

# **HUMAN RIGHTS COMMISSION : A CRITICAL STUDY**

## **DISSERTATION**

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This is to certify that SIDDHARTH SINGH student of LL.M Second Semester, BBD University, Lucknow, has worked on the topic “**Human rights commission : A critical study**” under my supervision. To the best of my knowledge this dissertation embodies the original work of the candidate himself and the findings and suggestions put forth in the dissertation are his own.

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Date: .....

Place: Lucknow

SIDDHARTH SINGH

## LIST OF ABBRIVATIONS

- A.I.R. : All India Reporter
- A.I. : Amnesty International
- A.D.R.D. : The American Declaration of the and Duties of man
- A.E.O. : Assistant Educational Officer
- A.J.I.L. : Article American Jotrrnal of International Law
- A.L.R. : American Law Review
- B.B.C. : British Broadcasting Corporation
- B.C.I. : Bar Council of India
- B.C.R. : Bar Council review
- C.R.C. : Committee on the Rights of the Child
- C.A.D. : Constituent assembly Debates
- C.B.C.I.D. : Crime Branch Criminal Investigation Department
- C.E.S.C.R. : Committee on the Elimination of Discrimination  
against Women
  
- C.J. : Chief Justice
- C.E.S.C.R. : Committee on Economic, Social and Cultural Rights
- C.A.T. : Committee against Torture
- Cr.P.C. : Criminal Procedure Code Civil and Military Law  
Journal
  
- Cr.L.J. : Criminal Law Journal
- D.E.O. : District Educational Officer
- D.P. : Directive Prirnciples
- D.G.P. : Director General of Police
- Dy.S.P. : Deputy Superintendent of Police
- ECOSOC. : Economic and Social Council Economic and  
Political Weekly
  
- F.R. : Fundamental Rights
- G.A. : General Assembly
- H.C. : High Court
- H.R.C. : Human Rights Commission
- H.R.P. : Human Rights Petition
- H.R.M.P. : Human Rights Miscellaneous Petition
- I.C.E.S.C.R. : International Court of Justice International Covenant  
on Economic, Social and Cultural Rights

- I.C.H.R. : International Covenants of Human Rights .
- I.C.C.P.R. : International Covenant on Civil and Political Rights .
- I.J.I.L. : Indian Journal of International Law
- I.L.R. : Indian Law Reporter .
- I.P.C. : Indian Penal Code
- I.P.S. : Indian Police Service
- I.T.B.P. : Indo Tibetan Border Police
- P.I.L. : Public Interest Litigation
- P.U.C.L. : People's Union for Civil Liberties
- P.U.D.R.. : Peoples Union for Democratic Rights
- P.W.D. : Public Works Department .
- R.A.W. : Research and Analysis Wing
- R.T.A. : Regional Transport Authority
- S.C. : Supreme Court
- S.C.C. : Supreme Court Cases
- S.C.J. : Supreme Court Journal
- S.G.P. : Superintendent Government Press
- U.D.H.R : Universal Declaration of Human Rights
- U.N. : United Nations
- U.N.H.R.C : United Nations Human Rights Commission .
- U.N.E.S.C.O. : United Nations, Educational Scientific and Cultural Organisation

## LIST OF CASES

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- Ajay Hasia v . Khalid Mujib. A.I.R. 1981 S.C. 487
- A.K. Gopalan v . State of Madras, A.I.R. 1950 S.C. 27
- Anwar v . State of Jammu and Kashmir. A.I.R. 1971 S.C. 337
- Birma v . State of Rajasthan. A.1.R. 1951 S.C. (Rajasthan) 127
- Chairman Railway Board v . Mrs . Chandrima Das. A.I.R. 2000(1) S.C. 265
- Deoraj Khatri v . State of Bihar. A.I.R. 1981 S.C. 928
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- Keshavananda Bharati v . State of Kerala. A.I.R. 1973 S.C. 1461
- Kharak Singh v . State of UP. A.1 R . 1963 S.C. 1295
- Maneka Gandhi v . Union of India. A.I.R. 1978 S.C. 597
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- Sathwant Singh Sawhney v . Rarnanathan. Assistant Passport Officer New Delhi. A.I.R. 1967 S.C. (Delhi) 1836
- State of West Bengal v . Subodh Gopal Bose. A.I.R. 1954 S.C. 92
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- Shivakumar Sharma and others v . Union of India. A.I.R. 1968 S.C. (Delhi) 64
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# CHAPTER 1

