concern.

In two fields of Human Rights, the League of Nations made a significant advance over the past. These fields are regulation of mandated territories and minorities system. The activities of the League in both these fields represented apart international concern with the Human Rights of individuals living in territories formerly governed by the enemy powers, and in part, the growing international concern with the right of self-determination of peoples and nations.

The International Labour Organisation and the League of Nations thus touched some aspects of the fields of Human Rights. Concern was shown especially in the fields of slavery, forced labour, mandated territories and minorities. The major work of the League and the ILO has provided an efficient system for developing and coordinating new international machinery for economic and social cooperation rather than to define rights and to device measures for promoting them.

In 1929, the Institute of International Law adopted declaration of International Rights of Man. It asserted that rights of a citizen laid down in several domestic Constitutions, particularly those of the French and the United States Constitutions were ordained not only for citizens but for all men. Article 1 of the Declaration lays down, "it is the duty of every state to recognize the equal rights of every individual

right to life, liberty and property and to accord to all within its territory the full and entire protection of these rights without distinction to nationality, sex, race, language or religion".

Human Rights Provisions under the U.N.Charter

With the rise of fascism in Germany and Italy and the outbreak of world war- II, the question of Fundamental Rights of man became much more important in many international conventions, The United Nations Declaration of January 1, 1942 put on record that complete victory over their enemies is sentential to defend life, liberty, independence and religious freedom and to preserve Human Rights and justice in their own land as well as in other lands.

The big three (United States, Soviet Union and Great Britain) endorsed the above declaration in their conference of March 3, 1943.Then came the Philadelphia Declaration of the International Labour Organization 26th session which laid down "All human beings, irrespective of trade, creed, or sex, have the right to pursue both their material well being and their spiritual development in conditions of freedom and dignity of economic security and equal opportunity".

The Dumbarton Oaks Conference of 1944 among the four big powers led to the first tentative draft of a new world organization. At Yalta conference of 1945, the Great powers issued a declaration of liberated Europe where principles of Atlantic Charter and Declaration of United Nations were affirmed.

Then came on April 25, 1945 the San Francisco conference of the United Nations where of the Charter of United Nations emerged. It is important to note that till the

coming into force of the U.N. Charter, Human Rights were expressed in pious terms in treaties. Prior to coming into force of the U.N. Charter Human Rights movement was confined to abolition of slavery, humanitarian laws of welfare, and protection of Minorities. The brutality committed by the Nazis and fascists during the second world war made it imperative for a world organization to proclaim and advocate the protection of Human Rights. The U.N. Charter proclaims sacrosanct of Human Rights and Fundamental Freedoms.

The United Nations Organization was primarily concerned with evolving a mechanism to maintain international peace and security. The first documentary uses of expression "Human Rights are to be found in the Charter of the United Nations".

In its preamble, the Charter interalia reaffirms its "Faith in Fundamental Human Rights…." and Article thereafter stated that the purposes of the United Nations shall be, amongothers,

"To achieve international co-operation… in promoting and encouraging respect for Human Rights and for Fundamental Freedoms for all without distinction as to race, sex, languages, orreligion….".

The U.N Charter, however was not a binding instrumentand merely stated the idea which was later developed by the different agencies and organs.

The Universal Declaration of Human Rights, which was adopted by the UN General Assembly on 10th December, 1948, has been proclaimed "as a common standard of achievement for all peoples and all nations". It incorporates not only the traditional Civil Liberties but also Social, Economic and Cultural Rights. Together with it, the two principal international Human Rights instruments, namely the International Covenant on Civil and Political Rights, 1966 and the International Covenant on Economic, Social and Cultural Rights 1966 have given very wide connotation to the concept of Human Rights and fundamental freedoms. At regional level the European Convention on Human Rights was adopted in 1950, the Inter-American Convention on Human Rights in 1969, the African Charter on Human and Peoples" Rights in 1981; in 1994 the Council of the Arab League passed the Arab

Charter on Human Rights. In order to add emphasis upon all those categories of Human Rights contained therein and to exemplify them, a number of international Human Rights instruments have been concluded. Some of them may be mentioned here, such as, the International Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; the Conventional on the Elimination of All Forms of Discrimination Against Women; the Declaration on the Right to Development; the Convention on the Rights of Child; the Convention on the Rights of Persons with Disabilities; the Convention for the protection of all Persons from Enforced disappearance and many more.

The question that, how far, the rights contained in the Universal Declaration of Human Rights, the two International Covenants and other Conventions have been translated into real rights of individuals, can be answered only after the examination of the individual legal system of the respective States.

In the field of Human Rights, international conferences have been held, in the past, on specific issues of Human Rights. For instance, to deal with the problems of women, four international conferences have been convened under the auspices of the United Nations. Similarly, conferences have also been arranged to discuss other issues of Human Rights such as minorities, racial discrimination, crime and torture. These consequences have pushed the international community to focus on economic and social issues in their programmes. In addition to the above, international conferences have been convened to discuss all the aspects relating to Human Rights. Such conferences covered a variety of issues relating to the protection and promotion of Human Rights.

The recognition and protection of Human Rights is nothing but the acknowledgement of the dignity of the human race, and are designed to enable each human individual to lead a life of fulfilment and achieve the maximum potential of the talents imbued by nature upon that individual.

It is by the faithful and unstinted enforcement of these rights that civilization of the world can truly qualify to be called human civilizations, bereft of barbarism, cruelty and conduct shocking to the human conscience. It would also be the best

guarantee to humankind against looming spectres of holocausts, genocides, violent conflicts and mindless annihilation of the human race in the name of wars. If peace of body, mind, and spirit be the ultimate objective of the human beings, protection of Human Rights is the categorical imperative of modern life.

The close examination of above stated historical facts/events at International and national levels bear testimony to the belief that man's struggle for rights is as old as the history of mankind. This concept of Human Rights was in rudimentary from in the ancient times, in formative stage in the Middle Ages and fully grown in the 20th century with the formation of United Nations.

The UDHR was adopted by the UN General Assembly on 10th December, 1948. The declaration was, however of great importance in stimulating and directing the International promotion of Human Rights. It formulates a unitary and universally valid concept of what values all states should cherish within their own domestic orders. Together with it, the two International Human Rights covenants namely the International Covenant on Civil and Political Rights, 1966 and the International.

Covenant on Economic, Social and Cultural Rights, 1966 have given a very wide connotation to the concept of Human Rights and Fundamental Freedoms. At the Universal and the Regional level a host of specific treaties on Human Rights was hammered out.

International conferences on Human Rights have also been arranged from time to time to discuss various issues of Human Rights issues relating to minorities, racial discrimination, crime, population, development and torture and many more. These conferences have pushed the International community to focus on economic and social issues in their programmes. So far as the protection and promotion of Human Rights are concerned the NGOs have rendered signal services since 1863 when the International Counsel of Red Cross was established. It is also clear that, in India, the movement for the protection of Human Rights started during British rule. Indian people demanded these rights from British Government.

After independence, Fundamental Rights are incorporated in part-III of the Indian Constitution which bears close resemblance with Human Rights. In accordance with the mandate of International Covenants on Human Rights as well as the provisions of the Indian Constitution the government had enacted the protection of Human Rights Act 1993 to provide for the Constitution of National Human Rights Commission, State Human Rights Commissions in the States and Human Rights Courts at district level for better protection of Human Rights and for matters connected therewith or incidental thereto.

In addition to the protection of Human Rights Act, 1993 there are certain legislations which directly or indirectly protect the Human Rights and Fundamental Freedoms of mankind in multidimensional approach. All these are in accordance with the mandate of Human Rights instruments as well as in accordance with the Constitutional provisions.

Theories of Human Rights

In order to have a comprehensive understanding of human rights, a look at the various theories becomes necessary to observe the shifting of priority of rights during the different phases of history. These theories provide the basis to determine the precise subject matter upon which there could be an agreement.

An incisive insight into the major theories of rights is as follows:-

The Theory of Natural Rights

This is the earliest theory of rights.Its origin can be traced back to the ancient Greeks. According to this theory, rights belong to the man by nature and thus are self-evident truths. They are considered as inborn absolute, pre-civil and according to some, they are even pre-social. They can be asserted anywhere and everywhere. Thomas Paine, Grotius, Tom Paine and John Locke, to name a few, are the main exponents of this theory. These theorists derived their ideas about right from God, reason or a prior moral assumption. To them, every individual possesses a unique identity and is expected to account for his actions as per his own conscience.

However, the critics of the natural rights theory argue that rights are abstract, absolute, or unidentified phenomenon. Liberty, as they argue, lives within restraints. So, restraints upon rights create social conditions where everyone has a share to develop his personality and 'correspondingly has his obligations to others. Rights and obligations, in fact, are the two sides of the same coin.

Despite the above the theory of natural rights inspired the idea that any kind of unjust, arbitrary or oppressive treatment to human beings is an assault upon humanity itself. Apart from this, it also provided the basis, for the English, French and American revolutions, thereby resulting in the Bill of Rights.

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The Legal Theory of Rights

This theory is a reaction against the theory of natural rights. Advocates of this theory argue that the ideas of natural law and natural rights are an abstract and ridiculous phenomenon. Hence, the existence and enjoyment of the fundamental rights of an individual could be better maintained and practiced by the state rather than by the individual himself.

Thomas Hobbes, John Austin, and Jeremy Bentham are the main propounders of this theory.

According to them, rights are purely utilitarian concepts and thus the rule and regulations are necessary for identification and protection of one's rights. Towards this end, every individual has to sacrifice certain rights and freedoms for the general welfare of the society.

This theory has been severely criticized on the ground that law alone does not create rights. Rather, it recognizes and protects them. Customs, traditions and morality also have a basis for rights. However, the truth in this theory lies in the fact that it enables individuals to demand certain specific and recognized rights as granted and guaranteed by the state.

The Anti-utilitarian Theory of Rights

There are yet other theorists who strongly argue that the priority of the well-being of the majority as stated by the utilitarian is not the prime objective of state. Amongst them Dowrkin, Nozic and John Rawls are the leading ones. They hold the view that the welfare of the majority might lead to detrimental consequences as far as the welfare of a particular person or a group of persons is concerned. So there has to be proper reconciliation between the well being of the majority and individual well-being for the better enjoyment of social and individual rights. Today, the demand for right to development on international foray is perhaps the manifestation of this theory.

The Legal Realist Theory of Rights :

The Legal Realist Theory of Rights is of recent origin. It mainly originated in U.S.A. with the expansion of regulatory activities followed by president Roosevelt's "New Deal Policy."A group of jurists such as Karl Liewellyn, Roscoe Pound and others discussed the point as to what law does, rather than what law is, in a highly complex and industrialized society. These theorists did not propound a common theory of rights. Rather, they considered rights as the end product of both the interaction of prevailing moral values of the society as well as the broad-based international sharing of values. So human rights, as they argue, are nothing but a manifestation of an on-going process rather than a theoretical debate.

This kind of a new approach to the concept of rights does away with the problems relating to the abstract nature of the concept. However, this theory goes about questioning the existing laws, their values and the actions, so far enacted upon the society. In other words, it questions the shortcomings and ineffectiveness

of the existing laws does not prescribe any solution in the form of super-value of a human being.

The Marxist Theory of Rights

Rights, according to Marx are simply concept and a product of bourgeois capitalist society primarily designed to maintain and reinforce the predominant position of the ruling class. This theory of rights is very simple and to a certain extent convincing too. Marx regards the state as a coercive agency to uphold the particular type of social organization and law is a tool of the state that perpetuates and safeguards the interest of the dominant group in the society. He firmly believes that rights can exist and flourish only in a classless society where all are equal and no one is an exploiter.

Social and economic rights are, thus, the main concern of this theory. However, the contribution of Marxist thought to the development of international covenant on economic, social and cultural rights has been found in the International Covenant on Economic, Social and Cultural Rights (ICESCR) in 1966. This theory, however, does not include religion, customs, traditions and mortality as integral components of human rights.

To sum up, "There is not a single theory which can adequately explain the origin and nature of rights. Each theory is the product of its own time and in conformity with the genius of the people with whom the propounders of the theory were associated. There is some element of in all these theories. But there is one eternal truth which cannot be ignored that individual good and social good go together. Society is an organic unit and welfare of the community is built upon the welfare of the individuals, and both go hand in hand. Hence ,a good theory of rights should take into consideration the most conductive variable essential for the welfare of all members of a society.

CLASSIFICATION OF HUMAN RIGHTS

Human Rights broadly can be classified from two different perspectives: Firstly, from the perspective of different aspects of human life, civil, political moral, social, economical; and secondly from the perspective of the ways of securing them. The human rights can be classified asunder:

Natural Rights

Natural rights are those rights which are considered to be inherent and integral to human nature. In fact, every individual, by nature, is given an individual property of his own which cannot be taken away by any authority. Such rights include intellectual rights, rights of the mind and also rights of acting as an individual for his own comfort and happiness, provided they are not injurious to the natural rights of others.

Moral Rights

These rights are based on the general principles of fairness and justice. These are simply aspirations and ideals of the people who claim for it. Sometimes, people justify these rights on the ground of the role they perform or the position they occupy in society. For example, the mother of a family might complain that she has the right to be consulted about what is going on in her family. In this case, she is applying the principle that parents are entitled to be consulted when family decisions affect the members. So it is them oral duty of other members to do the same.

Fundamental Rights

There are certain rights which are more important and basic than the others. For example, right to life is the most basic of all rights upon which the enjoyment of other rights depends. Among other basic rights to be recognized as a person before the law, the right to equal protection under law, and freedom from illegal arrest or detention. These rights never be restricted or taken away by any authority. That is why, every society has a fundamental duty to protect these at all times.

Legal Rights

Legal rights are otherwise known as positive rights. These rights are laid down in law. They are also guaranteed and protected by the law of the State. Thus, legal rights are uniform and open to all irrespective of the caste, color, race or culture.

Civil and Political Rights

Rights that are granted by government or civil society are called civil and political rights. These rights provide the basis for the fulfillment of elementary conditions of the social life. Without them, civilized life is not possible and they are ,therefore, considered very essential for the free and progressive life of man. Civil and political rights, however, include the right to the freedom of speech, of assembly the right to move freely, to hold property and practice trade or profession, and the right to take part in the government of one's country.

Economic, Social and Cultural Rights

These are entitlements of the individual vis-a-vis the State, in order to eradicate social inequality, economic imbalances and to limit disadvantages caused by nature, age and so on. These rights, however are bestowed by the State.

The State is not bound to meet these entitlements all at once. Most of the socialist states recognize these rights as fundamental rights of the people. Right to equality, right to work, right to have family, right to privacy, right to information, right to public assistance during old age and sickness, right to health-care, right to special care during childhood and during motherhood are some of the examples of these rights.

The rights mentioned above do not fully serve the purpose in the sense that rights have tendency to grow with the corresponding changes in the society. Some of the rights are of recent origin like the right to development, the right to know and the right to self determination.

There are many controversies regarding the question as to which are the more important rights. The Vienna Declaration issued after a conference in which representatives of 171 countries affirmed that 'all human rights are universal indivisible, inter-dependent and inter-relation.

UNIT II – UDHR, ICCPR & ICESCR

UNIVERSAL DECLARTION OF HUMAN RIGHTS

Synopsis

- Introduction
  - Pre-UN CharterDevelopment
  - Post-UN CharterDevelopment
- STRUCTURE AND CONTENT OFUDHR
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  - Articles proclaiming civil and politicalrights
  - Articles proclaiming economic, social and culturalrights
- LEGAL EFFECT OF THE UDHR
- INFLUENCE OF THE UDHR

INTRODUCTION

The Universal Declaration of Human Rights (UDHR) was proclaimed and adopted by the United Nations General Assembly (UNGA) on 10 December 1948. Its adoption was a milestone in the history of the development of international human rights law and because of its profound significance it is also termed as 'Magna Carta' of all mankind. The UDHR represents the earliest international agreement on the content of 'human rights', the term that finds reference at several places in the UN Charter but is nowhere elaborated in the Charter. It catalogues basic human rights and fundamental freedoms that all human beings are entitled and should enjoy. Together with the International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols, and International Covenant on Economic, Social and Cultural Rights (ICESCR), the UDHR form the International Bill of HumanRights.

Pre-UN CharterDevelopment

The Genesis of the UDHR is closely linked with the demand, made after the Second World War, to have an international bill of human rights.

Massive abuse of human life and dignity during and immediately preceding the Second World War

was main reason behind this demand. The need was felt for a formal and detailed international measure of protection for human rights.

During the drafting of the UN Charter this concern to have a bill of rights was very much visible. At the United Nations Conference on International Organization (UNCIO), popularly known as San Francisco Conference, held in 1945, representatives of some countries suggested that the UN Charter should contain a bill of rights.But, due to paucity of time,UNCIOcouldnotproducesuchadraft. TheUNCIO,however,decidedthatUN,once formed, would give separate attention to the issue and develop a bill of rights through the work of a special commission. That commission was contemplated by the Article 68 of the UN Charter, which provides that the Economic and Social Council (ECOSOC), 'shall set up commissions in economic and social fields and for the promotion of human rights'.

Post-UN CharterDevelopment

As mandated under the UN Charter, the ECOSOC, at its **1st session**, established a Commission on Human Rights in nuclear form (nuclear Commission) on 16 February 1946 by Resolution 1/5.The ECOSOC decided that the work of the nuclear Commission should primarily be devoted to submitting proposals, recommendations and reports for an international bill of human rights. The nuclear Commission, however, felt its inability to draft a bill of human rights and recommended that the full Commission should draft an international bill ofrights.

The ECOSOC considered the recommendation of the nuclear Commission during its 2nd session, 25 May to 21 June 1946. And by Resolution 2/9, adopted on 21 June 1946, ECOSOC decided that the full Commission should consist of one representative from each of 18 members of the UN selected by theECOSOC.

The full Commission on Human Rights (CHR) held its 1st session from 27 January to 10 February 1947 at Lake Success, New York. The CHR considered the question of the international bill of human rights and devoted a great deal of its time to a discussion of the form and content of the proposed bill.

It decided that the Chairman, together with the Vice- Chairman and Rapporteur,should undertake,

with the assistance of the UN Secretariat, the task of formulating a preliminary draft of an international bill of human rights, to be submitted to the CHR at its 2nd session for thorough examination. However, during the 4th session of the ECOSOC, from 28 February to 29 March 1947, when the CHR's Report was being

considered,certainmembersoftheECOSOCexpressedaviewthatthedraftinggroup was agreed, therefore, generally, that there should be an obligation of the international community to promote human rights and fundamental freedoms. As a result, the final draft of the UN Charter referred human rights in its Preamble (second paragraph) and six different Articles (Articles 1(3), 13(1) (b), 55, 56, 62(2) and 68). However, Charter's references to human rights are terse and vague as they did not elaborate and spell out the specific human rights norms andobligation.

Two views were expressed in the Drafting Committee regarding the form the preliminary draft international bill of human rights should take. Some representatives were of the view that it should take the form of a declaration or manifesto having only moral weight but no legal obligation on Members of the UN; others thought that it should be in the form of a legally binding convention. The Drafting Committee, therefore, while recognizing that the decision as to the form of the bill was a matter for the CHR, decided to prepare two documents; one, a working paper outlining a declaration or manifesto setting forth general principles, and the second, a working paper outlining a draftconvention.

On the basis of the Secretariat's Draft Outline, Prof. Rene Cassin, Member of the Drafting Committee, prepared a draft declaration containing a preamble and 46 suggested articles. After revising this draft declaration, the Drafting Committee submitted it to the CHR as working paper for a preliminary draft of International Manifesto or Declaration on Human Rights. The Drafting Committee also examined the possibility of developing a draft convention on the basis of draft International Bill of Hunan Rights proposed by the United Kingdom. After making certain amendments to the UK proposal, the Drafting Committee submitted it to the CHR as a working paper for a preliminary draft of an International Convention on Human Rights.

Both the documents were considered by the CHR at its 2nd session, which held from 2 to 17 December 1947. In the course of that session, the CHR decided that three documents- to be known as International Declaration on Human Rights, the International Covenant on Human Rights and Measures for implementation-would together form the International Bill of HumanRights

The Drafting Committee met for its 2nd session from 3 to 21 May 1948. It considered comments on the draft International Bill of Human Rights which had been received from a number of Member Governments. It redrafted the entire draft covenant, but redrafted only parts of the draft Declaration due to paucity of time. It did not consider the question of implementation.

During at its 3rd session, which took place from 24 may to 18 June 1948, the CHR examined the reportof the 2nd session of its Drafting Committee. The individual articles of the draft Declaration were examined anew. The CHR completed the re-draft of the Declaration and it was adopted without opposition. The CHR did not consider the Drafting Committee's re-draft of the Covenant due to paucity of time. It also did not discuss the question of implementation.

The CHR forwarded the text of the draft International Declaration of Human Rights,comprising 28 articles, to the 7th session of the ECOSOC. By its Resolution 151(VII), which was adopted without vote on 26th August, the ECOSOC transmitted this draft Declaration to the UNGA for final consideration.

The UNGA referred the draft Declaration to its Third Committee on 24th September 1948. The Third Committee considered the draft declaration and adopted most of the articles by unanimous vote, but with abstentions, explanations and reservations by the member States. The Third Committee on 7th December 1948 submitted the final draft Declaration, comprising 31 articles, to the UNGA for adoption. The UNGA adopted the proposal by the Third Committee with only one alteration, which put Article 3 as a second paragraph of Article 2. This changed the numbering of all following articles. The UNGA finally adopted the Universal Declaration of Human Rights on 10 December 1948 by its Resolution 217A(III).The UDHR was adopted by a vote of 48 in favour and none against, with 8 abstentions (see Table 1).

Table 1: Adoption of the UDHR

Relevant Provisions/ Articles		Voting Pattern
First recital of the preamble		Adopted with 2 abstentions
Second to Seventh recitals of the preamble		Adopted unanimously
Article 1		Adopted by 45 votes, with 9 abstentions
Article 2	First Paragraph:	Adopted unanimously
	Second Paragraph:	Adopted by 36 votes to 1, with 8 abstentions
Article 3 to 12		Adopted unanimously
Article 13		Adopted by 44 votes to 6, with 2 abstentions
Article 14 to 17		Adopted unanimously
Article 18		Adopted by 45 votes, with 4 abstentions
Article 19		Adopted by 44 votes to 7, with 2 abstentions
Article 20 to 25		Adopted unanimously
Article 26		Adopted by 53 votes, with 3 abstentions
Article 27		Adopted unanimously

Vote on each recital of the preamble and on each article

Article 28	Adopted by 47 votes, with 8 abstentions
Article 29	Adopted unanimously
Article 30	Adopted unanimously

STRUCTURE AND CONTENT OF UDHR

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

The rights specified therein encompass both civil and political rights and economic, social and cultural rights. Proclaimed by the General Assembly as a 'common standard of achievement for all peoples and all nations',the UDHR is addressed to every individual and every organ of the society that they shall strive to promote respect for and to secure the universal and effective recognition and observance of the rights and freedoms enumerated in it.

Based on the content and the nature of the rights enumerated therein, the 30 Articles of the UDHR can be broadly classified into fourcategories.

Articles general in nature

Articles 1 and 2 of the UDHR come under this category. Both the Articles provide the philosophical assumptions upon which UDHR is founded.

Article 1 proclaims that 'All human beings are born free and are equal in dignity and rights'. It emphasizes that humans are endowed with reason and conscience and they should act towards each other in a spirit ofbrotherhood.

Article 2 states that everyone is entitled to all the rights and freedoms set forth in the UDHR, without distinction of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. It further states that 'no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs'. In brief, Article 2 incorporates the principles of equality and non-discrimination and states in a negative way what Article 1 states in positive terms.

These two articles assure that human rights are the birth right of everyone and not privileges of a select few. All human beings are entitled to these rights, not because of any State or international organization, but simply because of their common birth into the human family.

Articles proclaiming civil and political rights

This category comprises the largest number of Articles. Articles 3 to 21 of the UDHR set forth the civil and political rights to which everyone isentitled. Articles 3 proclaims that 'Everyone has the right to life, liberty and security of person', *i.e.*, the right to live and to live in freedom and safety. The rights recognized in **Article 3** sets the base for all following political rights and civil liberties, enumerated in the UDHR.

Article 4 provides that 'No one shall be held in slavery or servitude'. It further prohibits all forms of slavery and slave trade. Thus, not only slavery but slavery-like practices, e.g., servile marriages in which women have no rights to refuse marriage or may be transferred from one person to another upon the death of the husband, are also proscribed by this Article.

Article 5 proclaims the individual's right not to be subjected 'to torture or to cruel, inhuman or degrading treatment or punishment'.

The right 'to recognition everywhere as a person before the law' is guaranteed to everyone under **Article 6** of the UDHR. The phrase 'person before the law' refers to the recognition which States should accord to the right of all individuals to make, *e.g.*, agreements or contracts which courts will enforce, and start proceedings before courts to ensure that their legal rights are enforced.

Article 7 declares that every individual is equal before the law and is entitled to equal protection of the law without any discrimination. Thus, it ensures non-discrimination in the application of the law in general, *i.e.*, essentially, national laws. The Article further states that everyone is entitled to equal

protection against any discrimination in violation of the UDHR and against any incitement to such discrimination.

Article 8 of the UDHR aims to create a right of recourse to a domestic tribunal or a court for a person whose constitutional or legal rights have been violated. Thus, it emphasises on the point that no situation should ever arise where a person is without a

remedywhenhisorherrightsareviolated.However,the

Articlestressesthattheperson concerned should approach to the 'competent' court. The word 'competent' refers to court which have been designated for a certain purposes (thus a person who claims that his or her intellectual property rights have been infringed should petition to a court specialized in this question and not to a court which deals, *e.g.*, environmental law).

Article 9, together with Articles 10 and 11, constitute fundamental legal safeguards which all legal systems should offer to individuals, *viz.*, freedom from arbitrary arrest, the right to fair and prompt trial and the presumption ofinnocence.

Article 9 first of all proclaims that 'no one shall be subjected to arbitrary arrest, detention or exile.' The term 'arbitrary' is open to two possible interpretations. *Firstly*, an individual may only be arrested, detained or exiled in accordance with legal procedures; and *secondly*, nobody should be subjected to arrest, detention or exile, where there is no likelihood that he or she has committed an offence. The second interpretation is the valid one, as laws often allows sweeping power of arrest and because legal procedures may often themselves be arbitrary or abused.

Article 10 provides for the basic right to a fair trial in both civil and criminal matters. The Article guarantees a fair and public hearing by an independent and impartial tribunal to all those who appear incourt.

Article 11 paragraph 1 creates 3 rights in favour of persons charged with penal offences. *Firstly*, the presumption of innocence, *i.e.*, anyone who is charged with a criminal offence shall not be treated as being guilty until his or her guilt has been proved; *secondly*, the right to a defence, *i.e.*, he or she must have all the guarantees necessary for his or her defence; and *thirdly*, the right to a public trial, *i.e.*, his or her trial must not be held in secret. The second right imposes obligation on States to ensure that an accused person has both legal representation and proper possibilities to establish his or her innocence, including the right to call witness. The third right cast a duty on States to show that the law is being fairly and properly applied.

Article 11 paragraph 2 provides freedom from the application of *ex post facto* laws and penalties in cases related to penal offences. It means that a person shall not be punished for those acts which were legal when they were committed and it also means that, if an act was punishable in one way when committed, a later change in the law cannot increase the punishment given.

Article 12 lays down the individual's right to freedom from arbitrary interference with his privacy,

family, home or correspondence or attacks upon his honour and reputation. It further provides everyone the right to the protection of the law against such interference or attacks.

The right 'to freedom of movement and residence within the borders of each State' is recognized in **Article 13**. It also proclaims the individual's right 'to leave any country, including his own, and to return to hiscountry'.

Article 14 guarantees the right 'to seek and to enjoy in other countries asylum from persecution'. However, it further clarifies that this right cannot be invoked 'in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the UnitedNations'.

Article 15 provides that 'Everyone has the right to a nationality' and one shall not be 'arbitrarily deprived of his nationality nor denied the right to change his nationality'.

Article 16 paragraph 1 proclaims that men and women of full age have the right 'to marry and to found a family'. Further, they are entitled 'to equal rights as to marriage, during marriage and at its dissolution'. Paragraph 2 emphasizes that 'Marriage shall be entered into only with the free and full consent of the intending spouses'. The use of the word 'free' is intended to eliminate any compulsion by parents, by the other spouse, by the authorities, or anyone else. Paragraph 3 recognizes that the family, whatever its nature is, *e.g.*, nuclear, single parent or extended, is the 'natural and fundamental group unit of society and is entitled to protection by society and theState'.

The right 'to own property alone as well as in association with others' is recognized in **Article 17**. It also states that one shall not be deprived of his or her property arbitrarily.

Article 18 proclaims the individual's right 'to freedom of thought, conscience and religion'. This right includes freedom to change his religion or belief, and freedom to manifest his religion or belief in teaching, practice, worship and observance either alone or in community with others and in public or private.

Article 19 recognizes the right 'to freedom of opinion and expression'. This right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

The right to 'freedom of peaceful assembly and association' is recognized in Article 20. It further states that one cannot be 'compelled to belong to an association'.

Article 21 of the UDHR proclaims important political rights. Paragraph 1 of it declares that an individual has the right 'to take part in the Government of his country, directly or through freely chosen representatives'. Paragraph 3 further declares that the 'will of the people shall be the basis of the authority of government' and requires 'periodic and genuine elections' by universal and equal suffrage and to be held by secret vote for the expression of such will. Paragraph 2 of Article 21 provides that 'Everyone has the right to equal access to public service in his country'.

Articles proclaiming economic, social and culturalrights

Articles 22 to 27 of the UDHR form part of this category.

Article 22 is the cornerstone of the economic, social cultural rights enumerated in the UDHR. It starts with the proposition that everyone, as a member of society, is entitled to realization of 'the economic, social and cultural rights indispensable for his dignity and the free development of his personality.' In order to achieve these aspired rights, the article emphasises that national efforts and international cooperation should be taken and each country must take into account its own resources and priorities. The Article then proclaims the individual's right to social security.

Article 23 sets forth a series of rights. Paragraph 1 of it proclaims the individual's right to work, to 'just and favourable conditions of work', to 'free choice of employment' and to 'protection against unemployment'. It further states that everyone has the right to 'equal pay for equal work without any discrimination' (paragraph 2) and to 'just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection' (paragraph 3). It also recognizes the individual's right 'to form and to join trade unions for the protection of his interests' (paragraph 4).

The right 'to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay' is recognized in Article 24.

Article 25 paragraph 1 of the UDHR provides that everyone has the right 'to a standard of living adequate for the health and well-being of himself and of his family'. This includes food, clothing, housing and medical care and necessary social services. It also recognizes the individual's right 'to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control'. Paragraph 2 of the Article 25 acknowledges that 'Motherhood and childhood are entitled to special care and assistance'. It also states that all children

shall enjoy the same social protection, whether born in or out of wedlock.

Article 26 paragraph 1 deals with the right to education. It states that education shall be free in the elementary and fundamental stages and that elementary education shall be compulsory.

It further states that technical and professional education shall be made generally available and higher education shall be equally accessible to all on the basis of merit. Paragraph 2 declares that the aim of education shall be 'the full development of the human personality'; 'the strengthening of respect for human rights and fundamental freedoms'; and the promotion of 'understanding, tolerance and friendship among all nations, racial or religious groups'. Paragraph 3 of Article 26 recognizes parents' prior right to choose the kind of education that shall be given to theirchildren'.

Article 27 of the UDHR prescribes the enjoyment of cultural rights. Paragraph 1 of it insists that everyone has the right freely to participate in all forms of cultural life of the community. They have also the right to be benefitted from scientific and technological progress. Paragraph 2 proclaims the individual's right 'to the protection of the moral and material interests resulting from any scientific, literary or artistic production which he is the author'. Paragraph 1 can be interpreted as prescribing both group rights and individual rights. Paragraph 2, on the other hand, clearly prescribes individual rights.

Concluding articles

Articles 28 to 30 of the UDHR, which constitute the fourth and last category, provide a larger framework in which all human rights are to be universally enjoyed.

Article 28 declares that 'Everyone is entitled to a social and international order in which the rights and freedoms set forth in the UDHR can be fully realized'.

Article 29 is the only provision in the whole UDHR which speaks of duties. Paragraph 1 of it acknowledges that, along with rights, every human being also has duties 'to the community in which alone the free and full development of his personality is possible'.

Paragraph 2 of the Article 29 recognizes that the rights proclaimed by the UDHR are not absolute but subject to limitations. It permits a state to enact laws limiting the exercise of these rights, provided their sole purpose is to secure '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'. Paragraph 3 further states that these rights cannot be exercised contrary 'to the

purposes and principles of the United Nations'.

The last Article of the UDHR, namely, Article 30, spells out a rule of interpretation. It states that the UDHR should not be used as a pretext for violating rights in any circumstances. This rule applies not only to States, but also to groups and individuals. Thus, no one may take an article of the UDHR out of context and apply it in such a way that other articles would be violated.

LEGAL EFFECT OF THE UDHR

There are two conflicting views regarding the legal effect of the UDHR.

As per the first view, the UDHR is not a legally binding instrument but possesses only moral and political force. Scholars who support this view emphasize that the UDHR is not a treaty rather it is merely a non-binding resolution adopted by the UNGA in the form of a declaration. They state that the purpose of the UDHR, according to its preamble, is to provide 'a common understanding' of the human rights and fundamental freedoms referred to in the UN Charter and to serve 'as a common standard of achievement for all peoples and all nations'. In other words, it is a statement of ideals, a path finding instrumentand simply a recommendation to States.Supporters of the first view further point out the absence of legal force in the UDHR on the basis of the debates which took place in the UNGA and the Third committee on the UDHR. They argue that the UDHR was not intended or proposed to be a legally binding instrumentas most of the Member States of the UN who voted for the UNGA Resolution comprising UDHR insisted repeatedly and emphatically on the fact that the Declaration was not a legal document and possessed no legally bindingforce.

According to second view, the UDHR, since its adoption in 1948, has undergone a dramatic transformation. It might not have been binding when it was adopted but it has now become binding or assumed legal implications. It has an indirect legal effect. Scholars who support this view advance three theories in support of their claim. *Firstly*, they argue that the UN's consistent reliance on the UDHR when applying the human rights provisions of the UN Charter compels the conclusion that the Declaration has come to be accepted as an authoritative interpretation of these provisions.According to this view, the Member States of the UN have agreed that they have an obligation under the Charter to promote 'universal respect for, and observance of' the rights which the Declaration proclaims.

Secondly, they contend that the repeated reliance on and resort to the UDHR by governments and intergovernmental organizations represent the requisite state practice which is capable of giving rise to customary international law. This theory leads to the conclusion thatthe Declaration, *in toto*,or, at the very least, some of its provisions, *e.g.*, prohibition of slavery, torture, *etc*., and not all,have become customary international law and thus binding on all states, not only on Member States of the UN. And *thirdly*, they contend that the international human rights norms contained in the UDHR constitute general principles of law.

INFLUENCE OF THE UDHR

The UDHR has exercised a profound influence, both internationally and nationally, since its adoption. The UDHR provided the framework, upon which the two international human rights covenants, i.e., ICCPR and ICESCR, were constructed and adopted by the UNGA on 16 December 1966. It has been the source of inspiration and has been the basis for the UN in making advances in standard setting as contained in number of international human rights treaties. The core international human rights instruments make reference to the UDHR. It has inspired a number of declarations and international conventionsconcluded under the auspices of the UN and of the specialized agencies. The UDHR as a whole or its different articles have been frequently quoted in the resolutions of the UNGAas justification for actions taken by theUN.

The UDHR has also inspired major regional human rights instruments. These instruments refer to the UDHR in their preambles.

Table 2. UDHR and the Core International Human Rights Instruments

Serial No.	Instruments/Treaties	Relevant provisions of the Instrument in which UDHR has been referred
1.	International Convention on the Elimination of All Forms of Racial Discrimination,	2nd recital of the Preamble; Article 4 and 7

	1965	
2.	International Covenant on Civil and Political Rights, 1966	3rd recital of the Preamble
3.	International Covenant on Economic, Social and Cultural Rights, 1966	3rd recital of the Preamble
4.	Convention on the Elimination of All Forms of Discrimination against Women, 1979	2nd recital of the Preamble

Table 3. UDHR and the Regional Human Rights Instruments

Serial No.	Regional Human Rights Instruments	Relevant provisions of the Instrument in which UDHR has been referred
1.	European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950	1st, 2nd and 5th recital of the Preamble
2.	American Convention on Human Rights, 1969	4th and 5th recital of the Preamble
3.	African Charter on Human and Peoples' Rights (Banjul Charter), 1981	3rd recital of the Preamble
4.	Arab Charter on Human Rights, 2004	5th recital of the Preamble

The practical importance of the UDHR has been demonstrated through its invocation by the

international as well as by the regional courts as an aid to interpretation of relevant human rights treaties. The international Court of Justice (ICJ) invoked the UDHR in relation to the detention of hostages 'in conditions of hardships' in the ***Case Concerning United States Diplomatic and Consular Staff in Tehran***.ICJ has also referred to the UDHR in number of cases, such as, the ***Asylum Case*****and *Corfu Channel Case.***

International Criminal Court (ICC) has referred the UDHR in ***Omar Al Bashir Case***.The UDHR has also been invoked by the European Court of Human Rights, as an aid to the interpretation of the European Convention on Human Rights in *Golder Case* of 1975.

The provisions of the UDHR have also influenced various national constitutions, laws, regulations, and policies that protect fundamental human rights. It has served directly and indirectly as a model for the rights provisions of some 90 constitutions.

The UDHR is frequently cited in support of judicial decisions which upheld a particular right guaranteed under domestic constitutions or legislations, *e.g.*, Indian Supreme Court in the ***Chairman, Railway Board and others v Mrs. ChandrimaDas*** and US Circuit Court of Appeals in ***Filartiga v Pena-Irala*****have** referred to the UDHR.

The discussion in the preceding sections has emphasized the genesis, content and importance of the UDHR. It adoption was a landmark event. It is the first instrument that should be consulted when one tries to identify the contemporary content of international human rights law. It spells out the fundamental and minimum rights which everyone is entitled. The UDHR has set a standard by which national behaviour can be measured and to which nations can aspire. Although, there is a disagreement pertaining to legal effect of the UDHR, but its importance within the context of human rights law cannot be disregarded. And this point has been emphasized by the Vienna Declaration and Programme of Action, 1993,when it referred to the UDHR as the 'source of inspiration' and the basis for the UN 'in making advances in standard setting as contained in the existing international human rights instruments'.Through the Vienna Declaration, Representatives of 171 countries affirmed by consensus their commitment to theUDHR.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Synopsis

- INTRODUCTION
  - International bill of rights
  - ICCPR
    - Purpose:
    - Structure of ICCPR
  - Optional protocols
  - International covenant on civil and political rights [ICCPR] & the Constitution of India

The ICCPR is a key international human rights treaty, providing a range of protections for civil and political rights. The ICCPR, together with the Universal Declaration of Human Rights and the International Covenant on Economic Social and Cultural Rights, are considered the International Bill of Human Rights.

International Bill of Rights

The International Bill of Human Rights is an informal name given to one General Assembly resolution (UDHR) and two international treaties/covenants and one established by the United Nations. It consists of:

1. Universal Declaration of Human Rights (adopted in 1948),
2. International Covenant on Civil and Political Rights (1966) with its two Optional Protocols and
3. International Covenant on Economic, Social and Cultural Rights (1966).

The two covenants entered into force in 1976, after a sufficient number of countries had ratified them. The Bill influences the decisions and actions of Government, State and Non-State actors to make economic, social and cultural rights a top-priority in the formation and implementation of national, regional and international policy and law.

ICCPR

In 1948 the United Nations General Assembly adopted the UDHR. The UDHR is not a treaty, so it does not directly create legal obligations for States. On the same day that it adopted the UDHR, the United

Nations General Assembly asked its Commission on Human Rights to draft a covenant on human rights, which could become a binding treaty. After six years of drafting and debate, in 1952 the General Assembly requested that the Commission on Human Rights draft two covenants rather than one.

The covenants, International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights were opened for signature in 1966 and entered into force in 1976.

PURPOSE:

The ICCPR recognizes the inherent dignity of each individual and undertakes to promote conditions within states to allow the enjoyment of civil and political rights. Countries that have ratified the Covenant are obligated to protect and preserve basic human right and compelled to take administrative, judicial, and legislative measures in order to protect the rights enshrined in the treaty and to provide an effective remedy." There are currently 74 signatories and 168 parties to the ICCPR.

STRUCTURE OF ICCPR

The covenant contains six parts with 53 articles.

PART 1

-contains Article 1 which recognizes the right of all peoples to self-determination, including the right to "freely determine their political status", pursues their economic, social and cultural goals, and manage and dispose of their own resources. It recognizes a negative right of a people not to be deprived of its means of subsistence, and imposes an obligation on those parties still responsible for non-self governing and trust territories (colonies) to encourage and respect their self-determination.

PART 2(A.2 TO 5)

- The unifying themes and values of the ICCPR are found in Articles 2 and 3 and are based on the notion of **non-discrimination**. Article 2 ensures that rights recognized in the ICCPR will be respected and be available to everyone within the territory of those states who have ratified the Covenant (State Party) and imposes a duty on the State party to take all necessary steps to implement these rights. Article 3 ensures the equal right of both men and women to the enjoyment of all civil and political

rights set out in the ICCPR.

- Article 4 of ICCPR(**Limitation on rights**) allows for certain circumstances for States Parties to derogate from their responsibilities under the Covenant, such as during times of public emergencies. However, State Parties may not derogate from Articles 6, 7, 8 (paragraphs I and 2), 11, 15, 16 and 18.

PART 3: RIGHTS (A.6-27)

Rights to physical integrity

1. Article 6 – Right to life.
2. Article 7 – Freedom from torture.
3. Article 8 – Right to not be enslaved.

Liberty and security of person

4. Article 9 – Right to liberty and security of the person.
5. Article 10 – Rights of detainees.
6. Article 11 – Right to not be imprisoned merely on the ground of inability to fulfil a contractual obligation.

Procedural fairness and rights of the accused

7. Article 14 – Equality before the courts and tribunals. Right to a fair trial.
8. Article 15 – No one can be guilty of an act of a criminal offence which did not constitute a criminal offence.
9. Article 16 – Right to recognition as a person before the law.

Individual liberties

10. Article 12 – Freedom of movement and choice of residence for lawful residents.
11. Article 13 – Rights of aliens.
12. Article 17 – Freedom from arbitrary or unlawful interference.
13. Article 18 – Right to freedom of thought, conscience and religion.
14. Article 19 – Right to hold opinions without interference.
15. Article 20 – Propaganda for war shall be prohibited by law.
16. Article 21 – Right of peaceful assembly.
17. Article 22 – Right to freedom of association with others.

18. Article 23 – Right to marry.
19. Article 24 – Children's rights
20. Article 25 – Right to political participation.
21. Article 26 – Equality before the law.
22. Article 27 – Minority protection.

Article 3 the right against non-discrimination can be used an accessory i.e., it can be relied upon in relation to any other right but cannot be used independently.

PART 4: HUMAN RIGHTS COMMITTEE (A.28-45)

This part governs the establishment and operation of the Human Rights Committee and the reporting and monitoring of the Covenant.

What is the Human Rights Committee?

The Human Rights Committee was established to monitor the implementation of the ICCPR. It is composed of 18 independent experts with recognized competence in the field of human rights. Committee members are elected for a term of four years and must be from countries that have ratified the Covenant. As of January 2020, members of the Committee come from: Paraguay, Tunisia, Latvia, Guyana, Egypt, Japan, South Africa, Mauritania, Canada, Uganda, Greece, Chile, Slovenia, Portugal, Israel, France, Germany, Albania.

What is the function of the Human Rights Committee?

The Human Rights Committee meets three times a year for sessions lasting three weeks at the United Nations Office in Geneva, Switzerland. Countries that have ratified the ICCPR are obliged to report to the Committee every four years. Three to five countries are invited to present their reports at each session which is open to the public and is usually live streamed. The Committee examines the report and addresses its concerns and recommendations to the country in the form of "concluding observations." The Committee also publishes general comments which are its interpretation of the content of the treaty's human rights provisions.

PART 5: (ARTICLES 46 – 47)

This part clarifies that the Covenant shall not be interpreted as interfering with the operation of the

United Nations or "the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources"

PART 6: (A48-53)

It governs ratification, entry into force, and amendment of the Covenant.

Optional protocols

There are two Optional Protocols to the Covenant. The First Optional Protocol establishes an individual complaints mechanism, allowing individuals to complain to the Human Rights Committee about violations of the Covenant.

This has led to the creation of a complex jurisprudence on the interpretation and implementation of the Covenant. As of September 2019, the First Optional Protocol has 116 parties.

The Second Optional Protocol abolishes the death penalty; however, countries were permitted to make a reservation allowing for use of death penalty for the most serious crimes of a military nature, committed during wartime. As of September 2019, the Second Optional Protocol had 87 parties.

INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS [ICCPR] & THE CONSTITUTION OF INDIA

Certain rights enshrined in ICCPR are specifically enumerated in the Constitution of India while certain few of them are not. Following tabular list would make it aptly clear:-

RIGHTS	ICCPR	CONSTITUTION OF INDIA
Right to life and personal liberty	Art. 6(1) & 9(1)	Art. 21
Prohibition of traffic in human beings and forced labour	Art. 8(3)	Art. 23
Protection against arrest detention in certain Cases	Art. 9(2) & (3) & (4)	Art. 22

Right to movement	Art. 12(1)	Art. 19(1)(d)
Right to equality	Art. 14(1)	Art. 14
Protection against self-incrimination	Art. 14(3)(g)	Art. 20(3)
Protection against double-jeopardy	Art. 14(7)	Art. 20(2)
Protection against ex-post facto law	Art.15(1)	Art. 20(1)
Freedom of conscience and free profession, practice and propagation of religion	Art.18(1)	Art. 25
Right of expression of thoughts and feelings using spoken language.	Art. 19(1) & (2)	Art. 19(1)(a)
Right to assemble peaceably and without arms	Art. 21	Art. 19(1)(b)
Right to form associations or unions	Art. 22(1)	Art. 19(1)(c)
Right to equality of opportunity in matters of public employment	Art. 25(c)	Art. 16(1)
Government is prohibited from making Law which discrimination of its citizens.	Art. 26	Art. 14 & 15(1)
Protection of interests of minorities and right of minorities to establish and administer educational institutions	Art. 27	Art. 29 & 30

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS

Synopsis

- INTRODUCTION
  - Purpose
  - Structure
  - Optional Protocol to the ICESCR
  - Special Procedures
  - International Labour Organization
  - Regional Human Rights Commissions And Courts

The International Covenant on Economic, Social and Cultural Rights (ICESCR) was adopted by the United Nations General Assembly on 16 December 1966. As one of two international treaties that make the 'International Bill of Human Rights' (along with the Universal Declaration of Human Rights), the ICESCR provides the legal framework to protect and preserve the most basic economic, social and cultural rights.

Purpose:

The preamble of the covenant states that in order to enjoy freedom from fear and want conditions whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights have to be created. Considering that justice, freedom and peace in the world can be achieved only if inherent dignity of human beings are guaranteed, the covenant was adopted.

Structure:

The covenant consists of 31 articles that are divided into 5 parts and an Optional Protocol.

PART I (Article 1)

Article 1 of the ICESCR states that all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." This provision is identical to Article 1 of the International Covenant on Civil and Political Rights.

The right of self-determination has two components: external and internal. "External self-determination" can be thought of as international self-determination, because it refers to peoples' right

to determine their political status and their "place in the international community" based upon the principle of equal rights and freedom from colonialism, "alien subjugation, domination, and exploitation."

"Internal self-determination" can be thought of as self-determination within the domestic sphere, because it refers to the right to freely pursue economic, social and cultural development free from outside interference. See id. Consequently, the right to development is integral to the right of internal self-determination.

PART II (Article 2-5)

Article 2:

Each State Party undertakes to take steps to the maximum of its available resources to achieve progressively the full realization of the rights in this treaty. Everyone is entitled to the same rights without discrimination of any kind.

ICESCR recognizes that the full realization of all economic, social and cultural rights will generally not be able to be achieved in a short period of time. Therefore, States are responsible for **"progressive realization"** of these rights and must "move as expeditiously and effectively as possible towards that goal. States must initiate such steps within a reasonably short time." States must incorporate the content of the right into domestic law and the law must provide individuals with an effective remedy for addressing alleged violations.

Discrimination is prohibited on the basis of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. **Non-discrimination clause** is not exhaustive, and has also been interpreted to forbid discrimination on the basis of sexual orientation.

Article 4

Limitations may be placed on these rights only if compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

For example, the CESCR explains, if a State were to forbid a doctor from treating a person believed to be opposed to the government on the basis of national security, the State would then have the burden of justifying that its action was: performed in the interest of a legitimate aim; in accordance with domestic law and international human rights standards; compatible with the nature of ESCR; and that it was strictly necessary to promote the general welfare in a democratic society.

PART IV (Article 6- 15)

Economic Rights

Economic rights protected by the ICESCR include the rights to work, to receive a fair wage, safe working conditions, and to form and join trade unions.

Article 6

Everyone has the right to work, including the right to gain one's living at work that is freely chosen and accepted.

Article 6 of the ICESCR protects the right to work, which is the opportunity to gain a living by work that one freely chooses or accepts. To fully realize the right to work, States are encouraged to develop technical and vocational guidance and training programs, along with policies that facilitate access to employment. States have the core obligation to ensure the right of access to employment, by avoiding measures that discriminate against marginalized groups and by implementing national plans of action to effectuate the right to work for the disadvantaged. The right to work implicitly forbids forced labor. Forced labor is involuntary "work or service which is extracted from any person under the menace of any penalty."

Article 7

Everyone has the right to just conditions of work; fair wages ensuring a decent living for himself and his family; equal pay for equal work; safe and healthy working conditions; equal opportunity for everyone to be promoted; rest and leisure.

The ICESCR protects the right to just and favorable work conditions, including the right of all workers to receive "fair wages and equal remuneration for work of equal value." The ICESCR's emphasis on equality prohibits States from discriminating against women, and requires States to "ensure equal opportunities and treatment between men and women in relation to their right to work." The ICESCR guarantees the right to safe and healthy working conditions, equal opportunity for promotion, and provides for "rest, leisure and reasonable limitation of working hours and periodic holidays with pay, as well as remuneration for public holidays." The work itself must be "decent," meaning that it respects workers' physical and mental integrity, and respects their human rights in terms of work safety and remuneration. The remuneration should be enough so that individuals are able to earn "a decent living for themselves and their families."

Article 8

Everyone has the right to form and join trade unions, the right to strike.

International human rights law protects the right to form and join trade unions, and protects the unions' right to function freely without restrictions other than organization rules, regulations "prescribed by law and which are necessary in a democratic society in the interests of national security or public order," and limitations necessary to protect others' rights.

The decision to join a trade union should be the workers' independent choice, exercised free from influences that constrain their freedom to make a decision.

The ICESCR protects workers' right to go on strike, as long as the strike conforms to the legitimate requirements of the relevant State's laws. As with other economic, social and cultural rights, any limitation a State places on the right to strike must comply with the general limitations clause of Article 4. On this issue, for example, the European Court of Human Rights has held that the State's ban preventing public employees from participating in a national strike to support collective bargaining was a violation of the freedom of assembly and association.

Social Rights

Social rights protected by the ICESCR include the rights to social security, protection of the family, an adequate standard of living (including freedom from hunger, access to clean water, adequate housing, and protection of property), and mental and physical health.

Article 9

Everyone has the right to social security, including social insurance.

According to the CESCR, the right to social security includes the right to access and maintain benefits without discrimination to help secure protection from lack of work-related income, unaffordable access to healthcare, and insufficient family support (in the case of children and adult dependents). States have an obligation to develop a national strategy for the full implementation of the right to social security. There is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited.

Article 10

Protection and assistance should be accorded to the family. Marriage must be entered into with the free consent of both spouses. Special protection should be provided to mothers. Special measures should be taken on behalf of children, without discrimination. Children and youth should be protected from

economic exploitation. Their employment in dangerous or harmful work should be prohibited. There should be age limits below which child labor should be prohibited.
One example of social exploitation is forced marriage. The ICESCR prohibits forced marriages, stating that marriage "must be entered into with the free consent of the intending spouses."

International human rights law requires States to accord "the widest possible protection and assistance" to the family, especially when the family is "responsible for the care and education of dependent children." For example, mothers should receive special protection for a reasonable time before and after childbirth, including maternity leave with pay or with adequate social security benefits. In Amnesty International v. Zambia (Comm. No. 212/98), the African Commission found that the State violated its duty to protect and assist the family when the State deported political activists, because their deportation resulted in forcibly breaking up their family units.
To prevent the employment of children in dangerous or harmful work conditions, States should set age limits on employment, in addition to prohibiting and punishing child labor.

Article 11

Everyone has the right to an adequate standard of living for himself and his family, including adequate food, clothing and housing. Everyone has the right to be free from hunger.
The right to an adequate standard of living entails the rights to adequate food, clothing, housing, and to the continuous improvement of living conditions. States are required to "take appropriate steps to ensure the realization of this right." To realize an "adequate" standard of living, States are required to take actions that guarantee individuals' access to the minimum conditions necessary for a life of dignity, rather than conditions that merely ensure survival.
The following rights must be guaranteed for an individual or community to have an adequate standard of living:

i) The Right to Food (Article 11(2))

International human rights law recognizes the fundamental right to be free from hunger. The right to food will be realized when "every man, woman and child, alone or in community with others, have physical and economic access at all times to adequate food or means for its procurement." The core content of the right requires food to be available in a quantity and quality that is sufficient to satisfy

dietary needs, safe and culturally appropriate, and accessible without interfering with other human rights.

Violations of the right to food occur when States directly interfere with enjoyment of the right and when States insufficiently regulate other actors that interfere with enjoyment of the right. States should develop a "national strategy to ensure food and nutrition security for all," including objectives, policies,

and benchmarks for progress. States are obligated to "improve the methods of production, conservation and distribution of food by making full use of technical and scientific knowledge," in order to produce food sustainably and disseminate the knowledge of nutrition principles.

ii) The Right to Water (Articles 11 & 12)

Although the right to water is not explicitly provided for in the ICESCR, it has been interpreted to arise through the rights to an adequate standard of living and to health. The right to water entitles individuals to safe, affordable, clean, and physically accessible water for personal and domestic uses. States should prioritize the allocation of water for personal and domestic uses, for the prevention of starvation and disease, and to ensuring that water is available to meet the core obligations of other ESCR, including the right to food or the right to health. States have a related duty to ensure that everyone has access to adequate sanitation, which is crucial to protecting the quality of the water supply.

The CESCR has noted that during armed conflicts and emergency situations, States have the duty to protect drinking water sources and to ensure that civilians, internees, and prisoners have access to adequate water. For example, in the context of the armed conflict in Darfur, the African Commission found that the State violated the right to health under the African Charter when its armed forces, inter alia, poisoned water wells and denied access to water sources.

The nexus between business and human rights often impacts the right to water. States have a duty to refrain from interfering with individuals' use of water, and a duty to reasonably prevent other actors, including corporations, from "denying equal access to adequate water; and polluting and inequitably extracting from water resources." States have an obligation to prevent private companies from "compromising equal, affordable, and physical access to sufficient, safe, and acceptable water" by establishing an effective regulatory system.

iii) The Right to Housing (Article 11)

Individuals have the right to housing, which goes beyond the right to have a roof over one's head, and includes the right to live in peace and dignity, with security from outside threats.

The following factors are taken into account when determining if housing is considered "adequate": protection from forced eviction and harassment; access to facilities essential for health, security, comfort, and nutrition; affordability to the extent that other basic needs are not compromised; habitability; accessibility; in a location allowing access to social services; and individuals' ability to express their cultural identity.

For example, the European Committee on Social Rights found a violation of the right to housing in **European Roma Rights Centre v. Portugal** (Complaint No. 61.2010), when the Roma were living in a settlement that frequently had no access to water, electricity or sanitation. The Committee noted that the Roma's housing was discriminatorily segregated from the rest of society and that the State failed to respect their cultural diversity when resettling them, because it did not consider their family size and the resettlement structure prevented family gatherings.

Forced evictions are prohibited under the right to housing. Forced evictions are the permanent or temporary removal of individuals or communities against their will from their homes or land without access to appropriate protection. States should establish legal guidelines for evictions that specify when they may be carried out and that provide evicted parties with remedies if needed. Evictions that are in accordance with law are permitted, but States must ensure that evictions are "justified and are carried out in conditions that respect the dignity of the persons concerned, and that alternative accommodation is available."

iv) Right to Property Article 11

Although the right is not enumerated in the ICESCR, it is implicitly protected as part of the right to housing, the right to food, and the right to an adequate standard of living. For example, to effectuate the right to food, States are encouraged to guarantee "the right to inheritance and the ownership of land and other property."

Article 12

Everyone has the right to the enjoyment of the highest attainable standard of physical and mental health.

The ICESCR identifies the following four steps States should take to fully realize this right: provide for the reduction of the stillbirth-rate and infant mortality and for the healthy development of children; improve all aspects of environmental and industrial hygiene; prevent, treat, and control disease; and create conditions that would provide all with medical attention in the event of sickness.

The right to health implicitly involves the Right to a Healthy Environment. States are obligated to eliminate or reduce the harmful effects of environmental pollution by taking appropriate regulatory or monitoring measures so that its citizens may fully enjoy their right to health.

Cultural Rights

Cultural rights protected by the ICESCR include the rights to education, to take part in cultural life, to enjoy the benefits of scientific progress, and copyright and trademark protections.

Article 13

Everyone has the right to education. Primary education should be compulsory and free to all.

Article 14

Those States where compulsory, free primary education is not available to all should work out a plan to provide such education.

The ICESCR requires States to make primary education compulsory, free, and available to all. This is the core content of the right, it must be immediately implemented, and it is **justiciable**(enforceable).

States that have not implemented free primary education have **two years to adopt** a detailed action plan that provides for its progressive implementation within a reasonable period. All sections of **civil society should participate** in formulating the plan, which should include a periodic review process to ensure accountability. If states do not have the resources to adopt a detailed plan, "the **international community has a clear obligation to assist**." To request assistance, States should reach out to international agencies including the International Labor Organization, UN Development Program, UN Educational, Scientific and Cultural Organization, UN Children's Fund, the International Monetary Fund, and the World Bank.

The obligation of **non-discrimination** must be applied immediately and fully. For example, in the case of **Girls Yean and Bosico v. Dominican Republic,** the Inter-American Court held that the State

violated the American Convention when the Dominican Republic refused to issue a birth certificate to a child of Haitian descent who was born in the Dominican Republic, which prevented the child from attending day school because she did not have an identity document.

The ICESCR requires States to develop and continuously improve a school system containing all academic levels, including **fundamental education** for those who have not completed primary education. States must respect the ability of parents and legal guardians to choose their children's schools, provided that the schools conform to the State's minimum educational standards. Secondary education must be made "generally available and accessible to all," and higher education shall be accessible to all on the basis of capacity. States should **progressively introduce free secondary education and higher education.**

Article 15

Everyone has the right to take part in cultural life; enjoy the benefits of scientific progress and to protection of material and moral interests.

i) The Right to Take Part in Cultural Life (Article 15(1)(a))

Individuals have a right to freely determine their cultural identity. States are prohibited from interfering with the "exercise of cultural practices and with access to cultural goods," and must ensure "preconditions for participation, facilitation and promotion of cultural life" and access to cultural goods.

The State may limit the right to take part in cultural life to prevent individuals from infringing upon other human rights. However, the limitations must pursue a legitimate aim, be compatible with the nature of the right to take part in cultural life, and be strictly necessary to promote the general welfare.

States have the duty to immediately implement the following core obligations: take necessary steps to guarantee non-discrimination and gender equality in the enjoyment of the right to take part in cultural life; respect individuals' ability to identify with different communities and to engage in their own cultural practices; eliminate obstacles that restrict access to culture; and allow minority and indigenous groups to participate in the implementation of laws that affect them.

The right to take part in cultural life protects cultural diversity. States are required to take steps to avoid

the adverse consequences that globalization has on the right to take part in cultural life. See id. at para. 42. On this issue, the Inter-American Court in the case of the **Kichwa Indigenous People of Sarayaku v. Ecuador**, found that the State violated the American Convention when the State granted a permit to a private oil company to engage in oil exploration on the territory of the Kichwa Indigenous People of Sarayaku, without consulting the indigenous community. The oil exploration prevented the Sarayaku from accessing resources on their land and limited their right to cultural expression. The Court found violations of the right to communal property and the right to consultation, considering "the serious impacts suffered by the community owing to their profound social and spiritual relationship with their territory" and the "suffering caused to the people and to their cultural identity."

States should "adopt measures to protect and promote the diversity of cultural expressions, and enable all cultures to express themselves and make themselves known."

ii) The Right to Enjoy the Benefits of Scientific Progress (Article 15(1)(b))

The ICESCR protects the right to enjoy the benefits of scientific progress, which also protects individuals from the negative effects of scientific progress.

The right to access the benefits of scientific progress must be non-discriminatory, and protects access to: scientific knowledge, opportunities to contribute to scientific endeavors, participation in decision-making regarding the right to information, and the conservation, development and diffusion of science and technology.

iii) The Right to Benefit from the Protection of Moral and Material Interests Resulting from Scientific, Literary and Artistic Productions (Article 15(1)(c))

Individuals have the right to "benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he [or she] is the author." The State is required to reasonably prevent other actors from infringing upon authors' ownership rights to their work and the material interests associated with their work. This cultural right involves economic and social rights as well, because it implicates the right to engage in work which one freely chooses and the

right to an adequate standard of living.

The CESCR cautions against equating the right to benefit from the protection of moral and material interests resulting from scientific, literary and artistic productions with intellectual property rights, although they do share some similarities. Human rights are inalienable, universal and fundamental, whereas intellectual property rights are generally temporary and may be transferred or sold.
This right to benefit from the protection of moral and material interests is interdependent upon the Right to Freedom Indispensable for Scientific Research and Creative Activity, which ensures "that the scientific enterprise remains free of political and other interference, while guaranteeing the highest standards of ethical safeguards by scientific professions."

PART IV (Articles 16–25)

Monitoring & Enforcement

The Committee on Economic, Social and Cultural Rights (CESCR) originally called the United Nations Economic and Social Council- oversees States parties' implementation of the ICESCR. The CESCR issues General Comments, which are authoritative interpretations of the ICESCR. Additionally, every five years State Parties to the Covenant are required to submit to the CESCR a report explaining how they have been implementing the Covenant's provisions. The CESCR evaluates these reports, and considers any NGO input regarding the State's implementation (these NGO submissions are called "shadow reports"). The CESCR issues non-binding Concluding Observations, which are assessments of how effectively States are complying with their obligations under the ICESCR and recommendations for improving compliance.

Optional Protocol to the ICESCR

On May 5, 2013, the Optional Protocol to the ICESCR entered into force, which created an individual complaint mechanism and an inter-State complaint mechanism, and enabled the CESCR to conduct inquiries into grave or systematic violations. The relevant State must have ratified the Optional Protocol in order for these measures to be available. Individuals must meet specific requirements in order to submit a complaint, including exhausting domestic remedies. If domestic remedies are unavailable, ineffective, or unreasonably delayed, then the individual is not required to exhaust domestic remedies. Once the CESCR receives a communication, it is also able to issue "interim measures" to request that

the State take action to avoid irreparable harm to the victim. The CESCR examines individual and inter-State complaints ("communications") and then issues its decision ("views") regarding the alleged violation.

Special Procedures

Various United Nations "special procedures" monitor and promote ESCR. The Special Procedures of the UN Human Rights Council are independent experts that report and advise on human rights, either as an Independent Expert, Special Rapporteur, or as part of a Working Group. Their mandates are either thematic, authorizing them to investigate a category of human rights, or country-specific, authorizing investigation into a country's treatment of human rights. The mandates outline their responsibilities, which frequently include: conducting thematic studies, country visits, sending communications to States regarding alleged human rights abuses; organizing expert consultations; raising public awareness; engaging in advocacy; and providing advice for technical cooperation. Special procedures annually report their findings to the UN Human Rights Council, and many mandates also require reporting to the UN General Assembly. While the Human Rights Council appoints special procedures, they are not UN members and are expected to conduct their investigations independently and impartially.

The following Special Procedures monitor and promote economic, social and cultural rights:

1. Independent Expert on the effects of foreign debt and other related international financial obligations of states on the full enjoyment of all human rights, particularly economic, social and cultural rights
2. Independent Expert on human rights and the environment
3. Intergovernmental Working Group on the right to development
4. Special Rapporteur on adequate housing as a component of the right to an adequate standard of living, and on the right to non-discrimination in this context
5. Special Rapporteur on extreme poverty and human rights
6. Special Rapporteur in the field of cultural rights
7. Special Rapporteur on the human right to safe drinking water and sanitation
8. Special Rapporteur on the right to education
9. Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health

10. Special Rapporteur on the right to food
11. Special Rapporteur on the rights of indigenous people.

International Labour Organization

The International Labour Organization (ILO), a specialized United Nations agency, has a supervisory system to ensure that Member States are complying with its standards related to labor and employment rights.

It also manages a complaint procedure that allows parties to file complaints against States for failure to comply with ratified ILO standards. These complaints may be filed by another Member State to the same ILO Convention under which the violation is alleged, a delegate to the International Labor Conference (of Member States), or the ILO Governing Body. Once the complaint is received, a Commission of Inquiry may be formed, which consists of three independent members who investigate the complaint and recommend measures for the Member State to take to address the problem. If that Member State refuses to implement the Commission's recommendations, then the Governing Body may ask the International Labor Conference to take measures to secure the Member State's compliance with the recommendations.

Regional Human Rights Commissions And Courts

The regional human rights commissions and courts also play a role in protecting economic, social, and cultural rights. One such body is specifically focused on ESCR; this body is the **European Committee of Social Rights**, which reviews States' implementation of the European Social Charter and decides collective complaints made against States that have accepted the complaints procedure. This procedure allows employers, trade unions, and international NGOs that have participatory status with the Council of Europe to submit complaints to the Committee.

Other regional human rights bodies that may address ESCR violations include the **African Commission on Human and Peoples' Rights, the African Court on Human and Peoples' Rights, the European Court of Human Rights, the Inter-American Commission on Human Rights, and the Inter-American Court of Human Rights**. Each evaluates individual complaints alleging

violations of the regional human rights treaties, which include provisions protecting ESCR. Frequently, the regional treaties' provisions protecting ESCR are not identical to the rights enumerated in the ICESCR, and States' obligations may differ depending on the regional instrument(s) they have ratified.
Two **regional human rights systems** have also established special mechanisms that focus on ESCR. The Inter-American Commission on Human Rights has a Unit on Economic, Social and Cultural Rights, which undertakes country visits to OAS Member States, prepares studies and publications, and provides the Commission with advice during its processing of individual petitions, cases, and requests for precautionary measures. This Unit is expected to become a Special Rapporteurship once the necessary funding is in place.

The African Commission on Human and Peoples' Rights also has special mechanisms that address ESCR, including the Working Group on Economic, Social and Cultural Rights; the Working Group on Extractive Industries, Environment and Human Rights Violations; and the Working Group on Indigenous Populations/Communities in Africa.

PART V(Articles 26–31)

It governs ratification, entry into force, and amendment of the Covenant.

UNIT III – REGIONAL PROTECTION OF HUMAN RIGHTS

(European system- Inter American System- African System)

REGIONAL HUMAN RIGHTS SYSTEMS - EUROPE

Synopsis

- INTRODUCTION
- European Convention on Human Rights
- European Court of Human Rights
- Enforcement Mechanism
- SUMMARY

Introduction

As has been discussed all throughout in earlier modules, there is no hierarchical order or a set constitution in the international arena from which the law flows. The international human rights law is no different. In fact, international human rights law consists of multiple layers ñ (a) the global system, which is micro-managed by the United Nations, (b) the domestic system, which is micro-managed by each State, (c) regional systems which are micro-managed by each region. It is this third layer that this module is going to deal with.

These regional human rights systems consisting of regional instruments and mechanisms, play an important role in the promotion and protection of human rights. These systems help to localise international human rights norms and standards, reflecting the particular human rights concerns of the region. Its existence is paramount for the following reasons, among others: (a) the local needs and aspirations of people are more likely to be met by way of these regional instruments, (b) some regions collectively may want to commit to hight human rights standards that could possibly be agreed to under the auspices of the United Nations, (c) global enforcement mechanisms may prove futile and a region may want stronger monitoring and enforcement mechanisms, such as regional courts and commissions, (d) it is likely to comfort regions with the whole concept of human rights, given that some of these regions are vary that human rights is in fact only a western notion.

Currently, the three most well-established regional human rights systems exist in the Americas, Europe and Africa. Having said that, there are other regional systems that are still in their infancy, however, they do require a mention. Accordingly, we will be studying the human rights systems in the America, Europe and Africa in greater detail in the following modules.

Regional human rights system in Europe

The Council of Europe (CoE) is a regional inter-governmental organisation which promotes human rights, democracy and the rule of law in its member states. The organisation is separate from the European Union, which is a politico-economic union. The Council of Europe established the European Convention on Human Rights and Fundamental Freedoms, which entered into force in 1953, and is the main European human rights convention. It is popularly known as ëEuropean Convention on Human Rightsí or simply ëECHRí. The said Convention was drafted by the Council of Europe after the Second World War and was designed to protect individualsí fundamental rights and freedoms. Accordingly, it deals with a lot many civil and political rights, and is in that sense similar to the ICCPR. It must also be pointed out that several additional Protocols have added to its substantive and procedural provisions. Let us now have a look at some of the primary provisions of ECHR.

European Convention on Human Rights

The ECHR consists of three parts. The main rights and freedoms are contained in the first part, which consists of Articles 1 to 18. The second part consists of Articles 19 to 51, which sets up the European Court of Human Rights and its rules of operation. Finally, the third part gives out some miscellaneous provisions dealing with rules overall and not falling within the ambit of either part one or part two.

European Court of Human Rights

The machinery for enforcement of human rights under the ECHR is the most developed in Europe and in fact some scholars refer to it as one of the most efficient human rights systems in the world. By Protocol 11 of the European Convention on the Protection of Human Rights and Fundamental

Freedoms, a single permanent Court called the European Court of Human Rights was established in order to maintain and improve the efficiency of protection of human rights and fundamental freedoms.

In fact, the previous mechanism composed of the European Commission on Human Rights and the European Court of Human Rights was abolished only after Protocol 11 took effect. In this previous classical format, once someone had pursued all avenues to have their rights vindicated by the legal system of the country where they find themselves, they could approach the European Commission on Human Rights. The commission then would give the State an opportunity to respond, and then decide whether there has been a violation. This decision did not, however, by itself carry the force of law. To obtain such a result, the case had to proceed to the European Court of Human Rights, where legally binding decisions were issued on whether a state party has violated the treaty.

The European Court of Human Rights is a judicial body composed of a number of judges equal to the number of states that are current members of the Council of Europe. Judges are elected by the Parliamentary Assembly of the Council of Europe for a term of six years. In this regard, it is also important to note that judges are required to sit on the Court in their individual capacity only. More so, to consider cases brought before it, the Court sits in committees of three judges, in Chambers of seven judges and in a Grand Chamber of seventeen judges.

There are two main stages in consideration of cases brought before the Court: the admissibility stage and the merits stage. The processing of an application goes through these phases. A Committee finding that an application is not admissible will declare the case inadmissible, by a unanimous vote, and its decision cannot be appealed against. If however, no decision is taken by the Committee on admissibility, a Chamber shall decide on its admissibility. If however, the application is found admissible, a Chamber will give notice of the case to the respondent Government for their observations. Written observations are submitted by both parties. Ultimately, the Chamber delivers a judgment that will become

final only after the expiry of a three-month period during which the applicant or Government may request the referral of the case to the Grand Chamber for fresh consideration. The Grand Chamber only accepts these requests if the case raises a serious question affecting the interpretation or application of the Convention or the protocols thereto, or a serious issue of general importance. The judgment of the Grand Chamber shall be final, however.

Enforcement Mechanism

The European Court of Human Rights may receive applications from any person (including group of individuals) who claims to be a victim of a violation by one of the State party to the ECHR. The only admissibility criteria for hearing such applications are: (a) all domestic remedies must have been exhausted, (b) the application to the ECHR must have been filed within six months from the date on which the decision in point (a) would have been taken, (c) the application must not be anonymous,
(d) the application must not contain a substantially same matter as has already been examined by the Court already, and (e) the application must not have been submitted to another procedure of international investigation or settlement and contains no relevant new information.

Furthermore, the State partIes to the Convention in fact undertake to abide by the final judgment of the Court in any case to which they are parties. In any event, however, the concerned State does not abide by the decision, the Court transmits its judgement to the Committee of Ministers which further supervises its execution. The Committee of Ministers is the Council of Europeís decision-making body, which comprises of the Foreign Affairs Ministers of all the member states, or their permanent diplomatic representatives. The Committeeís work is carried out mainly at four regular meetings every year, which takes the shape of ëAnnotated Order of Businessí. The Committee completes each case by adopting a final resolution, which is made public.

EUROPEAN SOCIAL CHARTER AND THE EUROPEAN COMMITTEE OF SOCIAL RIGHTS

Synopsis

- Introduction
- A. The European Social Charter within the Regional Human Rights Framework
- B. Rights Protected by the European Social Charter
- C. The Structure and Function of the European Committee of Social Rights
- Summary

Introduction

The European Social Charter is the primary instrument protecting economic, social and cultural rights in Europe. The Charter has been ratified by 43 out of 47 members of the Council of Europe. Along with the European Convention on Human Rights and the EU Charter of Fundamental Rights, it forms part of a comprehensive framework of human rights protection to almost all citizens of Europe.

The European Committee of Social Rights enforces the European Social Charter. The Committee is an independent expert body that monitors state compliance with the Charter by reviewing annual reports submitted by states parties and by issuing decisions in response to complaints filed against states parties.

This module introduces readers to the structure and workings of the European Social Charter and the European Committee of Social Rights. It begins by placing the European Social Charter within the broader regional human rights framework in Europe, describes the rights and policy aims within the Charter, and discusses the makeup and functions of the European Committee of Social Rights.

A. The European Social Charter within the Regional Human Rights Framework

The European Social Charter is the principal instrument for the protection of economic, social and cultural rights in Europe. This section overviews how the Charter complements other human rights instruments in the region.

The 1950 European Convention on Human Rights (ECHR) is the primary regional human rights treaty in Europe. While the Convention is a highly respected and progressive human rights instrument, it only enumerates and explicitly protects civil and political rights. Protocol 1 to the ECHR, however, protects the right to education – an economic, social and cultural right. Article 2 of the Protocol provides that no person shall be denied the right to education and requires states to respect the right of parents to educate their children in line with their own religious and philosophical beliefs. All Council of Europe members (except Monaco and Switzerland) have ratified the Protocol. The European Court of Human Rights enforces the Convention and its Protocols. It is empowered to issue binding judgments against member states upon applications from individuals alleging the violation of their human rights or upon applications from other member states.

The European Social Charter (adopted in 1961, revised in 1996) complements the ECHR by enumerating and protecting a different set of human rights. The Charter offers comprehensive economic, social and cultural rights (ESCR) protection to citizens of states parties. The European Social Charter has been ratified by 43 out of 47 members of the Council of Europe. It is therefore enforceable against most European states, with the exceptions of Lichtenstein, Monaco, San Marino and Switzerland. It is worth noting that three of these countries (Lichenstein, Monaco and San Marino) are tiny principalities that are highly developed with no serious economic, social or cultural rights deprivations. Switzerland, due to its long history of neutrality on international legal matters, is also not a party to other regional agreements such as the ECHR and the constituent treaties of the European Union. Still, it provides strong ESCR protection through its domestic courts.

A good illustration of Switzerland's domestic commitment to ESCRs is the case of ***V. v. Einwohnergemeinde X. und Regierungsrat des Kantons Bern (1995***). It involved three Czechs, who were residing in Switzerland illegally. They had been expelled from Switzerland for committing

criminal offenses, and returned with no papers, food, or means of subsistence and were denied social welfare by the state. They challenged this denial before the Swiss Federal

Court – the highest court in Switzerland.

The Court held that this denial of social welfare violated an implied constitutional right to a social minimum or basic level of subsistence. According to the Court, this basic right was essential for the exercise of other, enumerated constitutional rights such as the rights to life, human dignity and equality. The Court further held that this right applied to both Swiss citizens and foreigners because it is a fundamental human right that applies to all human beings by virtue of their common human dignity. It therefore reaffirmed the interconnectedness of civil and political rights with economic, social and cultural rights, recognizing that a life of human dignity cannot be pursued without meeting basic needs.

Following this decision, the Swiss Constitution was revised in 2000 to provide for a right to aid in distress. Article 12 of the Constitution now states, "Whoever is in distress without the ability to take care of himself or herself has the right to help and assistance and to the means indispensable for a life led in human dignity."

Another important regional instrument for the protection of ESCRs is the EU Charter of Fundamental Rights, which has a binding effect on all member states since 2009. It includes, inter alia, the right to education (Article 14), the right to fair and just working conditions (Article 31), and the right to social security and social assistance (Article 34). Courts are empowered to strike down any EU laws or domestic laws in member states that violate this Charter. All told, the European framework provides the most comprehensive regional protection of ESCRs in the world.

B. Rights Protected by the European Social Charter

The European Social Charter differs from the International Covenant on Economic, Social and Cultural Rights (ICESCR) by explicitly separating rights subject to progressive realization from rights that are immediately enforceable. Part I of the Charter, declares: "The Parties accept as the aim of their policy, to be pursued by all appropriate means both national and international in character, the attainment of conditions in which the fol-lowing rights and principles may be effectively realised." It proceeds to list 31 rights and principles that parties must progressively realize through state policy. These include various rights of workers (inter alia to equal pay, safe and healthy working conditions, and collective

bargaining), the right to protection against poverty and social exclusion, and the right to housing. These rights are framed in simple, aspirational terms. For instance, "All workers shall have the right to just conditions of work" or "Everyone has the right to benefit from social welfare services."

Part II of the Charter, in contrast to Part I, states: "The Parties undertake, as provided for in Part III, to consider themselves bound by the obligations laid down in the following articles and paragraphs." It then sets forth a range of rights that are immediately binding upon member states. These include the right to work (art. 1-6), the right to health (art. 11), the right to social security (art. 12), the rights to medical and welfare services (art. 13-14), the right to protection against poverty and social exclusion (art. 30), and the right to housing (art. 31). These rights are couched in broader language and more nuanced language than the list in Part I so that states can immediately take steps to fulfill the necessary obligations. For instance, Article 3 protects the right to safe and healthy working conditions. Article 3(1) directs states parties, in consultation with employers' and workers' organisations,"to formulate, implement and periodically review a coherent national policy on occupational safety, occupational health, and the working environment."

With respect to certain rights, it is worth noting how the European Social Charter deviates from other human rights instruments. For instance, the Charter does not explicitly contain a right to food, but such a right can be inferred through Article 30, which provides that states must take measures "to promote the effective access of persons who live or risk living in a situation of social exclusion or poverty, as well as their families, to, in particular, employment, housing, training, education, culture and social and medical assistance." This provision is phrased as a non-exhaustive list, meaning that food deprivation resulting in poverty may be covered within it.

On the right to education, the European Social Charter imposes greater obligations on states parties than the corresponding provisions of Protocol 1 to the ECHR. Article 2 of the Protocol merely sets forth negative state obligations, declaring, "no person shall be denied the right to education and requires states to respect the right of parents to educate their children in line with their own religious and philosophical beliefs." Part II of the Charter goes further to encompass states obligations to provide vocational training on the basis of merit (Article 7), enact necessary measures to ensure that disabled persons have access to

education and vocational training (Article 15), and to institute free primary and secondary education for all children and young person's (Article 17).

While there is no single provision on cultural rights, the right to participate in cultural life forms part of many rights within the European Social Charter. For example, Article 15(3) requires states to undertake to promote the full social integration and participation of disabled persons in cultural activities. Article 23 similarly obligates states to allocate adequate resources to ensuring that elderly persons can play an active role in "public, social and cultural life." Article 30, which establishes a right to protection against poverty and social exclusion, requires states to take measures to, inter alia, promote effective access to culture for persons at risk of living in a situation of poverty or social exclusion.

C. The Structure and Function of the European Committee of Social Rights

The European Committee of Social Rights is responsible for enforcing the European Social Charter. The Committee is composed of 15 independent experts elected to six-year terms by a committee of ministers representing the member states. The Committee performs two main functions. First, it requires all member states to submit annual reports of their compliance with the Charter and issues "conclusions" as to whether countries have fulfilled their obligations. Every year, states parties are expected to file reports to the Committee detailing their progress in realizing obligations under the Charter in particular thematic areas. For instance, in 2014, parties were asked to report on the theme

of "labour rights". These include, inter alia, the right to just conditions of work (Article 2), the right to a fair remuneration (Article 4), the right to organise (Article 5), the right to bargain collectively (Article 6), the right to information and consultation (Article 2 of the Additional Protocol), and the right to take part in the determination and improvement of the working conditions and working environment (Article 3 of the Additional Protocol). On each provision, the Committee issues conclusions on the particular state's compliance. For instance, in its 2014 Conclusions on Italy, the Committee concluded that Italy complied with the Charter on 12 out of 23 situations. It also issued "7 conclusions of non-conformity". On the remaining four situations, the Committee found that Italy had not provided sufficient information to make a definitive conclusion, which it declared amounted

to a breach of the reporting obligation that Italy had entered into under the Charter.

Second, the Committee issues "decisions" in response to complaints filed through the "Collective Complaint Procedure." This mechanism allows certain organizations to file complaints against member states alleging noncompliance with the Charter's provisions. Many of the complaints filed against states parties directly involved, or are related to, the right to work. This is largely due to the kinds of organizations that are authorized to file complaints before the Committee. They include the European Trade Union Confederation, BUSINESSEUROPE, and the International Organization of Employers. In addition, employers' associations and trade unions within each state party may also file complaints, as may a designated list of NGOs.

The Committee's docket (or case load) reflects the nature of these organizations. For instance, in ***STTK ry and Tehyry v. Finland (2001***), the Committee found that health sector workers in Finland had been exposed to radiation at the workplace, and held that this violated Article 2§4, which requires states parties "to eliminate risks in inherently dangerous or unhealthy occupations."

Another important case on the right to work involved a conflict between an EU Directive and provisions of the European Social Charter. In ConfédérationFrançaise de l'Encadrement ***CFE-CGC v. France (2009***), the Committee was asked whether France violated various right to work provisions in the European Social Charter. The Committee found that French Labour Code provisions regarding annual working days failed to set limits on daily and weekly work times in contravention of Article 2§1, wrongly regarded "on call periods" as rest periods in violation of Article 2§5, and imposed unpaid work hours and days on workers in violation of Article 4§2. In response to an argument that the French law resulted from a EU Directive, the Committee made clear that such directives do not override a state's obligations under the Charter. It stated:

The Committee is neither competent to assess the conformity of national situations with a directive of the European Union nor to assess compliance of a directive with the European Social Charter. However, when member states of the European Union agree on binding measures in the form of directives which relate to matters within the remit of the European Social Charter, they should – both when preparing the text in question and when transposing

it into national law – take full account of the commitments they have taken upon ratifying the European Social Charter. It is ultimately for the Committee to assess compliance of a national situation with the Charter.

Summary

The European Social Charter is the primary instrument aimed at protecting economic, social and cultural rights in Europe. It is part of a broader regional human rights framework that includes the European Convention on Human Rights and the EU Charter of Fundamental Rights. The Charter (adopted in 1961, revised in 1996) has been ratified by 43 out of 47 members of the Council of Europe.

Unlike the ICESCR, the European Social Charter is divided into two distinct sections. Part I lists aspirational rights that states parties must undertake to fulfill subject to progressive realization. Part II, by contrast, puts forth binding obligations on all states parties. The rights enshrined in Part II are framed in broader, piecemeal terms that allow for immediate compliance. They include the right to work (art. 1-6), the right to housing, the right to health (art. 11), social security (art. 12), the rights to medical and welfare services (art. 13-14), the right to protection against poverty and social exclusion (art. 30), and the right to housing (art. 31).

The European Committee of Social Rights is charged with enforcing the European Social Charter. It has two main enforcement mechanisms. First, all member states are required to submit annual reports of their compliance with the Charter's provisions. The Committee issues "conclusions" as to whether countries have fulfilled their obligations under the Charter, focusing on specific groups of rights each year. Second, through a "Collective Complaint Procedure", the Committee issues "decisions" in response to complaints filed by designated organizations. These organizations are predominantly concerned with labour rights and other issues related to the right to work.

THE EUROPEAN COURT OF HUMAN RIGHTS

Synopsis

- Introduction
- Judges
- Structure
- Submitting applications
- Admissibility of application
- Against whom a complaint can be filed
- Jurisdiction
- Procedure and Decision
- Critique
- Summary

Introduction:

The European Court of Human Rights (Court) is a regional human rights judicial body based in Strasbourg, France, that has delivered more than 10,000 judgments on violations of the European Convention on Human Rights and Fundamental Freedoms (Convention). It serves a complementary role to that of the European Committee of Social Rights, which oversees European States' respect for social and economic rights. In 1998, the European human rights system was reformed to eliminate the European Commission of Human Rights, which previously decided the admissibility of complaints, oversaw friendly settlements, and referred some cases to the Court – in a manner similar to the current Inter-American Human Rights.

The Court was established on 21 January 1959 on the basis of Article 19 of the Convention when its first Members were elected by the Consultative Assembly of the Council of Europe. The Convention delegates the Court with ensuring the observance of the engagements undertaken by the Contracting States in relation to the Convention, its protocols, and the enforcement and implementation in the Member States of the Council of Europe. The jurisdiction of the Court has been recognized to

date by all Member States of the Council of Europe. In 1998, by Protocol 1 to the Convention, the Court became a full-time institution and the European Commission of Human Rights was abolished. Since then individual victims may submit their complaints directly to the Court.

Judges

The number of full-time judges sitting in the Court is equal to that of the Contracting States to the Convention, now 47. The Convention requires that judges be of high moral character and to

have qualifications suitable for high judicial office, or be a juris-consult of recognized competence.

Judges are elected by majority vote in the Parliamentary Assembly of the Council of Europe from three candidates nominated by each Contracting State. Judges are elected whenever a sitting judge's term has expired or when a new State becomes party to the Convention. The retiring age of judges is 70, but they may continue to serve as judges until a new judge is elected or until the cases in which they sit have come to an end. The judges perform their duties in their individual capacity and should not have any institutional or other type of ties with the Contracting State on behalf of which they were elected. Judges are not allowed to participate in any activity that may compromise the Court's independence. A judge cannot hear or decide a case if he or she has a family or professional relationship with the parties. A judge can only be dismissed from office if the other judges decide, by two-thirds majority, that the judge has ceased to fulfil the required conditions. Judges enjoy the privileges and immunities provided for in Article 40 of the Statute of the Council of Europe.

Judges used to be elected for a six-year term, renewable once. Protocol 14 that entered into force in 2010 amended this and now judges serve one non-renewable nine-year term.

Structure

In order to resolve several cases simultaneously, the Court is organized into five sections, or administrative entities, each of which has a judicial chamber. Each section

has a President, Vice President, and a number of judges.
Within the Court, the judges work in four different groups, or "judicial formations":
Single judge: only rules on the admissibility of applications that are clearly inadmissible based on the material submitted by the applicant.

Committee: composed of three judges. Committees rule on the admissibility of cases as well as the merits when the case concerns an issue covered by well-developed case law (the decision must be unanimous).

Chamber: composed of seven judges. Chambers primarily rule on admissibility and merits for cases that raise issues that have not been ruled on repeatedly (a decision may be made by a
majority). Each chamber includes the Section President and the "national judge" (the judge with the nationality of the State against which the application is lodged).

Grand Chamber: composed of 17 judges. The Grand Chamber hears a small, select number of cases that have been either referred to it (on appeal from a Chamber decision) or relinquished by a Chamber, usually when the case involves an important or novel question. Applications never go directly to a Grand Chamber. The Grand Chamber always includes the President and Vice-President of the Court, the five Section Presidents, and the national judge.

There is also a Plenary Court – an assembly of all of the Court's judges. It has no judicial functions, but elects the Court's President, Vice-President, Registrar and Deputy Registrar and deals with various administrative matters, discipline, working methods, reforms, the establishment of Chambers and the adoption of the Rules of Court.

Submitting applications

Applications to the Court must comply with the requirements of Article 47 of the

Rules of Court. The Court periodically modifies its rules – for example, in 2014 it began applying stricter requirements for individual applications. Copies of all relevant documents must be included along with the application, which is submitted by postal mail. The proceedings before the Court are conducted primarily in writing; public hearings are rare. There is no cost associated with submitting an application and the applicant may apply for legal aid to cover expenses that arise in the proceeding. While a lawyer is not necessary to lodge a complaint, applicants should have representation after the case is declared admissible, and must be represented by a lawyer in any hearing before the Court. Applications to the Court go through two phases: admissibility and merits. The specific nature of the case will dictate the speed and course of the proceedings. However, it may be months or years before an applicant receives a decision or judgment.

Admissibility of application

When the Court receives an application, it first determines if it meets the admissibility requirements. Admissibility decisions are made by a single judge, a three-judge committee, or a seven-judge chamber. To be declared admissible, an application must meet the following criteria:

(a) Exhaustion of domestic remedies
(b) Six-month application deadline (from the final domestic judicial decision)
(c) Complaint against a State Party to the Convention
(d) Applicant suffered a significant disadvantage

If an application fails to meet any of these requirements, it is declared inadmissible and cannot proceed. There is no appeal from a decision of inadmissibility.

Against whom a complaint can be filed

A complaint can be filed against one or more of the States bound by the Convention

which has/have (through one or more acts or omissions) violated the European Convention on Human Rights. The act or omission complained of must be attributed to one or more public authorities in the State(s) concerned (for example, a Court or an administrative authority). The Court cannot deal with complaints against individuals or private institutions, such as commercial companies. The application must relate to one of the rights set out in the Convention. Alleged violations may cover a wide range of issues, such as:

(a) Torture and ill-treatment of prisoners;
(b) Lawfulness of detention;
(c) Shortcomings in civil hearings or criminal trials;
(d) Discrimination in the exercise of a Convention right;
(e) Parental rights;
(f) Respect for private life, family life, the home and correspondence;
(g) Restrictions on expressing an opinion or on imparting or receiving information;
(h) Freedom to take part in an assembly or demonstration;
(i) Expulsion and extradition; confiscation of property; and expropriation.