## 1.1 INTRODUCTION

'Human Rights' is a twentieth century term for what had been generally known as "Natural Rights" or, in a more appealing phrase, the "Rights of Man" The thought of "Rights of Man" and other such ideas of human rights are as old as humanity. "These rights of men had a spot nearly in all the old social orders of the world, however they were definitely not alluded to by that name<sup>1</sup>. The Virginian Declaration of Rights of 1776, other comparative Constitutional establishments around the same time, the Constitution of New York and of New Georgia of 1777 and that of Massachusetts of 1780, the Declaration of Independence of 1776; the Bill of Rights in the type of the initial ten amendments to the Constitution of America and the Affirmation of the Rights of Man and of the Citizen embraced in 1789 by the French National Assembly parched prefixed to the Constitution of 1793 and 1795 explicitly acknowledged the characteristic rights of man<sup>2</sup> . It is a general conviction that the idea of human rights is Western and that the source of the idea of human rights in world history discovered its first articulation in the "Magna Carta" of 1215 followed by the Petition of Rights of 1628, the Bill of Rights of 1688, the American Bill of Rights of 1791 and French Declaration of the Rights of Mm of 1789.

"Every State is known to the rights that it maintains. Our method of judging its character lies, abode all in the contribution that it makes to the substance of man's happiness."<sup>3</sup>

Democracy, which entered the vocabulary of the English language in the sixteenth century, had is birth way back in Athens some 2500 years ago. Official respect for freedom was sanctified (in the Western heritage) by the 1688 English Bill of Rights. It is interesting to note that prior to the use of the term "Human Rights," such rights were typically called the Rights of Man or Natural Rights. Thomas Paine, who coined the expression "human rights" in his English translation of the French Declaration of the Rights of Man and the Citizen (1789), wrote his classic book on human rights in 1792 titled *The Rights of Man* In the same year, for the first time in recorded history, Mary Wollstonecraft argued for equal rights for women in her equals classic book *A Vindication of the Rights of Woman*. Eleanor Roosevelt suggested the change of name from "Rights of Man" to "Human Rights" in 1947. This term has since

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<sup>1</sup> S. Subramanian, *Human Rights: International Challenges*, Vol.1 (New Delhi: Manas Publications, 1997) 3-56.

<sup>2</sup> H. Lauterpacht, *International Law and Human Rights* (London: Stevens and Sons Ltd., 1950) 88

<sup>3</sup> Harold J. Laski, *A Grantmar of Politics* (London: Allen & Unwin, 4lh ed., 1960) 89.

been universally accepted, beginning with the Universal Declaration of Human Rights, which the General Assembly had passed on 10th December 1948.

## **1.2 MEANING OF HUMAN RIGHTS**

Human beings are rational. By virtue of being human, they possess certain basic and inalienable rights, commonly known as human rights. They become operative with their birth. Human rights, being the birthright, are therefore inherent in all human beings irrespective of their caste, creed, religion, sex and nationality. Human rights are also sometimes referred to as fundamental rights; 'basic rights', 'inherent rights', 'natural rights' and 'birth rights'. 'Human rights' is a generic term, which embraces 'civil rights', civil liberties, and 'social, economic and cultural rights'. The idea of human rights is bound up with the idea of human dignity. Thus all those rights, which are essential for the maintenance of human dignity, are called human rights. These rights are essential for all individuals as they are consonant with their freedom and dignity and are conducive to their physical, moral, social and spiritual welfare. Human rights include those areas of individual or group - freedom that are immune from Governmental interference because of their basic contribution to human dignity or welfare and are subject to Governmental guarantee, protection or promotion. D.D. Basu defines human rights as "those minimum rights, which every individual must have against the State or other public authority by virtue of his being a member of human family, irrespective of any other consideration".<sup>4</sup>

Justice V.R. Krishna Iyer writes:

Human rights are those irreducible minima, which belong to every member of the human race when pitted against the State or other public authorities or group or gangs and other oppressive communities. Being a member of the human family, he has the right to be! treated as human, once he takes birth or is alive in the womb with a potential title to personhood.<sup>5</sup>

Durgadas Basu referring to natural laws observes:

Western scholars date the genesis of this ideal of natural law to Sophocles more than 400 years before Christ. In England, the case for a natural law, superior to man-made law, was argued by Blackstone in the 17th century. Once the concept of a higher law binding on human authorities was evolved, it came to be asserted that there were certain rights anterior to society, which too were superior to rights created by the human authorities which were of

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<sup>4</sup> D.D. Basu, Human Rights in Constitutional Law (Nagpur: Wadhwa and Co., 1994) 5.

<sup>5</sup> V.R. Krishna Iyer, The Dialectics and Dynamics of Human Rights in India - Yesterday, Today and Tomorrow - Tagore Law Lecturers, (Calcutta: Eastern Law House, 1999) 54.

universal application to men of all ages and all climes, and were supposed to have existed even before the birth of political society. These rights could not, therefore, be violated by the state.<sup>6</sup>

### **1.3 OBJECTIVE OF STUDY**

The history of mankind has been firmly associated with the struggle of individuals against injustice, exploitation and disdain. The assertion of human rights is one of the remarkable manifestations of this struggle. The domain of human rights is ever expanding in India. Many laws, institutions and organizations have been enacted and established to ensure our citizens a better standard of human rights. The Indian Parliament enacted the Protection of Human Rights Act in the year 1993.

The objectives of the present study are:

1. To study historically the evolution of the basic international human rights law.
2. To analyze the human rights provisions of basic human rights documents.
3. To study the historical foundations of human rights in India.
4. To examine various provisions relating to human rights in the Indian Constitution.
5. To evaluate the role of Indian Judiciary and the National Human Rights Commission for the protection of human rights.

### **1.4. RESEARCH METHODOLOGY**

The methodology followed in this study is not uni-dimensional. It is rather a blend of the historical, theoretical and practical aspects of human rights. A historical approach has been followed for the study of the origin and development of human rights in the world scenario as well as in India. In analyzing the judicial behavior of the Supreme Court and the State High Courts as well as the role and function of the National and State Human Rights Commissions, the methodology adopted is analytical.

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<sup>6</sup> D.D. Basu 5

## **1.5 HYPOTHESIS**

The major hypotheses guiding this investigation are:

1. In modern times human rights are regarded as the most important rights.
2. The United Nations provide a good background for the development of human rights.
3. Human rights are found in the ancient Indian thought.
4. The Indian Constitution itself contains ample provisions for the protection of human rights.
5. The Protection of Human Rights Act 1993 and the Constitution of National Human Rights Commission encourage protection of human rights. However, N.H.R.C., is a weak body that suffers from inherent weaknesses.
6. The Judiciary in India has expanded the scope of Article 21 of the Constitution - "No person shall be deprived of his life or personal liberty except according to the procedure established by law."
7. The Supreme Court is the most important protector of human rights in India.

## **1.6 LITRATURE REVIEW**

An attempt is made in this section to review the available literature on human rights with a view examining the different standpoints and views adopted by various thinkers and experts. In as much as a comprehensive analysis of all the literature relating to the topic is neither essential nor requisite, only the relevant contributions are briefly presented.

H. Lauterpacht in his book, *International Law and Human Rights* (1950) systematically traces the evolution of human rights at the international level. After discussing the various provisions of the U.N. Charter concerning human rights, he throws light on the adoption of the Universal Declaration of Human Rights.

B.N. Rau's *India's Constitution in the Making* (1960) contains all the relevant debates and deliberations that took place on the floor of the Constituent Assembly of India on the desirability of the adoption of fundamental rights in the present Constitution. This book closely analyses the events that led to the change of the phrase "Procedure Established by Law" in place of "Due Process of Law." Prof. A.V. Dicey in his famous work, *The Law of the Constitution* (1961) gives a narrow meaning to the concept of personal liberty. He also explains the implications and ramifications of "Rule of Law" as applied in the United Kingdom.

D.D Basu, a legal luminary, in his book *Commentary on the Constitution of India in Ten volume* (1965) gives a systematic exegesis of all the provisions of the Indian Constitution including chapter III that deals with fundamental rights. Besides, he gives a comparative analysis of the constitutional framework of the contemporary political systems.