A complaint cannot be filed for violation of any other legal instrument, such as the Universal Declaration of Human Rights and the Charter of Fundamental Rights.

Jurisdiction

The Court cannot take up a case on its own initiative; it has jurisdiction to decide only complaints submitted by individuals and States concerning violations of the Convention, committed by a State Party to the Convention that directly and significantly affect the applicant.

The jurisdiction of the Court is divided into (1) inter-State cases, (2) applications by individuals against Contracting States, and (3) advisory opinions in accordance with Protocol 2 to the Convention.

Inter-State cases – where a Contracting State of the Convention can bring an action against another Contracting State in the Court for alleged breaches of the Convention

– have been very rare.

Applications by individuals constitute the majority of the cases heard by the Court. These can be made by any person, non-governmental organization or group of individuals, who do not have to be citizens of a State Party. Although the official languages of the Court are English and French, applications can be submitted in any of the official languages of the Contracting States. Applications should be in writing and signed by the applicant or by his or her representative. Once registered with the Court, the case is assigned to a judge rapporteur, who can make a decision on admissibility. A case may be inadmissible when it is incompatible with the requirements of *rationemateriae*, *rationetemporis* or *ratione personae*, or cannot be proceeded with on formal grounds, such as non-exhaustion of domestic remedies, lapse of six months from the last domestic decision, anonymity or substantial identity with a matter already submitted to the Court or with another procedure of international investigation. If the judge rapporteur decides that the case can proceed, it is referred to a Chamber which, unless it decides that the application is inadmissible, communicates the case to the Government of the State against which the application is made, asking for its observations. The Chamber then deliberates the case on its merits. Cases which raise serious questions of interpretation and application of the Convention, a serious issue of general importance or which may depart from previous case law can be heard in the Grand Chamber, if all parties to the case agree on relinquishing jurisdiction to the Grand Chamber. A panel of five judges decides whether the Grand Chamber accepts the referral.

Advisory opinions are requested by the Council of Europe by majority vote, asking the Court to deliver opinions on the interpretation of the Convention, unless the matter relates to the content and scope of fundamental rights which the Court already considers.

Procedure and Decisions

After a preliminary finding of admissibility, the Court examines the case by hearing

representations from all parties. The Court may undertake an investigation if it deems it necessary on the facts or issues raised in the application and Contracting States are required to provide all necessary assistance. All hearings are public, unless there are exceptional circumstances justifying the holding of a private hearing. In practice, the majority of cases are heard in private following written pleadings. In confidential proceedings, the Court may assist parties to secure a settlement, in which case the Court monitors the compliance of the agreement with the Convention.

The Court's Chamber decides both issues regarding admissibility and merits in the same judgment. In final judgments, the Court makes a declaration that a Contracting State has violated the Convention, and may order the Contracting State to pay material and/or moral damages and the legal expenses incurred in domestic courts and the Court in bringing the case. The Court's judgments are public and must contain reasons justifying the decision.

Chambers decide cases by a majority. Any judge who has heard the case can attach to the judgment a separate opinion. This opinion can concur with or dissent from the decision of the Court. In case of a tie in voting, the President has the casting vote.

The judgment of the Grand Chamber is final. Judgments by a Chamber of the Court become final three months after they are issued, unless a reference to the Grand Chamber for review or appeal has been made. If the panel of the Grand Chamber rejects the request for referral, the judgment of the Chamber of the Court becomes final.

Article 46 of the Convention provides that Contracting States undertake to abide by the Court's final decision. On the other hand, advisory opinions are, by definition, non-binding. The Court has to date decided consistently that under the Convention it has no jurisdiction to annul

domestic laws or administrative practices which violate the Convention. The Committee of Ministers of the Council of Europe is charged with supervising the execution of the Court's judgments. The Committee of Ministers oversees the Contracting States' changes to their national law in order that it be compatible with the Convention, or individual measures taken by the Contracting State to redress

violations. Judgments of the Court are binding on the respondent States concerned and States usually comply with the Court's judgments.

Critique

There has been criticism of the Court's structure. The former judge in respect of Cyprus, LoukisLoucaides, wrote that by introducing in its Rules a Bureau, the Court created a separate collective organ that had nothing to do with the structure of the Court organs according to the Convention. The Court's interpretation of the Convention's reach has also been subject to criticism – ironically as either too narrow or too wide. Loukis Loucaides criticized the Court for a "reluctance to find violations in sensitive matters affecting the interests of the respondent States". On the other hand, the British Law Lord, Lord Hoffmann, argued in 2009 that the Court has not taken the doctrine of the margin of appreciation far enough, being "unable to resist the temptation to aggrandise its jurisdiction and to impose uniform rules on Member States. It considers itself the equivalent of the Supreme Court of the United States, laying down a federal law of Europe". Lord Hoffman considered that the ability of the Court to interfere in the detail of domestic law ought to be curtailed. He was in 2010 joined in the criticism by the President of the Belgian Constitutional Court, Marc Bossuyt, who in 2014 also criticized the Court for being judicial activist as it expanded the guarantees of the Convention to issues that clearly were not included in the Convention nor intended by the framers. Bossuyt especially criticized the Court's handling of asylum cases with respect to articles 3 and 6 of the Convention.

Criticism from Russia, a country held to be in violation of the Convention by the Court in many decisions, is frequent. The Court's judge in respect of Russia, Anatoly Kovler, explaining his frequent dissenting opinions, noted that "I dislike when the Court evaluates non-European values as reactionary (*Refah*v. *Turkey*)". The Chairman of the Russian Constitutional Court,Valery Zorkin, pointing to the ***Markin v. Russia*** case, stated that Russia has the right to create a mechanism of protection from Court decisions "touching the national sovereignty, the basic constitutional principles".

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REGIONAL HUMAN RIGHTS SYSTEM IN AMERICA

Synopsis

- Introduction
- American Convention on Human Rights
- Inter-American Commission on Human Rights
- Inter-American Court of Human Rights
- Land Mark judgments of the IACHR
- Summary

Introduction

In the Americas, the regional human rights arrangements exist within the intergovernmental organisation known as the Organisation of American States (OAS). The OAS was established in order to achieve among its member states ñ as stipulated in Article 1 of the Charter ñ ìan order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence. Two organs of the OAS that are central to the enforcement of its human rights regime are: the Inter-American Commission on Human Rights (IACHR) and the specialized organization known as Inter-American Court of Human Rights (IACHR). The OAS Charter established the IACHR way back in 1959, whereas the IACHR was established much later in 1979, after the American Convention on Human Rights entered into force.

American Convention on Human Rights

The American Convention on Human Rights (ACHR) is divided into three parts. Part I deals with all the rights that are protected under the Convention and all that the State is obligated to do. Part II lists out provisions that govern the setting up and functioning of both IACHR

and IACHR. Finally, Part III deals with General and Transitory Provisions which are not covered elsewhere in the Convention. You may refer to this convention for a detailed understanding of the provisions.

It must also be noted that the IACHR is competent to examine petitions in which violations are alleged based on any of the inter-American human rights treaties. Some of these are: (a) Inter-American Convention to Prevent and Punish Torture, 1985, (b) Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women, (c) Inter-American Convention on Forced Disappearance of Persons, 1994, (d) Inter-American Convention on the Elimination of All Forms of Discrimination against Persons with Disabilities, 1999. In this regard, it is pertinent to note that not all Member States of the OAS have ratified all the treaties. Before approaching a problem question, you must first double-check if the accused Member State has in fact ratified the treaty in question.

The American Convention on Human Rights (ACHR) was adopted on 20 November 1969 and entered into force on 18 July 1978. It is the key regional human rights instrument for the protection of civil and political rights in the Americas. The majority of major OAS Member States have ratified the Convention with the notable exception of the USA and Canada, and in 2012 Venezuela denounced the Convention citing dissatisfaction with its monitoring bodies.

The Convention confers competence with respect to matters relating to the fulfillment of its obligations to two organs: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The supervisory system provided by the Convention is legally binding only on the states parties to it.

Although the ACHR contains primarily civil and political rights, Article 26 expresses the general commitment of states parties to adopt measures with a view to the full realisation of economic, social and cultural rights. Moreover, the ACHR differs from the ICCPR, because it contains guarantees of the right to reply (Article 14) and to property (Article 21). In addition, it has a more elaborate and advanced text than the ECHR in regard to, for example, to right to participate in government (Article 23) and a guarantee of the right to equal protection (Article 24).

Ch.I: **General obligations**: obligation to respect rights (Art.1) and domestic legal effects (Art.2).

Ch.II: **Civil and political rights**: juridical personality (Art.3); right to life (Art. 4); right to humane treatment (Art.5); freedom from slavery (Art. 6); right to personal liberty (Art.7); right to fair trial (Art.8); freedom from law (Art. 9); right to compensation (Art.10); right to privacy (Art.11); freedom of conscience and religion (Art. 12); freedom of thought and expression (Art.13); right to reply (Art.14); right to assembly (Art.15); freedom of association (Art.16); rights of the family (Art.17); right to a name (Art.18); rights of the child (Art.19); right to nationality (Art.20); right to property (Art. 21); freedom of movement and residence (Art. 22); right to participate in government (Art.23); right to equal protection (Art. 24); and right to judicial protection (Art.25).

Ch.III: **Economic, social and cultural rights** (Art. 26).
Ch.IV: suspension of guarantees, interpretation and application (Art.27 to 31).
Ch.V: personal responsibilities (Art.32).
Ch. VI: competent organs (Art.33).
Ch. VII: Inter-American Commission on Human Rights (Art.34 to 51).
Ch.VIII: Inter-American Court of Human Rights (Art.52 to 69).
Ch. IX: common provisions (Art.70 to 73).
Ch.X and XI: general and transitory provisions (Art.74 to 82).

Inter-American Commission on Human Rights

The inter-American human rights system was born with the adoption of the American Declaration of the Rights and Duties of Man in 1948, predating the Universal Declaration of Human Rights by more than six months. The IACHR is a principal and autonomous organ of the OAS whose mandate stems from the Charter of the OAS. The Commission is made up of seven members, independent experts on human rights who do not represent any country and are elected by the General Assembly of OAS.

The IACHR was created in 1959 and held its first session in 1960. In fact, by 1961, the

IACHR had begun to carry out on-site visits to observe the general human rights situation in member states. Thereafter, by 1965, the IACHR was expressly authorized to examine complaints or petitions regarding specific cases of human rights violations.

In fact, the IACHR was created only with the coming into force of the latest American Convention on Human Rights (the provisions of which have been summarized above) and until that time, IACHR was the sole protector of human rights in the Americas.

Today, the Commissionís function is to promote the observance and defence of human rights in the Americas and it acts as a first line of defence for the victims of human rights violations. The Commission performs this function by making visits to the countries, carrying out thematic activities and initiatives, preparing reports on the human rights situation in a certain country or on a particular thematic issue, adopting precautionary measures or requesting provisional measures before the Inter-American Court, and processing and analyzing individual petitions with a view to determining the international responsibility of States for human rights violations, and issuing the recommendations it deems necessary.

The individual petition system, by way of which any person, group of persons, or organization may file a petition alleging a violation of human rights against one or more Member States of the OAS, is the single most important resource available to the people living in the Americas. Once the victim files his/her petition with the Commission, the Commission preliminarily evaluates it and makes a decision to either request additional information or open the petition for processing. Thereafter, at the admissibility stage the petition is sent to the respective State for its observations on the matter at hand. On receiving the State is observations, the Commission decides on whether the petition is admissible in fact. If found admissible, the Commission then goes on to analyze the parties allegations and the evidence submitted along with it. Thereafter, if the Commission finds the State responsible for human rights violations, it issues a report on the merits that includes recommendations to the State that are aimed at: (a) bringing a halt to the acts that are in violation of human rights, (b) clarifying the facts, carrying out an official investigation, and imposing a sanction,

(c) making reparation for the harm caused, (d) making changes to the law, (e) requiring the adoption of other measures or actions by the State.

However, it must be noted that before a petition is filed with the IACHR, the following requirements must have been met:

(a) all remedies under domestic law must have been pursued and exhausted in accordance with generally recognized principles of international law, (b) the petition must have been lodged within a period of six months from the date on which the party alleging violation of his rights was notified of the final judgment, (c) the subject of the petition must not be pending in any other international proceeding, (d) the petition must contain the name, nationality, profession, domicile and signature of the person or persons or of the legal representative of the entity lodging the petition. In this regard, it is also pertinent to note that foregoing provisions (a) and (b) will not be applicable when either the domestic legislation of the state concerned does not afford due process of law for the protection of the right allegedly violated or the party alleging violation has been denied access to the remedies under domestic law or has been prevented from exhausting them.

It is also pertinent to note that in certain serious and urgent situations, and provided that certain requirements are met, the Commission may adopt precautionary measures. Furthermore, in addition to precautionary measures, there is a mechanism established in Article XIV of the Inter-American Convention on Forced Disappearance of Persons, which the Commission can use in cases of alleged forced disappearances with respect to the States that have ratified the said treaty.

Now, there is a possibility that the State decides to not comply with the recommendations of the Commission. It is this scenario, where the Commission decides to either publish the case or refer the matter to the IACHR if it considers appropriate. The functioning of the Court is discussed in the next segment, below.

IACHR is also an autonomous judicial organ of the OAS whose mandate stems from the American Convention. The Court is headquartered in the city of San JosÈ, Costa Rica, and is made up of seven judges elected in their personal capacity who are from the OAS Member States.

The objective of the Court is to interpret and apply the American Convention and other inter-American human rights treaties, in particular by issuing judgments on cases and

consultative opinions.

It is pertinent to note, however, that only the States parties to the American Convention who have accepted the Courtís contentious jurisdiction and the Commission may submit a case to the Court. Individuals do not have direct recourse to the Inter-American Court; they must first submit their petition to the Commission and go through the procedure for cases before the Commission. It is also important to note that the Commission may, when the conditions are met, refer cases to the IACHR only with respect to those States that have ratified the American Convention and have previously recognized the contentious jurisdiction of the Court, unless a State accepts jurisdiction expressly for a specific case.

If the Court finds that there has been a violation of a right or freedom protected, the Court shall rule that the injured party be ensured the enjoyment of his right or freedom that was violated. It shall also rule, if appropriate, that the consequences of the measure or situation that constituted the breach of such right or freedom be remedied and that fair compensation is paid to the injured party. Also, in cases of extreme gravity and urgency, and when necessary to avoid irreparable damage to persons, the Court has the power to adopt such provisional measures as it deems pertinent in the matters it has under consideration.

It must also be noted down that Member States of the OAS may consult the Court regarding the interpretation of Conventions / Treaties in the Americas. The Court, accordingly, may provide that State with opinions regarding the compatibility of any of its domestic laws with the aforesaid international instruments.

Since its creation in 1959 by the Fifth Meeting of Consultation of Ministers of Foreign Affairs, the Inter-American Commission on Human Rightshas evolved into a unique organ within the Inter-American system. The Protocol of Buenos Aires of 1967 amended the OAS Charter to transform the Commission into a formal organ of the OAS and prescribed that the Commission's principal function should be 'to promote the observance and protection of human rights' (Articles 52 and 106 OAS Charter).

The Commission is characterised by a unique 'dual role', which reflects its origin as a Charter-based body and later transformation into a treaty body when the American Convention came into force. As an OAS Charter organ the Commission performs functions in relation to all member states of the OAS (Article 41 ACHR) and as a Convention organ its functions are applicable

only to states parties to the American Convention on Human Rights (ACHR).

The Commission is composed of seven members 'elected in a personal capacity' (Article 36 ACHR) and meets for eight weeks a year (Article 15 Commission Regulations) in Washington D.C. It also carries out in loco visits.

The Commission's function is to promote the observance and the defence of human rights. The Commission's activities include the following:

(e) It receives, examines and investigates individual complaints or petitions which allege violations of the rights guaranteed under the American Declaration or the American Convention.

(f) It refers cases to the Inter-American Court of Human Rights under the American Convention and appears before the Court. Before the Court, the Commission, acting as guardian of the

Convention and of the Inter-American system for the protection of human rights, presents its own case while the alleged victim has independent legal counsel presenting his/her case.

4. It requests advisory opinions from the Court regarding questions of interpretation of the American Convention.
5. It monitors the general human rights situation in the member states. It carries out on-site visits to observe the general human rights situation in a country or to investigate specific situations.
6. It publishes special reports on the general human rights situation of member countries when it considers it appropriate.
7. It undertakes research and publishes documents.

The supervisory procedures of the Commission are the following:

Individual petition procedure

Admissibility of communications

Article 44 of the American Convention on Human Rights establishes that the individual petition procedure is automatic for all states parties. (Article 20(b) of the Commission's Statute provides the same with regard to the American Declaration on the Rights and Duties of Man for those OAS member states that have not ratified the ACHR). The petitions procedure is not limited to victims but is open to 'any person or group of persons, or any non-governmental entity legally recognized in one or more member states of the Organization'. This is a major advantage given that the victims may not know or have access to the protection machinery. In practice, however, to ensure effective follow-up, there needs to be some link between the victim and the persons or organisation presenting the case.

Petitions may refer to a specific event, practice or even to widespread human rights abuses, encompassing numerous violations and victims. The petition must, however, refer to specific victims and provide a detailed description of the act or situation that gives rise to the complaint.

Like other international human rights bodies, the Commission and Court require that domestic remedies be exhausted in order for an individual petition to be admitted for consideration. Article 46(2) ACHR stipulates, however, that domestic remedies need not be exhausted where they are ineffective, when the victim has been denied access or prevented from exhausting them or there has been unwarranted delay in rendering a final judgement.

Although a petition must be filed within six months of the exhaustion of domestic remedies, an exception can be made where the state has interfered with the petitioner's ability to file or where the complaint is lodged by a third party on the victim's behalf. In these cases, the Commission may admit complaints filed a 'reasonable' time after exhaustion of domestic remedies.

Precautionary measures

Although the ACHR does not explicitly grant the Commission the faculty to request interim measures, the wide powers conferred upon it by Article 41 have been interpreted in its Rules of Procedure, which establish that 'in serious and urgent cases, and whenever necessary according to the information available, the Commission may, on its own initiative or at the request of a party, adopt precautionary measures to prevent irreparable harm to persons' (Article 25(1)). Measures may be taken when three conditions are satisfied: the situation is urgent, the circumstances could lead to irreparable harm and the facts appear to be true.

The possibility of a rapid response is assured by the power granted to the Chairman of the Commission who may act when the Commission is not in session. The Commission may act ex officio or at the request of a petitioner. It should be noted that as with other cases presented to the Commission, the petitioner need not necessarily be the victim or his representative but can also be, for example, an NGO with knowledge of the case. This is especially important in refugee cases as many potential victims of *refoulement* may live in remote rural areas.

Unlike the judicially enforceable, Convention-based measures that may be exercised by the Court, the precautionary measures of the Commission are not binding but they do put the government in question 'on notice' and communicate the seriousness with which the Commission views the case.

When the state concerned is a party to the Convention, the Commission may also exercise the power bestowed on it by Article 63(2) which permits it to request that the Court adopt binding provisional measures in 'cases of extreme gravity and urgency'.

Decision on the merits

Where a friendly settlement is not reached, Article 50 of the Convention establishes that the Commission is to draw up a report of its 'conclusions' and any 'recommendations as it sees fit'. If, after three months, the matter has not been settled or referred to the Court by the Commission or the state concerned, Article 51 stipulates that the Commission must issue a second report stating its 'opinion and conclusions', making 'pertinent recommendations' where this is 'appropriate'. In place of adopting and publishing a final report, the Commission may present a case to the Court.

On-site visits and country reports

In the face of gross, systematic violations of human rights carried out by undemocratic governments in the Americas during its formative years, the Commission developed the practice of doing factfinding through country visits and reporting on the human rights situation in selected OAS member states by means of country reports. This has proven to be one of the most effective mechanisms in the system. Country reports are often produced after a Commission in loco visit to the country or hearings on the situation in the state. The country reports are generally published separately from the Commission's annual report but sometimes 'mini-

country reports' are published in the annual report. Although the Convention does not specifically provide for the practice of country reports (Article 41 (c) merely refers to the preparation of those reports the Commission 'considers advisable'), the Rules of Procedure do establish a legal basis for the practice and set out the procedural aspects for them, including the possibility for states to comment on draft reports.

The Commission carries out country visits and country reporting at its own discretion, generally when it believes violations to be widespread. The reports typically focus on the general human rights situation in a country but raise issues of specific concern.
The effectiveness of country visits is hard to measure as the impact appears to lie mainly in dissuading future violations. The visits also provide the Commission with information, and therefore credibility, for its country reports. Since country reports usually deal with large scale violations of human rights and are frequently cited by NGOs as authoritative descriptions of the human rights situation in a given country, governments may find them particularly embarrassing.

Since 2000, the Commission has issued special thematic reports on a number of topics, including the rights of indigenous peoples, terrorism, status of human rights defenders, access to justice for women victims of violence in the Americas and demobilisation in Colombia. In addition, the Commission has published the reports of its special rapporteurs and units: the Special Rapporteur for Freedom of Expression, the Special Rapporteur for the Rights of Women, the Special Rapporteur for Migrant Workers and Their Families, the Special Rapporteur on Human Rights Defenders, the Special Rapporteur on the Rights of Afro-Descendants and against Racial Discrimination, the Special Rapporteur on the Rights of the Child, the Special Rapporteur on LGBT Persons, the Special Rapporteur on the Rights of Persons Deprived of Liberty and the Unit on Economic, Social and Cultural Rights.

The Annual Report

The Annual Report of the Commission includes a broad range of information, inter alia,

information on individual cases, on-site visits, requests for precautionary measures and 'mini-country reports' as well reporting on the activities of the rapporteurships.

Land Mark judgments of the IACtHR

The IACHR has been an active defender of human rights in the Americas and in fact it has had an impact the world over for its innovative approach to human rights. In about one-half of the rulings it has issued since it began its work, the IACtHR has issued orders that require action by national courts. It also has increasingly taken on a role of reviewing whether national practices of judicial independence and due process comply with the American Convention on Human Rights. Therefore, any discussion on the sources of international human rights is incomplete without taking a look at some of its judgments.

Case of the Mayagna (Sumo) AwasTingni Community v. Nicaragua (August 31, 2001)

The IACHR presented this case for the Court to decide whether the State of Nicargua violated Articles 1 (Obligation to Respect Rights), 2 (Domestic Legal Effects), 21 (Right to Property), and 25 (Right to Judicial Protection) of the Convention, in view of the fact that Nicargua had not demarcated the communal lands of the AwasTingni Community, nor had the State adopted effective measures to ensure the property rights of the Community to its ancestral lands and natural resources, and also because it had granted a concession on community lands without the assent of the Community, and the State did not ensure an effective remedy in response to the Community ís protests regarding its property rights.

The IACHR handed down a judgment affirming the existence of indigenous peoples collective rights to their land, resources and environment, in spite of not having any real property title deed in the land it claims. The Court declared that the community ís rights to property and judicial protection had been violated by the Nicarguan government when it granted concessions to a company to log on the community ís traditional land without even consulting the community, let alone obtaining its consent.

Deeming Nicarguaís legal protections for indigenous lands illusory and ineffective, the

Court ruled that not only did the government discriminate against the community by denying them equal protection under the laws of the state, it also violated its obligations under international law to bring its domestic laws in line with the rights and duties articulated in the American Convention on Human

Rights, of which Nicargua is a signatory. In its ruling, the Court declared that for indigenous communities, the relationship with the land is not merely a question of possession and production; the land is also a material and spiritual element which they should fully enjoy, as well as a means of preserving their cultural heritage and passing it on to future generations.

The Court finally ordered the government to demarcate the land, recognizing the community ís ancestral and historical title to it, and to establish legal procedures for the demarcation and titling of the traditional lands of all indigenous communities in Nicargua.

Case of Expelled Dominicans and Haitians v. Dominican Republic (August 28, 2014)

The Commission submitted to the Court this case against the State of the Dominican Republic. This case related to the arbitrary detention and summary expulsion by the Dominican Republic within its territory, of the victims who were Haitians and Dominicans of Haitian descent, including children. Among other facts, one was also that there were a series of obstacles that prevented Haitian immigrants from registering their children born in Dominican territory and persons of Haitian descent born in the Dominican Republic from obtaining Dominican nationality.

Among other things, the IACHR unanimously held that the State violated: (a) the rights to recognition of juridical personality, to nationality and to a name recognized in Articles 3, 20 and 18 of the American Convention on Human Rights, as well as the right to identity, owing to the said violations taken as a whole, in relation to the obligation to respect rights without discrimination established under Article 1 of the Convention, (b) the prohibition of the collective expulsion of aliens established in Article 22 (9) of the American Convention on

Human Rights for failure to comply with the obligation to respect rights without discrimination established under Article 1 of the Convention., (c) the right to protection of the family recognized in Article 17 of the Convention.

Conclusion

Therefore, in this module we learnt how the Organisation of American States through its two organs - the Inter-American Commission on Human Rights and the specialized organization known as Inter-American Court of Human Rights creates a regional system of international human rights in the Americas.

Both the Commission and the Court work hand in hand in upholding the human rights in the region. The Commission acts as the first line of defence for the victims of human rights violations. If the State decides to not comply with the recommendations of the Commission, the Commission can refer the matter to the IACHR. Since its inception, IACHR has delivered many landmark decision discussed above.

Summary

The Inter-American system for the protection for human rights is one of the world's major regional human rights systems. The fundamental instrument is the American Convention on Human Rights, complemented by protocols on economic, social and cultural rights and on the abolition of the death penalty.

Within the system, conventions have been elaborated on the prevention and punishment of torture, enforced disappearances, discrimination against disabled persons and the prevention, punishment and eradication of violence against women.

INTER-AMERICAN COURT OF HUMAN RIGHTS

The Court came into being in 1979 following the entry into force of the American Convention. The Court is the supreme judicial organ established by the American Convention and exercises both

contentious and advisory jurisdiction. The Court is composed of seven judges elected for a term of six years who may be re-elected once. The Court is a part-time body, with its seat in San José, Costa Rica.

Advisory jurisdiction

The Court's advisory jurisdiction is unique in several ways. In addition to the Inter-American Commission and other authorised bodies of the OAS, all OAS member states have the right to request advisory opinions regardless of whether they are parties to the American Convention or whether they have recognised the Court's jurisdiction over contentious matters. Furthermore, OAS member states may consult the Court regarding the interpretation not only of the Convention, but also of any other treaty pertaining to the protection of human rights in the Americas. They may also consult the Court on the compatibility of their domestic laws, bills and proposed legislative amendments with the ACHR or any other treaty concerning human rights (Article 64 ACHR).

Contentious jurisdiction

The Court was establised in 1979, but the first decision on merits was not until 1988 in a case against Honduras, which originated in a petition received by the Commission on 7 October 1981. States parties do not accept the contentious jurisdiction of the Court merely by becoming parties to the Convention. The acceptance of its jurisdiction is optional and requires a separate declaration or special agreement. A declaration of acceptance of the Court's jurisdiction may be

made at the time of ratification or adherence to the Convention or at any subsequent time (Article 62(1) ACHR).

Declarations may be unconditional, recognising the Court's jurisdiction as binding ipso facto, without requiring special agreement. States can also accept the Court's jurisdiction on the condition of reciprocity (inter-state cases), for a specified period or for specific cases. In addition, all states parties to the Convention may at any time, on an ad hoc basis, permit the Court by special agreement to adjudicate a specific dispute relating to the application of the Convention (Article 62(3) ACHR).

The jurisdiction of the Court comprises all cases concerning the interpretation and application of the provisions of the Convention that are submitted to it provided the parties to the dispute have accepted its jurisdiction.

Only states parties to the Convention and the Commission have the right to submit a case to the Court (Article 61(1) ACHR). Individuals cannot bring a case directly to the Court; they have to file a complaint with the Commission; the Court can only deal with individual complaints when they have been considered and referred to it by the Commission. States parties can bring cases directly to the Court. It should be noted also that, unlike the European Convention, the American Convention does not require that those filing complaints with the Commission be the victims of the alleged violations themselves; any 'person or group of persons, or any non-governmental entity legally recognised in one or more member states' may lodge petitions with the Commission.

The proceedings before the Court in contentious cases terminate with a judgement, which is final and not subject to appeal. The Court may be requested to interpret the meaning or scope of any judgement at the request of any party to the case (Article 67 ACHR and Article 46 Rules of Procedure).

While the decisions of the Court are only binding on the parties to the case, the Court's interpretation of the rights contained in the Convention are authoritative and have a greater practical significance than their formal status would suggest.

If the Court finds that there has been a violation of the Convention, it shall rule that the injured party be ensured the enjoyment of the right or freedom that was violated and, if appropriate, rule that the consequences of the measures or situation that constitute the violation be remedied and

award compensation. The Court has a distinctive reparations scheme that is not limited to monetary compensation but has also included ordering the state to locate mortal remains of a victim, to publish the court's judgement in a national newspaper and acknowledge wrong-doing as well as to adopt national legislation that incorporates international human rights norms into the state's legal system.

When reparations are awarded, the Court has generally reserved for itself the faculty of supervising compliance with the judgement (see, e.g**.,** ***Aloeboetoe v. Suriname*** ***and*** ***Maqueda v. Argentina*****).**

States parties to the Convention undertake to comply with the Court's judgement in any case to which they are parties. The part of the judgement that stipulates compensatory damages may be executed in the country concerned in accordance with domestic procedure governing the execution of judgements against the state (Article 68 ACHR).

The Court reformed its rules of procedure significantly in 2009, inter alia, including provisions establishing the Court's practice of holding hearings away from its seat and the recording of audio of the hearings and the deliberations. The appointments of the deputy state agent or agents were regulated and clarified as well as the procedure of provisional measures, replacement of witnesses and designation of expert witnesses. The Court extended deadlines for submitting briefs and set deadlines for the submissions of the amici curiae. In order to improve the way the Court receives and processes evidence, the declarations of the alleged victims are no longer qualified as testimonial declarations and, therefore, are no longer needed to be given under oath. In this sense, the declarations of the alleged victims shall be assessed, within the context of the case, taking into account the special characteristics of such statements. In order to clarify its case-law, the Court deemed it fit to omit any reference to the next-of-kin of the alleged victims, as according to its legal opinion they shall, under certain circumstances, be considered as alleged victims and may be beneficiaries of the reparations as long as they have been identified as such in the Commission's application. In this way, said next-of-kin shall be considered alleged victims and all provisions referring to victims shall be applicable. Finally, the Court established its practice of holding private hearings on the procedure to monitor compliance with its judgments and the possibility of commissioning the Secretariat to carry out the preliminary proceedings for taking evidence in those cases where it is impossible for the Court to proceed.

The case-law of the Inter-American Court of Human Rights compared to that of the European Court of Human Rights

The case-law of the Inter-American Court of Human Rights is not as extensive as that of the European Court of Human Rights and although the American Convention contains all of the traditional civil and political rights, the case-law in contentious cases has dwelt primarily upon a few of the most basic rights. These include the right to life (Article 4); the right to personal liberty (Article 7); the right to humane treatment (Article 5); the right to a fair trial (Article 8); the right to judicial protection (Article 25); and the right to equal protection before the law (Article 24).

Although cases regarding these rights still find their way onto the Court's docket, the Court has slowly been widening its scope to deal with a broader range of issues, including the wrongful dismissal of judges and civil servants, film censorship, the withdrawal of citizenship and removal from positions of authority of government critics and the land rights of indigenous peoples. In addition, the Inter-American Commission invoked Article 26 of the American Convention before the Court, and the Court addressed the problem by implicitly admitting jurisdiction to apply Article 26 in its contentious cases (see Torres Benvenuto et al. (Five Pensioners case) v. Peru).

The reasons for the limited case-law of the Inter-American system are manifold. One is that the Inter-American Court is a young institution, meeting for the first time in 1979. The first cases in which the Court decided that a state party had violated the Convention were in 1988 in the so-called Honduran Disappearance Cases (Velásquez Rodríguez v. Hondurasand Godínez Cruz v. Honduras).

The European Court began its work twenty years earlier. Secondly, for various reasons relatively few contentious cases have been submitted to the Court. In the early years of the Court, only a few states had made optional declarations accepting its contentious jurisdiction. Furthermore, individuals do not have the right to submit an application directly to the Court (jus standi); they do, however, have standing before the Court since 2001 in the reparations phase and since 2004 at every stage of the proceedings. States are

generally reluctant to present cases to the Court, but may elect to submit cases to the Commission (see, e.g., Nicaragua v. Costa Rica (declared inadmissible)).

In the end, what is most determinative of the volume of the Court's work is the extent to which the Inter-American Commission is prepared to submit cases. Under the latest amendments to the Rules of Procedure of the Commission, when the state has not complied with its recommendations within a given period, the Commission is required to submit the case to the Court, unless a qualified majority decides not to do so. Previously, the Commission had the discretion whether or not to submit a case, even in cases of non-compliance, and could submit a case only by a decision of a qualified majority.

Under the new system, it is more likely that cases will be submitted to the Court. Although most of the cases which the Inter-American organs of human rights have dealt with have involved gross violations of human rights, the political reality of the continent has changed from what it was at the system's inception, and the jurisprudence is evolving to include other issues. One example is the case of Atala Riffo and Daughters v. Chile where the Court reviewed a Chilean court ruling that in 2005 awarded child custody to a father because of the mother's sexual orientation. In 2012, the Court ruled in favour of the mother in its first case concerning LGBT rights. The Court also determined sexual orientation to be a suspect classification.

In relation to the above, it should be noted that while the case-law of the Inter-American Court is relatively limited in terms of the number of judgements and scope, the Court has nonetheless contributed significantly to the progress of international human rights with cases such as its landmark decision in Velásquez Rodriguez v. Honduras.

Conclusion

The Inter-American Court of Human Rights established in 1959 by the Fifth Meeting of Consultation of Ministers of Foreign Affairs is charged to promote the observance and the defence of human rights. Its various functions include receiving, examining and investigating individual complaints or petitions alleging violations of the rights guaranteed under the American Declaration or the American Convention and referring cases to the Inter-American Court of Human Rights and appearing before the Court, apart

from other advisory, research and supervisory functions.

The Inter-American Court of Human Rights came into being in 1979 following the entry into force of the American Convention. The Court is the supreme judicial organ established by the American Convention and exercises both contentious and advisory jurisdiction. The Court is a part-time body, with its seat in San José, Costa Rica. All OAS member states have the right to request advisory opinions regardless of whether they are parties to the American Convention or whether they have recognised the Court's jurisdiction over contentious matters. The contentious jurisdiction of the Court comprises all cases concerning the interpretation and application of the provisions of the Convention that are submitted to it provided the parties to the dispute have accepted its jurisdiction.

The last part of the module compares the case law of the Court with that of the European Court of Human Rights. The case-law of the Inter-American Court of Human Rights is not as extensive as that of the European Court of Human Rights and although the American Convention contains all of the traditional civil and political rights, the case-law in contentious cases has dwelt primarily upon a few of the most basic rights. Under the latest amendments to the Rules of Procedure of the Commission, when the state has not complied with its recommendations within a given period, the Commission is required to submit the case to the Court. In spite of limited jurisdiction, the Court contributed significantly to the progress of international human rights with landmark decisions such as in Velásquez Rodriguez v. Honduras.

REGIONAL HUMAN RIGHTS SYSTEMS Ñ AFRICA

Synopsis

- Introduction
- African Charter on Human and Peoples' Rights or Banjul Charter or African Charter
- Institutions
- The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
- Summary

In 1981, the Organization of African Unity (OAU), which was established with the main objective to rid the continent from colonization and apartheid, adopted the African Charter on Human and Peoples' Rights (also known as the Banjul Charter or the African Charter) to stand as the primary human rights instrument for the African Continent. The OAU has since been replaced by the African Union (AU), however, it legacy continues to contribute to the human rights protection systems that were created under its aegis.

The African System, like the Inter-American System and the European System (as originally designed), is composed of two entities: a Commission and a Court. These entities are tasked with the interpretation and application of a number of regional human rights instruments (in addition to the Banjul Charter). Some of these are: (a) African Charter on the Rights and Welfare of the Child, (b) Protocol on the African Human and Peoples' Rights Court, (c) Protocol to the African Charter on the Rights of Women in Africa, (d) Convention on the Prevention and Combating of Terrorism, 1999, (e) Convention for the Protection and Assistance of Internally Displaced Persons, 2009. Now will be discussing the role and function of the Commission and the Court.

African Charter on Human and Peoples' Rights or Banjul Charter or African Charter

The Banjul Charter was adopted in 1981. Since then, Africa has experienced scores of human rights catastrophes of extreme proportions: the scourge of poverty, the HIV/AIDS pandemic, the 1994 Rwandan genocide, the Darfur crisis, and civil wars in Somalia, Sierra Leone among others. Through these tough times, the Banjul Charter has stood the test of time and has helped steer Africa from the age of human wrongs into the new age of human rights. The Charter sets standards and establishes

On 26 June 1981, the African Charter was unanimously adopted by the Assembly of Heads of State and Government. It became effective on 21 October 1986. As of December 2014, it had been ratified by 53 AU member states. The two principal organs charged with the supervision of states parties' compliance with the African Charter are the African Commission on Human and Peoples' Rights and the African Court on Human and Peoples' Rights (to be replaced by the single African Court of Justice and Human and Peoples' Rights).

The African Charter is a binding treaty that covers four main categories of rights and duties: individual rights; rights of peoples; duties of states; and duties of individuals. The combination of the specific needs and values of African cultures and the international human rights standards has resulted in some distinctive features, compared to other regional conventions. The Charter covers economic, social and cultural rights, as well as civil and political rights and it confers rights upon peoples and not only individuals. Furthermore, the African Charter covers 'third generation rights', and gives due importance to the assumption that a person has duties as well as rights in a given community. Article 29 of the African Charter offers a list of duties, each implicitly embodying the 'values of African civilization'.

Unlike other international human right conventions, the African Charter does not contain a general derogation clause allowing the states parties to suspend the enjoyment of certain rights during national emergencies. Instead, the African Commission has found that legitimate reasons for limiting rights and freedoms are found in Article 27(2) ACHPR, namely 'the rights of others, collective security, morality and common interest' (see **Media Rights Agenda et al. v. Nigeria, Communications 105/93,128/94, 130/94 and 152/96).**

While not providing for derogation clauses, the African Charter contains a number of

articles with provisions that limit the reach of these rights, and which have been referred to as 'clawbackclauses'. Article 9(2) ACHPR provides an example of a so-called 'clawback clause': 'every individual shall have the right to express and disseminate his opinions within the law'. The term 'within the law' was by many experts interpreted to mean that no domestic legal provision limiting the right in question could be challenged under the African Charter. The Commission rectified this interpretation in one of its communications, when it found that the term 'within the law' was to be understood to refer to international law, not domestic law (**Civil Liberties Organization in respect of the Nigerian BarAssociation v. Nigeria, Communication 101/93)** and has stated a general principle applying to all therights and freedoms contained in the African Charter.

To allow national law to have precedent over the international law of the Charter would defeat the purpose of the rights and freedoms enshrined in the Charter. International human rights standards must always prevail over contradictory national law. Any limitation on the rights of the Charter must be in conformity with the provisions of the Charter ***(Media Rights Agenda et al. v. Nigeria).***

INSTITUTIONS

The African Commission on Human and Peoples' Rights

The African Commission on Human and Peoples' Rights was established in 1987 under the African Charter on Human and Peoples' Rights to protect and promote human and peoples' rights in Africa.

The African Commission was incorporated into the AU framework at the Durban Summit held in July 2002. The Commission is composed of 11 members, who are elected for a term of six years by secret ballot by the AU Assembly from a list of persons nominated by the states parties to the Charter. The Commission meets twice a year in ordinary sessions.

The African Charter provides the African Commission with three principle functions:

examining state reports (Article 62 ACHPR), considering communications alleging violations of human rights from both individuals and states (Articles 47 and 55 ACHPR) and interpreting provisions in the African Charter (Article 45(3) ACHPR).

Under Article 62 ACHPR, member states are obliged to submit reports every two years on legislative and other measures they adopted in order to give effect to the provisions of the African Charter. The African Charter failed in Article 62 to identify the organ competent to review these reports. In order to remedy this situation, the African Commission adopted a resolution at its third session requesting the OAU Assembly to allow it to review state reports. The request was approved by the OAU Assembly, and the state reports are now presented to the African Commission for examination. Like UN treaty bodies, the African Commission has drawn up guidelines to help states submit reports that are sufficiently clear and detailed. Many states, however, have not yet submitted any reports, and some of the reports that have been submitted show a lack of commitment to carrying out serious self-evaluation. Following a review of a state's report and a dialogue between the Commission and the state, the Commission issues Concluding Observations to the state.

The African Commission is empowered to receive and consider inter-state complaints under Article 47 ACHPR. The procedure governing inter-state communications has been used once.

The Commission has the power to consider communications from individuals and organizations alleging violations of human and peoples' rights under Article 55 ACPHR. Initially this provision was interpreted to mean that the Commission could only accept communications revealing a series of serious and massive violations of human rights. The Commission, however, refuted this in **Jawara v.The Gambia, Communications 147/95 and 146/96**, where it stated that it is empowered to considerany communication from anyone, including NGOs, as long as rights contained in the African Charter come into play. After examining such communications, the Commission makes recommendations to the Assembly of the African Union and to the state party concerned. Recommendations are included in the annual reports of the Commission, which are made public once the AU Assembly has approved them.

In addition to examining state reports and receiving, examining and investigating communications, the African Commission may interpret any provision in the African Charter if requested to do so by AU member states, organs of the AU or African organizations. The Commission is also entitled to appoint members of the Commission as special rapporteurs to gather information about human rights violations. The Commission has appointed special rapporteurs on thematic issues such as extrajudicial executions, prisons and conditions of detention, women's rights, human rights defenders, freedom of expression and access to information and refugees, asylum seekers and IDPs. Special Working Groups have also been established on Indigenous Populations/Communities and Economic, Social and Cultural Rights in Africa as well as a Focal Point on the Rights of Older Persons.

The mandate of the Commission are listed down under Article 45 of the African Charter, as follows:

(j) Carrying out sensitization, public mobilization and information dissemination on human rights through seminars, symposia, conferences and missions, (b) Ensuring protection of human and peoples' rights through its communication procedure, friendly settlement of disputes, state reporting (including consideration of NGOs shadow reports), urgent appeals and other activities of special rapporteurs and working groups and missions, and (c) Interpreting the provisions of the Charter at the request of a State party or an individual.

Now, as seen in the case of Inter-American System, whereby the IACHR is charged with receiving individual petitions for human rights violations, the African Commission is also tasked with a similar obligation, though it's called a communication. This Communication is one of the mechanisms whereby it receives complaints from states against another state, or by individuals and NGOs against one or more states on alleged violations of human rights in accordance with its mandate under Articles 48, 49 and 55 of the African Charter. The most important aspect of this Communication system is that any individual may bring a communication before the Commission. The African Charter is silent on the issue of standing and the Rules of Procedure of the Commission does not provide for a victim requirement. Therefore, a communication may be submitted by the

victim or anyone on their behalf, as well. However, it must be noted that a communication can only be brought against a state that has ratified the African Charter and no one else.

Now, before a communication is admitted by the Commission, it must comply with the following requirements: (a) the Author must have been indicated, (b) must not be in disparaging or insulting language, (c) must not solely be based on media reports, (d) domestic remedies must have been exhausted unless, either the domestic procedure is unduly prolonged or rights claimed are not guaranteed by domestic laws., (e) must be submitted within a reasonable time after exhausting local remedies, (f) issue raised must not have been settled under other UN or AU procedures.

With respect to the functioning of the Commission, it must also be noted that once a communication has been admitted, the Commission may direct the state concerned to take one or more provisional measures pending the finalization of the communication. These measures are necessary to prevent irreparable damage being done to the victim of an alleged violation. If the state fails to comply with a request by the Commission for the adoption of provisional measures after a period specified, the Commission may refer the communication to the African Court of Human and Peoples' Rights.

The African Court on Human and Peoples' Rights

The original African Charter did not provide for the institution of a court of human rights. In June 1998, the OAU adopted the 'Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights', which came into force 25 January 2004. This Protocol was to be replaced by the 'Protocol on the Statute of the African Court of Justice and Human Rights' adopted by the AU Summit in July 2008 with the aim of ensuring adequate resources for the operation of a single effective court in Africa. The Protocol was further amended in

June 2014 (see below). The 2008 Protocol as amended was to merge the African Court on Human and Peoples' Rights and the Court of Justice of the African Union but the 1998 Protocol would remain in force for a transitional period to enable the

African Court on Human and Peoples' Rights to implement measures necessary for the transfer of its prerogatives, assets, rights and obligations to the African Court of Justice and Human and Peoples' Rights.

The Court on Human and Peoples' Rights has its seat in Arusha, Tanzania. It is composed of 11 judges elected in their individual capacity by the AU Assembly. Judges serve for six-year terms and are eligible for re-election once. All judges, except the President of the Court, serve on a part-time basis.

Under its advisory jurisdiction, the Court is entitled to give advisory opinions on 'any legal matter relating to the Charter or any other relevant human rights instruments'. Advisory opinions may be requested not only by a member state of the AU, but also by any organ of the AU, or an African NGO recognized by the AU.

The Court's jurisdiction is not limited to cases or disputes that arise out of the African Charter, but also any relevant instruments, including international human rights treaties, which are ratified by the state party in question. Furthermore, in addition to the African Charter, the Court can apply as sources of law any relevant human rights instrument ratified by the state in question.

The African Commission, states parties and African intergovernmental organizations can bring a case to the African Court once a state ratifies the Protocol. As of December 2014, 26 States have accepted the Court's jurisdiction. Individuals and NGOs however, do not have 'automatic' access to the Court. The Court cannot receive an individual petition unless the state party involved has made a declaration under Article 34 of the Protocol accepting the competence of the Court to receive such cases, cf. Article 5(3). As of December 2014, seven States have accepted this jurisdiction, Burkina Faso, Cote d'Ivoire, Ghana, Malawi, Mali, Rwanda and Tanzania. The Court is formally independent of the African Commission although it may request the Commission's opinion with respect to the admissibility of a case brought by an individual or an NGO. The Court may also consider cases or transfer them to the African Commission, where it feels that the matter requires an amicable settlement, not adversarial adjudication.

The Court's judgments are final and without appeal. They are binding on states. In its annual report to the AU, the Court shall specifically list states, which have not

complied with its judgments.

The AU Executive Council is required to monitor the execution of the judgments on behalf of the AU Assembly.

The African Court of Justice and Human and Peoples' Rights

The Constitutive Act of the AU provides for the establishment of the Court of Justice with authority to rule on disputes over interpretation of AU treaties, and for a Protocol on its statute, composition and functions. The Protocol to set up the Court was adopted in 2003, but is envisaged to be superseded by the 'Protocol on the Statute of the African Court of Justice and Human Rights' adopted in July 2008 creating a Court of Justice and Human Rights, which will incorporate the African Court on Human and Peoples' Rights. It was to have two chambers, one for general legal matters and one for rulings on the human rights treaties. By a Protocol adopted in Malabo in June 2014, the Court, to be re-named the African Court of Justice and Human and Peoples' Rights, will have a third section, an international criminal law section with three chambers, a PreTrial Chamber, a Trial Chamber and an Appellate Chamber.

The Court consists of 11 judges elected by the AU Assembly from a list of candidates nominated by member states of the AU, who serve the Court for a period of six years and are eligible for re-election only once. Also, the Court's jurisdiction applies only to 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 organization recognized by the AU.

It must also be noted that individuals may directly petition the African Court, as well. However, this feature of allowing individuals to approach the African Court has been diluted to a great extent by the Court's Protocol. Article 34 (6) of the said Protocol lays down that at the time of ratification of the said Protocol, the States shall make a

declaration accepting the competence of the Court to receive cases under Article 5 (3) of the Protocol. It further states that the African Court shall not receive any petition under Article 5 (3) involving a State Party which has not made any such declaration. This means that until and unless States make a declaration accepting that individuals may also approach the African Court directly for human rights violations, individuals may not approach the Court against that State.

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa was adopted by the AU on 11 July 2003 and entered into force on 15 November 2005. As of December 2014 the Protocol had been ratified by 36 AU member states.

The Protocol addresses a variety of civil, political, economic, cultural, and social rights. Of particular note are Articles 4, 5, and 14. Article 4 prohibits all forms of violence against women. Article 5 forbids all forms of female genital mutilation. Article 14 assures women a wide variety of health and reproductive rights, including the right to decide whether to have children, the number of children and the spacing of children; the right to choose any method of contraception; the right to self-protection and to be protected against sexually transmitted infections, including HIV/AIDS; the right to be informed of one's health status and of the health status of one's partner; the right to have family planning education and, perhaps most significantly, the right to 'medical abortion in cases of sexual assault, rape, incest, and where the continued pregnancy endangers the mental and physical health of the mother or the life of the mother or the foetus'. This represents the first time that an international standard explicitly provides for the right of a woman to abortion. It is also unique in that it unequivocally denounces and declares female genital mutilation and related practices illegal.

The Protocol particularly addresses the special needs of women in times of armed conflict (Article 11). States are required to protect asylum-seeking women, refugees,

returnees and internally displaced persons from acts of sexual violence that take place within the context of armed conflict and to ensure that such acts are considered as war crimes, genocide and/or crimes against humanity and to prosecute them accordingly.

The Protocol elaborates far more extensive human rights for women than any other international treaty. States parties to the Protocol are required to submit periodic reports indicating what legislative and other measures they have undertaken to fully realize the rights in the Protocol (Article

26). Moreover, the African Court of Justice and Human Rights can be seized in matters of interpretation arising from the implementation of the Protocol.

Summary

The African Union Constitutive Act confirms the importance of human rights by the adoption of guiding principles such as gender equality, participation of the African peoples in the activities of the Union, social justice, peaceful co-existence of the member states, and respect for democratic principles, human rights, the rule of law, and good governance.

UNIT IV – PROTECTION OF HUMAN RIGHTS AT NATIONAL LEVEL

(Human rights and the Constitution; The Protection of Human rights Act, 1993.)

HUMAN RIGHTS, DUTIES, INDIAN CONSTITUTION

Synopsis

- Introduction
- Origin and development of human rights in India
- Human rights and duties guaranteed under Indian Constitution
- Judicial expansion of rights
- Summary

INTRODUCTION

The notion of Human Rights and Fundamental Rights was known from past civilizations. These Rights have been the concern of all civilizations from the time immemorial. It is visible in Indian culture which has been the product of a synthesis of diverse culture and religions since beginning of the Indus Valley civilization in Indian context. The Babylonian Laws and the Assyrian laws in the Middle East, the "Dharma" o the Vedic period in India and the jurisprudence of Lao-Tze and Confucius in China, comprise championed human rights all through the history of human civilization. The Indian concept perceives the individual, the society and the universe as an organic whole. One and all are a child of God and all fellow beings are connected to one another and set out to a universal family. In this context, Mahatma Gandhi remarks, "I do not want to think in terms of the whole world. My patriotism includes the good of mankind in general. Therefore, my service to India includes the services of humanity.

ORIGIN AND DEVELOPMENT OF HUMAN RIGHTS IN INDIA

Human Rights in Ancient India

In ancient India, human life was clear in the expression of human dignity. And eventual individual development depended exclusively upon the uplift and improvement of humanity as a whole. The individual not only comprise the right to be treated with equality, but also a duty to strive for the happiness of every other individual. A distinctive feature of Indian culture is its thorough understanding of nature, human values and dignity of man. In ancient India the rule of law was a significant embracing institution to protect the innate of all. The existing rule of law protects the dignity of every individual and the king could not interfere by means of enacting or altering the law substantially at his will.

The individual soul has been the entity in the study of mankind since from pre-historic time. Indian servants and sages categorically uttered the entire mankind forms a single species. And in spite of outer diversities each and every one have the common self-respect which supplies the connection of unity in the minds of its diversity. No individual possibly will claim to be, or to be considered as superior to others. Individuals don't barely have the right to be treated with parity, but also a duty to attempt for the pleasure of every other individual. India had been the cradle of the various great religions. For at least a thousand years, a figure of religions has thrived in India. Each religion has its own philosophy, divinity, mythology, ceremonies and rituals. In spite of these outward diversities of religious faith and practice, the gigantic bulk of people in India had developed definite common fundamental standards of life based on the principle of human dignity which might sustain and build up into a great extensive society.

Government of India Act, 1915, in pursuance of the demands for fundamental rights, guaranteed equality of opportunity in public services. A succession of resolutions adopted by the National Congress between 1917 and 1919 repeated the insist for civil rights and parity of status with the English.

Motilal Nehru Committee

In 1925 the Indian National Congress finalizes the draft of the Common Wealth of India adopting a 'Declaration of Rights.' The Madras Session of the Congress held in the year 1927 - demand incorporation of a 'Declaration of Fundamental Rights' in any future constitutional framework. A committee under the leadership of Motilal Nehru was appointed by the National

Congress to revise the fundamental rights. It is fascinating to note that the Constitution of the Republic of India, enacted in 1950, incorporated ten of the nineteen rights enumerated in the Motilal Nehru Committee Report, 1928. The rights emphasized as a result of the Motilal Nehru Committee reports were:

(g) Personal liberty, inviolability of dwelling place and property

(h) Freedom of conscience, and of profession and practice of religion

(i) Expression of opinion and the right to assemble peaceably without arms and to form associations

(j) Free elementary education

(k) Equality for all before the law and rights f)

8. Protection from punishment under ex-post facto laws

9. Non-discrimination against any person on grounds of religion, caste or creed in the matter of public employment

10. Equality of right in the matter of access to and use of public roads and wells etc.

11. Freedom of combination and association for the maintenance and implementation of labor and economic factors

12.Right to keep and bear arms

13. Equality of rights of man and woman

Constituent Assembly and Human Rights

The Simon Commission, selected by the British Government in 1927, Though, totally rejected the demands uttered by the Nehru Committee reports. Afterward The Government of India Act, 1935 was passed exclusive of any bill of rights greatly to the disappointment of the Indian leaders. It was the 'Sapru Committee' of 1945 that consequently stressed the require for a written code of fundamental rights and the Constituent Assembly raise a powerful command for the insertion of human rights in the Constitution.

The Indian Constitution was framed by the Constituent Assembly of India, which met for the first time on December 9, 1946. The Constitution of India gives primary importance to human rights. The demand for a declaration of fundamental rights arose as of four factors.

(e) Lack of civil liberty in India during the British rule
(f) Deplorable social conditions, particularly affecting the untouchables and women
(g) The existence of different religious, linguistic, and ethnic groups encouraged and exploited by the Britishers
(h) Exploitation of the tenants by the landlords.

The Constituent Assembly built-in the Constitution of India the matter of the right proclaimed and adopted by the General Assembly in the Universal Declaration of Human Rights. Further on 10th December 1948, when the Constitution of India was in the structure, the General Assembly proclaimed and adopted the Universal Declaration of Human Rights, which definitely influenced the framing of India's Constitution. Viewed from the Indian perspective, human rights have been synthesized, like it is being, not as an integrated stuff by the Preamble promises and various Constitutional clauses of the National Charter of 1950.

Human Rights and The Indian Constitution the Constitution of the Republic of India which came into force on 26th January 1950 with 395 Articles and 8 Schedules, is one of the most detailed fundamental laws eternally adopted. The Preamble to the Constitution declares India to be a Sovereign, Socialist, Secular and Democratic Republic. The term 'democratic' denotes that the Government gets its power from the will of the people. It gives a sensation that they all are equal "irrespective of the race, religion, language, sex and culture." The Preamble to the Constitution pledges justice, social, economic and political, liberty of thought, expression,

belief, faith and worship, equality of status and of opportunity and fraternity assuring the self-esteem of the individual and the unity and integrity of the nation.

Modern Rights in Modern India

The framers of the Indian Constitution, 1950 were motivated by the motivating goals set out in the Universal Declaration of Human Rights, 1948. The preamble to the Constitution of India, 1950 underlines the call for secure to all its citizens justice, liberty, equality and also the dignity of the personality as important ideals. A number of civil and political rights such as the right to equality, freedom of speech, right to life and personal liberty, the right to free primary education, right to practice and propagation of religion etc., be provided as fundamental rights. A number of economic, social and cultural rights like the right to education, health and work have been provided under the provision of Directive Principles of State Policy, which are fundamental in the supremacy of the country. The legislative body has enacted a range of legislations which seek out to protect and promote the right of the susceptible sections of the society like the disable, the scheduled castes and scheduled tribes, women and children. As far as women are concerned, the legislations wrap issues such as dowry harassment, immoral traffic, prevention of sati and female feticide.

The parliament enacted the Protection of Human Rights Act 1993 which provides for the constitution of the National Human Rights Commission, the State Human Rights Commission and Human Rights Courts, which are constituted for the better fortification of human rights as well as for matters associated therewith or subsidiary thereto National Commission on Human Rights was set up in India on September, 27, 1997.

HUMAN RIGHTS AND DUTIES GUARANTEED UNDER INDIAN CONSTITUTION

UDHR and the Fundamental Rights of Indian Constitution

The Universal Declaration of Human Rights established by the General Assembly on 10 December, 1948, constituted a significant event of the first enormity. It was an encouragement for all the States to value some basic rights. It enumerates the political, civil, economic, social and cultural rights of man. It is a proposal of man's absolute rights and

fundamental freedoms. Most of the Human Rights in Universal Declaration are integrated as fundamental rights. Rights in part III of the Constitution of India, which was adopted in 26th, November, 1949 came into force on 26 January, 1950. The following table shows the similarity

SI. No.	Universal Declaration of Human Rights	Indian constitution
1	Everyone has the right to life, liberty and security of person.(Art.3)	Article 21
2	No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms(Art.4)	Article 23
3	Equality before Law and Non-discrimination (Art.7)	Article 14 and 15
4	Right to effective remedy (Art.8)	Article 32
5	Rights against arbitrary arrest, detention and right to habeas corpus (Art.9)	Article 22
6	Rights ex-post facto law [Art.11(2)]	Article 20(1)
7	Right to freedom of movement [Art.13(1)]	Article 19(1)(d)
8	Right of own property and not be deprived of property(A.17)	Article 19 (1)(f) (but it was omitted by the Constitution) (42th Amendment)
9	Right to freedom of thought, conscience and religion (Art.18)	Article 25(1)
10	Right to freedom of opinion and expression (Art. 19)	Article 19(1)(a)
11	11 Right to freedom of peaceful assembly and association [Art.20(1)]	Article 19(1)(b)
12	Right to equal access to public service [Art.21(1)]	Article 16(1)
13	Right of social security (Art.22)	Article 29(1)
14	Right of form and join Trade Unions (Art.23)	Article 19(1)(c)

SI No.	Universal Declaration of Human Rights	Indian Constitution
1	Art. 23 (1) Right to work, to free choice of an employment, to just and favourable conditions of work etc,	Article 41
2	Art. 23 (2) Right to equal pay for equal work conditions of work etc,	Article 39(d)
3	Art. 23 (3) Right to just and favourable remuneration	Article 43
4	Art. 24 (1) Right to rest to leisure	Article 43
5	Art. 25 (1) Right of everyone and a standard of living adequate for his and his family	Article 39 (a) and 47
6	Art. 26 (1) Right to education and free education in elementary and fundamental stages	Article 41 and 45
7	Art. 28 Right to proper social order	Article 38

Economic, Social and Cultural Rights

The following table shows that most of the economic, social and cultural rights proclaimed in the UDHR have been incorporated in Part IV of the Indian Constitution. In deference of the above rights of express mention does not mean that these rights have not been included in the Indian Constitution. As a matter of fact, the above rights are either subsume in the existing rights or have been expressed in a slight diverse scope.

HUMAN RIGHTS, DUTIES, INDIAN CONSTITUTION

INTRODUCTION

The Constitution of India in the preamble assure the pride of citizen and this has been well-protected by the Part III (Article 12-35) of the Constitution. Our Constitution not only elaborates the essential human rights in Part III, it also secures them by providing constitutional remedies under Article 32 and 226 of the Constitution. The right to move to the apex court for the enforcement of the basic rights isfundamental as per Article 32.

Part IV (A) of the Constitution embody the Eleven Fundamental Duties of every Indian citizen (Article 51-A). These are: the duties to value the Constitution and its institutions, to live by the dignified morals of the freedom struggle, to defend the sovereignty and integrity of India, to protect the nation, to endorse collective harmony, to relinquish practices offensive to the dignity of women, to conserve the literary heritage, to shield and progress the usual atmosphere, to have kindness for living creatures, to build up the scientific temper, to maintain public property and renounce violence and to struggle towards excellence in all spheres of individual and collective movement. The Eighty-sixth Constitutional Amendment 2002 inserted a new clause (k) in Article 51 (A) instructing "a parent or guardian to provide opportunities for education to his child or, ward between the ages of 6 to 14 years."

Parts III, IV and IV (a) of the Constitution greatly depend upon the judiciary for their analysis and application. The various 'reasonable restriction clauses in Part III, Article 21, and the seldom-used Part IV-A have set the scope for judicial interpretation resulting in the Judicial Review of theadministrative and legislative action. Indeed, Article 21 has allowed it to act as acatalyst in prodding the State to put into practice the directive principles in so far as they honestly bear upon "life and personal liberty."

The Constitution provides for the enjoyment of 6 Fundamental rights. They are:

Right to Equality (under Article 14 – Article 18)

Right to Freedom (under Article 19 – Article 22)

Right against exploitation (under Article 23 – Article 24)

Right to Freedom of Religion (under Article 25 – Article 28)

Cultural and Educational rights (under Article 29 – Article 30)

Right to Constitutional remedies (Article 32)

Fundamental duties under Indian Constitution

The Fundamental Duties are a narrative feature of the Indian Constitution in recent times. Initially, the Constitution of India did not have these duties. The Forty Second Constitution Amendment Act, 1976 has incorporated ten Fundamental Duties in Article 51(A) of the Constitution of India. The Eighty-Six Constitution Amendment Act, 2002 has added one more Fundamental Duty in Article 51 (A) of the Constitution of India. As a result, there are now 11 Fundamental Duties of the citizen of India.

JUDICIAL ACCEPTANCE OF HUMAN DUTIES

Part IV-A, which deals with fundamental duties of the citizens, was added by the Constitution (Forty-Second Amendment) Act, 1976, in accordance with the recommendations of the Swaran Singh Committee. It thus brought the Constitution of India in line with Article 29 (1) of the Universal Declaration of Human Rights, 1948.

When the court is called ahead to give effect to the directive principles and the fundamental duty, the court is not to wave its shoulders and say that priorities are a matter of policy and so it is an issue for the policy-making power. Practically speaking, these duties are ethical and societal obligations of Indian citizens to develop into accountable citizens and build up the country. The fundamental duties can be promoted by constitutional means and can be

forced only by constitutional methods. Constitutional enactment of fundamental duties must be used by courts as a tool to tap, in State action which is diverting away from constitutional values. The fundamental duties enjoined on citizens under Article 51-A should also guide the legislative and executive actions of nominated or non-elected institutions and organizations of the citizens together with the municipal bodies.

As the Verma Committee (1999) on fundamental duties said essentially all that is contained in the fundamental duties is just a codification of tasks integral to the Indian way of life. A scrutiny of the clauses of Article 51-A indicates that a number of these clauses basically refer to such values which have been a part of the Indian tradition, mythology, religion, and practices. Although the fundamental duties were inserted during the emergency and very noble in the literal sense, cannot either be part of a Constitution or a statute nor give any locus standing. They cannot be enforced by a court, but only by constitutional methods. Nevertheless, fundamental duties, though not enforceable by mandamus or any other legal remedy still provide a valuable guide and aid to interpretation of constitutional and legal issues. In thecase of doubt or choice, people's wish as manifested through Article 51-A can be served as a guide not only for resolving the issue but also for constructing or molding the relief to be given by the courts.
In ***AIIMS Student's Union vs AIIM***[11], a three-Judge Bench of the Supreme Court made it clear that fundamental duties, though not enforceable by a writ of the court, yet provide valuable guidance and aid to interpretation and resolution of constitutional and legal issues. Again in ***L.K. Koolwal v. the State of Rajasthan***[22] the Court held Article 51-A is the duty of the citizens however Article 51-A gives a right to the citizens to move the court for the enforcement of the duty cast on State, instrumentalities, agencies, departments, local bodies and statutory authorities created under the law of the State. The Hon'ble Court on similar occasion also stated that the collective duties of the citizens imply the duty of the State.

However, this is not denying that the State does not have duties. If the State does not have duties, then it is under Parts III and IV of the Constitution, namely, fundamental rights and

[1] JT 2001 (8) SC 218

[2]AIR 1988 Raj 2, 1987 (1) WLN 134

directive principles, where analogous negative and positive duties lie in the State. Moreover, the scrutiny of the Court that fundamental duty gives the citizens the authority to move the court is also not totally undersized of errors. Taking into consideration, that the fundamental duties are not executable, how can courts overlook about making decisions, even consider petitions under it? And if the society does have to move the court to request the State to do its duty it would relatively do it by way of a petition under Article 32 or 226 as an issue of their rights rather than the duty of the State. In Article 51-A under Part IVA, the Constitution of India spells out only eleven fundamental duties to the citizen.

Where such individual rights have been included in Indian law, the courts have no complexity in enforcing them. For example, the protection of the Human Rights Act, 1993 gives recognition to the rights of life, liberty, equality, and dignity of an individual and embody in them the international covenants. India is also a party to conventions on Elimination of All Forms of Discrimination, 1966; Suppression and Punishment of the Crime of Apartheid, 1973; Prevention and Punishment of the Crime of Genocide, 1948; Elimination of All Forms of Discrimination against Women, 1979; and Rights of the Child, 1989.

In ***Smt. Nilabati Behera & Lalita Behera vs. State of Orissa &Ors***.[3] the Supreme Court asserted the jurisdiction of the judiciary as "protector of civil liberties" under the obligation "to repair damage caused by officers of the State to fundamental rights of the citizens", holding the State responsible to pay compensation to the near and dear ones of a person who has been deprived of life by their wrongful action, reading into Article 21 the "duty of care" which could not be denied to anyone. For this purpose, the court referred to Article 9 (5) of the International Covenant on Civil and Political Rights, 1966 which lays down that "anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation"

Similarly, ***In Vishaka&Ors. vs. State of Rajasthan &Ors***.,[4] Supreme Court said that *"genderequality includes protection from sexual harassment and right to work with dignity, which is a universally recognized basic human right. The common minimum requirement of this right has received global acceptance. 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 workplaces, 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 and for the formulation of guidelines to achieve this purpose…. in the absence ofenacted law to provide for the effective enforcement of the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly, guidelines and norms are hereby laid down for strict observance at all workplaces or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 for enforcement of the fundamental rights and it is further emphasized that this would be treated as the law declared by the Supreme Court under Article 141 of the Constitution."

[3] (1993) 2 SCC 746
[4] (1997) 6 SCC 241
[5] AIR 1999 SC 625

Further, in ***Apparel Export Promotion Council v. A.K. Chopra***[5], a two-Judge Bench of the Supreme Court yet again dealt with a case of sexual harassment of a lady secretary by her male superior. The court relied on the Convention on Elimination of All Forms of Discrimination against Women, 1979 and other international instruments on human rights.

This approach was once more evidenced in Chairman, ***Rly. Board Vs Chandrima Das***[6], In this case, a woman tourist of Bangladesh was raped in the Railway Guest House by the employees of the railway board. The petition on her behalf was filed by an Advocate of Calcutta High Court. The Supreme Court apprehended that our Constitution in Part III guarantees all the basic and fundamental human rights set out in the Universal Declaration of Human Rights, 1948 to its people and other personnel, i.e., aliens and that It will be appropriate for the court to refer to international human rights norms while interpreting the national constitution.

In ***Guruvayoor Devaswom Managing Committee v. C.K. Rajan***[7], the court said that it will not hesitate to invoke international conventions on human rights to protect group rights of people. It is not only the "first generation" and the "second generation" human rights which have been accepted and applied by the Indian Court, but the "third generation or solidarity right" has also been recognized.

Further in ***N D Jayal. V. The Union of India***[8], a three- judge Bench of the Supreme Court has accepted the right to development as an integral part of human right. The Constitution of India also does not expressly provide for the right of privacy. But the Indian judiciary has traced this right in Article 21 of the Constitution. In District Registrar and collector, Hyderabad. v. Canara Bank[9], the Supreme Court has invoked Article 12 of the UDHR, 1948 and Article 17 of the International Covenant on Civil and Political Rights, 1966, in upholding the right of privacy.

The Indian Supreme Court has followed two lines of reading in support of applying international human rights norms in its domestic jurisdiction. Firstly, the fundamental rights which are guaranteed by the Constitution can be interpreted in the light of international human rights norms, since these norms indicate the currently accepted view of the content of the various fundamental rights of part III of the Constitution of India. Secondly, the court has also said that international covenants declaring universal fundamental rights can be used by the courts as a legitimate guide in developing common law.

The Constitution prescribes fundamental rights such as impartiality facing the law. Neither the Union nor the State legislative, executive or judiciary can act in breach of these fundamental rights. Fundamental duties were supplementary to the Constitution in 1977. Among these are duties to stand for the Constitution and value its morals and institutions, the National Flag and the National Anthem, to write and safeguard the prosperous heritage of our amalgamated culture, to defend and develop the national environment as well as forests, lakes, rivers and wild life and to have the kindness for living creations and to endeavor towards superiority in all spheres of personality and cooperative action. Rights and duties go side by side. Rights without duties are worthless. Hon'ble Supreme Court of India and the court has even relied on international human rights law to protect the fundamental rights of the people and has in some cases tried to interpret the collective fundamental duty of the society as the duty of the state.

CONCLUSION

The Indian Constitution is a text wealthy in human rights jurisprudence. This is a sophisticated charter on human rights eternally framed by any State in the world. Part Ill of the Indian Constitution may well characterize as the 'Magna Carta' of India. The Judiciary of India plays a considerable role in protecting human rights. The Indian Courts have become the courts of the poor and the stressed masses and left open their portals to the deprived, the unaware, the illiterates, the demoralized, the have-nots, the handicapped and the half-hungry, half-naked countrymen.

[6] AIR 2000 SC 988
[7] AIR 2004 SC 561
[8]2003 Supp(3) SCR 152
[9] AIR 2005 SC 186

JUDICIAL EXPANSION OF RIGHTS

INTRODUCTION

In Constitutional democracies, often the legislative process is too slow to keep pace with the new challenges. Hence judicial intervention through due process becomes inevitable and we find that judiciary has played a vital role in all spheres of life. The Court has expanded and humanized the concept of the Right to Life and Personal Liberty. This has given birth to the concept of Judicial Activism and the dynamics of the judicial process has brought in significant changes in interpreting the law and the Constitution to meet the rapidly changing societal needs. This lesson focuses on this strategy adopted by the apex court in bringing significant changes and thereby protecting and upholding the most cherished Constitutional preambular values i.e. Life and liberty in the context of advance science and technology and in this global era. We see that the judiciary has now come forward with a fresh look by giving an introduction of its pro-activeness through judicial activism, it has started giving primacy to public interest over private interest by encouraging public interest litigation, it has also expanded the scope of various rights particularly right to life and personal liberty.

IMPACT OF JUDICIAL PROCESS ON FUNDAMENTAL RIGHTS AND DIRECTIVE PRINCIPLES OF STATE POLICY

Judicial activism has greatly contributed to the expansion, protection, and enforcement of Fundamental Rights and further impacted on the justiciability of Directive Principles of State Policy. The Supreme Court has broadened the Fundamental Rights. It has enlarged the scope of their operation by liberally interpreting Article 12 of the Constitution which defines 'State'. It has by its judicial activism attached importance to Directive Principles of State Policy and many of been enforced them have. It has liberally interpreted the Fundamental Rights, particularly Right to Life and Personal Liberty, guaranteed under Article 21 of the Constitution.

The Fundamental Rights are binding on and enforceable against the State. The 'State' has

been defined under Article 12 of the Constitution. According to that article 'State' includes the following:

Government and Parliament of India, in other words, the Union Executive and Legislature:

The Government and Legislature of each of the States, in other words, the State's

Executive and Legislature:

All local or other authorities within the territory of India:

All local or other authorities under the control of the Government of India

Earlier the term 'other authorities' wag given a restricted meaning by applying the principle of *ejusdem generis* and it was held that it means authorities of a like nature. Such interpretation includes only those authorities which exercise sovereign functions. [1] But subsequently, this view was overruled by the Supreme Court. It was held that *ejusdem generis* rule was resorted to in interpreting this expression. In Article 12 the 'bodies' specifically named are the government of the Union and the State, the Legislature of the Union and the State and Local Authorities. There is no common genus running through these named bodies nor can these bodies be placed in one single category on any rational basis. In a subsequent case,[2] the Supreme Court stated that the expression other authorities' is wide enough to include all authorities created by the Constitution or statute or on whom powers are conferred by law. It is not necessary that statutory authority should be engaged in performing sovereign functions. Since then, there has been a growingly widening of the meaning of 'other authorities'. Now, several categories of State 'instrumentalities' such as Public Corporation, Companies, Societies etc. have come to be included within the ambit of 'other authorities'.[3] The Fundamental Rights are binding on them and they are amenable to the writ jurisdiction of the court.

It would appear that parts III, IV and IV (a) of the Constitution greatly depend upon the

judiciary for their analysis and application. The various 'reasonable restriction classes in Part Ill, Article 21, and the seldom-used Part IV-A have set the judiciary liberal extent for the Judicial Review of theadministrative and legislative action. Indeed, Article 21 has allowed it to

(i) act as an analyst in prodding the State to put into practice the directive principles in so far as they honestly bear upon "life and personal liberty."

JUSTICIABLE RIGHTS

Fundamental rights are those rights which are necessary for the well-being of a person. Part III of the Indian Constitution contains the list of Fundamental Rights; that guarantees civil liberties to all the citizens of India to be alive in serenity and synchronization without the fear of being censored by others. The Indian Judiciary has the prudence to penalize those violating these fundamental rights under the provisions of the Indian Penal Code. No individual can be deprived of these rights pertaining to fundamental liberty in the form of human freedoms. It is the judiciary that safeguards these constitutional rights of the citizens. In some outstanding cases, i.e. all through emergency the State can inflict limitations on the gratification of these fundamental rights.

The Constitution provides for the enjoyment of 6 Fundamental rights. They are:

Right to Equality (under Article 14 – Article 18)

Right to Freedom (under Article 19 – Article 22)

Right against exploitation (under Article 23 – Article 24)

Right to Freedom of Religion (under Article 25 – Article 28)

Cultural and Educational rights (under Article 29 – Article 30)

Right to Constitutional remedies (Article 32)

NON- JUSTICIABLE RIGHTS - JUDICIAL APPROACH

Principles have been declared to be fundamental in the governance of the country, they were not enforceable by courts. Consequently, in the beginning, they did not receive the importance, they deserved. They were held to be subject to fundamental rights. However, gradually the courts started underlining their importance. It was held that an attempt must be made to harmonize the

provisions of the fundamental rights with the directive principles of state policy as far as possible[4]. They were resorted to in determining the reasonableness of restrictions imposed by law in respect of fundamental rights.[5] Constitutional amendments were made to give primacy to some Directive Principles. By Constitution (Twenty-fifth) Amendment, 1971, it was provided that no law giving effect to the policy of the State towards securing the principles specified in clause (b) or clause (c) of Article 39 shall be deemed to be void that it is violative of the rights contained in Articles 14, 19 and 31. Again by Constitution (Forty Second) Amendment, 1976, Articles 19(f), 39A, 43A and 48A were inserted in the Constitution which are intended to secure to children opportunities and facilities to develop in a healthy manner etc., equal justice and free legal aid, participation of workers in management of industries and protection of improvement of environment and safeguarding of forests and wild life respectively.

The Court has also laid growing emphasis on Directive Principles of State Policy. Some of its directives have been conferred the status of fundamental rights, such as 'equal pay for equal work'[6]. The Acts intended to secure directive principles particularly those inserted by the Forty-Second Amendment have been held to be valid. They have been held to be an integral part of thedemocratic system and are meant to secure socio-economic justice. The Supreme Court observed[7]

[8] In re Kerala Education Bill, 1957, AIR 1958 SC 956.
[9] State of Bombay v. F.N. Balsara, AIR 1951 SC 318.

"The Directive Principles of our Constitution are the forerunners of the UN Convention of the Right to Development as an inalienable human right and every person and all people are entitled to participate in, contribute to and enjoy economic, social, cultural and political developments in which all human rights, fundamental freedoms would be fully realized. It is the responsibility of the State as well as the individuals, singly and collectively, for the developments taking in to account the need for fuller responsibility for the human rights, fundamental freedoms as well as the duties to the community which alone can ensure free and complete fulfillment of the human being. They promote and protect and appropriate social and economic order in democracy for development. The State should provide facilities and opportunities to ensure development and to eliminate all obstacles to development by appropriate economic and social reforms to eradicate all social injustice. These principles are embedded as integral part of our Constitution in the Directive Principles. Therefore, the Directive Principles now stand elevated to inalienable fundamental human rights. Even they are justiciable by themselves. Social and economic democracy is the foundation for stable political democracy. Therefore, for the establishment of just social order in which social and economic democracy would be a way of life, inequalities in income should be removed and every endeavor is made to eliminate inequalities in status through the rule of law."

In *Ahmedabad Municipal Corporation v. Nawab Khan Gulab Khan*[8], the court observed that it is the obligation of the State to implement them. The court held: "The State i.e., Union of India and the State Governments and the local bodies constitute an integral executive to implement 'the Directive Principles contained in Part-IV through planned development under the rule of law. The Municipal Corporation, therefore, has Constitutional duty and authority to implement the directives contained in Articles 38, 39 and 46 and all cognate provisions to make the fundamental rights available to all the citizens as meaningful. It would, therefore, be the duty of the Municipal Corporation to enforce the scheme in a planned manner by annual budget to provide the right to the residence to the poor.[9]"

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10 State of Rajasthan v. Gopikrishnaesn, AIR 1992 SC 1754:
11 Air India Statutory Corpn. v. United Labour Union, AIR 1997 SC 645.
12 AIR 1997 SC 152
13 AIR 1997 SC 152

JUDICIAL EXPANSION OF LIFE AND PERSONAL LIBERTY

The judicial interpretation with respect to the terms "life", "personal liberty" and "procedure established by law" changed from case to case and time to time. The scope of the right to personal liberty received two-dimensional judicial approach in the Gopalan case, which is the very first case on personal liberty in the Supreme Court of India immediately after the commencement of the Constitution of India. The majority opinion was that the right to personal liberty was not so wide as to include within it the freedom of movement throughout the territory of India. They were of the view that the concept of right to move freely throughout the territory of India, referred to in Article 19(1)(d) of the Constitution, was entirely different from the concept of right to personal liberty referred to in Article 21 and should not, therefore, be read as controlled by provisions of Article 21. The majority judges believed if the concept of personal liberty was interpreted to include the freedom of movement throughout the territory of India, then Article 19(1) (d) would become redundant and they kept both the freedoms in separate compartments. It thus appears that the majority gave a very narrow and restricted view of the expression personal liberty. Post-Gopalan case[10] the scenario in respect of thescope of Article 21 has been expanded or modified gradually through different decisions of the Apex Court and it was held that interference with the freedom of a person at home or restriction imposed on a person while in jail would require theauthority of law. Whether the reasonableness of a penal law can be examined with reference to Article 19, was the point in issue after Gopalan's case in the case of Maneka Gandhi v. Union of India[11] and the Apex Court opened up a new dimension and laid down that the procedure cannot be arbitrary, unfair or unreasonable one. Article 21 imposed a restriction upon the state where it prescribed a procedure for depriving a person of his life or personal liberty.

Judiciary and Gender Justice

In ***Vishakha&ors. v. State of Rajasthan & Ors***[12], Supreme Court said that *"genderequality includes protection from sexual harassment and right to work with dignity, which is a universally recognized basic human right. The common minimum requirement of this right has received global acceptance. 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 workplaces, 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 and for the formulation of guidelines to achieve this purpose…. in the absence of enacted law to provide for the effective enforcement of*

the basic human right of gender equality and guarantee against sexual harassment and abuse, more particularly, guidelines and norms are hereby laid down for strict observance at all workplaces or other institutions, until a legislation is enacted for the purpose. This is done in exercise of the power available under Article 32 for enforcement of the fundamental rights and it is further emphasized that this would be treated as the law declared by the Supreme Court under Article 141 of the Constitution."

Judiciary and prisoners protection

It is beyond doubt that in the recent past the Indian judiciary; particularly the Supreme Court has been very vigilant against encroachments upon the human rights of the prisoners. The courts have recently viewed third-degree methods and custodial deaths in police custody as a serious violation of human rights and constitutional provision of theright to life and liberty. The Supreme Court of India and the High Courts have developed human rights jurisprudence for prisoner's rights by interpreting Art.14, 19, 21, 22, 32, 37 and 39 A of the Constitution.

Reiterating the view taken in ***Motiram and Ors v. the State of M.P***[13]., the Supreme Court in ***Hussainara Khatoon and ors. v. Home Secretary State of Bihar***[14]**,** expressed anguish at thetravesty of justice because under-trial prisoners spending extended time in custody due to unrealistically excessive conditions of bail imposed by the magistracy or the police and issued requisite corrective guidelines, holding that the procedure established by law for depriving a person of life or personal liberty also should be reasonable, fair and just. Strongly denouncing handcuffing of prisoners as a matter of routine, the Supreme Court said that to manacle a man is more than to mortify him, it is to dehumanize him, and therefore to violate his personhood.

Judiciary and Right to Education

In ***Mohini Jain Vs. State of Karnataka and others***[15], the observations of the court are as follows: 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 must be read into the fundamental rights. Both are supplementary to each other. The State is under a constitutional mandate to create conditions in which the fundamental rights guaranteed to the individuals under Part III could be enjoyed by all. Without making "right to education" under

Art.41 of the Constitution a reality the fundamental rights under Chapter III shall remain beyond the reach of thelarge majority which is illiterate. "Right to life" is the compendious expression for all those rights which the Courts must enforce because they are basic to the dignified enjoyment of life. The Court holds that every citizen has a 'right to education' under the Constitution. The State is under an obligation to establish educational institutions to enable the citizens to enjoy the said right. The State may discharge its obligation through State-owned or State-recognized educational institutions.

When the State Government grants recognition to the private educational institutions it creates an agency to fulfill its obligation under the Constitution. The students are given admission to the educational institutions whether State owned or State-recognized in recognition of their 'right to education' under the Constitution."

Justice Mathew observed that "the social responsibility of modern welfare State extends to the field of human rights and imposes obligation upon the Government to promote liberty, equality, and dignity"[16] The right to education must be given greater importance so as to give everyone the benefit of education and awareness of other rights to which they are entitled. None of the civil, political, economic and social rights can be exercised by individuals unless they have received a certain minimum education.

It is emphasized in Unni Krishnan case[17] that, *"In order to treat a right as a fundamentalright, it is not necessary that it should be expressly stated as one in Part III of the Constitution. The provisions of Part III and IV are supplementary and complementary to each other. Fundamental rights are but a means to achieve the goal indicated in Part IV and must be constructed in the light of the directive principles…That right to education is implicit in the right to life is that the State cannot deprive the citizen of his right to education except in accordance with the procedure prescribed by law. The right to education which is implicit in the right to life and personal liberty guaranteed by Article 21 must be constructed in the light of the directive principles in Part IV of the Constitution."*

The declarations of the right to education as a fundamental right have been further confirmed by the eleven-Judge Constitutional Bench of the Supreme Court in ***T.M.A. PaiFoundation v. the State of Karnataka[18]***. The notion that private unaided Educational Institutionsare entitled to earn profits and not to profiteer has been affirmed by the Supreme Court in a recent case of *Unaided Private Schools of Delhi v. Director of Education*[19]. The Court has allowed the Management to adopt a rational fee structure and it directs the Govt. to frame a scheme

relating to the grant of admission and fixing the fee and to check the commercialization of education. The Indian judiciary which has a high reputation in the globe is cause for theright to education as a fundamental right as well as statutory right.

Judiciary and Right to Die

The question whether the right to die is included in Article 21 of the Constitution came for consideration the first before the Bombay high court in ***State of Maharastra v. MarutySripatiDubal***.[20]The Bombay high court held that the right to life guaranteed by Article 21 includes aright to die, and consequently, the court struck down Section 309 IPC which provides punishment for an attempt to commit suicide by a person as unconstitutional. The judges felt that the desire to die is not unnatural but merely abnormal and uncommon. They listed several circumstances in which people may wish to end their lives, including disease, the cruel or unbearable condition of life, a sense of shame or disenchantment with life. They held that everyone should have the freedom to dispose of his life as and when he desires. In this case, a Bombay police constable who was mentally deranged was refused permission to setup a shop and earn a living. Out of frustration, he tried to set himself a fire in the corporation's office room. On the other hand, the Andhra Pradesh high court in ***Jagadeeswar v. the State of AP***[21] held that the right to die is not a fundamental right within the meaning of Article 21 and hence Section 309 I.P.C is not unconstitutional.

In ***P.Rathinam v. Union of India***[22] a division bench of the Supreme court comprising Mr. Justice M. Sahai and Mr. Justice Hansaria agreeing with view of the Bombay High Court in ***Maruti Sripati Dubal***[23]***case*** held a person has a 'right to die' and declared unconstitutional,section 309 of the Indian penal code which makes attempt to commit suicide a penal offence. The "right to live" in Article 21 of the Constitution includes the "right not to live", i.e., right to die or to terminate one's life. Later in ***Gian Kaur v. the State of Punjab***,[24] a five judge Constitution bench of the Supreme Court has now overruled the ***P. Rathinam's*** case and rightly, held that "right to life" under Article 21 of the Constitution does not include "right to die" or "right to be killed". "The right to die", is inherently inconsistent with the "right to life" as is "death with life".The court rejected the plea that "euthanasia" (mercy killing) should be permitted by law. The judges said that they would not decide this point as firstly it is beyond the scope of the present petition and secondly also because in euthanasia a third person is either actively or passively involved with whom it may be said that he aids or abets the killing of another person. There is a distinction between an attempt of a person to take his life and action of some others to bring to an end the life of a third person such a distinction can be made on principle and is conceptually permissible

A petition for euthanasia was first filed for Ms. Shanbaug by Pinky Virani, a journalist who has written a book on the woman who she says is being forced to live her life stripped of basic dignity. The Supreme Court praised Ms. Virani's concern but ruled that her relationship with the patient does not give her right to petition on Ms. Shanbaug's behalf for a mercy killing. The only party that can appeal for euthanasia for Ms Shanbaug was the staff of KEM Hospital which had nursed her since she was discovered in the basement with an iron chain around her neck. She had been sodomized by a ward boy who she had scolded for stealing food that was meant for stray animals adopted by the hospital. The chain used to strangle her had cut off the supply of oxygen to her brain. The damage was irreversible. The verdict in Ms. Shanbaug has, however, changed forever India's approach to the contentious issue of euthanasia. The verdict on her case today allows **passive euthanasia** contingent upon circumstances. So other Indians can now argue in court for the right to withhold medical treatment - take a patient off a ventilator, for example, in the case of an irreversible coma. The judgment makes it clear that passive euthanasia will "only be allowed in cases where the person is in persistent vegetative state or terminally ill."

Worker's Rights to have protection

In ***Research Foundation for Science, Technology and Natural Resource Policy v. Unionof India & Ors***.,[25]the Supreme Court held: "that in the event of noncompliance, the provisionsof the Hazardous Wastes (Management and Handling) Rules, 1989, should be declared as unconstitutional, cannot be granted, since the

[12] 1997 (7)SCC 323
[13]1978 AIR 1594
[14]1979 INDLAW SC 113
[15] (1992)3SCC666
[16] Dr. Shashi P. Misra "Fundamental Rights and the Supreme Court-Reasonableness of Restrictions" Deep
[17] (1993)1SCC645
[18] (2002)8SCC 697
[19] (2009)7SCC751
[20] 1987 Cr. LJ 549
[21] 1988 Cr. LJ 549
[22] 1994) 3 SCC 394}
[23](1986) 88 BOMLR 589
[24] (1996) 2 SCC 648

same is in aid and not in derogation of the provisions of Articles 21, 39(e), 47 and 48A of the Constitution". In fact, as mentioned hereinabove, even at the interim stage, directions were given for compliance with the said rules, particularly in the matter of the destruction of the waste oil contained in 170 containers by incineration at the cost of the importer. The writ petition was entertained and had been treated by all concerned, not as any kind of adversarial litigation, but litigation to protect the environment from contamination. The Central Government was also directed to ban import of all hazardous/toxic wastes which had been identified and declared to be so under the BASEL Convention and its different protocols. The Central Government was directed to bring the Hazardous Wastes (Management and Handling) Rules, 1989, in line with the BASEL Convention and Articles 21r 47 and 48A of the Constitution. The further declaration made it clear that without adequate protection to the workers and public, the aforesaid rules are violative of the fundamental rights of the citizens and are, therefore, unconstitutional.

Narco analysis – Judicial perspective

In ***Ramchandra Ram Reddy v. The State of Maharashtra***, the Bombay High Court, In ***SmtSelvi v. Karnataka***[26], the Karnataka High Court,and **in *Rojo George v. Deputy Superintendent of Police***, the Kerala High Court held that narco analysis test does not amount to deprivation ofpersonal liberty or intrusion into privacy". The Indian Supreme Court addressed the issue in the ***Smt.Selviv.State of Karnataka***[27]that subjecting a person to the impugned techniques in aninvoluntary manner violates the prescribed boundaries of privacy. It held that forcible interference with a person's mental processes is not provided for under any statute. While the scheme of criminal procedure as well as evidence law mandates interference with physical privacy through statutory provisions that enable arrest, detention, search and seizure among others, the same cannot be the basis for compelling a person `to impart personal knowledge about a relevant fact'. The theory of interrelationship of rights mandates that the right against self-incrimination should also be read as a component of `personal liberty' under Article 21.