Jagdish Swarup in his book, *Human Rights and Fundamental Freedoms* (1975) sums up individual rights in retrospect. He explains how right to liberty was engendered by the right to the security of a person. The right to privacy against searches and privacy in marital relationship are elaborated in this book.

*Constitutional Government in India* (1977) by M.V. Pylee discusses the main factors responsible for the incorporation of fundamental rights in the Indian Constitution starting from the Constituent Assembly debates. It also refers to various judgment; of Indian Courts.

Subhash C. Kashyap in his book entitled *Human Rights and Parliament* (1978) seeks to clarify the meaning, scope and ramifications of the concept of human rights in India and the role that Parliament played in safeguarding them. This work throws much light on the working of the Parliamentary form of Government but it places less emphasis on the implementation of the concept of rights.

T.S. Batra in his study *Human Rights - A Critique* (1979) articulates his concern about the violation of human rights. He explains how on the one hand human rights are proclaimed to be inviolable and on the other hand how human beings seeking such rights are tortured, killed and even burnt alive. This book is highly useful in identifying the areas of violations of human rights.

B.G. Ramacharan (ed) *Human Rights: Thirty Years After the Universal Declaration* (1981) is an interesting collection of enlightening essays reviewing the progress of Human rights in the 30 years following the adoption of the Universal Declaration of Human Rights in 1948. The author also makes some seminal suggestions for further development.

Dr. H.O. Agarwal in an earlier book entitled, *Implementation of Human Rights Covenants* (1983) examines the international standard for the protection of human rights and then compares them with that of Indian standards. Besides this, it also lists those rights which are made available to the citizens of India by a latitudinarian interpretation of Article 21 which otherwise are not specifically mentioned in the Constitution.

Justice V.R. Krishna Iyer in his well-known book *Human Rights and the Law* with refreshing fearlessness and passion for socio-spiritual betterment of men and matters, issues and themes displays a deep commitment to humanistic values. Justice Krishna Iyer rightly examines here the interplay of law and social change in the context of the Indian legal system

R.C. Hingorani's work *Human Rights in India* (1985) shows how far international human rights are observed in the Indian context. This book classifies rights into five categories i.e. civil, political, economic, social and cultural rights. However, it is (not an in-depth study of the implementation of human rights in India because it ignores judicial activism in this field.

Attar Chand's book, *Politics of Human Rights and Civil Liberties* (1985) is an important work that enumerates the various rights guaranteed in the contemporary political systems of



the world. A close study of this book enables us to correctly assess the possibility of the realization of those rights in the Indian context.

Shashi P. Misra's *Fundamental Rights and the Supreme Court* (1985) is a pioneer attempt in the study of judicial behavior as an integral part of the political process in India. The greatness of this book rests on the fact that the norms evolved by the Supreme Court to operationalize the concept of reasonableness have been identified from the plethora of judicial decisions on fundamental rights.

A.R. Desai's (ed) *Violation of Democratic Rights in India* (1986) exhaustively discusses how far the people of India enjoy the fundamental rights guaranteed by the Indian Constitution. He examines in detail some of the selected reports and documents, which give authentic accounts of the attacks by the guardians of the law by way of Police atrocities, encounter deaths, deliberate murders and torture inflicted on the people. This book provides a myriad of useful data relating to the violations of the right to life in India.

Nagendra Singh in his book, *Enforcement of Human Rights* (1986) lists the ways and means for the enforcement of human rights. It provides 14 an insight into the problems involved in the enforcement of human rights in India.

Freed Kazmi in his book, *Human Rights and Reality* (1987) makes an attempt to demystify the numerous myths that have been woven around the concept of human rights. He redefines the concept of human rights as a means for the promotion of the happiness of the people of India.

Upendra Baxi's (ed) *The Right To Be Human* (1987) is a collection of articles, which indicate that new rights arise from the matrix of the old. Now the sphere of the ideas, values and thoughts associated with human rights is ever widening and covers new areas. The main emphasis of the book is on human rights of the child, the mentally challenged and the beggars.

John Humphrey's book entitled *No Distant Millennium: The International Law of Human Rights* (1989) deals with the principal organs of the U.N. and human rights. This book seeks to broaden the scope of current thinking on human rights so that the idea of those rights becomes a reality.