Judiciary and Right to Health

In ***Paramananda Katara v. The Union of India***[28] , it has been held that it is the professional obligation of all doctors, whether government or private, to extend medical aid to the injured immediately to preserve life without waiting for legal formalities to be completed by the police under Cr.P.C. Article 21 of the Constitution casts an obligation on the state to preserve life. It is the obligation of those who in charge of the health of the community to

preserve life so that the innocent may be protected and the guilty may be punished. Social laws do not

contemplate death by negligence which amounts legal punishment. In ***Paschim bang KhetMazdoor Samithi v. the State of W.B.***[29]following*Peramanand Katara* ruling the Supreme Courtheld that denial of medical aid by governments hospitals to an injured person on the ground of non-availability of beds amounted to aviolation of the right to life under Article 21 of the Constitution. The Supreme Court held that Article 21 imposes an obligation on the state to provide medical assistance to every injured person. Preservation of human life is of paramount importance. Failure on the part of government hospitals to provide timely medical treatment to a person in need of such treatment results in a violation of his right to life guaranteed under article 21 of the Constitution. The court also directed that the state should pay Rs. 25,000 to the petitioners as compensation. Playing an active role in the matters involving the environment, the judiciary in India has read the right to life enshrined in Article 21 as inclusive of the right to clean environment. The Court has, time and again, expressed concern about the impact of pollution on our ecology in present and in the times to come and the obligation of the State to anticipate and prevent the causes of environmental degradation and to secure the health of the people, improve public health and protect and improve the environment[30]. The aforesaid cases are only a few examples from numerous judgments concerning human rights. It has mandated to protect and improve the environment as found in a series of legislative enactments and held it to be a State duty to ensure sustainable development, where, common natural resources were properties held by the Government in trusteeship for the free and unimpeded use of the general public as also for the future generation.

[25] AIR 2012 SC 2627.
[26] 2004(7) KarLJ 501
[27] *Judgement delivered on 5thMay 2010,Cr. Appeal No1267 0f 200,accessed onDec.2011\,available from http://supreme courtofindia.nic.in/*
[28] AIR 1989 SC 2039
[29] (1996) 4 SCC 37}

Right to Free Legal Aid and Right of a Council

The Supreme Court held that it is relevant to notice that the appellant had pleaded, both before the Trial Court and the High Court, that he was not given a fair and impartial trial and he was denied the right to a counsel. The Court held that when material witnesses were examined he was unrepresented and the trial court did not bother to provide him legal aid at State expense, and by not doing that the Trial Court, in fact, failed to discharge its pious duty of ensuring that the accused was defended properly and effectively at all stages of the trial either by his private counselor in the absence of private counsel by an experienced and responsible *amicus curiae*. There can be no dispute about the legal proposition put forward by the learned counsel for the appellant that it is the duty of the Court to see and ensure that an accused in a criminal trial is represented with diligence by a defense counsel, and in case an accused during the trial remains unrepresented because of poverty, etc., it becomes the duty of the Court to provide him legal aid at State expense.[31]In ***Hussainara Khatoori (IV) v. Home Secretary, State of Bihar***,[32] the Court referring to Article 39-A, then newly added to the Constitution, said that the article emphasized that free legal aid was an inalienable element of a 'reasonable, fair and just' procedure, for without it a person suffering from economic or other disabilities would be deprived of securing justice. In paragraph 7 of the judgment, the Court observed and directed as under:

The right to free legal services is, therefore, clearly an essential ingredient of 'reasonable, fair and just', the procedure for a person accused of an offense and it must be held implicit in the guarantee of Article 21. This is a Constitutional right of every accused person who is unable to engage a lawyer and secure legal services on account of reasons such as poverty, indigence or incommunicado situation and the State is under a mandate to provide a lawyer to an accused person if the circumstances of the case and the needs of justice so require, provided, of course, the accused person does not object to the provision of such lawyer.

In ***Mohammed Ajmal Mohammad Amir Kasab Alias Abu Mujahid v. the State ofMaharashtra;***[33]the Supreme Court held that no hesitation in holding that the right to access tolegal aid, to consult and to be defended by a legal practitioner, arises when a person arrested for a cognizable offense is first produced before a magistrate. The Supreme Court, accordingly, held that it is the duty and obligation of the magistrate before whom a person accused of committing a cognizable offense is first produced, to make him fully aware that it is his right to consult and be defended by a legal practitioner, and in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the State. The right flows from Articles 21 and 22(1) of

the Constitution and needs to be strictly enforced. The Supreme Court directed all the magistrates in the country to faithfully discharge the aforesaid duty and obligation and further make it clear that any failure to fully discharge the duty would amount to dereliction in duty and would make the concerned magistrate liable to departmental proceedings.

CONCLUSION

It is observed that judiciary has played a proactive role in all spheres, be it environment, police system, the status of women, etc. leading towards their amelioration and ensuring that justice is delivered in its entirety. Looking at the way the issues of diverse nature, have been addressed by the judiciary, one can easily conclude that Judiciary despite its lacunae is the only potent weapon through which the grievances of the society can be redressed and justice can be ensured. it is emphasized that the Indian Judiciary has played a vital role in bringing human rights approach to right to life and personal liberty and it is the fervent hope of the nation that the Indian judicial response to contemporary challenges in protecting life and personal liberty of individuals like protecting human rights of netizens in cyber space, would be more awesome and more justice - sensitive.

[33] AIR 2012 SC 356

PROTECTION OF HUMAN RIGHTS ACT, 1993

Synopsis

- Historical Context
- Features
- National Human Rights Commission
- State Human Rights Commission
- Human Rights Courts
- Summary

HISTORICAL CONTEXT

The idea of a domestic institution to perform the function of protection and promotion of human rights was gaining significance. The idea was originally proposed by the United Nations Educational, Scientific and Cultural Organization or UNESCO in 1946. However the real progress in the development of such institutions started in 1970s when the United Nations Human Rights Commission recommended the member states to establish their own National Human Rights institutions according to their social structure and the traditions. However, in 1991, certain guidelines were provided in the form of the Paris Principles for every domestic institution working for the protection and promotion of human rights to ensure their credibility.

As the idea was becoming popular, India was being criticized by the western countries for the alleged human rights violations by the armed forces and the para military forces in Jammu and Kashmir, North East and Andhra Pradesh. As a response to this growing criticism, India felt the need to enact a law for establishing a Commission.

An ordinance was promulgated by the President on September 27, 1993 for the creation of National Human Rights Commission with Justice Ranganath Misra as its first Chairperson. A bill was passed by Lok Sabha to replace the ordinance on December 18, 1993. It received the assent of the President on January 8, 1994 which led to the Protection of Human Rights Act, 1993 came into force. The Act came into force on 28th September 1993.

FEATURES

The Act is divided into 8 chapters and 43 sections.

Preamble

The Preamble of the Act proclaims the object of enacting it which is to establish the National Human Rights Commission, the State Human Rights Commissions and the Human Rights Courts for "better" protection and promotion of human rights.

Definition of Human Rights

The definition of human rights is provided under Section 2(d) of the Act. It states that human rights mean '*the rights relating to life, liberty, equality and dignity of the individual guaranteed by theConstitution or embodied in the International Covenants and enforceable by courts in India.'*

The International Conventions have been further defined as The International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights and such other Covenant or Convention adopted by the General Assembly of the United Nations as the Central Government may, by notification, specify.

National Human Rights Commission

This Act was enacted with the main purpose of establishing a National Human Rights Commission which has been discussed under Chapter 2 of the Act. Section 3 of the Act provides that the Central Government shall constitute a body known as the National Human Rights Commission. The Commission shall have the following 8 members.

The Hon'ble Supreme Court in *Paramjit Kaur* v. *State of Punjab*[1] observed that, the chairperson of the Commission and the members of the Commission who are Chief Justice of High Court have throughout their tenure as a judge have considered, explained and enforced the fundamental rights and thus they are an expert in the field of human rights. The National Human Rights Commission's headquarter are to be located in Delhi however, with the prior approval of the Central Government they may have offices in any other place in India.

Appointment of the Chairperson

The appointment of the Chairperson has been dealt with in Section 4 of the Act. The Chairperson is to be appointed by the President after obtaining the recommendations from a committee that shall consist

of-

The Prime Minister as
Chairperson; Speaker of House of
People;
Home Minister;
Leader of Opposition in Lok Sabha;
Leader of Opposition in Rajya
Sabha; Deputy Chairman of Rajya
Sabha;

Section 6 of the Act provides that the Chairperson so appointed shall hold the office for a term of 5 years or till he or she reaches the age of seventy whichever is earlier. In case of Members, a similar term of five years is provided but they shall be eligible for re appointment for another term of 5 years. Such persons shall also become ineligible for further employment under the Government after they cease to hold office.

Removal of Members of Commission:

The member of the Commission shall cease to hold office on either resignation or removal by the President either after an inquiry conducted by the Supreme Court. The same has been discussed in detail in the following chart.

Functions of the Commission

The Commission's functions have been outlined in Section 12 of PHRA. They are

- Inquire into any complaint of human rights violation or any negligence in preventing it by a public servant, either suo moto or based on a petition or on direction by the court.
- Intervention in the proceedings pending before a court with its approval if it involves any allegation of violation of human rights
- Review and report the conditions of jail or any other institution for treatment, protection and reformation where persons are detained or lodged, to the government along with recommendations for their improvement.

- Review and recommend for the effective implementation of the safeguards for the protection of human rights provided either under the Constitution or under any other law.
- Review the causes that impede the enjoyment of human rights and recommend for their remedial measures.
- Review and recommend the effective implementation of international instruments on human rights.
- Undertake research projects in the field of human rights.
- Spreading human rights literacy and promote awareness of the safeguards available through media, publications or any other available means.
- Encourage the efforts of NGOs and other institutions working in the field of human rights.
- Any other function necessary for protection and promotion of human rights.

The Hon'ble Supreme Court in *Paramjit Kaur* v. *State of Punjab,* observed that in deciding the matters which are referred to the Commission by the Court, the NHRC is not circumscribed by any condition and can move forward with it independently. The matters referred are of special nature and not covered under Section 12.

Powers of the Commission

Section 13 provides that the commission shall have the power of the civil court when inquiring into complaints under Section 12(a) like,

- Summoning and enforcing attendance of witness. Compelling production of a document.
- Recording of evidence.
- Examination of witnesses and documents.
- Production of any public copy from any court or a public office. Compelling any person to furnish information.
- Enter any building where it believes that a document relating to the inquiry can be found. Transferring complaints to a State Human Rights Commission

Section 14 gives the power of utilizing services of any office or investigative agency of the Central or State Government.

Inquiry into complaints

Section 17 of PHRA provides the following procedure for inquiry into complaints.

- The Commission while inquiring into the complaints of violations of human rights may–
- (i) call for information or report from the Central Government or any State Government or any other authority or organisation subordinate thereto within such time as may be specified by it:- Provided that–
- (a) if the information or report is not received within the time stipulated by the Commission, it may proceed to inquire into the complaint on its own;
- (b) if, on receipt of information or report, the Commission is satisfied either that no further inquiry is required or that the required action has been initiated or taken by the concerned Government or authority, it may not proceed with the complaint and inform the complainant accordingly;
- (ii) without prejudice to anything contained in clause (i), if it considers necessary, having regard to the nature of the complaint, initiate an inquiry.

Section 18 of PHRA outlines steps during and after inquiry which are as follows:

The Commission may take any of the following steps during or upon the completion of an inquiry held under this Act, namely:-

- 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 –
- 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;
- to initiate proceedings for prosecution or such other suitable action as the Commission may deem fit against the concerned person or persons;
- 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;
- subject to the provisions of clause (e), provide a copy of the inquiry report to the petitioner or his representative;
- the Commission shall send a copy of its inquiry report together with its recommendations to the concerned Government or authority and the concerned Government or authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission;
- the Commission shall publish its inquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission.

Section 19 of PHRA stipulates the following procedure with regard to violations committed by personnel of armed forces:

- While dealing with complaints of violation of human rights by members of the armed forces, it may, either on its own motion or on receipt of a petition, seek a report from the Central Government;

- after the receipt of the report, it may, either not proceed with the complaint or, as the case may be, make its recommendations to that Government.

- The Central Government shall inform the Commission of the action taken on the recommendations within three months or such further time as the Commission may allow.

- The Commission shall publish its report together with its recommendations made to the Central Government and the action taken by that Government on such recommendations.

- The Commission shall provide a copy of the report published under sub-section (3) to the petitioner or his representative.

Section 20(2) of PHRA states that the Central Government and the State Government, as the case may be, shall cause the annual and special reports of the Commission to be laid before each House of Parliament or the State Legislature respectively, as the case may be, along with a memorandum of action taken or proposed to be taken on the recommendations of the Commission and the reasons for non-acceptance of the recommendations, if any. This provision enables scrutiny of action taken by the members of the Parliament or State Legislatures, thus going a long way in holding the Executive accountable

State Human Rights Commissions (SHRC)

State Human Rights Commission are provided under Chapter V of the Act. Section 21 provides that SHRCs shall be constituted by the State Government for inquiring into violation of human rights related to matters provided in List II and List III of the Seventh Schedule of the Constitution provided it is not being inquired into by the National Human Rights Commission or any other Commission duly constituted for this purpose.

The State Commission shall have the following members for a term of 5 years or the age of 70 years whichever is earlier.[2]

The chairperson shall be appointed according to Section 22 by the Governor after a recommendation from a committee consisting of the Chief Minister as the Chairperson, Speaker of the Legislative Assembly, Minister in Charge of the Department of Home and Leader of Opposition in the Legislative Assembly.

The members shall cease to hold office in the same manner as the members of the National Human Rights Commission.[3] It shall also have the same functions and powers as the National Human Rights Commission.[4]

The State Human Rights Commissions shall submit annual reports to the state government. Such reports shall be laid down before the legislative assembly.[5]

[1.] Paramjit Kaur v. State of Punjab, 1996 SCC (7) 20.
[2.] Section 24 of the Protection of Human Rights Act, 1993.
[3.] Section 23 of the Protection of Human Rights Act, 1993 provides for resignation and removal. It is the same as has been provided in Section 5.
[4.] Section 29 provides that Sections 9, 10, 11, 12, 13 , 14, 15, 16, 17 and 18 shall apply to the State Commission.
[5.] Section 28, The Protection of Human Rights Act, 19

HUMAN RIGHTS COURTS IN INDIA

Introduction

In the previous modules, we examined the role of the public interest litigation. In this module, we shall take up another facet of the role of judiciary in the protection and promotion of human rights. Part III and Part IV of the Constitution seek to protect a range of human rights. The Judiciary has been the custodian of fundamental rights since independence. Yet a need has been felt for the creation of new institutions for 'better protection' of these rights which would complement the courts. Human rights need to be protected everywhere and in particular, at the grass root level. The National Human Rights Commission, State Human Rights Commissions and, at the district level, Human Rights Courts were envisaged in this backdrop. While we shall see details relating to NHRC and SHRCs in the subsequent modules, this current module will focus on the human rights courts in India.

The state government under Section 30 has the power to specify a court of session in any district to be a Human Rights Court for speedy trial of offences arising out of violation of human rights. For every such Court, established under Section 30, the State Government shall specify a Public Prosecutor for the purpose of trying these offences. Such a person appointed by the State Government shall have an experience of minimum 7 years as a Special Public Prosecutor.

Thus, it is not compulsory for the government to establish human rights courts in each district. However as these courts provide for speedy trial, they should be established in states where there are frequent cases of human rights violations. Human Rights Courts have already been established in Tamil Nadu, Assam and Uttar Pradesh. However, the National Human Rights Commission in its report of the year 1998 drew attention to the ambiguity of the function of these court and recommended amendment to Section 30 but no steps have been taken in this direction since then.

Legal Provisions relating to Human Rights Courts

The Protection of Human Rights Act, 1993 (hereinafter described as PHRA), in its Preamble, states that it seeks to "provide for the constitution of a National Human Rights Commission,

State Human Rights Commission in States and Human Rights Courts for better protection of human rights and for matters connected therewith or incidental thereto". As one can see, the objective of the law makers was to secure "better" protection of human rights through these institutions.

Chapter VI of the PHRA deals with the Human Rights Courts whose purpose is to provide speedy trial of offences arising out of violation of human rights. The State Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify for each district a Court of Session to be a Human Rights Court to try these offences[1]. The PHRA further provides that

"*For every Human Rights Court, the State Government shall, by notification, specify a Public Prosecutor or appoint an advocate who has been in practice as an advocate for not less than seven years, as a Special Public Prosecutor for the purpose of conducting cases in that Court*[2]."

Practical difficulties faced by human rights courts

In practice, the lack of clarity on the precise nature of offences that could be tried in the Human Rights Courts has been a great impediment in their effective functioning. The procedure to be adopted by such Courts has not been specified anywhere. Though Section 30 of PHRA requires the State to specify for each district a Court of Session to be a Human Rights Court, it is silent as to who will take cognizance of human rights offences. No time limits have been laid down for disposal of cases. Drawing attention to these ambiguities, the National Human Rights Commission has stressed the need for substantive amendments to Sec.30 of the Protection of Human Rights Act, 1993 and other laws to enable the courts designated as human rights courts to fulfill their mandate[3]. Noting that Section 30 of the PHRA is inadequate and defective and

[10] Section 31 of PHRA, see http://nhrc.nic.in/documents/Publications/TheProtectionofHumanRightsAct1993_Eng.pdf

[11] See National Human Rights Commission Annual Report for 1996-97, http://nhrc.nic.in

[12] NHRC Annual Report for 2000-01, see http://nhrc.nic.in.

[13] See website of the National Human Rights Commission, http://nhrc.nic.in/disparchive.asp?fno=2523

6.See NHRC Annual Report 2001-02, page 257-258, see http://www.nhrc.nic.in

requires modification, the Commission stressed the need to equip Human Rights Courts, both in terms of personnel and competence, as well as financial autonomy[4].

In the NHRC-India submission to the UN Human Rights Council for India's Second Universal Periodic Review, while commenting on the action taken on recommendations of UPR-1, it has noted as follows:

"*On Recommendation 3, to energize "existing mechanisms to enhance the addressing of humanrights challenges", the record is uneven because:*

The Central Government has continued to let the National Commissions function independently, but given them no added powers or greater resources;

The State Human Rights Commissions are mostly moribund;

Very few Human Rights Courts have been set up[5]."

Such courts were notified in Andhra Pradesh, Assam, Sikkim, Tamil Nadu, Uttar Pradesh and West Bengal.

NHRC's recommendations relating to Human Rights Courts and related law reform

The National Human Rights Commission posed a number of issues for the consideration of Ahmadi Committee that was established by it to review the Protection of Human Rights Act and suggest amendments. These include, among others, the following:

"*Whether it is necessary to clarify and lay down the precise scope and purpose of theprovisions of Section 30 of the Act relating to the constitution of Human Rights Courts*?"

Based on Ahmadi Committee Report, the National Human Rights Commission made a number of serious recommendations to the Government for critical amendments to the Protection of Human Rights Act, 1993. These include, among others, the following amendment in relation to

Human Rights Courts.

"(1) Where an offence under any law for the time being in force also involves the violation of human rights, the State Government may, for the purpose of providing speedy trial of the offence involving human rights as, specified by notification issued in that behalf by the appropriate Government, and with the concurrence of the Chief Justice of High Court by notification, constitute one or more Human Rights Courts to try the offence.

A Human Rights Court shall be presided over by a person who is, or has been a Sessions Judge who shall take cognizance and try the offence, as nearly as may be in accordance with the procedure specified in the Code of Criminal Procedure, 1973. Provided that a Human Rights Court shall, as far as possible, dispose of any case referred to it within a period of three months from the date of framing the charge.

- It shall be competent for the Human Rights Court to award such sentence as may be authorised by law and the power to decide the violation of human rights shall, without prejudice to any penalty that may be awarded, include the power to award compensation, relief, both interim and final, to the person or members of the family, affected and to recommend necessary action against persons found guilty of the violation:

- An appeal against the orders of the Human Rights Court shall lie to the High Court in the same manner and subject to the same conditions in which an appeal shall lie to the High Court from a Court of Session.

- Nothing in this section shall apply if - (a) a Court of Session is already specified as a special court; or (b) a special court is already constituted, for such offences under any other law for the time being in force[6]."

The Protection of Human Rights Act, 1993 was amended in 2006. The above amendments suggested by the National Human Rights Commission, however, had not been carried out. According to the Ministry of Home Affairs Annual Report for 2014-15, the National Human Rights Commission has constituted a Committee headed by Justice Shri K.G. Balakrishnan, Chairperson and comprising Justice Shri Cyriac Joseph, Member, Justice Shri D. Murugesan,

Member, Justice Shri Vijender Jain, Chairperson, Haryana Human Rights Commission as Members on the issue of Jurisdiction and Mandate of Human Rights Courts. The Committee has so far held 5 meetings and in the 4th meeting held on 26.08.2014, it was decided that instead of a separate legislation, amendment of Section 30 of the PHRA would be the appropriate course of action and under the amendment, offences would be identified, which could be tried by the

Human Rights Courts along with the specification of the procedure for the same. "Moreover, there could be a provision added that Union/State governments would have the powers to add offences by notification of the respective Commissions. It was also decided that the draft amendments would be placed before the Committee and the amendment would be referred through Ministry of Home Affairs to Ministry of Law and Justice, Government of India. Accordingly the draft amendments were considered by the Committee in its 5th Meeting held in the Commission on 05.01.20157." It is important to recognize that the process has been very slow and in the absence of law reform, the Human Rights Courts that had been notified by many states remained ineffective and only on paper.

Judgments relating to Human Rights Courts

The Chief Justice of Madras High Court had received a memorandum from the People's Union for Civil Liberties (PUCL) regarding the jurisdiction and the procedures to be followed by Human Rights Courts constituted under Section 30 of the Act. Thereupon, the Division Bench of the High Court of Madras requested the National Human Rights Commission to give its views on the scope, sweep, amplitude, powers, jurisdiction and functioning of the Human Rights Courts in the Criminal Revision Case No.868/96. Subsequently, the High Court of Madras delivered its judgement on 23 June 1997[8] giving its views in this regard. The High Court framed 25 questions/issues relating to PHRA, the scope of jurisdiction of the Human Rights Courts and the human rights offences[9]. The Madras High Court clarified a number of aspects including the difference between Human Rights Commission and Human Rights Court, the human rights by law or the time being in force, as reliable to life, liberty, and dignity of the individual and nothing else"[10].

The Madras High Court further clarified as follows: "Violation of `Human Rights', as recognized by International treaty, Covenant or agreement, to which India is a party, in the absence of any law made by the Parliament therefore under the statutory provisions adumbrated under Article 253 read with Article 51(c) and entry Nos12 to 14 and 95 of List I and Entry Nos65 of List II of the VIIth Schedule of the Constitution cannot be reckoned and given effect to either by HRCs or superior Courts of jurisdiction High Courts and the apex Courts creatures of the Constitution. However, there can be no prohibition for the courts in India to apply the principles offences, procedures to be followed by the Human Rights Court. This is a very significant judgment.

Summary of key findings of the Madras High Court on the setting up of Human Rights Courts

The Madras High Court has ruled that "There is a clear guidance in PHRA as to what can be regarded as `offences arising out of violation of `Human Rights'… There is no need or desirability to amend PHRA and specify the `offences' arising out of violation of `Human Rights', which can be tried by HRCs. It is only such violation of `Human Rights' as embodied in International Covenants, treaties, etc., either incorporated in the Constitution, as justiciable right or incorporated or transformed in the municipal law, at the instance of the instrumentalities of the State that got attracted the jurisdiction of the High Court under Article 226 or the Supreme Court under article 32 of the Constitution. The violation of such rights, if occurred at the instance of private individuals, there is no other go for the affected individual, except to seek his

(j) Section 30 of PHRA, see http://nhrc.nic.in/documents/Publications/TheProtectionofHumanRightsAct1993_Eng.pdf

17 Annual Report of Ministry of Home Affairs, 2014-15, see http://mha.nic.in/sites/upload_files/mha/files/AR(E)1415.pdf

18 *1997 MLJ (Cri) 655 Madras – TamilnaduPazhankudiMakkal Sangam –Vs- State of Tamilnadu, Crl.R.C.No.868 of 1996).*

19 See NHRC Annual report 97-98 for summary of various points raised and findings recorded by the Court, http://nhrc.nic.in

20 *1997 MLJ (Cri) 655 Madras – TamilnaduPazhankudiMakkal Sangam –Vs- State of Tamilnadu, Crl.R.C.No.868 of 1996*

21 Ibid.

remedies under the ordinary law of the land. In the light of the definition of `offence', as contained in Section 2(n) of the Code, `offence' arising out of violation of `Human Rights', as mentioned in Section 30 of PHRA, in the context of the definition of `human Rights' in section 2(1) (d) of PHRC, means such act or omission on the part of the instrumentality of the State, that is say , public servants, punishable underlying such covenants, treaties etc. in the process of interpretation, if they are not in conflict with municipal law or not opposed to fundamental rights of Chapter III of the Constitution[11]."

"HRC is not a Court or Tribunal of a Court constituted under Article 323-A or 323-B of the Constitution. But it is a Court constituted under Section 30 of PHRA, as a Special Court in the cadre of a Court of Session with powers of a Court of original jurisdiction. The Constitution and designation of a `Court of Session' in each and every District as HRC a `Special Court' - with powers of a Court of original jurisdiction for trial of all offences arising out of violation of `Human Rights', irrespective of their classification into various categories of offences - First Class, Second Class or exclusively triable by Court of Session is permissible under Law[12]..."

"It is correct to state that HRC, being a Criminal Court has no power to grant compensation, except under Section 357 of the Code. It is desirable and necessary that HRC, by way of amendment to be brought in, must have to be invested with the exclusive jurisdiction, in the matter of award of compensation to the victims of Human Rights offences, without prescribing any limit therefore, ousting the jurisdiction of civil court and vesting public law jurisdiction inhering in Writ Courts - High Courts and Supreme Courts reliable only to the award of compensation for violation of fundamental rights of citizens - with a discretion for such courts to permit the Government - Central or State- to recover whole or part of compensation from the officer(s) who are found guilty and to award interim compensation to the victims, befitting such a relief. Until necessary amendments of PHRA on such lines are made, the existing jurisdiction of various forums in the matter of award of compensation to the victims of Human Rights offences will not get affected and continue to operate."

"It is correct to state that the scheme of PHRA in constituting NHRC,SHRC and HRC indicates, in no uncertain terms, the NHRC and SHRC are akin to the Commission of Inquiry set up under Commission of Inquiry Act and have no powers to give a definitive judgement in respect of offences arising out of violation of Human Rights and are constituted with the object of creating

awareness of Human Rights at the Governmental level and the public at large excepting the fact they are permanent Standing Commissions, while in sharp contrast, the only institution which can inquire into, adjudicate upon and punish for violation of Human Rights is HRC - first of its kind, anywhere in the world[13]."

Supreme Court directions on Human Rights Courts

"In order to ensure speedy trial in cases of human rights violations, the Supreme Court has asked all the states to set up special courts in each district. It has also directed the state governments to install CCTV cameras in all prisons, apart from police stations, within one year to keep an eye on activities which may lead to human rights violations of inmates"[14]. "The state governments have been directed to take appropriate action in terms of Section 30 of the Protection of Human Rights Act, 1993, in regard to setting up/specifying human rights courts.

. **Resources for further reading**

Section 30 and 31 of PHRA, see http://nhrc.nic.in/documents/Publications/TheProtectionofHumanRightsAct1993_Eng.pdf

See National Human Rights Commission Annual Report for 1996-97, 1997-98, 2000-01, 2001-02 http://nhrc.nic.in

Annual Report of Ministry of Home Affairs, 2014-15, see http://mha.nic.in/sites/upload_files/mha/files/AR(E)1415.pdf

1997 MLJ (Cri) 655 Madras – TamilnaduPazhankudiMakkal Sangam –Vs- State of Tamilnadu, Crl.R.C.No.868 of 1996).

Set up human rights court in each district: SC Amit Anand Choudhary,TNN | Jul 26, 2015, 04.31 AM IST, http://timesofindia.indiatimes.com/india/Set-up-human-rights-court-in-each-district-SC/articleshow/48221185.

NATIONAL HUMAN RIGHTS COMMISSION

INTRODUCTION

The Protection of Human Rights Act, 1993 was enacted with the main purpose of establishing a National Human Rights Commission. The idea of a domestic institution to perform the function of protection and promotion of human rights was gaining significance globally. The idea was originally proposed by the UNESCO in 1946. However, the real progress in the development of such institutions started in the 1970s when the United Nations Human Rights Commission recommended the member states to establish their own National Human Rights Commission according to their social structure and the traditions. However, in 1991 certain guidelines were provided in the form of Paris Principles for every domestic institution working for protection and promotion of human rights. They are required to adhere to them in order to ensure credibility.

India felt the need to enact a law for establishing a National Human Rights Commission. There was pressure from the international community for greater accountability and also a strong yearning from the Indian civil society. An ordinance was promulgated by the President on September 27, 1993, creating the National Human Rights Commission (NHRC) with Justice Ranganath Misra as its first Chairperson. A Bill was passed by Lok Sabha to replace the Ordinance on December 18, 1993. It received the assent of the President on January 8, 1994 which led to the enactment of the Protection of Human Rights Act, 1993. Section 3 of the Act provides that the Central Government shall constitute a body known as the National Human Rights Commission.

Features

- The NHRC is envisaged to be an independent statutory body created by an act of Parliament.
- It seeks to comply with the guidelines laid down by Paris Principles, adopted by the UN General Assembly in 1993.

- The statute gives NHRC the right to freely express its opinion in any case pertaining to human rights violation.

It has wide ranging functions within its official mandate.

It is equivalent to a civil court in exercising the function of inquiry and investigation in cases of human rights violations.

Independence of NHRC is assured by providing security of tenure to its members, a fixed term of service and a proper procedure laid down in the Act for removing or dismissing them. The salaries of the members cannot be deducted arbitrarily.

COMPOSITION OF NHRC

Section 3 of the National Human Rights Commission provides that the Commission shall have the following members.

The appointment of the Chairperson has been dealt with in Section 4 of the Act. The Chairperson is to be appointed by the President after obtaining the recommendations from a committee that shall consist of-

The Prime Minister as
Chairperson; Speaker of House of
People;
Home Minister;
Leader of Opposition in Lok Sabha;
Leader of Opposition in Rajya
Sabha; Deputy Chairman of Rajya
Sabha;

The Hon'ble Supreme Court in ***Paramjit Kaur* v. *State of Punjab***[1] observed that, the Chairperson of the Commission and the Members of the Commission have, throughout their tenure as a judge, considered, explained and enforced the fundamental rights and thus they are experts in the field of human rights.

Apart from these members, there shall be a Secretary General who is the Chief Executive Officer of

the Commission. He has to exercise all the functions and the powers that are delegated to him by the Commission.

STRUCTURE OF NHRC

The Chief Executive Officer is the head of the secretariat. The secretariat has 5 divisons:

Law Division

This division receives and deals with the complaint of human rights violations. It is headed by the Registrar who is assisted by the Joint Registrar and a number of Deputy Registrars.

Investigation Division

Headed by the Director General of Police, its primary responsibility is to carry out investigation all over the country, examining complaints and scrutinizing reports. One important responsibility of the division is that it looks into the instances of custodial violence or death in police or judicial custody and encounter deaths by analyzing reports from state authorities, mandated under the Act.

Administration Division

This division is headed by the Joint Secretary. It looks after the establishment, personnel, administrative and other requirements. It takes care of housekeeping jobs dealing with procurement of stores, maintenance of office building, equipment, machinery, furniture and vehicles. It also performs the work of translating the annual reports and monthly newsletter into Hindi. It publishes an Annual Journal called *Manavadhikar-NaiDishayein*. This division also looks after the library of the Commission and maintains an online database of all Supreme Court decisions.

The Administration Division has a computer cell which monitors the status of complaints from their receipt to their final disposal along with looking into the applications received under the Right to Information Act, 2005. Its works also includes informing the public about the activities of NHRC through any medium, print or electronic.

Training Division

The training division is responsible for the function of spreading human rights literacy and sensitizing staff within the government and outside the government. This division also conducts training and internship programmes for undergraduate and post graduate students.

Policy, Research, Projects and Programmes Division

If the commission feels that a particular subject is of a great importance, it converts that into a project

or programme which is then dealt by the Policy, Research, Projects and Programme division. Thus, in this way, it enables sustained monitoring by the Commission. This Division undertakes or promotes research on human rights issues and organizes various conferences and seminars. This division also reviews policies, laws and international treaties along with providing the necessary support to the training division for spreading human rights literacy.

COMPLAINT HANDLING MECHANISM

The NHRC has been established for the protection and promotion of human rights. As a part of its protection mandate, it handles complaints alleging the human rights violations under Section 12(a) of the PHRA.

Procedure for filing of complaints

Who can file a complaint?

The complaint can be filed by:

- Any person or group of individuals;
- Any forum or an association; or
- Any other agency.

The Commission has to mandatorily file the complaint if it is relating to human rights violation. Age, economic status, caste, sex or religion cannot be a ground to refuse registration of complaint.

Against whom the complaint is to be filed?

The complaints are to be filed against public servants who-

- Violate human rights of any person;
- Abet someone in violation of human rights; or/ and Neglect their duty in prevention of human rights.

Thus, it covers both acts of commission as well as omission of public servants with regard to human rights. A public servant has been defined under Section 21 of Indian Penal Code as, *any person whoderives authority from the government and perform its function like magistrate, policemen, armed forces officer, government doctor, teacher, tehsildar, patwari or any employee in any government department*.

Mode of filing complaint

A complaint can be filed to NHRC free of cost and without the assistance of any advocate by-

- Posting a letter to the registered address of the Commission explaining what happened. It should be clear and simple.
- Filing the complaint form that is made available on the NHRC website. By email.
- Personally to the NHRC.

A complaint should be in writing, addressed to the Chairperson or the Secretary of the Commission and signed by the person complaining. It should include-

- Name, address and other contact details of the complainant; Name, address and other contact details of the victim;
- Name, address and other contact details of the person against whom the complaint is filed; Time, date and place of incident describing exactly what happened without leaving any facts; Explaining how the situation has affected the human rights of the victim;
- Name, address and contact details of any witness to the incident; and
- Any action if taken, any report that has been filed to the police station or any lawyer who has been consulted.

Type of complaints not taken up by NHRC

NHRC does not take up a complaint if-

- It is against a private person.
- NHRC has been approached a year after the alleged violation took place.

- The case is inquired into by any other Commission or is pending before any other court.

Inquiry into complaints

The Commission calls for a report from the government on the incident of the alleged human rights violation. Based on the report of the government it decides whether there is a need to initiate an investigation and inform the complainant accordingly.[2]

Steps after inquiry

If the inquiry discloses that human rights of a person has been violated, the Commission makes the following recommendations:

- To pay compensation for damages To initiate prosecution
- To approach the High Court or the Supreme Court for required orders or writs. Recommend payment of an interim relief to the victim
- Provide a report of the inquiry to the complainant and to the Government within a period of one month
- Publish the inquiry report along with the comments of the Government.

Procedure for human rights violations by armed forces

Unlike complaints of human rights violations against police personnel and other authorities, Section 19 of the PHRA lays down a slightly different procedure for complaints against violations committed by personnel of armed forces. As can be seen from the above diagram, the Commission cannot

1. Paramjit Kaur v. State of Punjab, 1996 SCC (7) 20.
2. Section 17, Protection of Human Rights Act, 1993.

investigate such violations but can seek reports from the authorities concerned. Many NGOs have criticized this restrictive provision.

SOME ILLUSTRATIVE CASES TAKEN UP BY NHRC

The Commission can suo moto take cognizance of various human rights violations based on newspaper reports along with receiving a number of complaints by individuals and associations. NHRC has effectively dealt with a number of cases on custodial deaths, torture, illegal detention, unlawful arrest, false implications, fake encounter, cases related to women and children, atrocities on dalits and members of minority communities as well as disabled, bonded laborers and human rights violations by personnel of armed forces and para military forces.

Firing by security forces in BijBehara, Jammu and Kashmir

This case was taken up by the Commission soon after its establishment in 1993. It took suo moto cognizance of a report of 60 deaths which were the result of firing by security forces and called for reports from the Defence Ministry and Government of J&K. The Defence Ministry reported that there was no involvement of the army. A report was also sent to the Commission by the Home Ministry based on an inquiry conducted. The Commission made the following recommendations:

- Disciplinary proceedings should be initiated under the Border Security Force Act against 14 persons.
- Interim compensation should be paid.
- Review to be done by the Government of the conditions in which the Border Security Forces are deployed and how they are to operate in situations which involve only civilian population.

Gujarat Riots

The year 2002 witnessed communal violence in the State of Gujarat and reports showed the Commission that the authorities did not do enough to prevent them from happening. The NHRC took a

suo moto initiative and directed the state government to restore law and order and made a number of important recommendations. The State Government was asked to report to the Commission about the actions taken on, among other things, relief and rehabilitation of victims. The Commission also approached the Supreme Court on behalf of the victims.

Prosecution of Hajong and Chakma Refugees

The Amnesty International and the People's Union of Civil Liberties reported to the Commission that the Hajong and Chakma refugees were harassed and threatened. When they fled from East Pakistan, they were initially welcomed but later the inability of authorities to protect them made the situation serious. The Commission directed the State Government to take effective steps for the protection of these refugees. In the wake of protracted delay on the part of the State Government to take effective steps, the Commission approached the Supreme Court to issue appropriate directions to the Government. The Supreme Court ordered that the right to life and property of these refugees be protected.

Starvation deaths in Orissa

In the districts of Koraput, Bolangir and Kalahandi in Orissa, many people died of starvation. The NHRC took cognizance of the situation and sent a team to analyze the situation and make a report. A Special Rapporteur was also appointed to oversee and monitor the relief and rehabilitation work. The Commission made a series of short term and long term recommendations to address this issue. The state government was asked to strengthen emergency feeding and ensure enough staff and adequate food stock was available for proper distribution.

The state government was also directed to review the existing public distribution system, the situation of tube wells and their distance from residential areas. The Commission reviewed the progress made by the state government in remedying the situation.

Torture and gang rape by Police Officers

The Asian Centre for Human Rights complained to the Commission about the torture and gang rape of

a girl by three Special Police Officers in Tripura. The victim family's complaint was not even recorded by the police station. The Commission called for a report from the concerned police station. The police station responded by recording the FIR. The Commission directed the state government to provide an interim relief to victim. State Government responded by providing Rs.15000 to the victim's family as compensation for the mental and physical harm the victim went through. The Commission, however, directed the state government to pay Rs. 50,000 as compensation owing to the nature of the brutality of the offence.

Fake encounter in Uttar Pradesh

The complainant informed the Commission that his son along with three other persons was killed in a fake encounter. The police told the Commission that they received a secret information that a dreaded criminal is going to commit dacoity in a petrol pump. The police formed three teams to track him down. When four people came to the petrol pump, they saw the police and started running. The police report stated that there was a lot of cross firing from both the sides in which four people died.
Unconvinced by the police version, the Commission conducted its own inquiry on the basis of which a case was registered against 36 persons. The Commission directed the state Government for payment of interim relief and compensation.

Release of Bonded Laborers in Haryana

The Commission received a complaint from the Bonded Labour Liberation Front that around 20 persons including women and children were kept as bonded labour in a quarry. The Commission directed the Chief Secretary to look into the matter. The state government reported it as an industrial dispute. Unsatisfied with the investigation of the state government, the NHRC sent its own investigation team which found the situation to be otherwise. The NHRC directed the concerned district magistrate to take appropriate action for their rehabilitation. The release certificates were given to the labourers and the Commission supervised their rehabilitation.

Seats in All Medical Courses for Physically Handicapped

The complainant, a differently-abled person complained to the Commission that there was no provision of reservation for differently-abled candidates and the result of the entrance exams do not show a separate merit list of such candidates. The Commission called for a report from the deputy registrar of the Delhi University who reported to the Commission about the absence of any provision of reservation in MBBS/BDS courses. The Commission directed the deputy registrar to comply with the Persons with Disability Act, 1995, and the Supreme Court judgment on the issue which provides for 3% reservations for such candidates.

Medical treatment to a patient suffering from AIDS

The Commission received a complaint that a patient suffering from AIDS is being denied treatment by a government as well as a private hospital. He was admitted to the Apollo Hospital and the LNJP Hospital for a couple of days but the patient could not undergo dialysis. The Commission called for a report from both the hospitals. Apollo Hospital reported that the patient was clinically stable and didn't need dialysis. However, following the intervention of the NHRC, the LNJP hospital continued with the rest of his treatment.

Conclusion

The National Human Rights Commission has a wide mandate under Section 12 of PHRA. While dealing with individual complaints of human rights violation, it has the powers of a civil court. It cannot take up a complaint if it is against a private person; or it has been approached a year after the alleged violation took place or the case is inquired into by any other Commission or is pending before any other court. If the inquiry discloses that human rights of a person has been violated, the Commission can recommend payment of immediate interim relief or compensation for damages or prosecution or approach the High Court or the Supreme Court for required orders or writs. In the case of complaints involving personnel of armed forces, there is a separate procedure that has been laid down which precludes investigation. In the past 23 years of its existence, it has redressed thousands of complaints and provided relief.

ACTIVITIES OF THE NATIONAL HUMAN RIGHTS COMMISSION

- INTRODUCTION
- COMPLAINT REDRESSAL
- INTERVENTION IN PROCEEDINGS INVOLVING VIOLATIONS OF HUMAN RIGHTS
- ENSURE THE CONDITIONS OF JAIL, MENTAL HEALTH INSTITUTIONS OR ANY OTHER
- INSTITUTIONS
- REVIEW OF LEGISLATIVE BILLS AND ACTS FROM HUMAN RIGHTS PERSPECTIVE
- MONITOR THE IMPLEMENTATION OF INTERNATIONAL TREATIES
- SPREADING HUMAN RIGHTS LITERACY
- ANNUAL REPORT TO GOVERNMENT
- RESEARCH PROJECTS AND PROGRAMMES
- RELIEF AND REHABILITATION IN CASE OF NATURAL CALAMITIES
- Conclusion

INTRODUCTION

National Human Rights Commission is established for the protection and promotion of human rights in India. Thus, Section 12 of the (PHRA) provides for wide ranging functions within its official mandate.

- Inquire, either suo moto, based on a petition or on direction by the court, into any complaint of human rights violation or any negligence in preventing it by a public servant.
- Intervention in the proceedings pending before a court with its approval if same involves any allegation as to violation of human rights.
- Review and report the conditions of jail or any other institution for treatment, protection and reformation where persons are detained or lodged to the government along with recommendations for their improvement.
- Review and recommend steps for the effective implementation of the safeguards for the protection of human rights provided either under the Constitution or under any other existing law.

- Review the causes that impede the enjoyment of human rights and recommend remedial measures.
- Review and recommend the effective implementation of international instruments on human rights.
- Undertake research projects in the field of human rights.
- Spreading human rights literacy and promote awareness of the safeguard available through media, publications or any other available means.
- Encourage the efforts of NGOs and other institutions working in the field of human rights.
- Any other functions necessary for protection and promotion of human rights.

COMPLAINT REDRESSAL

Complaint Redressal and investigation is a major function of the Commission. A complaint made to the NHRC may be made in any language recognized by the Constitution. It can be made either by the victim or by any other person on his/ her behalf. It may be submitted either through post, fax, e-mail or online. A mobile no. has also been provided by the Commission to make urgent complaints during the working hours viz. 9810298900. There is a facilitation centre for obtaining information about the status of complaint. This status can also be ascertained at the website of NHRC- www.nhrc.nic.in

All complaints received by the NHRC are then processed by the Law Division which gives it a case number and a file number. A software is developed by NHRC- Complaint Management Information System (CMIS). Details of the complainant are entered into the computer and this software directly sends the acknowledgement to the complainant. If any such complaint requires investigation, it is sent to the investigation division.

The Commission takes one of the following actions to redress the complaints:[1]

- Dismisses complaints if they do not fall under the jurisdiction of the Commission or do not state violation of human rights by a public servant, failure to perform contractual obligations or relate to a civil dispute or if the complaint is vague or ambiguous.

- Disposes complaints by providing directions to the authorities concerned.
- Transfer the complaint to the concerned State Human Rights Commission according to Section 13(6) of (PHRA).
- Issue notices to the authorities concerned and calls for report from them or directs a fact finding spot enquiry by a team from its Investigation Division.

INTERVENTION IN PROCEEDINGS INVOLVING VIOLATIONS OF HUMAN RIGHTS

Section 12(b) of the (PHRA)provides that the NHRC can '*intervene in any proceeding involvingany allegation of violation of human rights pending before a court with the approval of such court.*'
NHRC has intervened in many proceedings which have led to effective and speedy remedial measures. Some of these have been discussed below:

Quashing the trial of Charanjit Singh

NHRC intervened in the case of Charanjit Singh. He was a mentally challenged undertrial prisoner. His case was pending before the Delhi High Court for 16 years. The Commission filed an application before the Delhi High Court under Section 482 of CrPCseeking quashing the trial. The High Court allowed the intervention and asked the Commission to provide the court with a list of all possible organizations which are willing to take the responsibility of Mr. Singh. Meanwhile, the Court transferred Mr. Singh to a mental institute along with exempting him from making any personal appearance before the Court.