S.N. Sharma in *Personal Liberty Under Indian Constitution* (1990) provides an empirical and analytical study of the social perception of the context and extent of personal liberty in the light of recent judicial policy of liberal interpretation. It also seeks to correlate the personal liberty decisions and maintenance of law and order. This book has greatly helped the researcher formulate new dimensions of personal liberty in the present research.

The main emphasis of K.L. Bhatia's (ed) *Judicial Activism and Social Change* (1990) is on the impact of judicial activism on socio-economic change. Section III namely "Civil Liberties and Judicial Activism," is particularly pertinent to the present thesis dealing as it does with the effect of judicial activism on fundamental rights.

Nisha Jaswal in her book, *Role of the Supreme Court with Regard to the Right of Life and Personal Liberty* (1990), closely examines Article 21 of the Indian Constitution in the light of recent judicial decisions. She also highlights some of the important aspects of the right to life and personal liberty such as the validity and desirability of capital punishment, right to legal aid and right to protection against exploitation.

P.L. Metha and Neena Iyengar in their book *Human Rights under the Indian Constitution, the Philosophy and Judicial Jerryandering* (1999) focus attention on the origin and development of human rights jurisprudence since Pre-Vedic times with special emphasis on its vicissitudes during different periods. The book also discusses the various constitutional provisions meant to provide human rights to the people of India.

Justice V.R Krishna Iyer, the Indian legal luminary on Human Rights, in his classical text *The Dialectics and Dynamics of Human Rights in India: (Yesterday Today and Tomorrow)* (1999) which is an anthology of lectures delivered by him at the Calcutta University directs a sharp focus on India's human rights odyssey from the jurisprudential perspective and presents with his erudition and scholarship a learned discourse on the emergence, dimension and development of human rights and the realities confronting those rights in a vibrant and inimitable style. The learned author in these lectures also makes a detailed study of the concept and origin of human rights and their relationship with religious culture and the foundation and structures of the United Nations and the International Covenants. This book has enormously helped the researcher to formulate new dimensions of human rights in the present research.

N. Jayapalan's book Human Rights (2000) is undoubtedly a very useful and handy collection of international treatises on human rights. It gives a graphic picture of the: Indian Constitutional guarantees of these rights in part III and part IV in a lucid language.

Dr. S.K. Kapoor in his book Human Rights Under International Law and Indian Law (2001) explains the origin, growth and development of human rights, the Universal Declaration of Human Rights and Regional Protection of Human Rights from a historical perspective. It also deals with the Indian Human Rights Protection Act 1993, protection of human rights under the Indian law and the role of the National Human Rights Commission. This work is a blend of stimulating scholarship and sparkling style.

D.N. Gupta and Chandrachud Singh in their book, Human Rights, Acts, Statutes and Constitutional Provisions (2003) focus attention on the Acts, Statutes and Constitutional provisions which are concerned with environmental issues, protection of the rights of the Indian citizen vis-a-vis the illegal migrants, the rights of the disabled persons, juveniles, prisoners, criminals, citizens', right to information and many other important subjects connected with human rights. In this study an attempt has been made to place before all concerned the basic Acts, Statutes and Constitutional provisions on various issues concerning human rights.

Dr. H.O. Agrawal in his work Human Rights (2004) critically examines the Universal Declaration of Human Rights and various Regional Covenants on Human Rights. He deals comprehensively with the interrelation between the provisions contained in our Constitution and the provisions of the two International Covenants. Particularly interesting is his discussion of the development of human rights following various decisions of the Supreme Court. The learned author makes a highly commendable analysis of the decisions of the Supreme Court subject-wise, showing clearly which particular human right has been recognized and developed by the Supreme Court in each decision.

## **1.7 CHAPTERIZATION**

In the light of the above said factors and discussions, the study on "Human Rights in India: With Special reference to the Role of the Kerala State Human Rights Commission," is schemed into Five chapters.

The first chapter, introduction, sets forth the importance of human rights, defines human rights and presents the objectives of the study, hypotheses, significance of the study, sources of information, the methodology adopted, relevance of the specific period and book reviews.

The second chapter entitled, "The Origin and Development of Human Rights in the Global Scenario deals with the evolution and development of human rights in the international scene. This chapter also addresses such varied themes as 'United Nations and Human Rights', the 'International Declarations of Human Rights', and the 'International Covenants of Human Rights'.

The third chapter "Human Rights in India -An Overview" attempts to throw light on the origin and development of human rights in India, human rights protection laws in the Indian Constitution and the role of the Judiciary in the protection of human rights.

The fourth chapter entitled "The Protection of Human Rights Act 1993 and the National Human Rights Commission" includes an analysis on the Protection of Human Rights Act, 1993 and the role played by the National Human Rights Commission for the protection of human rights.

Chapter five, "Conclusion and Suggestions" scrutinizes the working of the Kerala State Human Rights Commission. This chapter evaluates the entire study and also propose;; an agenda in the form of suggestions and recommendations.

## **CHAPTER 2**

### **THE ORIGIN AND DEVELOPMENT OF HUMAN RIGHTS**

### **IN THE GLOBAL SCENARIO**

#### **2.1 INTRODUCTION**

The term "Human Right;" is comparatively of recent origin. But the idea of human rights is as old as the history of human civilization. Human rights are deeply rooted in the historical past. The history of mankind has been firmly associated with the struggle of individuals against injustice, exploitation and disdain. Justice V.R. Krishna Iyer in his book, Human Rights and Inhuman Wrongs remarks that, "ultimately humanity has a commitment to history to make human rights a viable reality."<sup>7</sup>

#### **2.2 HISTORICAL FOUNDATIONS OF HUMAN RIGHTS**

The roots for the protection of the rights of man can be traced as far back as to the Babylonian laws.. The Babylonian King 'Hammurabi' issued a set of laws to his people called 'Hammurabi's Codes.' It established fair wages, offered protection of property and required charges to be proved at trial. The Assyrian Laws, the Hittite laws and the Dharma of the Vedic period<sup>8</sup> in India also devised different sets of standards by which rights of one was respected by another. All the major religions of the world have a humanist perspective that supports human rights despite the differences in their content.

Human rights are also rooted in ancient thought and in the philosophical concepts of 'Natural Law' and 'Natural Rights.' A few Greek and Roman philosophers recognized the idea of Natural Rights. Plato (427-348 BC) was one of the earliest thinkers to advocate a universal standard of ethical conduct. According to the Roman jurist Ulpian, natural law was that "which nature and the State assures to all human being."<sup>9</sup> This meant that foreigners must be treated in the same way as one deals with one's compatriots. It also implied conducting of wars in a civilized manner.

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<sup>7</sup> V.R. Krishna Iyer, Human Rights and Inhuman Wrongs (New Delhi: B.R Publishing Co., 1990) 36.

<sup>8</sup> P.N. Bhagwati, Supreme Court of India, Inaugural Address in the Seminar on Human Rights Organized by International Law Association (Allahabad Centre, 1980): 7. (Laws Promulgated in the Reigns of Urukagina of Lagash (3260 B.C), Sargon of Akkad (2300 B.C) and Hammurabi of Babylon (1750 B.C) cited in the Inaugural Address of Bhagwati.

<sup>9</sup> H.O. Agarwal, Human Rights, 7th ed. (Allahabad: Central Law Publications, 2004) 8

The Republic (400 BC) proposed the idea of universal truths that should be recognized by all. Aristotle (384-322 B.C) wrote in Politics that justice, virtue and rights change in accordance with different kinds of institutions and circumstances. Cicero (106-43 BC), a Roman statesman, laid down the foundations of "natural law" and "human rights" in his work, The Laws (52 BC). Cicero believed that there should be universal human rights laws that transcend customary and civil laws. Sophocles (495-406 B.C) was one of the first to promote the idea of freedom of expression of opinion against the State. Stoics employed the ethical concept of natural law to refer to a higher order of law which corresponded to nature and which was to serve as a standard for the laws of civil society and Government. Later, Christianity, especially the writings of St.Thomas Aquinas (1225-1274), based this 'natural law' in a divine law, which was revealed to man in part discoverable by him through his God-given right of reason. The City States of Greece gave freedom of speech, equality before law, right to vote, right to be elected to public office, right to trade and right to access to justice to their citizens. Similar rights were secured by the Romans by the "Jus civile" of the Roman law.<sup>10</sup> Thus, the origin of the concept of human rights can be found in the Greco-Roman natural law doctrines of "Stoicism" (the school of philosophy founded by Zeno of Citium), which held that a universal force pervades all creation and that human conduct should, therefore, be judged according to the laws of nature.