Release of MachangLalung

MachangLalung was a mentally challenged prisoner who spent 54 years in prison. NHRC Special Rapporteur brought his neglect to notice of the Commission. Along with Machang there were four other prisoners. He was only 23 years old when he was arrested under Section 326 of IPC. Though he was arrested in 1951, he was never produced before the court since August 1967. The NHRC directed the Government of Assam to release him with immediate effect. Because of the intervention by the

NHRC the Supreme Court took cognizance of the case and ordered the government to pay him due compensation of Rs. 3,00,000. He was released in 2005.

Mass Cremation in Punjab

In 1995, Mr. Jaswant Singh Khaira and Jaspal Singh Dhillon documented the mass cremation of 2097 unidentified dead bodies by the Punjab Police by releasing the official records for 1984-94 after which the Supreme Court ordered an inquiry by the CBI into the case. The case was referred to the NHRC for adjudication of compensation after the CBI presented a report on human rights violations. The Supreme Court ordered that the compensation recommended by the NHRC would be binding and payable. NHRC appointed a Commission for identification **of** victims. The Commission involved the Punjab Police, the State Government and those affected in this huge exercise, besides issuing an advertisement inviting claims from individuals to facilitate identification of bodies by the Commission of Inquiry headed by Justice (retired) Shri K.S. Bhalla. It was able to identify 1388 bodies out of 2097. The NHRC awarded a total of Rs. 2575.25 lakh as monetary relief in respect of 195 persons identified who were in deemed custody and 1193 other persons identified.

Human Rights Violation in Bastar

In March 2017, NHRC directed the senior officers of the Chhattisgarh Government about the actions taken by them to protect the violation of human rights a result of police hostility against representatives of civil society, academicians and journalists. The Government reported that following action has been taken:

1. Training, awareness and orientation program for the police force.
2. Clear and separate entry relating to human rights violations in the Annual Assessment
3. Seven Human Rights Protection Committees have been set up which will receive complaints regarding the violations

CONDITIONS OF JAIL, MENTAL HEALTH INSTITUTIONS OR ANY OTHER INSTITUTIONS

Section 12(c) of the Protection of Human Rights Act, 1993 provides that '*the Commission shallvisit any jail or other institution under the State Government, where persons are detained or lodged, for purposes of treatment, reformation or protection, for the study of living conditions of inmates thereof and make recommendations.*'

Visit to Jails

The need to address the conditions of prisoners in the jail has been a priority area of concern to the Commission. The Commission in the year 1997-98 made surprise visits to jails and found out that the cause of 70% of prison deaths is tuberculosis. The prison rules provide for a medical examination to be conducted on the prisoners but the Commission noted that it remained only as a procedural formality. As a result, the Commission made a format in accordance to which medical examination should be conducted. The Commission also recommended to all State Governments to check all inmates for tuberculosis and take remedial measures.

In the case of *Muktaram Sitaram Shinde* v. *State of Maharashtra*, the Bombay High Court asked the Commission to make visits to 33 prisons in Maharashtra. Following the order of the High Court, the Commission appointed members eminent in the field of correctional administration, juvenile welfare and human rights to make such visits and report the conditions.

The latest report of the NHRC concludes from their visit to jail that year that the main problem was the overcrowding of jails especially in States like Chhattisgarh, Dadra & Nagar Haveli, Andaman & Nicobar Islands, Uttar Pradesh, Delhi, Punjab and Goa which was in turn due to a large population of undertrial prisoners. This analysis indicated that there was dire need to increase jail capacity, ensure speedy trials to reduce overcrowding or by holding *jail adalats* along with streamlining the procedure of parole.

Status of mental health institutions

The Supreme Court of India directed the NHRC to monitor the functioning of three mental hospitals in Agra, Gwalior and Ranchi. The Commission has been regularly visiting the institutions there to observe the conditions of these institutions. The visits of NHRC have brought significant changes:

Streamlining of admission and discharge of the patients in accordance with the procedure laid down in Mental Health Act, 1987

Reduction in the number of deaths of mentally ill persons in such institutions

Up gradation of therapeutic and diagnostic facilities

Expanding of services at community level

Rehabilitation of a number of patients to their families and constitution of an expert group for this purpose

REVIEW OF LEGISLATIVE BILLS AND ACTS FROM HUMAN RIGHTS PERSPECTIVE

Section 12(e) of the Protection of Human Rights Act, 1993 mandates the NHRC to '*review thesafeguards provided by or under the Constitution or under any law for the protection of human rights and recommend measures for effective implementation.*'

The Child Marriage Restraint Act, 1929

The NHRC reviewed the Child Marriage Restraint Act, 1929 and concluded that there was a need to

- Reframe some of the provisions to provide for higher penalty and make the offence of child marriage cognizable and non bailable
- Provision should be included to penalize associations who organize child marriage on a wide scale.
- All religious and civil marriages should be registered.
- Make the contract of marriage voidable at the option of the minor

Protection of Human Rights Act, 1993

The proposed changes recommended by the Commission to the Act include:

Exclude para military forces from the definition of armed forces under Section 2(a).

Widen the scope of International Covenants to include all covenants adopted by the United Nations General Assembly.

Specify a time limit preferably 3 months under Section 20, for the Central Government to report on the action taken on the recommendations of NHRC

Clearly specify the qualifications needed for the appointment of the non judicial members to the Commission.

Reframe the procedure laid down under Section 19 with respect to armed forces bcause it results in lack of accountability.

Freedom of Information Bill, 2000

The commission reviewed the Bill and suggested the following:

- Change the name from Freedom of Information Bill, 2000 to Right to Information Bill, 2000.
- Change in the preamble which provided for freedom to access information to a bill which provides a system through which people can access their right provided by the Constitution.
- Re-examination of the provision contained in Section 8 against permissible restrictions to the freedom of speech guaranteed under Article 19. Section 8 provides for,exemption from disclosure of information'.
-

MONITOR THE IMPLEMENTATION OF INTERNATIONAL TREATIES

Section 12(f) of the Act mandates the NHRC to study treaties and make recommendation for their implementation.

Protocols to the Convention on Rights of Child

The Commission recommended that the Optional Protocols 1 and 2 dealing with child pornography, child prostitution, sale and trafficking of child be examined properly by Government of India. The Commission recommended these Protocols be adopted by the Government which has since been done

Additional Protocols to the Geneva Conventions, 1949

The Commission recommended to the Government to review and comment upon its stand on the 1977 Protocols to the four Geneva Conventions of 1949 which related to the protection of victims of armed conflicts. However, as of now they have not yet been ratified by India.

Convention against Torture

The Commission urged the government to ratify this convention. There was a need to make changes in domestic legislation to effectively ratify this convention. The Commission observedthat much time has passed since the signing of this convention by India and thus the government needs to act with great speed. The government's failure to ratify this convention has affected our capacity to secure the extradition.

Convention and Protocol on the state of refugees

The Commission recommended that there is a need of a comprehensive legislation which will deal with the situation of refuges. The law should conform with the principles evolved by the Supreme Court in many cases and by the provisions of this Convention. The Government also informed the Commission about the interim steps taken in this direction but full compliance is still awaited.

SPREADING HUMAN RIGHTS LITERACY

Section 12(h) provides that the Commission shall '*spread human rights literacy among varioussections of society and promote awareness of the safeguards available for the protection of these rights through publications, the media, seminars and other available means.*'

To perform this function of spreading human rights literacy, NHRC conducts various training, workshops and seminars.

The NHRC in its twelfth annual report for the year 2012-13 reported to have conducted a total of 114 training programmes, workshops and seminars viz. a training programme for techers and administration of KendriyaVidyala, a sensitization programme for BSF officers, summer and winter internship programmes for college students, training programme for Rights Protection, Accountability and Disaster Risk Reduction' at Port Blair along with the following conferences:

(i) Conference on 'Right to Food'. The main objectives of the Conference were threefold:
   - Analyze the right to food with respect to its availability, adequacy and sustainability.
   - Analyze the existing situation in the country with respect to the fulfillment of this right.
   - Analyze the implementation and effectiveness of the programmes and policies implemented in this area.

A workshop on Bonded and Child Labour to sensitize the authorities like District Magistrate, Sub Divisional Magistrate, Members of Vigilance Committee and the Labour Department about the economic sectors which engages children as laborers and the relief and rehabilitation of bonded labour along with the constitutional and legal safeguards.

A conference on missing children to discuss the compliance status of NHRC guidelines and recommendations on the same issue and also to decide on the future action plan for addressing this problem and an awareness programmes on leprosy to

empower leprosy cured persons to improve their social economic conditions.

ANNUAL REPORT TO GOVERNMENT

Section 20 of the Protection of Human Rights Act, 1993 provides that the Commission shall submit an annual report to the Central Government and to the State Government or a special report on any matter of any urgency to the Government concerned. Such reports shall be laid before the Parliament along with the memorandum providing actions taken on the recommendation of the Commission or its non acceptance.

The annual report of the NHRC gives a detailed description of the work done by NHRC in that year. It includes:

RESEARCH PROJECTS AND PROGRAMMES

Section 12(g) of the Protection of Human Rights Act mandates NHRC to undertake or ptomote research projects. Thus, the NHRC conducts research studies with universities, NGOs and technical institutions along with hiring research interns. These research projects are undertaken by NHRC with a view to take practical steps at ground level. These research projects help in creating a network system in the country which facilitates protection and promotion of human rights. Accordingly, the NHRC sponsors a number of studies to be taken up in a year. It provides grants of Rs. 1,00,000 to 6,00,000 depending upon the duration of the project.

Some completed Research Studies by NHRC

- The Commission completed a research study to examine the role played by civic authorities, state human rights commission, NGOs and armed forces in the restoration and protection of human rights in order to suggest some remedial measures to prevent them in future. The study is called, 'Role of Civil Administration in the Protection of Human Rights in strife torn areas of Jammu and Kashmir.'

- A Study of the Underlying Causes of Human Rights Violations as a Result of Insurgency in North East, the Nature of State Response, the Use of Special Laws, Violations by Non-state Actors, and Practical Suggestions / Recommendations for Improvement in the Situation – A Research Study in Tripura. This study was undertaken in collaboration with the Lal Bahadur Shastri Academy of Administration to understand the conflicts between tribals and non tribals in North East and understand how this insurgency contributed to human rights violation in that area.

- A study called 'Dependency on Forests for Livelihood and Its Impact on Environment - A Case of the Baiga Tribe of Mandla District, Madhya Pradesh.' The study reported that land based activities have reduced the dependency on forests of these tribals and thus a sustainable model of agriculture has to be developed to provide them with employment oppurtunities.

- A study called Plight of Mentally Ill Persons Languishing in ChamatkariHanumanji Temple in Chhindwara District of Madhya Pradesh. It revealed the pathetic conditions of such people including leaving in the temple premises without any sanitation facilities. The main aim of the study was to bring awareness to the family members of such patients so as to bring to them proper psychiatric treatment.

- Economic, Social and Cultural Rights: A Study to Assess the Promotion of Economic, Social and Cultural Rights in India. Conducted in Maharashtra, Karnataka and Chhattisgarh it was done to analyze the method of resource allocation for fulfillment of right to food, health and education.
- Estimating Precise Costs and Providing Level Playing Field to Persons with Disabilities (PWDs) : the study was done with the objective of providing quantifiable data relating to additional cost of living for persons with disability to analyse the minimum support needed by PWDs as producers and consumers.

RELIEF AND REHABILITATION IN CASE OF NATURAL CALAMITIES

The NHRC has taken several initiatives for safeguarding situations which resulted from either natural calamities or man-made tragedies some of which are discussed below:

34 The Commission ordered the State Government of Orissa to review the Public Distribution System when so many people died of starvation in the state. It monitored the measures taken by the Government pursuant to its directions to restore the situation in the state.

- It monitored the relief provided by the State Government to the victims of Super Cyclone in Orissa.
- It ordered the State Government to adopt relief measures for the victim of 2001 Earthquake that affected the State of Gujarat.
- It monitored the relief measures that are taken by the Government for the people who are affected by the Tsunami that struck the southern coastal areas of India in the year 2004.

Conclusion

In pursuance of mandate under Section 12 of PHRA, the NHRC has been undertaking a wide range of functions including redressal of individual complaints, intervention in court proceedings, review of the conditions in prisons, mental hospitals, review of laws and international conventions, spreading of human rights literacy and awareness and research.

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UNIT V – HUMAN RIGHTS AND VULNERABLE GROUPS

(Rights of Women, Children, Disabled, Tribals, Aged and Minorities)

HUMAN RIGHTS OF WOMEN

Synopsis

- The Need for Human Rights for Women
- Background
- National Commission for Women
- Indian Constitutional Framework; Articles 14, 15 and 16 of the Indian Constitution and women's rights
- Conclusion

The Need for Human Rights for Women

Background

Women's disadvantaged social position throughout her life is often referred to as the **cycle of violence**. In India, there is a strong **patriarchal** culture. This is reflected and manifested in variousforms including: son preference, and subsequent **sex determination based abortions** and **femaleinfanticide**; more money being spent on male children's health and education; young men havingmore choice and control over their access to higher education, choice of subject and location of employment; men's age of marriage being later; grooms receiving and not having to pay dowry; male control over domestic decision making, eg the use of contraception, the number, and the spacing of children, and choices over how the household income is spent; male control over the ownership of property and land; men having higher social status in their old age and as widowers over widows. Historically practises such as sati, and when widows were forced to live a life of isolation and poverty in temples but widowers could continue living in the family home were also forms of violence that only affected women.

Women in Law

The natural global average "of sex ratio at birth is around 105 male births per 100 female births."[2] This equates to a naturally occurring 952 female births to 1,000 male births. This difference in the sex ratio at birth is naturally occurring as more male children are likely to die before their second birthday than female children. Therefore the imbalance should naturally balance out by the time children are past infancy.

In India, the 1991 Census showed there were 948 female births compared to 1,000 male births.[3] As there was social concern that the female birth rate was being artificially interfered with (such as female foeticide and female infanticide) due to a socio-cultural preference for male children the Government of India passed a law in 1994 to ban the determining of the sex of the foetus.[4] Despite the Pre-Conception & Pre-Natal Diagnostic Techniques Act (1994) by 2012-2014, the census figures showed that the sex-ratio was 906:1,000. The continual decline of the sex ratio, even after the introduction of legislation to ban sex-determination, demonstrates that law in itself cannot change social values and pervasive cultural preferences.

The position of women in society:

Crimes Against Women in India

According to the National Crime Records Bureau figures from 2013 show there were a total of 3,09,546 incidents of crimes against women in 2013. Of these, the total number of cognizable offences against women were 52.24 crimes against women per 1,00,000 women. Of these offences the most common crimes, in descending order, were:

- Cruelty by husbands or his relatives: 1,18,866
- Assault on a woman to outrage her modesty: 70,739
- Kidnapping and abduction: 51,881
- Rape: 33,707
- Insult to modesty: 12,589
- Dowry: 8,083[11]

All of the above listed crimes are crimes that are committed against women and which are overwhelmingly perpetrated by men. Cruelty, rape, assault and dowry particularly demonstrate male dominance and violence over women in society. These crimes are typically perpetrated to

exert control, to create fear, and to reinforce a social hierarchy of power both within the family and within society that reinforces men's privileged and more powerful social position.

Conclusion:

This module has introduced how the life cycle of violence against women and girls includes forms of violence that are typically only experienced by women. These forms of violence may be extreme where they result in the ending of life females from sex-determined abortions to murder by intimate partners. They may also be more subtle and yet still be pervasive within society from greater control over women's choices to violence against their person. This is reflected in access to education and employment, ownership of property and choices that women may not have over their life direction and bodies that are freely available to men.

This module has also given an introduction to how the historical lack of participation of women in significant numbers in decision making positions has resulted in women's needs often being under funded and their labour has been under-valued and pigeon-holed into often unpaid forms of care work.

Without laws and policies that aim to promote a more equal and accommodative society that breaks down constructed gender stereotypes and builds solutions to encourage greater gender based equality women are likely to continue experiencing oppression.

This module on human rights of women will introduce theories of what equality can be understood to mean, laws, and case studies to promote why human rights of women need greater attention and how laws can be shaped and structured to increase women's lived equality.

The above examples ranging from the socio-economic position of women in society which reinforces women's more vulnerable and inferior position socially, lack of prioritisation of women's issues in the allocation of state funds to laws that do and do not exist, and their gender insensitive implementation demonstrates why special measures are needed to promote the substantive upliftment of women.

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NATIONAL COMMISSION FOR WOMEN

Emergence of the National Commission for Women

It took the Government almost 18 years to effectively establish the National Commission for Women. During this period, there were many discussions between the government and the women's organisations where core disagreements, in relation to the provisions affecting the autonomy of the proposed body and its nature, role and functions, etc., emerged. While the government was not keen to excessively empower the proposed Commission, the women's organization representatives felt that any compromise on the autonomy of the body would be detrimental and indeed counter-productive to the aims and purposes of such a proposed body.

Finally, the National Commission for Women ("NCW" or the "Commission") was constituted as a statutory body under the National Commission for Women Act, 1990 (Act No. 20 of 1990 of Govt. of India) which came into force on 31st January, 1992 ("NCW Act" or the "Act").[5] Under the Act, the Commission was envisaged as a body which will:

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.

Composition of the Commission

The Commission consists of a Chairperson, five Members and a Member-Secretary, to be nominated by the Central Government. The Chairperson must be a person 'committed to the cause of women' whereas the Members must be 'amongst persons of ability, integrity and standing who have had experience in law or legislation, trade unionism, management of an industry or organization committed to increasing the employment potential of women, women's voluntary organisations (including women activists), administration, economic development, health, education or social welfare'.[8]

The Member-Secretary is also nominated by the Central Government and shall either be an expert in the field of management, organizational structure or sociological movement, or an officer who is a member of a civil service of the Union or of an all-India service or holds a civil post under the Union with appropriate experience.

Functions of the Commission

As an autonomous body entrusted with advancing women's rights and socio-economic development, the Commission is mandated to perform various functions under Section 10 (1) of the NCW Act which are briefly outlined below:

- Investigation and examination of issues in relation to the safeguards provided for women under the Constitution and other laws and reporting to the Central Government on the working of such safeguards. Such reports to the Central Government may also include recommendations for the effective implementation of the safeguards for improving the conditions of women. Moreover, the Commission periodically reports to the Government on matters pertaining to women and in particular matters concerning difficulties affecting women.

- In addition, the Commission may review the existing provisions of the Constitution and other legislations affecting women and recommend amendments as remedial legislative measures in order to address any shortcomings, lacunae or inadequacies in such legislations.

- The Commission also takes up cases of violation of the provisions of the Constitution and of other laws relating to women with the appropriate authorities. Further, the Commission also acts on the basis of complaints or *suo moto* in relation to issues concerning deprivation of women; non-implementation of laws enacted to provide protection to women and also to achieve the objective of equality and development.

- The Commission is also entrusted with inspecting custodial institutions such as jails, remand homes, women's institutions, etc., where women are kept as prisoners or otherwise and if necessary, take up with the relevant authorities any remedial actions.

- In terms of conducting research, investigations and studies, the Commission may call for such special studies and investigations into specific problems or situations arising out of discrimination and atrocities against women and identify the constraints so as to recommend strategies for their removal. Additionally, the Commission may undertake

- promotional and educational research so as to suggest ways of ensuring due representation of women in all spheres and identify factors responsible for impeding their advancement, such as, lack of access to housing and basic services, inadequate support services and technologies for reducing drudgery and occupational health hazards and for increasing their productivity.

- It shall also participate and advise on the planning process of socio-economic development of women and also evaluate the progress of the development of women under the Union and the State.

- The Commission also funds litigation involving issues affecting a large body of women.

- Any other matter referred to by the Central Government.

- In addition, the Central Government has to consult the Commission on all major policy matters affecting women.

Therefore, the Commission is entrusted with a wide ambit of mandated purposes. At the same time, the Commission's functions gives it a character encompassing advisory, reporting, investigative, evaluative, remedial, educational and supervisory duties in relation to women's rights in India.

Complaints & Investigation Cell

The Complaints & Investigation Cell is an important component of the Commission in pursuance of a critical aspect of the powers enjoyed by the Commission especially relating to its powers as a civil court.

The Complaints & Investigation Cell acts on complaints received by it or which it has taken notice *suo moto*. It does not generally take up matters of the following nature[11]:

- Complaints that are illegible or vague, anonymous or pseudonymous;
- When the issue raised relates to civil dispute, between the parties such as contractual rights obligations and the like;
- When the issues raised relates to service matters not involving any deprivation of women's rights;
- When the issue relates to Labour/Industrial Disputes not involving any deprivation of women's rights, which are to be handled by the labour courts;
- When the matter is sub-judice before a Court/Tribunal;
- The Commission shall not inquire 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;
- When the matter has already been decided by the Commission;
- When the matter is outside the purview of the Commission on any other ground;
- When the issues raised relates to the property dispute.

The rationale for barring NCW's jurisdiction in some of the above-mentioned cases is that proceedings cannot be allowed to go on in parallel fora in the same matter at the same time.

Research & Studies Cell (R&S Cell)

The R&S Cell undertakes promotional and educational research on topics relating to issues impeding women's development. In addition, it promotes and encourages seminars, workshops, research studies, conferences, etc., by other organisations on issues related to gender equality and women empowerment.

Legal Cell

The Legal Cell of the Commission reviews legislation, undertakes specific legal studies and makes recommendations regarding enactment of new legislations or amendment of existing ones concerning women. In addition, the legal cell conducts conferences, seminars, workshops, public hearings, etc., on various issues including for the purpose of spreading legal awareness.

Conclusion

The Commission on the status of women in India, in its report submitted in 1974, recommended the establishment of the National Commission for Women to protect women's rights. It was established under the National Commission for Women Act, 1990 which come into force on 31st January 1992. The National Commission for Women consists of a Chairperson, five Members and a Member Secretary. The National Commission for Women is entrusted with a number of functions which include, among others, complaints redressal, law and policy reform, research. It has an advisory, reporting, investigative, evaluative, remedial, educational and supervisory duties in relation to women's rights in India. While trying individual complaints, it has the powers of a civil court.

INDIAN CONSTITUTIONAL FRAMEWORK; ARTICLES 14, 15 AND 16 OF THE INDIAN CONSTITUTION AND WOMEN'S RIGHTS

- Introduction
- The Constitution of India
- Article 14
- Article 15
- Article 16

Introduction

The Constitution of India is the result of a long and hard fought quest for freedom and self-determination. The essence of the Constitution, or the pillar as it may be called, is Part III containing the Fundamental Rights. There are six key fundamental rights:

Right to Equality (Articles 14 to 18)
Right to Freedom (Articles 19-22)
Rights against Exploitation (Articles 23-24)
Right to Freedom of Religion (Articles 25-28)
Cultural and Educational Rights (Articles 29-30)
Right to Constitutional Remedies (Article 32)[1]

Under the broad spectrum of the Right to Equality, Articles 14, 15 and 16 collectively represent the general principles of equality before law and non-discrimination, while Articles 17-18 seek to further the cause of social equality.

The Constitution of India

Article 14

> While 'equality before law' may be interpreted as a negative concept that implies the absence of any special privileges attached to certain individuals and equal subjection of all classes to the ordinary law of the land, the concept of 'equal protection of the laws' denotes a positive understanding that implies equality of treatment under equal circumstance

, the concept of 'equality before law' as enumerated in Article 14 is not an absolute rule, and there are a number of exceptions to it. For instance, Article 361 of the Constitution attaches certain privileges and immunities to the offices of the President of India or the Governor of a State. Under Article 361(2), no

criminal proceedings can be instituted or continued against the President of India or the Governor of a State during his or her term in office. Ministers, Members of Parliament and State Legislative Assemblies (MPs and MLAs) also enjoy a number of privileges and immunities so as to facilitate the smooth discharging of their responsibilities. Under Article 359(1) when a Proclamation of Emergency is in operation, the President may issue an Order whereby the enforcement of Article 14 may be suspended during the period in which the Proclamation is in force. Moreover, under the dictates of international law, foreign diplomats enjoy immunity from being prosecuted under the domestic law.

Equal Protection of the Laws

The notion of 'equal protection of the laws' is inspired by the American Constitution. It implies that the same law shall be applied to all those who are similarly situated. As per the scope of Article 14, (a) equal protection means equal protection under equal circumstances; (b) the State can make reasonable classification for purposes of legislation; (c) there must be a presumption of reasonableness in favour of the legislation; and (d) the burden of proof is on those who challenge the legislation.[7]

Article 14 prohibits hostile classification by law and is directed against the discriminatory class legislation. But it does not prohibit reasonable classification. Classification to be reasonable must fulfill the following two conditions: (1) The classification must be founded on an intelligible differentia which distinguishes persons or things that are grouped together from others left out of the group; and (2) The differentia must have a rational relation to the object sought to be achieved by the Act.

In Air India v. Nergesh Meerza[8], the Court was faced with questions of the constitutional validity Regulations 46(1)(c) and 47, which provided for the termination of services of female airhostesses upon being married or first pregnancy, whichever occurred earlier. These regulations forced them to retire at an age earlier than their male counterparts. The Court struck the impugned regulations, stating that the thought there was an intelligible differentia on the basis of sex, the classification did not have any nexus with the object of the Act; it was arbitrary and unreasonable, thereby violating Article 14.

Article 15

Article 15 of Part III of the Constitution is extremely significant as it prohibits discrimination on the grounds of religion, race, caste, sex or place of birth. However, unlike Article 14 that protects allpersons whether they are citizens or aliens, the scope of Article 15 extends only to the citizens of India.

In ***Anjali Roy v. State of West Bengal***[17], the petitioner finished her intermediate studies and wanted to pursue her Honors at Hooghly Mohsin College, an all-boys institute. When she applied, she was redirected to the newly established Women's College nearby; merely 3 years old, it did not have an honors course, neither were the educational facilities satisfactory. Faced with the question of constitutional validity, under Article 15(1), of the Order that restricted the admission of women into the aforementioned all boys' honors college, the Court relied on its misunderstood, extended and inappropriate application of Article 15(3). The court stated that the new women's college amounted to a 'special provision' and that Roy "*was not refused admission merely because she was a woman,but because [of] a scheme of better organisation of both male and female education (...) which covered development of the Women's College as a step towards the advancement of female education and also relieving the pressure on the [men's college] which was a mixed college."*[18]Thejudgment has led Atrey to argue that in the court's "final analysis, the basis of the Court's decision is not sex coupled with another ground which justified discrimination, but sex coupled merely with other organisational considerations which defeats a finding of sex discrimination."
(Anjali Roy v. State of West Bengal, AIR 1952 Cal 825.)

Article 16

Article 16 of the Constitution guarantees equality of opportunity to all citizens in matters of public employment. Clause 1 of the Article states – *There shall be equality of opportunity for all citizens inmatters relating to employment or appointment to any office under the State*.

Positive Discrimination

Although Article 16 guarantees all citizens equal opportunity in matters of public employment, it also incorporates the need to make special provisions for backward classes keeping in line with the spirit of social equality enshrined in the Constitution. The notion of 'backward class' can also extend so as to be applicable to women. Clause 4 of the Article states – *Nothing in this Article shall prevent theState from making 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.*

In ***Government of Andhra Pradesh v. P.B. Vijayakumar***,[24] the State Government passed an order, Rule 22-A(2) of which provided for a 30% of reservation of seats for women, for posts for which men and

women were equally suited. The purpose of the order was to improve the scarce presence of women in public offices. The Rule was challenged on the grounds that the rule made an arbitrary classification that seriously affected all unemployed males in the State of AP, therefore, was is in violation of Articles 14, 15 and 16. The Court looked at the object and scope of Article 15(3), which recognizes the fact that women have been socially and economically handicapped for centuries; in order to rectify this situation, it is imperative to increase women's access to job opportunities. The central idea behind 15(3) is to bring effective equality between the two sexes. Special provisions help improve women's participation in all activities that come under the supervision or control of the State. These provisions include affirmative actions, as well as reservations. Unlike other systems of reservation, this rule served as an administrative guideline for the selection of candidates who were equally meritorious. After a harmonious reading of Articles 14, 15 and 16, the Court upheld the validity of the impugned rule.

(Government of Andhra Pradesh v. P.B. Vijayakumar, AIR 1995 SC 1648.)

Conclusion

The Constitution of India, under Articles 14, 15 and 16, is deeply committed to the right to equality as a fundamental right. The Articles guarantee equality before the law and equal protection of the laws (Article 14), prohibition of discrimination on the grounds of religion, race, caste, sex or place of birth (Article 15), and equality of opportunity in matters of public employment (Article 16). However, the right to equality under the Constitution also allows the State to make positive discrimination in favour of certain classes of citizens such as women, children, socially and educationally backward classes, scheduled castes and scheduled tribes. The founding father of the Indian Constitution, Dr B.R. Ambedkar was of the view that in order to be lasting, social reform must precede political reform and that without according political power to the Depressed Classes their status would not improve.[26] Also, it is important to note that the right to equality loses its reality if all the citizens do not have equal facilities of access to the courts for the protection of their fundamental rights. The fact that these rights are guaranteed in the Constitution does not make them real unless legal assistance is available for all on reasonable terms.

UN CONVENTION ON THE RIGHTS OF CHILD, 1989

Synopsis

- Introduction
- Objectives of *UN Convention on the rights of the child*(UNCRC), 1989
- Provision for Rights of Child in *UNCRC,1989*
- Summary

Introduction

"The child, by reason of his physical and mental immaturity needs special safeguards and care including appropriate legal protection before as well as after birth". *-Declaration on the rights of thechild, 1959.*

The child cannot express as an adult of its pain and hardship. "Health is a state of complete physical, social and mental well-being and not merely an absence of disease or infirmity" says WHO. Due to poverty, parental illiteracy, social and economic backwardness nations many a children today are unable to be born healthy and develop in full sense. Projections on child statistics are very alarming.

Almost 70 million children may die before reaching their fifth birthdays – 3.6 million in 2030

Children in sub-Saharan Africa will be 10 times more likely to die before their fifth birthdays than children in high-income countries

Data from a range of low- and middle-income countries show that around 120 million girls under 20 years of age (about one in 10) have been subjected to **forced sexual intercourse orother forced sexual acts**.

Globally, an estimated 230 million children currently live in countries and areas affected by **armed conflict** and tens of thousands of children each year are recruited and used by armedforces and armed groups

168 million children (representing 11 percent of all children) are engaged in child labour with 50 percent working in hazardous conditions.

About one-third of women aged 20–24 years in the developing world were married as children and approximately 30 million girls are at risk of female genital mutilation/cutting (FGM/C). Approximately 2 million children continue to live in residential care instead of with families[1]

International states thought of child's protection from these and many hazards since a long time. *The United Nations Convention on the rights of the child*, 1989 came into force by taking an initiativefrom earlier conventions. *The child labour convention adopted in 1919, Geneva declaration of therights of the child 1924, Universal Declaration of Human rights 1948, Declaration of the rights of the child adopted by the General Assembly on 20th Nov1959, Minimum age convention 1973 No 138, International Convention on Economic social and cultural rights, 3 March 1966, International Convention on Civil and Political rights 23 March 1968, Declaration of Alma Ata in 1978, Convention on the elimination of All Forms of Discrimination Against Women (CEDAW) 1979, Declaration on the right to development, 1986, Convention on the rights of the child adopted and opened for signature, ratification and accession by general assembly resolution 44/25 of 20 November 1989 (entered into force 2 September 1990 in accordance with* ***Article*** *49). Also World Summit 1990 and The worst forms of child labour convention 1999* came into force to protect the right of the child affected dueto various socio-economic and cultural conditions of many countries.

Objectives of *UN Convention on the rights of the child* (UNCRC), 1989

UN Convention on the rights of Child (UNCRC), 1989 aims at such rights of the child which will be"the foundation of freedom, justice and peace" 'treating all the human beings as members of the human family" (Preamble CRC, 1989). These objectives are in fact goals of many early international initiatives. These are:

- Recognition of inherent dignity and of equal and inalienable rights for the child
- Entitlement of rights to all without discrimination of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status
- "Special care and assistance" for the child owing to its' physical and mental immaturity" and "appropriate legal protection" before and after its birth
- Aiming at promotion of social progress and better guards of life

- To see that the child is brought up in family environment, in an atmosphere of happiness, love and understanding

- To see that family as a fundamental group be afforded the necessary protection and assistance such that it stands for well-being of all, particularly children.
- To see that the child lives as an individual with the spirit of peace and ideals
- Giving due importance to the traditional and cultural values to help harmonious development of child
- Sensing the need that "there are children living in exceptionally different conditions all over the world who need special attention" and
- Recognition for the need for international co-operation everywhere with particular reference to the children in developing countries

Provision for Rights of Child in *UNCRC,1989*

The convention on the rights of the child, taking an initiative from earlier conventions and certainlegal principles related to the welfare and foster placement and adoption and referring itself to the minimum rules for the administration of justice, and also declaration on the participation of women and children, developed its sacred goals and objectives. It aims at such rights of the child which will be "the foundation of freedom, justice and peace" 'treating all the human beings as members of the human family" (Preamble CRC, 1989).

Keeping in the view these aims, the text of the convention is dived into three parts. The **Part I** deals with the nature of rights described in 41 **Article**s; **Part II** deals with the progress report of child by parties to the convention. Articles 42 to 45 deal with the establishment of select committee with members of high moral standing and its functions. The countries should submit report within two years of the entry into force of the convention and thereafter for every five years to the select committee.. The **Part III** that constitutes **Article**s 46-54 deals with the proposed amendments, by state parties, that may be enforced basing on the majority of states adopted them. Hence according to the convention once a state (a nation) becomes a party to the convention it is obligated to see that following provisions for the rights of the child are ensured in its national states. Before entering into the details of the rights assured in the Convention one has to look at one significant aspect of convention. Through **Article 3 of Part I** of the convention importance given to child is explicit:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

There are 41 **Article**s in the part 1 of the convention stating and detailing the rights of the child. For the sake of convenience the present study is done looking at the rights under four categories as – ***'Right to survival'***, '***Right to development'***,' ***Right to participation'*** and ***'Right to protection'.*** Weshall now go into the details of the provisions under these four categories of rights for the child. We

will see further, the obligation of the state parties to convention to provide for the rights in the four categories the children of their nations.

A. Essential Articles (for all categories of rights):

Definition of the child:

As per the convention on the rights of the child, "a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier" –**Article 1**

Right to equal treatment

The convention provides for child's right to equal treatment through its **Article 2 (1)** that states that the state parties to the convention shall respect the child without discrimination, irrespective of child's or his or her parent's / legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth, or other status. The convention also takes appropriate measures to protect the child against discrimination or punishment on the basis of the status, activities, expressed opinions or beliefs of the child's parents, legal guardians or family members-**Article 2 (2)**

Right to survival and health:

The convention provides for child's right to survival, life, and standard of health, nutrition, adequate standard of living and identity, name and nationality and equal treatment.

Right to life:

The convention makes the state parties to recognize every child's inherent right to life **(Article 6 (1))** and to ensure the maximum extent possible the survival and development of the child **(Article 6(2)).**

Right for parental care:

- Makes parties to the convention to ensure the child with care from parents, legal guardians-**Article 3 (2**)

- Ensures that such care shall conform with the standards established by competent Authorities- **Article 3 (1)**

- Makes parents or others legally responsible for the child to provide appropriate guidance in a manner consistent with the evolving capacities of the child- **Article 5**

Right to preserve identity, family relations name, nationality

- Respects the child's right to preserve his or her identity, nationality, family relations- **Article8 (1)**
- Provides for appropriate assistance and protection when a child is illegally deprived of his/her identity- **Article 8 (2)**
- Sees that the child shall not be separated from parents against their will unless the judicial review determines so in such cases that involve neglect or abuse of the child by parents-

    - **Article 9 (1)**
- Obligates state parties (under **Article** 9 paragraph (mentioned above) to treat the applications by a child or his/ her parents to leave a state for the purpose of reunification in a human and positive sense- **Article 10(1**)
- To take measures to combat the illicit transfer and non-return of children abroad- **Article11(1)**
- To promote bilateral or multilateral agreements in the above referred- **Article 11(2**)
- Provides for appropriate protection for a child who is considered as a refugee in accordance with international law or domestic law- **Article 22(2)**
- Provides for the child to trace the parents or other members of the family of any refugee child through intergovernmental or non-governmental organization- **Article 22(2)**

Right to standard health, standard living and nutrition:

- Makes state parties to recognize the right of the child to the enjoyment of highest attainable standard of health and to provide for facilities for the treatment of illness and rehabilitation of health- **Article 24 (1)**

- Provides for the full implementation of this right- **Article 24 (2)** in particular:
- To diminish infant mortality **(2(a))**
- For primary health care **(2 (b))**
- Nutritious food, clean and drinking water, to combat disease and malnutrition,
    - environmental pollution **(20(c))**
- For appropriate pre-natal and post-natal health care for another **(2 (d))**
- To provide information and education of basic knowledge of child health and nutrition, of the advantages of breastfeeding, hygiene and environmental sanitation and the prevention of accidents **(2(e))**
    - To develop preventive health care, guidance for parents and family planning education and services **(2(f))** and
- Provides for care to abolish traditional practices prejudicial to the health of children-

    - **Article24 (3)**
- Provides for a periodic review of the treatment for the purpose of care, protection of his /her physical or mental health -**Article 24 (3)**
- Recognizes the right of every child to a standard of living for the child's physical, mental, spiritual, moral and social development- **Article 27 (1)**
- To secure conditions of living- **Article 27 (2)**
- Provides for measures to assist parents and others for child's nutrition, clothing and housing-

Article 27 (3)

- Takes measures for recovery of maintenance for the child from the parents or other persons who are within the state and from abroad; also holds that state parties shall promote accession to international agreements- **Article 27 (4)**

6UNICEF, 2016, **The State of Children**: **A fair chance for every child,** at https://www.unicef.org/publications/files/UNICEF_SOWC_2016.pdf, Accessed On 6TH AUGUST 2017

Rights for the disabled child

- Recognizes that a mentally or physically disabled child should enjoy a full and decent life, in conditions, which ensure dignity, promote self-reliance and facilitates the child's active participation in the community- **Article 23 (1)**
- Recognizes that special care and assistance be provided free of charge subject to available resources to the eligible child- **Article 23 (1)**
- Provides for effective access to education, training, health care services, rehabilitation services, preparation for employment opportunities and recreation opportunities conducive to cultural and spiritual development- **Article 23 (4)**
- Obligates state parties to promote the spirit of international cooperation, to exchange appropriate information on preventive health care, methods of rehabilitation, education and vocational services keeping in view of the needs of developing countries- **Article 23 (4)**

Right to development

This category of rights includes child's rights to:

- Parental Support for early childhood development
- Adoption /alternative care
- Provisions for refugee child
- Social security
- Education
- Respect for child's personality
- Leisure
- Recreation
- Cultural Activities

Right to parental support for early childhood development

- Obligates states parties shall to ensure the maximum extent possible the survival and development of the child- **Article 6 (2)**

- Provides for parental responsibility for upbringing and development of the child- Parents or, as the case may be, legal guardians, have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern - **Article18 (1)**
- Insists State parties to render appropriate assistance to parents and legal guardians in performance of their child-rearing responsibilities and to ensure the development of institutions and facilities and services for children-Article 18(2) and
- Obligates state parties to take appropriate measures to ensure that children of working parents have the right to benefit from child-care services and facilities - **Article 18(3)**

On adoption / alternative care:

- Provides for special protection by the state to the children who are temporarily or permanently deprived of his or her family- **Article 20 (1)**
- Provides for alternative care for the child in accordance with the national laws- **Article 20 (2)**
- Provides for foster placement and also to pay due regard when considering solutions, to the child's ethnic, religious, cultural and linguistic backgrounds- **Article 20 (3)**
- Recognizes and permit the system of adoption **(Article 21**). And in this regard further.
- Ensures adoption of child is authorized in accordance with applicable law **(21 (a))**

- Recognizes the inter-country adoption when the child cannot be placed in a foster oradoptive family in the child's country of origin **(21 (b))**

- Ensures that the child in the country adopted enjoys safeguards and standardsequivalent to those of national adoption **(21 (e))**

- Takes measures that inter-country adoption does not result in improper financial gain**(21(d)**

- Promotes bilateral or multilateral arguments to ensure the placement of child in another country is carried out by competent authorities- **Article 21(e)**

Rights of the refugee child

- Takes the measures for a child who is seeking refugee status, whether accompanied or unaccompanied by his her parents to receive appropriate protection and humanitarian assistance- **Article 22 (1)**
- To provide cooperation in any effort by the united nation's and other intergovernmental organizations to trace the parents or other members of family, of a refugee child- **Article22(2)**

Right for social security

- Makes state parties to recognize for every child's right to benefit from social security,including social insurance in accordance with their national law- **Article 26*Right to education***
- **Article 28** makes the parties to the convention to recognize the child's right to education. Further, basing on equal opportunity to be given for the child the convention:
  o Makes primary education compulsory

  o Encourages the development of secondary education o
  Makes higher education accessible to all
  o Makes educational and national information and guidance available and accessible to allchildren
  o Takes measures to encourage regular attendance of schools and to reduce the drop-out rule

Right to respect for child's personality

- **Article 29(1**) deals with the **guidelines** to be followed by state parties for the development ofthe child through child's right to education that has

  - Respect for child's personality, talents, and mental and physical abilities
  - Respect for human rights and fundamental freedoms
  - Respect for child's parents, cultural identity, language and values of country
  - Understanding of 'peace', 'tolerance', 'equality of sexes', friendship among all
  - Respect for natural environment

Right to leisure and recreation

- Recognizes the child's right to leisure, to engage in play and recreational Activities, to participate in cultural life and arts- **Article 31(1)**
- To participate fully in cultural life -**Article 31 (2)**

Right to participation

This category of right to participation includes:

- Respect for the views of the child
- Right to freedom of expression
- Right to access for appropriate information, and freedom of thought
- Right to conscience and religion etc.,

Right to expression

- Provides for expression of his or her own views giving due weight in accordance with the age and maturity of the child- **Article 12 (1)**
- Provides for an opportunity to be heard in any judicial and administrative proceedings affecting the child- **Article 12 (2)**
- Provides for the right to freedom of expression that includes right to seek, require and impart information and ideas of all kinds through any media of child's choice-**Article 13 (1)**
- Holds that the above right to expression is subject to such restriction that it respects therights of others-**Article (13(2a)** and protects the national security or of public order-**Article(13 (2b)**

Right to Conscience and religion

- Respects the right of child to freedom of thought, conscience and religion- **Article 14 (1)**
- Respects the rights and duties of parents and legal guardians to provide direction to exercise this right- **Article 14 (2)**
- Provides for child's freedom to religion subject to limitations to protect the safety order,health or morals or the fundamental rights and freedom of others- **Article 14 (3)*Right to freedom of association***
- Recognizes the child's right to freedom of association and peaceful assembly- **Article 15 (1)**

- Holds that no restrictions be placed on the exercise of these rights other than those imposed by law- **Article 15 (2)**
- Prohibits unlawful attacks/interferences and states that no child be subjected to arbitrary or unlawful interference with his/her privacy, family, home or correspondence- **Article 16 (1)**
- Provides for child with his/her right to protection against the interferences or attacks- **Article16 (2)**

Right to access to information from media

- Provides to recognize the important function of media from diversity of national and international resources- **Article 17(1).** To this end it also provides cultural benefit of the child in accordance with the spirit of **Article 29** that deals with right to education as preparation for development of personality -**Article 17 (a)**
- Encourages international co-operation- **Article 17 (b)**
- Encourages production of children's books- **Article 17 (e)**
- Encourages mass media to have regard to the linguistic needs of child from minority groups- **Article 17 (d))**
- Encourages the guidelines appropriate for protection against information and materialinjurious to his/her well-being- **Article 17 (e)**

Right to respect for child's background

- Provides for due regard for child's ethnic, religious, cultural and linguistic background **Article 20 (4)**
- Provides for right to enjoy his/her own culture, to prefer and practice his/her own religion, use his/her own language- **Article (30)**
- Provides for, right to participate in cultural, artistic life and also for equal opportunities in this regard- **Article 31, (2)**

Right to protection

In fact the term "child abuse" is inclusive of all sorts of exploitation of the child; it denotes, mistreatment, cruelty, ill-treatment, violence, maltreatment, neglect and misuse of the child.

However, the convention specifies each right to freedom from all sorts of ‘ human wrongs’ towards child and above all certain measures by state parties against exploitative use of children, through the provisions for child- care as:

Right to freedom from economic exploitation:

- Recognizes child’s right to protection from economic exploitation and from performing any work that is likely to be hazardous or to interfere with child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development- **Article 32(1)**
- Provides for legislative and administrative measures to provide for minimum age through, **Article 32 (a)**; for appropriate regulation, **32 (b)** and for appropriate penalties with referenceto employment of children, **32(c)**

Right to protection from illicit use of drugs:

- Provides for appropriate measures including legislative, administrative, social and educational measures to protect children from the illicit use of narcotic drugs and psychotropic substances as defined in the relevant international treaties and to prevent the use of children in the illicit production and trafficking of such substances- **Article 33**

Right to freedom from sexual abuse:

- Provides to protect the child form all sorts of sexual exploitation, sexual abuse- **Article 34.** Also provides for appropriate national, bilateral and multilateral measures against, **a**) coercion of child, b) exploitative use of child in prostitution and **c)** use of children inpornographic performance or materials

Right to protection from sale of or traffic in children:

- Provides for national, bilateral, multilateral measures to prevent the abduction of the sale ofor traffic in children- **Article 35**

Duty of state to protect the child from other forms of exploitation:

- **Article 36** of the convention holds that state parties should protect the child from otherforms of exploitation

Right to protection from inhuman or degrading treatment and neglect:

Ensures protection, from torture or cruel or inhuman degrading through **Article 37 (a); (b)** provides liberty in conformity with law, **(c)** provides for respect for the inherent dignity and **(d)** makes access to legal and other appropriate assistance as well as the right to challenge the legality of deprivation of liberty

Right to protection from armed conflicts:

- Provides for protection of children in case of armed conflicts to ensure respect for rules of international humanitarian law applicable to them through **Article 38 (1); (2)** ensures that children who have not attained the age of fifteen do not take part in hostilities, **(3)** takes measures to protect the children who have not attained the age of fifteen years from being recruited into their armed forces and **(4)** ensures protection of children who are affected byarmed conflicts

Provisions for state measures for reintegration of victims of any neglect:

- Insists states parties to take all measures to promote physical and psychological recovery and social reintegration of a child who is a victim of any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment,or armed conflicts- **Article 39**

Rights of alleged/accused child for dignity

- Obligates state parties to recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of child's sense of dignity and worth- **Article 40 (1**)

- **Article 40(2) (a)** states that no child shall be alleged as or accused of as having infringed thepenal law by reason of acts or omissions that were not prohibited by national or international law. And **Article 40 (b)** provides with certain guarantees for every child alleged or accused of penal law as:
    - To be presumed the child as innocent until proven guilty according to law
    - To be informed of charges against his/her and to have appropriate assistance for the preparation and presentation or his/her defence

- To have the matter determined without delay
- Not to be compelled to give testimony or to confess guilt
- To provide for a review of higher competent judicial body, is considered to have infringed of penal law
- To have free assistance
- To have privacy at all stages or proceeding

Provision for minimum age against infringement of law

- **Article 40(3)** provides for **(a)** establishment of minimum age for the children regardinginfringement of law **(b)** appropriate measures to deal with such children and to provide legal safeguards

Other provisions.

Provision for other dispositions as guidance, foster care etc

- **Article 40 (4**) obligates state parties to provide for children a variety of dispositions such ascare, guidance and supervision orders; counselling probation; foster care; education vocal training; alternative institutional care proportionate both to their circumstance and theoffence.

Scope for more conducive provisions within or without convention

- **Article 41** states that nothing in the present Convention shall affect any provision which aremore conducive to the rights of the child and which may be contained in **(a)** the law a state party; or **(b)** International law in force for the state

Obligation of international states for transmission of reports

When Part I, of the convention deals with the right of the child, Part II of the conventions makes the parties oblige to the select committee constituted as per the rules prescribed in the **Article 43** of the conventions, and to submit a report within two years after the entry into force of the Convention as per **Article 44 (1) (a)** and thereafter every five years as per **Article 44 (1) (b).** And **Article 44 (5)** insists that these reports, which are comprehensive, shall be submitted to the GeneralAssembly through economic and social council every two years**. Article 45(b)** of Part II provides for transmission of the reports to the specialized agencies of the United Nations Children Fund in order to transfer the effective implementation of the convention. The committee can also make suggestions and recommendations based on information received as per **Article 45 (d)**.

- Further, Part III of the convention in its **Article 46)** states that the present convention is open for signature by all states; also it is subject to ratification as stated in **Article 47.** The convention also provides for proposals for amendment and to file it with the Secretary-General of the United Nations through its **Article 50(1).** Further **Article 50(2)** states that the amendment adopted shall enter into to force when a two-thirds majority as approves it; from then onwards the amendment will be binding on those parties who have accepted it-states **Article 50 (3).**

- **UNCRC aims Relief of child from drudgery to development**

Part–III of the Constitution provides for the Fundamental Rights of the citizens. The Fundamental rights are inclusive Articles from 14 to Articles 35. Fundamental Rights include:

a. Right to equality
b. Right to freedom;
c. Right against exploitation
d. Right to freedom of religion and
e. Right to cultural and educational rights
f. Right to Constitutional Remedies

Summary

UN Convention on the rights of Child (UNCRC), 1989 aims at such rights of the child which will be"the foundation of freedom, justice and peace" 'treating all the human beings as members of the human family". In this module the provisions for the rights of child for survival& health, for development, protection and participation are dealt in length. Further UNCRC insists the state parties to be accountable to convention of child and to see all the children grow up as healthy individuals. In this process it also lays down parental responsibility and state's assistance to provide a healthy environment. A child needs good support mechanisms too in this context. Child rights study is not an exclusive study but is related to other issues as poverty of people and nations and literacy and health in broader categories.

Further reading:

1. Text of UNI International Convention on the Rights of Child(UNCRC), 1989

   www.unicef.orUnited Nations General Assembly (11th October 2002), Resolution adopted by the General Assembly [on the report of the As Hoc Committee of the Whole (A\S-

   27\19\Rev.1 and Corr. 1 and 21] S- 27\2. A World fit for children, Availed from: http://www.unicef.org/specialsession/docs_new/documents/A-RES-S27-2E.pdf[Accessed on 31st August, 2002

2. NALSAR University of Law (2001), Convention *on the Rights of the child-Andhra PradeshState Report,* 2001

3. Ramaswamy Gita, Child *and the law,* Andhra Pradesh Judicial Academy, 1996

THE NATIONAL COMMISSION FOR PROTECTION OF CHILD RIGHTS

NCPCR: Vision and Aims

The United Nations Convention on the Rights of the Child ("CRC") was adopted by the UN General Assembly and opened for signature, ratification and accession on 20 November 1989 and entered into force on 2 September 1990. India acceded to the CRC on 11 December 1992. The objective of the Convention is to give every child the right to survival and development in a healthy and congenial environment. The CRC makes it obligatory for State parties to take all necessary steps for the effective protection of children in addition to the responsibilities and obligations accepted through the CRC. [6]

Further, in May 2002, the UN General Assembly's Special Session on Children came out with an Outcome Document titled 'A World Fit for Children' which identified drivers of policies, goals, strategies and activities aimed at advancing the rights of children and identifying key areas for improvement in their overall development.[7] Also, the document set forth fresh quantitative and qualitative goals for children for the present decade relating to survival, health and nutrition, early childhood care and education, and child protection.

Together with the steps taken at UN and the national calls for an autonomous body dealing with children's rights, the National Commission for Protection of Child Rights ("NCPCR" or the "Commission") was constituted by the Government of India which came into existence in March 2007 in pursuance of the Commission for Protection of Child Rights Act, 2005 ("CPCR Act") to exercise and perform the powers and functions assigned to it under the CPCR Act. The CCPR Act provided for the establishment of National Commissions under Section 3 and State Commissions for Protection of Child Rights under Section 17.

According to the Citizen's Charter of NCPCR, its vision is to ensure that '[a]ll children enjoy their basic and inalienable rights i.e. survival, development, protection and participation in accordance with the Constitutional framework, law, policy and UNCRC [the United Nation Convention on the Rights of the Child], across the country'. Further, NCPCR's mission is '[t]o ensure that all laws, policies, programmes and administrative mechanisms are in consonance with the child rights perspective as enshrined in the Constitution of India as well as in, the United Nation Convention on the Rights of the Child, which India ratified in 1992'.[8]

Thus, the formation of the Commission with wide roles, responsibilities, duties and functions was a pivotal recognition of the need for a strong, independent and autonomous body tasked with overseeing effective protection of children and monitoring actions, policies and measures which could affect the interests and overall development of children in India.

Composition, Appointment of Members and Funding of the Commission

The provisions of the CCPR Act lay down various matters relating to the Commission.

In terms of the composition, the Commission is to consist of a Chairperson *who is a person ofeminence and has done outstanding work for promoting the welfare of children*[10]and sixMembers (out of which at least two must be women) who are *persons of eminence, ability,integrity, standing and experience, in, - (i) education; (ii) child health care, welfare or child development; (iii) juvenile justice or care of neglected or marginalized children or children with disabilities; (iv) elimination of child labour or children in distress; (v) child psychology or sociology; and (vi) laws relating to children.*[11]

Although, the appointments of Chairperson and the Members of the Commission is to be by notification of the Central Government; in case of Chairperson, the appointment has to be on the basis of the recommendation of a Selection Committee under the Chairmanship of the Minister-in-charge of the Ministry of Human Resource Development.[12]

Under Section 27 of the CCPR Act, the Commission is to receive funding for its activities by way of grants extended by the Central Government and under Section 28, State Commissions receive similar grants from the State Government for fulfilling the functions under the CCPR Act.

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1. National Plan of Action 2005 at p.50.

2. *Id.* at p.2.

3. *See* text of CRC.

4. *See* outcome document titled 'A World Fit for Children'.

Functions and Powers of the Commission

In its mandate for the protection of children, NCPCR takes on various roles depending on the legislation it is deriving its functions from. In addition to the CCPR Act, NCPCR is tasked with functions under other legislations concerning the interests of children such as under the POCSO Act, RTE Act, etc. In this section of the module, we will be reviewing the Commission's functions and powers under the CCPR Act, POCSO Act and the RTE Act.

Commission's functions and powers under the CCPR Act

As per the provisions of the CCPR Act, the Commission is tasked with varied roles of supervision, monitoring, investigation and inquiry, research, reporting, inspection, etc., relating to matters affecting the interest of children under its mandate.

Under Article 13(1) of the CCPR Act, the Commission is entrusted with performing the following functions:

- 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;
- present to be central government, annually and at such other intervals, as the commission may deem fit, reports upon working of those safeguards;
- inquire into violation of child rights and recommend initiation of proceedings in such cases;
- 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;

[1] Section 3(2)(a), CCPR Act.

[2] Section 3(2)(b), CCPR Act.

- 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;
- 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;
- undertake and promote research in the field of child rights;
- 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;
- 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;
- inquire into complaints and take *suo motu* notice of matter relating to :

    - deprivation and violation of child rights;
    - non-implementation of laws providing for protection and development of children;
    - 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 with appropriate authorities.
- such other functions as it may consider necessary for the promotion of child rights and any other matter incidental to the above functions.

One of the core functions of the Commission is to inquire into complaints of violations of child rights.[13] The complaints may be made to the Commission in any language listed in the 8th Schedule of the Constitution and there is no fee chargeable. The complaint must be clear, genuine, legible and not vague, trivial, frivolous, anonymous or pseudonymous. It should disclose a complete picture of the matter leading to the complaint and must not be related to

civil disputes such as property rights, contractual obligations, service matters and the like. Further, it must not be relating to any matter which is pending before any other commission duly constituted under the law or sub-judice before a court/ tribunal.[14] Finally, the complaint must not have already been decided by the Commission and must not be outside the purview of the Commission on any other grounds.

[3] Section 4, CCPR Act.

LEGAL FRAMEWORK FOR THE PROTECTION OF THE RIGHTS OF PERSONS WITH DISABILITIES

Synopsis

- Introduction
- Constitutional Framework Protecting the Rights of Persons with Disabilities
- Disability-specific legislations
- Conclusion

Introduction

Persons with disabilities have been facing discrimination, exclusion, marginalization as a result of which, they are unable to enjoy the full range of their human rights on par with others. This affects their right to education, health care, livelihood etc. They face significant physical, mental, environmental, attitudinal and other barriers in real life which forces them to live as second class citizens. This fact becomes clear when we review how many of our public premises (like Schools, hospitals, banks, post offices) are accessible to persons with disabilities and whether our transport systems have been designed to take care of the persons with special abilities.

The movement around the protection of rights of the physically and mentally 'specially-abled persons' has been a slow process where recognition of their rights in the public mind has been the biggest challenge. Nevertheless, the movement is finally emerging in the mainstream rights discourse leading to the current terminology of 'specially-abled persons' (*Divyangjan*). In terms of the numbers, as per Census 2011, there were 2.68 crore persons with disabilities which constitute 2.21% of the population.

While it is both appropriate and desirable that specially-abled persons should lead the march for the realization of their rights, since they have the experiential perspectives of day to day challenges due to disability; it is also true that like all other vulnerable, marginalised and excluded groups, they need active support and solidarity from the larger civil society.

Pre-1947, the perceptions around disability were driven by charity and welfare motives. Providing care was seen as a charitable thing to do for certain persons who were 'unfortunate' to be afflicted with physical and mental impairment affecting their daily lives and the leading of life 'normally'.

After independence, various organizations for persons with disabilities emerged in the country. Over

time, it was realized that there were two kinds of organisations working on disability rights issues – organisations*for* and *of* persons with disabilities.

The current century has witnessed the emergence of a movement of the poor disabled coming mostly from rural or semi-urban areas.

This movement is slowly gaining momentum under the banner of VikalangManchas. Currently, such VikalangManchas are operating in about ten or eleven states of the country and efforts are on to ensure convergence of these Manchas under the banner of RashtriyaVikalangManch. Contribution of such organisations in matters of delivering services must also be acknowledged.

At the same time, the legal framework for the protection of their rights has also undergone a shift in approach. It took almost 50 years since the independence for the enactment of a legislation specifically for the protection of rights of persons with disabilities. This was due to the international scenario calling for a human rights based approach to countering challenges of discrimination and access to services faced by specially-abled persons in their daily lives. Until the enactment of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act in 1995, the Constitution was the basis for such protection and promotion of their rights.

Therefore, it is important to understand the constitutional framework in the first place before analyzing certain key judicial judgments affecting the rights of specially-abled persons in India. Thereafter, we will move on to the international conventions, declarations, etc., which place obligations in this respect on India before examining the present legal regime governing the protection of the rights of specially-abled persons.

Constitutional Framework Protecting the Rights of Persons with Disabilities

It is common knowledge that international human rights law is based on the principles of equality, dignity, autonomy, and liberty/security. The Indian Constitution has also imbibed the spirit of these values. The Preamble to the Constitution clearly states, "…*secure to all its citizens; Justice, Social,Economic and Political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity and to promote among them all Fraternity assuring the dignity of the individual and the unity and integrity of the Nation*…."

Equality

Article14

Under the right to equality, the Constitution of India guarantees equality for all its citizens before law and equal protection of law.

Article 15 *and* ***Article 16***

These provisions prohibit discrimination on the grounds of "religion, race, caste, sex, place of birth or any of them."

Judicial Interventions

In ***Indra Sawhney v. Union of India*** **(1992 Supp (3) SCC)** the Apex Court examined the legality of reservation in favor of the disabled who are not clearly covered under Article 16 of the Constitution. The Court pointed out that "… mere formal declaration of the right would not make unequals equal.

To enable all to compete with each other on an equal plain, it is necessary to take positive measures to equip the disadvantaged and the handicapped to bring them to the level of the advantaged. Article 14 and Article 16(1) no doubt would by themselves permit such positive measures in favour of the disadvantaged to make real the equality guaranteed by them."

Disability-specific legislations

Disabilities Act, 1995 – A landmark Achievement of Disability Movement

The objectives of the *Persons with Disabilities (Equal Opportunities, Protection of Rights and FullParticipation) Act, 1995* are

(l) Promoting and ensuring equality and full participation of persons with disabilities and

(m) Protecting and promoting their economic and social rights.

The Act covers seven disabilities already mentioned in the introduction. The criteria for classification are medical and not based on the social perception of disability.

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 enforcement mechanisms envisaged in the Act include a Central Coordination Committee at the national level and a State Coordination Committee at the state level. It also includes Chief

Commissioner (Persons with Disabilities) at the national level and Commissioner (Persons with Disabilities) at the state level.

The critics of the PWD Act say that the Act lacks teeth and provides ample escape routes to the concerned government as some of its sections which provide for something concrete and tangible for persons with disabilities is prefixed or qualified with the clause – "the appropriate government and local authorities shall, within the limits of its economic capacity and development…….". However, thanks to the Indian judiciary that it has converted a relatively weaker Act into a stronger Act through its forward looking pronouncements.

The Rights of Persons with Disabilities Act, 2016

A Bill to replace it was introduced in the Parliament in 2014 and after due legislative process, the Rights of Persons with Disabilities Act, 2016 has been passed by both the Houses of Parliament in 2016. India signed the UN Convention on the Rights of Persons with Disabilities, 2006 and ratified it on 1 October 2007. This Act seeks to give effect to various provisions in the Convention on the Rights of Persons with Disabilities. It has increased the number of recognized disabilities from 7 to 21. It includes, among others, disability due to acid attacks, Thalassemia, Haemophilia, Muscular Dystrophy, Learning Disabilities and Parkinson's. Section 2 (c) of the Act defines "barrier'' as "any factor including communicational, cultural, economic, environmental, institutional, political, social, attitudinal or structural factors which hampers the full and effective participation of persons with disabilities in society". Section 2(h) further states that "discrimination" in relation to disability means "any distinction, exclusion, restriction on the basis of disability which is the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field and includes all forms of discrimination and denial of reasonable accommodation". Section 2(s) defines a "person with disability" as a "person with long term physical, mental, intellectual or sensory impairment which, in interaction with barriers, hinders his full and effective participation in society equally with others". Section 2 (r) of the Act defines a "person with benchmark disability" as "a person with not less than forty per cent. of a specified disability where specified disability has not been defined in measurable terms and includes a person with disability where specified disability has been defined in measurable terms, as certified by the certifying authority".

Section 32 (1) of the Act stipulates that "All Government institutions of higher education and other higher education institutions receiving aid from the Government shall reserve not less than five per cent seats for persons with benchmark disabilities".

Section 34(1) of the Act provides for 4% reservation in Government jobs with one per cent each in the categories of

- blindness and low vision;
- deaf and hard of hearing;
- locomotor disability including cerebral palsy, leprosy cured, dwarfism, acid attack victims and muscular dystrophy;
- One per cent reservation has been provided in
- autism, intellectual disability, specific learning disability and mental illness;
- multiple disabilities from amongst persons under clauses (a) to (d) including deaf-blindness in the posts identified for each disabilities

National Trust for the Welfare of Persons with Autism, Cerebral Palsy, Mental Retardation, and Multiple Disabilities Act 1999

Persons with disabilities are not a homogenous group. There is a great deal of heterogeneity and diversity amongst persons with disabilities. Certain groups among the disabled are more vulnerable than others. Therefore the enactment of the *National Trust for Welfare of Persons with Autism,Cerebral Palsy, Mental Retardation and Multiple Disabilities Act, 1999* aims to fulfill a commondemand of families seeking a reliable arrangement for their severely disabled wards. The specific objectives of the Act include:

The salient features of the act are:

(k) It mandates the creation of a Local Level Committee comprising a District Magistrate along with one representative from a registered organization and one person with a disability. The Committee is vested with the authority to decide upon the applications of legal guardianship.

(l) It provides for the manner in which legal guardians are to be appointed.

The conditions of eligibility, the order of eligible applicants, the disqualifications of applicants are contained in Regulations 11-14.

(k) It lays down the duties of the guardian who has to furnish periodic returns to the LLC about the assets of the ward and their disposal in his hands. Similarly, the Committee too is required to maintain inventory and annual accounts of the property and assets, claims and liabilities submitted by the legal guardians to it. The overall supervision of this Act is vested with a National Trust Board.

The Government has contributed Rs. 100 crore to the trust fund. The interest earned is used in supporting the mandated activities. In short, the National Trust Act provides for appointment of guardians for those persons belonging to these four named categories of disabilities who need guardianship. The provision of guardianship is essentially intended to address the mismatch between the intellectual and biological age of a person with intellectual disabilities. Besides, the National Trust created under the said Act also implements or supports the implementation for the benefit of persons belonging to the said four categories of disabilities.

Mental Health Act, 2017

The Mental Health Act 2017 in its Preamble states that it seeks to "provide for mental healthcare and services for persons with mental illness and to protect, promote and fulfil the rights of such persons during delivery of mental healthcare and services and for matters connected therewith."It further states that this legislation to seeks to align and harmonise the existing laws with the UN Convention on the Rights of Persons With Disabilities 2006 which India signed and ratified on 1 October 2007. Section 2(s) of the Act defines "mental illness" as a "substantial disorder of thinking, mood, perception, orientation or memory that grossly impairs judgment, behaviour, capacity to recognise reality or ability to meet the ordinary demands of life, mental conditions associated with the abuse of alcohol and drugs, but does not include mental retardation which is a condition of arrested or incomplete development of mind of a person, specially characterised by abnormality of intelligence".

The Mental Health Act decriminalizes suicide. Under Section 115 (1) of the Act, any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under section 309 of the Indian Penal Code. Section 115(2) outlines the duty of the Government to provide care, treatment and rehabilitation to such a person to reduce the risk of recurrence of attempt to commit suicide.

The Mental Health Act decriminalizes suicide. Under Section 115 (1) of the Act, any person who attempts to commit suicide shall be presumed, unless proved otherwise, to have severe stress and shall not be tried and punished under section 309 of the Indian Penal Code. Section 115(2) outlines the duty of the Government to provide care, treatment and rehabilitation to such a person to reduce the risk of recurrence of attempt to commit suicide.

Rehabilitation Council of India Act, 1986

The Rehabilitation Council of India was set up by the Government of India in 1986 to regulate and standardize training policies and programmes for rehabilitation of persons with disabilities.

National Policy on Disability, 2006

The Government of India has adopted a comprehensive national policy on disability covering critical areas like education, employment, support services, access, social security, etc. However, this policy also needs to be comprehensively modified in the light of the UNCRPD. Somehow, the said national policy is nearly silent on civil and political rights of persons with disabilities. Unfortunately, most of the states of India do not have a state level disability policy in place yet. A few states however, are in

the process of evolving such a policy. The state of Chhattisgarh now has a state level policy on disability.

International Human Rights Instruments/Norms/Standards On Disability

Part of the human family as they are, persons with disabilities are as much entitled to human rights and fundamental freedoms as anyone else. In this part, we shall take a quick and cursory look at examples of soft law/non-binding disability-specific human rights instruments, and discuss at some length the United Nations Convention on the Rights of Persons with Disabilities (UNCRPD) which is a binding hard law instrument on the rights of persons with disabilities.

Soft law/non-binding disability specific human rights instruments

Following are some examples of prominent soft law instruments on the rights of persons with disabilities:

- Declaration on the Rights of Mentally Retarded Persons, 1971
- Declaration on the Rights of Disabled Persons, 1975
- WPA 1981
- Standard Rules 1993
- Asian and Pacific Decade 1993-2002
- Biwako Millennium Framework 2003-2012
- ILO Discrimination (Employment & Occupation) Convention 1958

Hard law/binding human rights instrument at the international level

United Nations Convention on the Rights of Persons with Disabilities (UNCRPD)

The general assembly of the United Nations unanimously adopted the UNCRPD and its optional protocol on the 13th of December 2006. This international treaty together with its optional protocol was opened for signature on the 30th of March 2007. The UNCRPD (and not its optional protocol) was ratified by India in October 2007. This convention recognizes persons with disabilities as subjects having human rights and fundamental freedoms and not as objects needing mere medical care and social protection. It further spells out that disability is an evolving concept and that persons with

disabilities are a part of human diversity and humanity.

The UNCRPD is a legally binding instrument. The purpose of this convention is to protect, promote and ensure to persons with disabilities the full and effective enjoyment of all human rights and fundamental freedoms on an equal basis with others and also to promote respect for their inherent dignity.

Article 3 of the said convention envisages general principles which include:

- Respect for dignity, autonomy, freedom to make one's own choices, and independence of persons
- Non-discrimination
- Full in effective inclusion and participation in society
- Respect for difference and acceptance of persons with disabilities as part of human diversity and humanity
- Equality of opportunity
- Accessibility
- Equality between men and women
- Respect for the evolving capacity of children and their right to preserve their own identities

Article 5 of the convention provides for non-discrimination.

It goes without saying that the UNCRPD makes it obligatory for the states parties to actively consult with and involve persons with disabilities in the decision-making processes, especially in respect of matters which affect their lives. The convention itself is informed and influenced by the expertise of lived experience of persons with disabilities. It comprises 50 articles.

Conclusion

The persons with special abilities or divangjan must enjoy full range of their human rights on par with others. There should not be any barriers to their effective participation. The constitutional and international human rights provisions regarding PWDs must be fully implemented.

NATIONAL COMMISSION FOR SCHEDULED TRIBES

Synopsis

- Introduction
- Formation of a statutory National Commission for Scheduled Tribes
- Mandate and Vision of the National Commission for Scheduled Tribes
- Functions, duties and powers of the Commission
- Organisational Set-up of NCST
- Summary

Introduction: Basis for a national body for the protection and promotion of human rights of Scheduled Tribes in India

Scheduled tribes (STs) are the communities within the country who have for long inhabited mainly forest land where they are an integral part of the land and the eco-system. However, due to their geographical disconnect with the other population, they have been suffering from extreme economic and social backwardness, thus requiring special consideration for safeguarding their interests. These communities have been notified as 'Scheduled Tribes' under Articles 341(1) and 342(1) of the Indian Constitution.

Their well-being depends heavily on the occupation of their traditional lands, which have been inhabited through generations by the members of their communities. Their very existence in addition to the existence of their culture depends on these lands. Therefore, their concerns are also surrounding these issues. STs face discrimination from the larger society due to their low literacy levels and non-participation in the formal economy. At the same time, they face threat of displacement from the mining operations in their lands since they usually inhabit forest land which are rich in mineral resources. These necessitate a human-rights based protection mechanism for STs which is sought to be provided in the form of the National Commission for Scheduled Tribes (NCST).

The website of NCST acknowledges the above on its website where its stated that – "*The framers ofthe Constitution took note of the fact that certain communities in the country were suffering from extreme social, educational and economic backwardness arising out of age-old practice of*

untouchability and certain others on account of this primitive agricultural practices, lack of infrastructure facilities and geographical isolation, and who need special consideration for safeguarding their interests and for their accelerated socio-economic development."

Formation of a statutory National Commission for Scheduled Tribes

The course of the National Commission for Scheduled Tribes mirrors the course of the formation of an independent National Commission for Scheduled Castes.

Initially, under the original provisions of Art.338 of the Constitution, a Special Officer (Commissioner) for SC&ST appointed was designated the duty to investigate all matters relating to the Safeguards for SCs and STs in various Statutes and to report to the President upon the working of these Safeguards. In 1987, the Govt. (through another Resolution) modified functions of the Commission (making it as a National Level Advisory Body) to advise the Govt. on Broad Policy Issues and levels of Development of SCs and STs. Thereafter, a National Commission for SCs & STs came into being on 12-3-92 (after the Constitutional (65th) Amendment); Act of 1990. Finally, as per the provision of the Constitution (89th) Amendment Act, 2003, through a notification dated 19-2-2004, the erstwhile National Commission for SC & ST was replaced by two Commissions viz; National Commission for Scheduled Castes (NCSC) and National Commission for Scheduled Tribes (NCST).

Mandate and Vision of the National Commission for Scheduled Tribes

The National Commission for Scheduled Tribes was set to monitor all matters relating to the implementation of the safeguards provided for the Scheduled Tribes under the Constitution or under any other law or under any order of the Government and to participate and advise on the planning process of socio-economic development of the Scheduled Tribes.

The Vision of the NCST[1] is stated as - "*The National Commission for Scheduled Tribes with utmost zealand dedication shall uphold its mandate as entrusted by Constitution of India. In doing so, the Commission shall endeavor to bring about equality in the society by protecting the Constitutional, Socio-economic, Legal and Civil Rights of the Scheduled Tribe population of the*

Nation and shall facilitate easy access and effective delivery of justice to the Scheduled Tribe of the country."

The Mission Statement of NCST presents the outlook and strategy of the Commission in the following words:

"To evaluate the process of all round development of Scheduled Tribes.

To monitor the implementation of the Constitutional and Legal safeguards given to the members of the Scheduled Tribes.

To look into complaints and conduct enquiries in cases of violation and deprivation of rights and socio-economic safeguards of the Scheduled Tribes.

To give recommendations to the Central and State Governments regarding the protection of rights and furtherance of the safeguards of the Scheduled Tribes.

To proactively make recommendations for further empowering the Scheduled Tribes.

To work as an agent of justice and rights – without fear or favour, in the supreme interest of the Scheduled Tribes in consonance of the constitutional provisions."[2]

Functions, duties and powers of the Commission

Under Article 338A, clause (5), NCST is entrusted with the following functions and duties*:* -

- *To investigate & Monitor matters relating to Safeguards provided for STs under the Constitution or under other laws or under Government Order, to evaluate the working of such Safeguards;*

- *To inquire into specific complaints relating to Rights & Safeguards of STs;*

- *To participate and Advise in the Planning Process relating to Socio-economic development of STs, and to Evaluate the progress of their development under the Union and any State;*

- *To submit report to the President annually and at such other times as the Commission may deem fit, upon/working of Safeguards, Measures required for effective implementation of Programmers/Schemes relating to Welfare and Socio-economic development of STs;*

- *To discharge such other functions in relation to STs as the President may, subject to the provisions of any law made by Parliament, by rule specify.*

[1] http://www.ncst.nic.in/sites/default/files/2017/Citizen_Charter/citizen_charter_English.pdf

Further, under the notification of the Ministry of Tribal Affairs, dated 23rd August, 2005, the Commission was specifically entrusted to "*discharge the following other functions in relation to theprotection, welfare and development and advancement of the Scheduled Tribes, namely* :-

(s) Measures that need to be taken over conferring ownership rights in respect of minor forest produce to STs living in forest areas.

- *Measures to be taken to safeguard rights of the tribal communities over mineral resources, water resources etc. as laid down by law.*
- *Measures to be taken for the development of tribal to plug loopholes and to work more viable livelihood strategies.*
- *Measures to be taken to improve the efficacy of relief and rehabilitation measures for tribal groups displaced by development projects.*
- *Measures to be taken to prevent alienation of tribal people from land and to effectively rehabilitate such people in whose case alienation has already been taken place.*
- *Measures to be taken to elicit maximum cooperation and involvement of tribal communities for protecting forests and undertaking social afforestation.*
- *Measures to be taken to ensure full implementation of the provision of Panchayat (Extension to Scheduled Areas) Act, 1996.*
- *Measures to be taken to reduce and ultimately eliminate the practice of shifting cultivation by tribal that lead to their continuous disempowerment and degradation of land and the environment."*

Further, under clause (9) of Article 338A, the Union and every State Government is obligated to consult the Commission on all major policy matters affecting Scheduled Tribes.

The powers provided to the Commission for the purposes of effectively carrying out its functions and duties are laid down in clause (8) of Article 338A which states that: - *"The Commission shall, whileinvestigating any matter referred to in sub-clause (a) or inquiring into any complaint referred to in sub-clause (b) of clause (5), have all the powers of a civil court trying a suit and in particular in respect of the following matters, namely :-*

- *summoning and enforcing the attendance of any person from any part of India and examining him on oath;*
- *requiring the discovery and production of any documents;*
- *receiving evidence on affidavits;*
- *requisitioning any public record or copy thereof from any court or office;*
- *issuing commissions for the examination of witnesses and documents; or*
- *any other matter which the President may by rule, determine."*

The individual complaints mechanism of NCST

As per its functions, the Commission is required to inquire into specific complaints with respect to the deprivation of rights and safeguards of Scheduled Tribes. In order to enable the Commission to perform this function effectively and efficiently, the Commission requests the complainants to substantiate their complaints with supporting documents and quote the relevant provisions of the Act or Rules directions which have been violated. Further, **t**he complaint should be directly addressed to the Chairperson/Vice-Chairperson/Secretary, National Commission for Scheduled Tribes, New Delhi or the heads of its State Offices. The complainant must disclose his/her full identity with full address, duly signed. As far as possible, complaints should be legibly written or typed.

The Commission does not entertain matters which are *sub judice*, nor does it take up cases which are pending in courts or cases in which a court has already given its final verdict need not be taken up afresh with the Commission.

Procedure for Enquiry

As soon as information is received by the Commission regarding any violation of the rights of member of belonging to a ST community, it seeks relevant details of the incident and the action taken from the law enforcing and administrative machinery of the concerned State and the district to ascertain the details of incident and the action taken by the district administration.

The overarching considerations while asking for details from relevant authorities is :-

"Whether the scene of occurrence of the crime has been visited immediately by Collector and Superintendent of Police of the district on receipt of information?

Whether proper FIR is registered in local Police Station?

Whether names of all the persons involved/cited by the complainant has been included in the FIR?

Whether investigation has been taken up by a Senior Police Officer as per provisions of Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989?

Whether the culprits have been apprehended and booked without loss of time?

Whether proper charge sheet has been filed mentioning the relevant sections of IPC together with the SCs & STs (POA) Act, 1989 in the Court?

Whether the cases are tried by the Special Courts?

Whether special Public Prosecutors are appointed to handle these cases?

Whether Police assists the courts in bringing forward witnesses and see that the culprits are suitably punished by the courts?" [3]

Further, the Commission also monitors to ensure that the victims are provided with suitable medical assistance and on time in addition to adequate protection and proper compensation as per provisions of law. Wherever feasible and necessary, and depending on the circumstances of an incident, the Commission may visit the place of incident to oversee the arrangements and to console and infuse confidence among the victims.[4]

Organizational set-up of NCST

The National Commission for Scheduled Tribes has its headquarters in New Delhi and also functions from its six Regional Offices located at Bhopal, Bhubaneswar, Jaipur, Raipur, Ranchi and Shillong. The Regional Offices of the Commission work as a bridge between the Commission and the State authorities in addition to being the 'eyes and ears' of the Commission in the respective States.

There are four Wings at the Headquarters of NCST, namely :-

Administration/Establishment Wing

The Administration/Establishment Wing provides all kinds of administrative support to the Commission. It also looks after establishment matters, general administration including accounts and budgetary matters, and human resource management of officers and staff of the Secretariat of the Commission and its six Regional Offices.

Economic & Social Development Wing

The Economic and Social Development Wing of the Commission deals with matters relating to socio-economic development and advancement of Scheduled Tribes. The Commission discharges this duty, at various levels, i.e., state/district/taluk, through a mechanism of monitoring the implementation of the various plan schemes being formulated by the Central/State Governments. This is conducted by way of extensive reviews with the senior officials of the Central Ministries/Departments and the State Govts. The Commission seeks detailed information from various Ministries and departments of the Central and State governments by populating targeted questionnaires. If the information requires review, only then, a review is conducted.

An important aspect of these reviews is to monitor the flow of funds released by the Ministry of Tribal Affairs as Special Central Assistance to Tribal Sub-Plan (TSP) which are grants provided by the Ministry of Tribal Affairs under Article 275(1) of the Constitution for the benefit of the STs.

Some of the other activities of this Wing also include addressing complaints by members of a Scheduled Tribe community regarding their grievances on matters other than atrocities and service matters. Further, this Wing monitors the implementation of Land Reforms Acts and various schemes for the educational development of STs.[5]

Service Safeguards & Coordination Wing

A major safeguard for the STs is the reservation in various government institutions. All matters related to this are monitored by the Service Safeguards & Coordination Wing of the Commission which basically deals with the implementation of reservation policy and any connected complaints of the Scheduled Tribes in the services of the Central Govt./ State Government/ Central PSEs/ State PSEs/Universities/ Autonomous Bodies/ Public Sector Banks and Financial Institutions. Additionally, this Wing also deals with the matters relating to major policy issues affecting Scheduled Tribes which are referred to it by the Central Ministries/ State Govts. for the purpose of offering its

16 http://ncst.nic.in/content/procedure-inquiry
17 Ibid.

comments/ observations concerning service matters. Cases relating to false community certificates and inclusion in or exclusion from the lists of Scheduled Tribes are also dealt with in this Wing.

Atrocities Wing

This Wing's responsibilities pertain to matters pertaining to atrocities on Scheduled Tribes defined under the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 and its corresponding Rules, and cases relating to the Bonded Labour System (Abolition) Act, the Minimum Wages Act, etc. the Commission, through this Wing, entertains complaints from individuals or takes *suo moto* cognizance on the basis of reports published in newspapers. This Wing also conducts evaluation studies/surveys on matters affecting the rights of STs. Complaints relating to atrocities are referred to the concerned police authorities for detailed investigation by this Wing.

Summary

The importance of the institution as a constitutional body tasked with alleviating the status of Scheduled Tribes in India, cannot be overstated. However, continuous engagement of the Commission is essential with government and non-government stakeholders to maintain its critical role.

NATIONAL COMMISSION FOR SCHEDULED CASTES

Synopsis

- Introduction
- Institutional Setup of the National Commission for Scheduled Castes
- Way Forward
- Summary

Introduction

Justice is one of the most important values cherished and promoted by the Constitution of India. To ensure protection of all sections of the society, several institutional and legislative steps have been taken. For instance, the Article 46 of the Constitution provides that the State shall promote with special care the educational and economic interests of the weaker sections of the society and in particular, of the Scheduled Castes and shall protect them from social injustice and all forms of exploitation. Thus, it can be clearly seen that the Constitution of India is committed towards the protection of all weaker sections in general and SCs in particular. To this effect, the National Commission for Scheduled Castes was conceived with a view to ensure that there is an institutionalized mechanism to carry out the mandate of the Constitution.

The current Chairman of the National Commission for Scheduled Castes said the following about the mandate and role of the Commission-"effective implementation of these safeguards and provisions as well as to advise the Union & the State Governments in their planning process for the social and economic development of the Scheduled Castes. The Commission has been regularly presenting its Annual Reports and Special Reports to the President of India, evaluating the functioning of various welfare and development programmes for the Scheduled Castes, analysing the atrocities being committed against them as well as monitoring the actions taken by the authorities for effective implementation of the various Acts and Rules. The Commission has been making specific recommendations on all spheres including the handling of atrocity related cases, socio economic development programmes and service related safeguards."

In order to execute its functions, the Commission conducts itself with a defined mechanism laid down as the Rules of Procedure. The manner of investigation, approach and methodology to be

adopted- all such decisions are carried out in accordance with the Rules of Procedure. In the following section, the Module will discuss the Rules of Procedure in detail.

Institutional Setup of the National Commission for Scheduled Castes

The National Commission is headed by a Chairman whose has been assigned particular responsibilities with regard to the functioning of the Commission. The following chart gives a semblance of the organizational setup of the National Commission of Scheduled Castes.

The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Amendment Act, 2015

This amendment act came into effect in 2016 and includes several stringent measures for the protection of the members of both Scheduled Castes and Scheduled Tribes.

Following are the key features of the Amended Act:

- **Inclusion of an elaborate definition of atrocities:** "New offences of atrocities like tonsuring ofhead, moustache, or similar acts which are derogatory to the dignity of members of Scheduled Castes and Scheduled Tribes, garlanding with chappals, denying access to irrigation facilities or forest rights , dispose or carry human or animal carcasses, or to dig graves, using or permitting manual scavenging, dedicating a Scheduled Caste or a Scheduled Tribe women as devadasi, abusing in caste name, perpetrating witchcraft atrocities, imposing social or economic boycott, preventing Scheduled Castes and Scheduled Tribes candidates from filing of nomination to contest elections, hurting a Scheduled Castes/Scheduled Tribes woman by removing her garments, forcing a member of Scheduled Caste/Scheduled Tribe to leave house , village or residence, defiling objects sacred to members of Scheduled Castes and Scheduled Tribe,

  touching or using words, acts or gestures of a sexual nature against members of Scheduled Castes and Scheduled Tribe.

Several offences related to IPC have also been included in the Act:

- Addition of certain IPC offences like hurt, grievous hurt, intimidation, kidnapping etc., attracting less than ten years of imprisonment, committed against members of Scheduled Caste/Scheduled Tribe, as offences punishable under the PoA Act. Presently, only those offences listed in IPC as attracting punishment of 10 years or

more and committed on members of Scheduled Caste/Scheduled Tribe are accepted as offences falling under the PoA Act.

- **Establishment of specialized Institutional Structure:** Establishment of Exclusive Special Courtsand specification of Exclusive Special Public Prosecutors also, to exclusively try the offences under the PoA Act to enable speedy and expeditious disposal of cases.
- **Enhancement in the Powers of the Special Court:** Power of Special Courts and Exclusive SpecialCourts, to take direct cognizance of offence and as far as possible, completion of trial of the case within two months, from the date of filing of the charge sheet.
- **Recognition of the Rights of the Victims:** Addition of chapter on the 'Rights of Victims andWitnesses'.
- **Definition of the willful negligence:** Defining clearly the term 'willful negligence' of publicservants at all levels, starting from the registration of complaint, and covering aspects of dereliction of duty under this Act.
- **Addition of presumption to the offences** –If the accused was acquainted with the victim or hisfamily, the court will presume that the accused was aware of the caste or tribal identity of the victim unless proved otherwise.

Way Forward

In order to project India in a respectful position, it is important to lay emphasis on the manner in which we treat the marginalized and vulnerable sections of the society. In this regard, the role of the statutory bodies like National Commission for Scheduled Castes is extremely important. To ensure that the Commission is able to exercise its powers, it is important to ensure that the following words of the National Human Rights Commission are given true importance.

"In furtherance of its statutory responsibilities, the Commission has thus accorded the highest priority to ending discrimination against Scheduled Castes and Scheduled Tribes and in seeking to eradicate, in particular, two pernicious practices which largely affect members of these communities: these relate to manual scavenging and bonded labour. In respect of both of these matters, the Commission is coordinating its activities closely with all concerned Governmental and

Non-Governmental Organizations in an effort to end these practices and to rehabilitate those who have been affected by them."

In 2009, the Parliamentary Standing Committee on the Welfare of Scheduled Castes and Scheduled Tribes in its report to the Parliament gave following recommendations to improve the functioning of the Commission:

"The strength of the Commission should be increased suitably with a view to assigning each member specific subjects such as atrocities, socio-economic development, service matters, etc. so that he may give his undivided attention to find a favourable solution to the problems/difficulties being faced by the distressed SC people." However, this recommendation was rejected by the then government. It's time that this Commission is viewed as an important instrument for social change and hence, adequate financial resources are made available for it.

Summary

In this module, the institutional framework of the National Commission for Scheduled Castes has been explained in detail. There is also a detailed discussion of the powers and functions of each of the functionaries of the Commission. Moreover, this module discussed the rules of procedure adopted by the Commission. Lastly, this module entails a brief overview of the amendments that have been brought about by the government with regard to the protection of the Scheduled Castes.

Press Release, Ministry of Social Justice, available at http://pib.nic.in/newsite/PrintRelease.aspx?relid=135764.

Further reading

- The Protection of Civil Rights Act, 1955.
- The Scheduled Castes & Scheduled Tribes (Prevention of Atrocities) Act, 1989.
- National Crime Records Bureau, Annual Report for year 2010, p. 441
- Police & You: Know Your Rights, By 'Commonwealth Human Rights Initiative
- CHRI for Ministry of Home Affairs.
- SCST Commission Report, year 1993-94, Para 7.7
- K. B. Saxena, Report on Prevention of Atrocities Against Scheduled Castes, NHRC, 2004 p.47, 55
- SCST Commission Report, 1994-95, p.204
- NCRB Report, 2010
- SCST commission Report, 1994-95, p.210
- http://mahapolice.gov.in
- www.ncrb.nic.in

7. Annual Report of Supreme Court of India for year 2008-09.
8. http://indiacode.nic.in/
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UNDERSTANDING THE ELDERLY

Synopsis

- Introduction
- Understanding the elderly
- Who is an Old/ Elderly Person
- Legal Definition of Old Age/ Elderly Person
- Definition of Old Age/ Elderly Person in India - "Senior Citizen"
- Population Ageing
- Legal Protection of Elderly Rights in India
- Summary

INTRODUCTION

Each of us is entitled to various rights which are fundamental to human existence. These rights do not change as one grows older. In other words, older people as with every other section of the population have human rights as they are inherent to all human beings. Nevertheless, there has not been much dialogue and articulation of the rights of older people either nationally or internationally. Not very long ago, the issue of ageing was considered a matter of importance for only a handful of countries. However, in recent years, there have been significant advocacy efforts calling for enhanced international thinking and action on the human rights of older persons. With the increase in number of aged persons in the recent years, has shed light on the lack of adequate protection mechanisms, and on the existing gaps in policies and programmes to address the situation of older persons. Various stakeholders have called for more visibility and increased use of international human rights standards to address the dire situation of millions of older people around the world.

WHO IS AN OLD/ ELDERLY PERSON?

"Old Age" is usually associated with declining faculties, both mental and physical, and a reduction in social commitments (including sport participation) of any person. The precise onset of old age varies culturally and historically. With the increasing deliberations over the issue of the rights of the elderly, there arose a need to define old

age so as to enable this portion of the populace to avail the benefits that are available to them. However, till date, no commonly agreed definition of old age exists. Older persons do not represent a homogeneous group. The Committee of Ministers of the Council of Europe in its *Recommendation No. R(94)9 Concerning Elderly People* has asserted that "*Ageing is aprocess: being old depends on the individual's circumstances and the wider environment and it is useless to attempt to define exactly when old age begins*."

The definition of old age can be attempted based on three aspects:

14. ***Chronological age*** - A person is said to have attained old age based on chronology orthe number of years of age he has completed. The old age based on chronology is usually defined by the State.