'The Magna Carta,' also called Magna Charta in Latin, consisted of 70 clauses. Though not a complete catalogue of civil rights and liberties as we know of today, it could, nonetheless, be described as the starting point of Constitutional history) which shifted the focus from the power of the State to human rights since it has enshrined the principles of liberty, justice and even of equality and fraternity.<sup>11</sup> It is a great tribute to the people of the United Kingdom to have preserved it, to nurse it and to nurture it over the years to serve as a beacon to humankind. Though the bundle of civil rights and liberties under 'the Magna Carta' was limited, its impact was revolutionary as it ushered in the realization and recognition that individuals had certain rights and could claim these rights against the State and that the State was expected to respect and not to interfere with such rights and liberties of the individuals.

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<sup>10</sup> P.N. Bhagwati, Seminar on Human Rights 7

<sup>11</sup> Justice A.M. Ahmadi, inaugural Address on Fakhruddin Ali Ahmed Memorial Lecture on Democracy, Liberty and Changing Political Scenario, Dated 29th July 2000, (New Delhi: GHAL B Institute Publication, 2000) 9.

'The Magna Carta' granted by King John of England to the English barons on June 15, 1215 was in response to the stiff opposition to the heavy burden of taxation created by the third Crusade and the ransom of Richard I, captured by the Holy Emperor Henry VI. The English barons protested against the heavy taxes and were unwilling to let King John rule again without granting some concessions regarding their rights. The overreaching theme of "Magna Charta" was the protection against arbitrary acts by the King. Accordingly land and property could no longer be seized, judges had to know and respect laws and taxes could not be imposed without common counsel. There could be no punishment without a trial. The merchants were granted the right to travel freely within England and outside. The Magna Carta also introduced the concept of jury trial in its Clause 39, which provided protection against arbitrary arrest and imprisonment. Thus the Charta set-forth the principle that the power of the King was not absolute. In 1216-17 during the reign of John's son, Henry III, The Magna Carta was confirmed by Parliament and in 1297 Edward I confirmed it in a modified form. The Carta was reinforced in 1628 by the Petition of Rights and in 1689 by the Bill of Rights and thus formed the platform for Parliamentary superiority over the Crown and gave a documentary authority for the Rule of Law' in England. In addition to the above, the writings of St.Thomas Aquinas and Grotious also reflected the view that human beings are endowed with certain eternal and inalienable rights.

The concept 'fundamental rights of man' is found in the declarations and Constitutional instruments of many States. For instance, the 'Declaration of Independence' of the thirteen States of America in 1776 (The Virginia Declaration, 1776) and the Constitution of the United States of America, 1787, with amendments in 1789, 1865, 1869 and 1919 specified a number of rights. The Virginia Declaration of Rights affirmed that all men are by nature equally free and independent with certain inherent rights. The French Declaration of the Rights of Man and of Citizen of 1789 led other European States to include provisions in their laws for the protection of human rights. Sweden in 1809, Spain in 1812, Norway in 1814, Belgium in 1831, Denmark in 1849, Prussia in 1850 and Switzerland in 1874 made provisions for the fundamental rights of man.

The term "Natural Rights" eventually fell into disfavor, but the concept of "Universal Rights" took root. The phrase "The rights of man" was found unsuitable, as it was not universally understood to include the rights of women. It was Eleanor Roosevelt who suggested in 1947 that the term 'Rights of Man' be changed to 'Human Rights'. Though the term 'human right'

was first coined by Thomas Paine and used in his English translation of the French Declaration of the Rights of Man and Citizen (1789). Henry David Thoreau in his classical treatise - Civil Disobedience, expanded this concept.

Till the nineteenth and the beginning of the twentieth century, any attempt to enforce human rights was considered as an attack upon the concept of State sovereignty. However, there were exceptions to the above rule like the adoption of the Slavery Convention of 1926 and the establishment of the International Labour Organisation in 1919. The Covenant of the League of Nations adopted at the end of World War I was silent on the issue of human rights.