(m) ***Change in social role*** - the roles of a person in the society changes over a period oftime. Accordingly, whether a person has attained old age or not can be determined based on his social roles. For example, change in work patterns, adult status of children, menopause etc.

(n) ***Change in capabilities*** - The change in the capabilities of individuals also assists indetermining the developmental stage of individuals. For instance, senility, change in physical characteristics like frailty and so on are some of the factors in defining old age.

However, it is widely accepted that using a chronological age to define older people has a practical advantage, as it gives clarity to whom a specific policy or law targets. On the other hand, it also entails the disadvantage that setting an age threshold may differ from country to country and from one context to another. Moreover, biological age does not always coincide with chronological age of a person. Further, the age structure of the population also plays a role as to how old age is perceived.

LEGAL DEFINITION OFOLDAGE/ ELDERLYPERSON

Although there are commonly used definitions of old age, there is no general agreement on the age at which a person becomes old. Lacking a standard definition acceptable to all circumstances, the age at which a person becomes eligible for statutory and occupational retirement pensions has become the default definition in many instances. The ages of 60 and 65 years are often used, despite its arbitrary nature, for which the origins and surrounding debates can be followed from the end of the 1800's through the mid 1900's. In the background of the arbitrariness surrounding the definition of old age several attempts have been made in understanding rather than rigidly defining old age mainly for the purposes of human rights.

United Nations: Owing to the varied definitions of old age between countries andover time, *the United Nations has agreed that 60+ years may be usually denoted asold age*though no standard criterion has been formally adopted and this was thefirst attempt to define old age at the international level.

General Comment No. 6 of the Committee on Economic, Social and Cultural Rights: The General Comment defines older people as those *persons aged 60 years andabove*.

World Health Organisation: For its study of old age in Africa under the MDS Project,*WHO identified 50 years as the beginning of old age*. At the same time, it recognizedthat the developing world often defines old age, not by years, but by new roles, loss of previous roles, or inability to make active contribution to society.

The Regional Office for Europe of the World Health Organisation: The EuropeanRegional Office in its Report on Preventing Older Maltreatment, 2011 has defined older maltreatment as regards "*people aged 60 years and older*".

Council of Europe recommendation on the promotion of human rights of older persons: With the changing perceptions of old age in the modern society the Councilof Europe followed an illustrative approach in defining old age in its *Recommendation on the Promotion of Human Rights of Older Persons*

"*The present recommendation applies to persons whose older age constitutes, aloneor in interaction with other factors, including perceptions and attitudes, a barrier to the full enjoyment of their human rights and fundamental freedoms and their full and effective participation in society on an equal basis.*"

The Recommendation further takes note that the member States of the Council of Europe have identified chronological ages at national level whereby persons enjoy specific rights and advantages by reason of their older age.

Thus, there exist varied perceptions as to who are considered as old/ elderly persons and no standard

definition exists at the international level. The definitions vary based on the social construct and the wider environment of the concerned region along with the corresponding demography of population. Adopting a dynamic concept of age that reflects the specific needs of older people and the diminishing life chances they are facing is the need of the hour.

DEFINING OLD

"The ageing process is, of course, a biological reality which has its own dynamic, largely beyond human control. However, it is also subject to the constructions by which each society makes sense of old age. In the developed world, chronological time plays a paramount role. The age of 60 or 65 years, roughly equivalent to retirement ages in most developed countries, is said to be the beginning of old age. In many parts of the developing world, chronological time has little or no importance in the meaning of old age. Other socially constructed meanings of age are more significant, such as the roles assigned to older people; in some cases it is the loss of roles accompanying physical decline which are significant in defining old age. Thus, in contrast to the chronological milestones which mark life stages in the developed world, old age in many developing countries is seen to begin at the point when active contribution is no longer possible."

(Gorman M. Development and the rights of older people; In: Randel J, et al., eds. *The ageing and development report: poverty, independence and the world's older people*. London, EarthscanPublications Ltd., 1999: 3-21.)

DEFINITION OFOLDAGE/ ELDERLYPERSON ININDIA-"SENIORCITIZEN"

The National Human Rights Commission of India perceives old age as a social construct, rather than a biological stage. However, for the purposes of entitlement to various benefits provided by the Government to the elderly people, a legal definition of Old/ Elderly Persons has been provided under the terminology of "Senior Citizens".

National Policy for Older Persons, 1999: The National Policy for Older Personsformulated in the year 1999 by the Government of India identified that any person who has attained the age of 60 years or above as an old/ elderly person.

Maintenance and Welfare of Parents and Senior Citizens Act, 2007: According toSection 2(h) of the *Maintenance and Welfare of Parents and Senior Citizens Act,2007*, "*Senior Citizen means any person being a citizen of India, who has attained theage of sixty years or above*".

Hence, in the Indian context, any person who has attained the age of 60 years or above is a "Senior Citizen" i.e., an old/ elderly person.

POPULATION AGEING

Population ageing is a process by which the proportion of older persons in the total population increases. The population of the older persons in the total populace is proportionately higher in this phenomenon.
The twentieth century witnessed significant demographic transitions owing to the increased progress in research, science and technology. The advances in health care and rapid economic development have resulted in reduced fertility and increased life expectancy. Consequently, the world population has been experiencing significant ageing. This change in demographic trend is ongoing and the world population is experiencing significant ageing since the mid-twentieth century. Population ageing was advanced at the time of the International Conference on Population and Development in 1994 in Cairo, Egypt and the Second World Assembly on Ageing, which took place in Madrid, Spain, in 2002. According to the World Ageing Report, 2013, Ageing had started earlier in the more developed regions and was beginning to take place in some developing countries and was becoming more evident at the global scale during the 1994 conference. However, intensity and depth of ageing will vary considerably among countries and regions thought, the phenomenon is common throughout.

WORLDPOPULATION

The United Nations Population Division produces global population projections revised every two years. The population statistics and projections of UN provide a source for demographic trends in a global perspective. The latest population projections were released in 2012 - World Population Prospects: The 2012 Revision, the twenty-third round of the official United Nations population estimates and projections prepared biennially by the Population Division of the Department of Economic and Social Affairs of the Secretariat.

Based on the revised population projections of 2012, the United Nations released a *World Ageing Report* in the year *2013* updating all the previous editions. The demographic trends presented below are based on these reports.

Some of the major findings of the World Ageing Report, 2013 are as follows:

- The global share of older people (aged 60 years or over) increased from 9.2 per cent in 1990 to 11.7 per cent in 2013 and will continue to grow as a proportion of the world population, reaching 21.1 per cent by 2050. Globally, the number of older persons (aged 60 years or over) is expected to more than double, from 841 million people in 2013 to more than 2 billion in 2050. The United Nations has estimated the elderly population to be 12.3% of the total world population as on July, 2015.

- Older persons are projected to exceed the number of children for the first time in 2047.

- The process of population ageing has resulted in the shifting of the median age. Globally, the median age moved from 24 years in 1950 to 29 years in 2010, and will continue to increase to 36 years in 2050.

- Not only is the population ageing. The older population is itself ageing. Globally, the share of older persons aged 80 years or over was 14 per cent of

- the older population (60 years and above) in 2013 and is projected to reach 19 per cent in 2050. If this projection is realized, there will be around 392 million persons aged 80 years or over by 2050, more than three times the present.

- Most developed countries already have aged population. Nevertheless, the older population is growing faster in less developed countries of the world compared to the more developed countries and by 2050, nearly 8 in 10 of the world's older population will live in the less developed regions.

- There is a significant difference in the sex-ratio of the older population with the predominance of women within the aged population. Globally, there were 85 men per 100 women in the age group of 60 years and above and 61 men per 100 women in the age group of 80 years and above, in 2013. The sex ratios are expected to increase moderately during the next several decades.

- Globally, 40 per cent of older persons aged 60 years or over live independently, that is to say, alone or with their spouse only. Independent living is far more common in the developed countries, where about three quarters of older persons live independently, compared with only a quarter in developing countries and one eighth in the least developed countries.

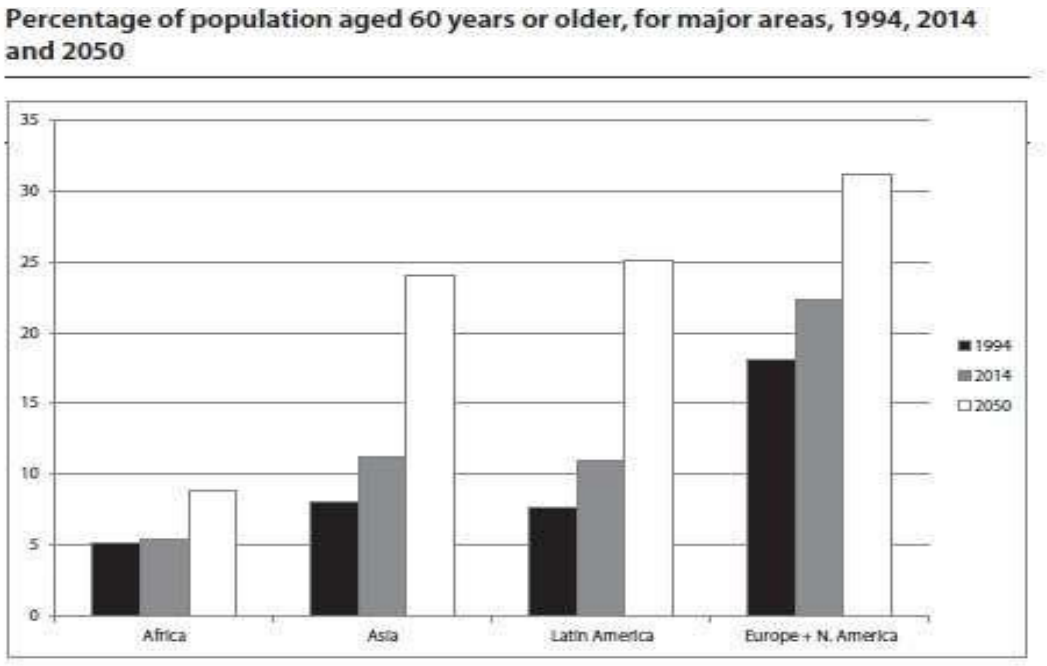
- Many older persons still need to work, especially in developing countries. In 2010, the labour force participation of persons aged 65 years or over was around 31 per cent in the less developed regions and 8 per cent in the more developed regions. While the participation of older men in labour force is decreasing in the less developed regions, it is increasing the more developed regions. However, men predominate the labour force of the older population.

- Older people are the world's fastest-growing age group. In 2014, the annual growth rate for the population aged 60 years or older will be almost triple the growth rate for the population as a whole. In absolute terms, the number of people aged 60 years or older has almost doubled between 1994 and 2014, and people in this age group now outnumber children under the age of 5.

The projections of the older population of the world in 2013 can be summarised as follows:

Older Population (60 years and above)	**12% of total population**
Very Old (80 years or above)	14% of the older population 1.68% of total population
Sex-ratio **60 years and above** **65 and above** **80 and above**	 85 men per 100 women 80 men per 100 women 62 men per 100 women
Independent living	40% of older population
Dependency Ratio	52
Old-age support ratio	8

Region-wise Percentage of Older Population (60 years and above)



Source: UN Concise Report on the World Population Situation in 2014

INDIANPOPULATION

Like all around the world, the populace in India is also undergoing the process of ageing. According to the facts of the Population Census conducted in 2011 under the authority of the Ministry of Home Affairs, Government of India, the population of older persons (60 years and above) has increased from 7.7% in 2001 to *8% of the total Indian population* in 2011. Recently, the United Nations has estimated that 8.9% of total Indian population comprises of the elderly as on July, 2015.

A brief account of the facts of the 2011 Population Census as released by the Government of India is as follows:

- 8% of the total Indian population comprises of Older Persons.

- The population of older women is more compared to older men with the sex ratio of 97 men per 100 women. While older women constitute around 8.98% of the total Indian population, older men account for 8.19% of the total population. Further, within the older population, women constitute 51% while men amount to 49%.

- Like the world, even in India the older population itself is undergoing the process of ageing. 10.87% of the total older population (60 years and above) of India comprise of the very old (80 years and above).

PERCENTAGE OFOLDERPOPULATION ININDIA*

	TOTAL	MALE	FEMALE
Older Population (60 years and above)	8.57	8.19	8.98
Very Old Population (80 years and above)	0.93	0.85	1.02

General Human Rights available to the Elderly:

Right to Life and Liberty

Right to Adequate Standard of Living

Right to Dignity

Right of Equality, Non-Discrimination and Equal Opportunity

Freedom of Expression and Access to Information

Right to Education

Right to work and employment

Right to Privacy

Right of Participation

Right to peaceful enjoyment of possessions

Specific Rights available to the Elderly:

Right to freedom from Ageism

Right to Health

Right to Housing

Right of Social Security

Right of Protection against Elderly Abuse

Right to Care and Assistance

Right of Independence and Self-fulfilment

SUMMARY

Any person who has attained the age of 60 years or above is said to be an older or elderly person or a senior citizen (in Indian context) both universally as well as domestically. With the advancement in science and technology, progress in medical and health care a decline is seen in the fertility and mortality rates which in turn have led to the increase in the population of the older persons. Consequently, the population is ageing both at the domestic as well as global levels. Further, the older population is itself ageing with the growing numbers of the very old (80 years and above).

The phenomenon of population ageing brings with it a number of challenges. Hence, there is a need to recognise and accord legal protection to the rights of the elderly to enable them to enjoy their human rights on an equal basis with others.

LEGAL PROTECTION OF ELDERLY RIGHTS IN INDIA

- Introduction
- CONSTITUTION OF INDIA
- Legislations and Other Legal Provisions
- Personal Laws
- Code of Criminal Procedure, 1973
- Maintenance and Welfare of Parents and Senior Citizens Act, 2007
- Administrative Set-up
- Policies and Schemes
- National Policy on Older Persons, 1999 (NPOP)
- Integrated Programme for Older Persons (IPOP)
- Assistance for Construction of Old Age Homes
- National Policy for Senior Citizens
- Other Schemes

Introduction:

In the light of the international recognition of the human rights of the elderly persons and considering the specific needs of the elderly in India, the Government of India has made various efforts to protect and promote the human rights of the elderly through various legislations, policies and schemes.

For the purposes of availing the various old age benefits made available to the elderly, "all those persons who have attained the age of 60 years or above have been defined as elderly in India".

The legal protection accorded to the various rights of the elderly in the Indian set-up can be studied under the following heads:

CONSTITUTION OFINDIA

The Constitution of India is the fundamental law of the land that provides protection to all fundamental rights and freedoms of all members of the society. Likewise, the rights of the elderly have also been addressed to certain extent under the Constitution of India.

The Constitutional provisions that are relevant to the elderly people are as follows:

Article 41 of the Constitution of India provides as follows:

"*The State shall, within the limits of its economic capacity and development, makeeffective provision for securing the right to work, to education and to public assistance in cases of unemployment,* ***old age****, sickness and disablement, and in other cases of undeserved want*".

Entry 24 in the List III of Schedule VII to the Constitution of India (Concurrent List) deals with the "*Welfare of Labour, including conditions of work, provident funds,employer's liability, workmen's compensation, invalidity and* ***Old age pension*** *and maternity benefits*."

Some of the other constitutional provisions that are also applicable to the elderly are as follows:

- Fundamental Rights under Part III of the Constitution of India (with exception of Articles 21A and 24 which deal with the rights of children specifically)
- Articles 39A, 42 to 44, 46 and 47 under Part IV of the Constitution

- Entry 9 in List II of Schedule VII to the Constitution of India (State List) which deals with the "*Relief of the disabled and unemployable*".
- Entries 20 and 23 in List III of Schedule VII to the Constitution of India (Concurrent List) that deal with "*Economic and Social Planning*" and "*Social Security and SocialInsurance; employment and unemployment*" respectively.

LEGISLATIONS AND OTHERLEGALPROVISIONS

All the legislations in India pertinent to the elderly focus upon the maintenance and welfare of these people. The laws protecting the right to maintenance of the elderly and their welfare in India are as follows:

Personal Laws

The maintenance of parents is the moral duty of the younger generations and is a widely recognised fact. However, the degree of responsibility of such maintenance varies from community to community, at least so far as the law is concerned.

Hindu Law (Hindu Adoption and Maintenance Act, 1956 under Section 20)

The *Hindu Adoption and Maintenance Act, 1956* provides the statutory recognition of the duty of the children with respect to the maintenance of their parents. *Section20*of the Act imposes an obligation on every Hindu to*maintain his/her aged orinfirm parents during his/her lifetime*. Thus, it is the duty of both sons as well asdaughters to maintain their aged or infirm parents. However, it is to be noted that such obligation extends only when the parent(s) is (or are) unable to maintain himself or herself.

Section 20 OF HINDU ADOPTION AND MAINTENANCE ACT, 1956

Subject to the provisions of this section a Hindu is bound, during his or her lifetime, to maintain his or her legitimate or illegitimate children and his or her aged or infirm parents.

A legitimate or illegitimate child may claim maintenance from his or her father or mother so long as the child is a minor.

The obligation of a person to maintain his or her aged or infirm parent or daughter who is unmarried extends in so far as the parent or the unmarried daughter, as the case may be, is unable to maintain himself or herself out of his or her own earnings or other property

Explanation- In this section "parent" includes a childless stepmother.

Mohammedan Law

The duty of the children to maintain their parents is also recognised under the Muslim Law. However, the duty of maintenance extends so long as the parents are unable to provide for themselves. Under Muslim Law, mothers are given preference over fathers when it comes to maintenance. But, under Shia Law, both parents are treated equally. Further, as under the Hindu Law, both sons and daughters have a duty to maintain their parents. However, this obligation of the children is dependent on their having the means to do so and is proportionate to their means.

MAINTENANCE OF PARENTS UNDER MUSLIM LAW

According to Mulla,

> ***Children in easy circumstances are bound to maintain their poor parents, although the latter may be able to earn something for themselves.***
>
> ***A son though in strained circumstances is bound to maintain his mother, if the mother is poor, though she may not be infirm.***
>
> ***A son, who though poor, is earning something, is bound to support his father who earns nothing.***

According to Tyabji, under Hanafi Law,

'Parents and grandparents in indigent circumstances are entitled to maintenance from their children and grandchildren who have the means, even if they are able to earn their livelihood.

Christian and Parsi Law

The Christians and Parsis have no specific provision for the maintenance of parents under their personal laws. However, the elderly belonging to these communities are entitled to claim maintenance from their children under the provisions of the Code of Criminal Procedure, 1973.

Code of Criminal Procedure, 1973

The Code of Criminal Procedure, 1973 provides for the maintenance of parents under the provisions of

Section 125 of the Code. According to this section, it is the obligation of the children to maintain their parents in the times of necessity. Both sons and daughters, including married daughters are responsible for the maintenance of the parents under the Code. However, it is essential for the parent to establish that the other party has sufficient means and has neglected or refused to maintain the parent, who is unable to maintain himself/herself to obtain maintenance under this provision.
It is important to note that, *the Code of Criminal Procedure, 1973 is a secular law and isapplicable to all communities and religions*.

Maintenance and Welfare of Parents and Senior Citizens Act, 2007

An initiative of the Ministry of Social Justice and Empowerment of the Government of India, the *Maintenance and Welfare of Parents and Senior Citizens Act* was enacted in the year 2007. The Act received the assent of the President of India on December 29, 2007. The Act came into effect in different states when the respective states notified the same in their official gazette. While some states have already implemented the Act, few others are yet to implement it.

According to this Act, parents and grandparents who are unable to maintain themselves are entitled to claim maintenance from their children. In case of childless persons, the specified relatives of the aged childless persons are obligated to maintain them. In other words, *thechildren or the specified relatives, as the case may be, are to fulfil the basic needs of the aged parents, provide them care during their old age and enable them to lead a normal life without deprivation or neglect of basic needs*. In case of violation of the provisions of theAct, the person who is guilty of such violation is punishable with an *imprisonment up to 3months or fine up to Rs. 5,000/- or both.*
Apart from providing the duties of the children or specified relatives, the Act also provides for the roles and responsibilities of the Government in the maintenance of senior citizens like setting up of old age homes and makes provisions for medical care of senior citizens and protection of their life and property. The Act also makes the rights provided under the Act justiciable through tribunals established under the Act.'

DEFINITIONS UNDER THEMAINTENANCE AND WELFARE OF PARENTS AND SENIOR CITIZENS ACT, 2007

Section 2

"children" includes son, daughter, grandson and grand-daughter, but does not include a minor

"maintenance" includes provision for food, clothing, residence and medical attendance and treatment

"minor" means a person who, under the provisions of the Majority Act, 1875 is deemed not to have attained the age of majority

"parent" means father or mother whether biological, adoptive or step father or step mother, as the case may be, whether or not the father or the mother is a senior citizen

"prescribed" means prescribed by rules made by the State Government under this Act

"property" means property of any kind, whether movable or immovable, ancestral or self-acquired, tangible or intangible and includes rights or interests in such property

"relative" means any legal heir of the childless senior citizen who is not a minor and is in possession of or would inherit his property after his death

"senior citizen" means any person being a citizen of India, who has attained the age of sixty years or above

"State Government";, in relation to a Union territory, means the administrator thereof appointed under article 239 of the Constitution

"Tribunal" means the Maintenance Tribunal constituted under section 7

"welfare" means provision for food, health care, recreation centres and other amenities necessary for the senior citizens

The provisions of the Act may be summarised as follows:

ADMINISTRATIVE SETUP

The ***Ministry of Social Justice and Empowerment*** of the Government of India is the nodal agency for the issues concerning the elderly. The Ministry has been adopting various policies and welfare schemes for the benefit of the elderly time and again. The programmes of the ministry aim at the welfare and maintenance

of the elderly, with special focus on the older persons belonging to the indigent groups.

POLICIES ANDSCHEMES

Various policies and schemes have been formulated and implemented by the Ministry of Social Justice and Empowerment, Government of India, which is the nodal agency for the issues concerning the elderly. A brief account of some of the policies and schemes in place in India for the welfare of the elderly are as follows:

National Policy on Older Persons, 1999 (NPOP)

A National Policy was initiated by the Ministry of Social Justice and Empowerment, Government of India in the year 1999 to promote the health, safety, social security and well-being of senior citizens in India and to strengthen their legitimate place in the society and help them to lead a dignified life. *The Policy for the first time clearlyrecognised a person above 60 years of age as a senior citizen*. The Policy aimed atmaking the elderly completely independent citizens of the nation.

National Council for Older Persons (NCOP)

In the pursuance of the National Policy on Older Persons, 1999, the Ministry of Social Justice and Empowerment, Government of India constituted a National Council for Older Persons in the year 1999 to operationalise and oversee the implementation of the National Policy on Older Persons of 1999. The Minister of Social Justice and Empowerment of the Government of India will be the chairperson of the Council. The National Council for Older Persons is not only the implementation agency of the 1999 Policy but also the highest body to advise the Government regarding the formulation and implementation of policies and programmes concerning the elderly. The Council was reconstituted in the year 2005 to include representatives of Central and State Governments, NGOs, citizens' groups, associations of senior citizens and experts in the fields of law, social welfare and medicine as members of the council.

Inter-Ministerial Committee on Older Persons (IMCOP)

Inter-Ministerial Committee on Older Persons comprising of 19 Ministries of the Government of India is another mechanism instituted for the implementation of the National Policy on Older Persons, 1999. The Secretary of the Ministry of Social Justice and Empowerment, Government of India heads the Committee.

LIST OF MINISTRIES

Ministry of Social Justice and Empowerment

Ministry of Health and Family Welfare

Ministry of Finance

Ministry of Rural Development and Employment

Ministry of Urban Affairs and Employment

Ministry of Human Resource Development

Ministry of Labour

Ministry of Personnel, Public Grievances and Pensions

Ministry of Law Justice and Company Affairs

Ministry of Home Affairs

Ministry of Information and Broadcasting

Ministry of Communication

Ministry of Railways

Ministry of Agriculture

Ministry of Surface Transport

Ministry of Civil Aviation

Ministry of Petroleum and Natural Gas

Ministry of Food and Consumer Affairs

Ministry of External Affairs

Integrated Programme for Older Persons (IPOP)

The Scheme of Integrated Programme for Older Persons was initiated in the year 1992 by the Ministry of Social Justice and Empowerment, Government of India to improve the quality of life of senior citizens by providing the basic amenities like food, water, shelter, health care etc. for this purpose, the scheme provides for capacity building of government and non-government agencies, Panchayat raj institutions and other local bodies and the community at large. Further, financial assistance up to 90% of the project cost will be provided to NGOs for establishing and maintaining old age homes, day care

centres and mobile medicare units. The Scheme was revised in the year 2008 to increase the financial assistance and include other innovative projects concerning elderly. The Scheme has been further revised in the year 2015 (w.e.f 01.04.2015) to make it flexible to include the diverse needs of the elderly.

Assistance for Construction of Old Age Homes

26 Non-Plan Scheme of Assistance to Panchayati Raj Institutions, voluntary organisations, self-help groups for the construction of Old Age Homes or Multi Service Centres for Older Persons was started in 1996-97. Aid up to 50 % of the construction cost subject to a maximum of Rs. 15 lakhs was given under the scheme. However, due to wide-spread discontent, the scheme was discontinued at the end of X Plan (2006-07).

After the enactment of the Maintenance and Welfare of Parents and Senior Citizens Act, 2007, formulation of a new scheme under Section 19 of the Act, which provides for the provision of old age homes for indigent elderly, is underway.

National Policy for Senior Citizens

The increasing population of the elderly, the heterogeneity of the elderly community, changing economy, social transformations, advancement of research, science and technology and the failure in the effective implementation of the existing policies and schemes all led to the formulation of a new policy concerning the elderly. Accordingly, the Ministry of Social Justice and

Empowerment, Government of India formulated a new policy titled *National Policy for Senior Citizens* which revises the existing 1999 National Policy on Older Persons. The draft of the new policy was released by the Ministry in the year 2011. The Policy is currently under finalisation and is yet to be implemented.

The proposed new policy is devised to overcome the flaws of the existing policy and tries to include comprehensive set of rights of the elderly. The policy values an age-integrated society and aims at strengthening the inter-generational integrity, understanding and support. The policy seeks to reach out to the elderly living in rural areas, in particular, who are dependent on family bonds.

The policy along with focusing upon *nine areas of intervention,* the policy also provides the mechanism for effectively implementing the policy.

Other Schemes

Some of the other schemes that are aimed at improving the quality of life of the elderly include,

- A Scheme of National Award for Citizens
- National Initiative on Care for Elderly
- Old Age Social and Income Security Scheme under AADHAR

NATIONAL COMMISSION FOR MINORITIES

Synopsis

- Introduction
- Establishment of the Minorities' Commission
- Communities covered under the Commission
- Composition of the NCM
- Functions and Powers of NCM
- State Minorities Commissions
- Role of NCM
- Conclusion

Introduction

Inclusion of constitutional and legal safeguards for protecting the rights and interests of minorities and other vulnerable groups and institutional mechanism to monitor their effective enforcement are the most important principles of governance in all inclusive democracies. India, which is also described as a 'confederation of minorities' provides institutional arrangements for protecting the interests of different vulnerable segments of its population. The National Commission for Minorities is such an institutional arrangement for monitoring the enforcement of legal and constitutional safeguards provided to religious minorities in India.

Genesis

Although the Minorities Commission came into existence in 1978 through a governmentresolution[1], the genesis of this body can be traced to pre-independence days. In fact, it was Sir Tej Bahadur Sapru Committee[2] of 1945 which proposed the establishment at the centre and in each ofthe provinces an independent Minority Commission. The functions assigned to the proposed
Commission were:

- to keep a constant watch over the interests of minority communities in the area;

- without attempting to deal with stray administrative acts or individual grievances, to call for such information as the commission may consider
- necessary for discharging their functions;
- to review periodically – for example once every six months – the policy pursued by the legislature and the executive in regard to the implementing of non-justifiable fundamental rights assured by the Constitution to minority communities and to submit a report to the Prime Minister.[3]

After the lapse of the Sapru Committee the creation of a body for protecting the rights of minorities was discussed in detail in the Constituent Assembly of India. The questionnaire on Minority Rights (drafted by K.M. Munshi and circulated among the members of the Sub-Committee on Minorities) contained a question about the setting up of machinery to supervise the efficacy of the safeguards provided to minorities.[4] Subsequently, the issue of administrative machinery to ensure protection of rights of minorities was taken up by the Sub-committee. Several proposals were brought before it for consideration including the establishment of 'a Minority Commission whose findings should be mandatory on government' (proposed by Mr. Khandekar).[5] Mr. Anthony suggested a Minority Commission with the right to make a report only,[6] However, both these proposals were defeated by majority in the Sub-Committee. Dr. Ambedkar's proposal for the appointment of an independent officer by the President at the centre and by the Governors in the provinces to report to the union and provincial legislatures respectively about the working of the safeguards provided to minorities was accepted but dropped before the final stage of the adoption of the Constitution. Thus there was no special/separate institutional arrangement for safeguarding the interests of religious minorities in India before 1978.

Establishment of the Minorities' Commission

The idea of a Minorities Commission was first conceived in the State of Uttar Pradesh in 1960 when a one-man Minorities Commission was created at Lucknow. Then the Government of Bihar set up a multi-member Minorities Commission in 1971. Following the examples of U.P and Bihar, the Government of Gujarat created a state Minorities High Powered Committee in 1977.

Communities covered under the Commission

Section 2 (c) of the NCM Act 1992 stipulates that 'Minority' for the purposes of the Act, means a community notified as such by the Central Government.

Therefore, all functions of the Commission as laid down in Section 9(1) of the Act are related to the six notified communities. Five religious communities, viz, Muslims, Christians, Sikhs, Buddhist and Zoroastrians (Parsis) were originally notified as minority communities by the Union Government.[14] Further vide notification detail 27th January 2014, Jains have also been notified as a minority community.[15] It is also important to mention that the NCM had recommended to grant minority status to Hindus in five states(Jammu & Kashmir, Mizoram, Meghalaya, Nagaland, and Punjab) and in the Union Territory of Lakshadweep.[16]

Composition of the NCM

The Commission consists of a Chairperson, a Vice Chairperson and five Members to be nominated by the Central Government from amongst persons of eminence, ability and integrity; provided that five Members including the Chairperson shall be from amongst the minority communities. As Jains have also been notified as the minority in 2014, one may expect suitable amendment in the NCM Act soon for giving representation to them in the composition of the Commission.

Functions and Powers of NCM

The powers and functions assigned to the Commission under Chapter III of the NCM Act 1992 are as follows:

The commission shall perform all or any of the following functions, namely:

- evaluate the progress of the development of minorities under the Union and the States;
- monitor the working of the safeguards provided in the Constitution and in laws enacted by the Parliament and the state Legislatures;
- make recommendations for the effective implementation of safeguards for the protection of the interests of minorities by the Central Government or the State Governments;
- look into specific complaints regarding deprivation of rights and safeguards of the minorities and take up such matters with the appropriate authorities;
- cause studies to be undertaken into problems arising out of any

- discrimination against minorities and recommended measures for their removal;
- conduct studies, research and analysis on the issues relating to socio-economic and educational development of minorities;
- suggest appropriate measures in respect of any minority to be undertaken by the Central Government or the State Governments;
- make periodical or special reports to the Central Government on any matter pertaining to minorities and on particular difficulties confronted by them : and
- any other matter which may be referred to it by the Central Government.
    - The Central Government shall cause the recommendations referred to in clause (c) of sub-section (1) to be laid before each House of Parliament along with a memorandum explaining the action taken or proposed to be taken on the recommendations relating to the Union and the reasons for the non- acceptance, if any, of any of such recommendations.

    Where any recommendation referred to in clause (c) of sub-section (1) or any part thereof is such with which any State Government is concerned, the Commission shall forward a copy of such recommendation or part to such State Government who shall cause it to be laid before the Legislature of the State along with a memorandum explaining the action taken of proposed to taken on the recommendation relating to the State and the reasons for the non-acceptance, if any, of any of such recommendations or part.

The Commission shall, while performing any of the functions mentioned in sub-clauses (a),and (d) of sub-section (1) , have **all the powers of a civil court** trying a suit and, in particular, in respect of the fallowing matters , namely:

- summoning and enforcing the attendance of any person from any part of India and examining him on oath;
- requiring the discovery and production of any document;
- receiving evidence on affidavits;
- requisitioning any public record of copy thereof from any court or office;
- issuing commissions for the examinations of witnesses and documents; and
- any other matter which may be prescribed.

Complaints and Monitoring Mechanism

The members of the notified communities can directly approach the Commission for redressal of their grievances. The Commission maintains a Complaint Monitoring System and regularly updates the status of the complaints at its official websites. The Commission receives hundreds of complaints every year. These complaints are mostly related to police atrocities, service matters, minority educational institutions and encroachments to religious properties. The Commission received 15134 complaints during 2000-2005.[17] It received 2439, 2127, 2639 complaints during the years 2011-12, 2012-13 and 2013-14 respectively.[18] The number of complaints received by the Commission shows people's trust in it. At the same time, it also highlights the fact that minorities need special institutional arrangement for redressal of their grievances. However, if we compare the number of complaints brought before the NCM with the National Human Rights Commission (NHRC) which receives about one lakh complaints every year[19,] it is lesser. One of the reasons for this is the fact that the NCM does not have enough powers to deal with the complaints to the satisfaction of the people. NHRC attached with the Ministry of Home Affairs and with wide powers of investigation and inquiry carries more weight. The Commissions for SCs and STs with constitutional status are better placed to discharge their duties as the departments and agencies of the government cannot afford to easily ignore to respond to the communications of the constitutional bodies.

State Minorities Commissions

Out of 29 states in India 16 have constituted State Minorities Commissions. Andhra Pradesh, Assam, Bihar, Chhattisgarh, Delhi, Jharkhand, Karnataka, Maharashtra, Madhya Pradesh, Manipur, Rajasthan, Tamil Nadu, Uttarakhand, Uttar Pradesh and West Bengal have also set up State Minorities Commissions in their respective States. Their offices are located in the State capitals. The functions of these Commissions, *inter-alia*, are to safeguard and protect the interests of minorities provided in the Constitution and laws enacted by Parliament and the State Legislatures.[20]As minorities are dispersed in all states of India, it is important that all remaining states make institutional arrangements for redressal of genuine grievances of minorities.

Role of NCM

An authentic account of the role and functions discharged and challenges faced by the Commission is found in the pioneering book of Tahir Mahmood titled "*Minorities Commission: Minor Role in MajorAffairs".* Since the book has been authored by a person who himself chaired the Commission, it mustbe taken as an authentic exposition of the role and functions discharged and challenges faced by the Commission. Besides**,** the Government of India has obligated the Commission to submit Annual Report to the President of India detailing its activities and recommendations. Hence, these annual reports are the index of the Commission's performance and progress made by the minorities under the aegis of the Commission. The Commission was also authorised by the Government to submit special reports on the matters within their scope of work. The Central Government on the other hand has to table these reports before each House of Parliament along with a memorandum explaining the action taken on the recommendations relating to the Union and the reasons for the non-acceptance, if any of such recommendations. Thus the Government's treatment of these reports and action taken on the recommendations is an exposition of its sincerity towards minorities and their problems.

It is often complained that the annual reports of the Commission and special studies conducted by it do not get due attention of the government. These reports are not tabled in the Parliament on time. Its recommendations are also not given due attention. In fact, there is lacuna in the NCM Act 1992 as it does not prescribe any time limit under which the annual report of the Commission is to be compulsorily tabled in the Parliament with Action-Taken report by the Government. As a result the annual reports of the Commission gather dust in the store houses of the concerned Ministry and the Commission respectively. This has greatly undermined the prestige of the Commission and therefore it has been reduced to the status of an ornamental body to provide lip service to the oppressed and aggrieved minorities. Unless the reports are tabled in the Parliament, they cannot be made public. Therefore, nothing can be known about the problem of minorities through the NCM in this situation.

Moreover, the Commission faces problem in discharging its duty of safeguarding the rights of minorities as it does not possess adequate powers. It can be easily understood that the nature of the work assigned to the NCM demands that it must possess the power of investigation. However the Commission has not been given any such power despite the statutory recommendation for suitably amending the NCM Act, 1992 to confer powers of investigation to the Commission' on the pattern of those given in the Protection of Human Rights Act, 1993. [29]The NHRC is also a statutory body like the NCM but the former has powers of investigation and inquiry which makes it more effective and

performing body and the later in the absence of the same is reduced to a toothless watchdog of minority affairs.

Conclusion

The foregoing discussion leads us to conclude that the root of the NCM lies in our freedom struggle. In fact, the leading actors of the freedom struggle were convinced that an additional institutional arrangement was necessary in independent India to allay the fears of minorities and ensuring the enforcement of constitutional safeguards proposed to be provided to minorities. The Partition of the country in 1947 resulted first in the abolition of the real safeguards of quota in public bodies and government services and second to their marginalisation in all walks of life. Whatever other rights were guaranteed by the Constituent Assembly remained also unrealized. However, the demand for institutional arrangement for ensuring the effective implementation of the safeguards to minorities remained a major issue during the Constituent Assembly debates even after the Partition of India. The demand remained an unrealized dream until 1978 when the Government of India created a central Minorities Commission by a Resolution. The NCM Act, 1992 provided it a statutory status. During this period (1978-1992), the Government made some half-hearted abortive attempts to accord a constitutional status to the NCM.

The debates in Parliament on the Bill to give a statutory status to the Minorities Commission reflect the misgivings and unfounded apprehensions towards the very idea of any special institutional arrangement for the minorities. The debates that followed the introduction of the Bill are also reflective of ignorance of most of the honourable members regarding minority rights and their postulates. Many members, however, showed their insight on minority issues and their commitment to promote the cause of the minorities. The Bill finally became the NCM Act 1992. The Act so passed is quite encouraging for the minorities but it suffers from many weaknesses rendering the National Commission for Minorities ineffective. As the bill for granting a constitutional status to the NCM has already been introduced in the lower house of Indian Parliament and subsequently referred to the Parliamentary Standing Committee on Social Justice and Empowerment[30] one may hope that the Government will make the Commission an effective body to deal effectively with the issues and challenges faced by the minorities in India.

THE ROLE OF NGOS IN THE PROTECTION OF HUMAN RIGHTS

NGOs participate in the treaty-monitoring process in the following ways:

When State Party is preparing country report, they can participate in this dialogue and give their inputs

In case they are not happy with the way a country report has been prepared, they can submit an alternate report or a shadow report.

They can suggest some draft questions to members of treaty monitoring body to enable it to further engage with the State Party. They can also share their research reports and other reports with the treaty body.

Upon completion of all stages and issue of concluding observations and recommendations by the treaty body, they can advocate for further action on the recommendations issued at the national level.

LEGAL INTERVENTION

NGOs can play a significant role in protection and promotion of fundamental rights by providing legal aid to victims of human rights violations. NGOs work towards the release of prisoners by writing letters to prison officials, judges, and various government officers of the State. The Supreme Court of India and NHRC have taken action on several complaints of human rights violations relating to such persons mainly reported by NGOs.

Illustration: Legal Aid Services, West Bengal, a non-political organization, under the Executive Chairmanship of D.K. Basu brought deaths in police lock-ups and custody to the cognizance of the Supreme Court, by addressing a letter to Chief Justice of India drawing his attention to certain news items published in the Telegraph dated 20- 22 July, 1986 and in the Statesman and Indian

Express dated 17th August, 1986 regarding deaths in police lock-ups and custody. The chairman submitted that it was imperative to examine the issue in depth and to develop “Custody jurisprudence” and formulate modalities for awarding compensation to the victim and family members of the victim for atrocities and death caused in police custody and to provide for accountability of the officers concerned. It was requested that the letter along with the news items be treated as a writ petition under “public interest litigation” category.

Considering the importance of the issue regarding the custodial violence and deaths in police lock-up, the letter was treated as a writ petition. The Apex Court gave a landmark judgement in this case and the guidelines evolved in this case are displayed in every police station of the country for adherence.

Some more illustrative examples

- JavedAbidi, who was a part of disability rights NGO movement, filed a petition in the Supreme Court of India regarding provision of air travel concession, ambu-lifts and aisle chairs for loco motor disabled.

- Disabled Rights Group filed a petition against Chief Election Commissioner in the matter of exercise of adult franchise by secret ballot, with dignity for disabled persons. It is for making polling booths accessible to persons with disabilities.

- Petition filed by Common Cause, a NGO, on the right to speedy trial

- People's Union for Civil Liberties filed a PIL on starvation deaths in Rajasthan (right to food case)

Other issues that they champion in, include:

- **RESEARCH AND DOCUMENTATION**
- **FUND-RAISING AND ALLIANCE BUILDING**
- **LEGISLATIVE ADVOCACY**
- **AWARENESS GENERATION THROUGH NAMING AND SHAMING**
- **NGOS' ROLE AS A HUMAN RIGHTS WATCHDOG**

ILLUSTRATION:

PEOPLE'S UNION FOR CIVIL LIBERTIES

Veteren leader Jayaprakash Narayan founded the People's Union for Civil Liberties and Democratic Rights (PUCL), during the emergency period in 1976. The idea was to make an organisation free from political ideologies, so that people belonging to various political parties may come together on one platform for the defence of Civil Liberties and Human Rights. On the formation of Janata Party government post emergency, the organization lost many key leaders. However, after the death of Jayaprakash Narayan, a conference, held in November 1980, drafted and adopted the Constitution of the new People's Union for Civil Liberties. It became a membership-based organisation, aiming to have branches all over the country. The Constitution laid down that the members of a political party will not have the right to hold any office. As a matter of policy, the PUCL does not accept money from any funding agency, Indian or foreign. All the expenses are met by the members, the office bearers, and the activists. For the expenses on the activities of the national office, money is raised from sympathizers and members by the way of donations.

PUCL member-lawyers prepare and argue cases in the local court, High Courts and the Supreme Court. They meet all the expenses in handling cases from their own pocket.

To raise awareness about civil liberties and human rights among the public and to bring to light the dedication and work of young journalists working in the area of human rights, PUCL instituted in 1981 the Journalism for Human Rights Award. It also organizes the annual J. P. Memorial Lecture on human rights every 23rd of March, the date of the lifting of national emergency in 1977. Prominent human rights academician, or lawyer, or prominent practitioner delivers the lecture. PUCL publishes a monthly journal, the PUCL

Bulletin, in English. It is the only journal of its kind in the country and is read in human rights circles all over the world.

In July 1981 the Bombay PUCL approached the Bombay High Court to stay the eviction of pavement dwellers in the midst of heavy rain in the city. PUCL also asked the courts for adoption of rehabilitation scheme and order proper compensation for evictees. PUCL, along with some other organizations, were in the forefront of the protest against issues related to the 1982 Asian Games in New Delhi including ban on demonstrations, use of Essential Services Maintenance Act, and payment of minimum wages to the workers engaged in construction work.

In 1983 the PUCL took part in a detailed study on child labour in Sivakashi, a district in the southern state of Tamil Nadu, where a large number of children were reportedly employed in the firecracker

manufacturing industry. It also made another study in the eastern state of Assam, where ethnic violence erupted and large number of people including children and women were victims of human rights violations by non-state actors as well as security forces.[2]

In the 1990s PUCL brought out reports on human rights violations in Jammu and Kashmir, and on communal riots in Aligarh (Uttar Pradesh), Mumbai (Maharashtra) and other parts of the country. It viewed the telephone tapping by the government seriously and subsequently petitioned the Supreme Court against it. It actively campaigned for the setting up of a high-powered and autonomous National Human Rights Commission (NHRC) and formulated pre-conditions for a purposeful Commission. PUCL pointed out the lacunas in the mandate, composition and functioning of the NHRC that came into existence. PUCL has been at the forefront of improving health facilities of the people, especially the vulnerable sections of society. On PUCL's petition, the court instructed the New Delhi Administration to take immediate steps in setting up a mental hospital-cum-medical college in New Delhi with sufficient autonomy to bring quality change in the condition of the inmates. This included changing the name of the hospital from Shahdara Mental Home to Institute of Human Behavior and Neuro Sciences. PUCL was able to make the government of Manipur pay compensation to the families of the victims of "fake encounters" with the military. It also condemned "liquidation or fake encounters." It made a landmark intervention in the case of widespread starvation deaths while the godowns (food stores) of Food Corporation of India were overflowing with grains. It led to the launching of nationwide program to ensure provision of food to stem the deaths, with Supreme Court monitoring.

SUMMARY

PUCL is among the few Human Rights NGOs that funds its actions, especially legal intervention, through its own members. Through its offices in many cities across India, it is able to successfully carry out research and documentation activities for human rights violations. AiNNI was the first to publish a shadow report on the Indian NHRC and submission to the GANHRI for accreditation review. It continues to scrutinize the functioning and work carried out by NHRI in relation to the Paris Principles. People’s watch grew from a robust local movement to an effective watchdog of human rights at the national level. It has been trying to expand the operation of some of its local rehabilitation programmes to more states. The ACHR is dedicated to investigation, research, campaign, and lobbying on issues pertaining to human rights violations. It is important for them to unveil human rights violations that are almost never dealt with fairly by the government and the mainstream media.

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5. International covenant on Economic and Cultural Rights,1966.
6. Convention on Elimination of All forms of Discrimination against Women,1979.
7. Convention on the Rights of the Child,1989.