The realization of the Forth of human being led the Institute of International Law to issue a Proclamation of the Rights of Man in 1929. Instead of enumerating the rights of human beings, it laid down six duties of the State. The Proclamation of 1929 recognised the right of every individual to life, liberty and prosperity; the rights without any distinction as to nationality, sex, race, language; the right of every individual to the free practice in public or in private of any faith, religion or belief. The proclamation may be regarded as the first attempt towards the universalisation of human rights,

The turning point for the traditional approach came in the 1940s, in the midst of the extreme abuse; of human rights in war-torn Europe during World War II. Atrocious crime; were being committed against humanity and there was a total suppression of fundamental human rights. The Nazi leaders of Germany had established a regime of complete lawlessness and tyranny. They had barbarously negated all human values and dignity within the territories under their occupation. It was at this time that the restoration of the freedom and rights of the people was accepted as one of the essential conditions for the establishment of international peace and security. The spirit of this principle was well reflected in the Proclamation issued by the American President Franklin D. Roosevelt on January 6, 1941, which came to be known as 'Four freedoms'.<sup>12</sup> In his message Roosevelt declared, "Freedom means the supremacy of human rights everywhere."

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<sup>12</sup> Document of the American Foreign Relations, Vol. 111, 1941): 26. Declaration by the American President, Franklin D. Roosevelt on January 6, 1941 came to be known as 'Four Freedoms' (Roosevelt Listed Freedom of Speech, Freedom of Religion, Freedom from Want and Freedom from Fear.



In the Moscow Declaration of German Atrocities of October 30, 1943, the United States, the United Kingdom, France and the Soviet Union declared that the Germans should be held responsible individually for their violations of international law. A number of conferences and meetings were held before the formation of the United Nations as an international organisation in 1945 (United Nations Declaration, 1942; Moscow Declaration, 1943; Tehran Declaration, 1943; Dumbarton Oaks Conference, 1944 and San Francisco Conference, 1945). A joint declaration was issued by President Franklin D. Roosevelt of the United States and Prime Minister Winston Churchill of the United Kingdom on August 14, 1941 in a document known as the 'Atlantic Charter.' The declaration of the United Nations signed on January 1, 1942 in Washington was the first document, which used the term human right.<sup>13</sup> In this document the signatories who were fighting against the Axis Powers recognized the need to "preserve human rights and justice in their own land as well as in other lands.

### **2.3 HUMAN RIGHTS UNDER THE U.N. CHARTER**

The Charter of the United Nations represents a significant advancement in the direction of faith in and respect for human rights. The appalling atrocities perpetrated by the Nazis against the Jews and other races during World War II led to a strong movement towards international protection of fundamental human right. The delegates from some of the States at the San Francisco Conference were in favour of the adoption of an even stronger provision concerning human rights. An attempt, which proved abortive, was also made to incorporate in the U.N. Charter an International Bill on Human rights. Concern for human rights is woven into the U.N. Charter like a golden thread. Human rights have occupied a significant chapter in any story of the U.N." The Charter contains a number of provisions for the promotion of human rights and fundamental freedoms in the Preamble and in Articles 1, 13(b), 55, 56, 62(2), 68 and 76(c), which are as follows:

a) The first paragraph of the Preamble of the Charter lays down that "we the people' of the United Nations are determined to reaffirm faith in the fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large or small ."

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<sup>13</sup> H.O. Agarwal, International Law and Human Rights, 8<sup>th</sup> ed. (Allahabad: Central Law publications, 2002) 656.

b) Paragraph 3 of Article I of the Charter lays down that the achievement of international co-operation in promoting and encouraging respect for- human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion shall be one of the purposes of the U.N.

c) By the terms of Article 13, the General Assembly is empowered to initiate studies and make recommendations for the purpose of assisting the realization of human rights and fundamental freedoms without distinction as to race, sex, language or religion.

d) Article 55 empowers the U.N. to promote universal respect for, and observance of human rights and fundamental freedoms for all without any distinction as to sex, race, language or religion.

e) Article 56 provides that the members of the United Nations shall pledge themselves to take joint and separate action in co-operation with the Organisation for the achievement of the purposes set forth in Article 55.

f) Article 62 of the Charter of the U.N. empowers the Economic and Social Council to make recommendations for the purpose of promoting respect for and observance of the human rights and fundamental freedoms of all.

g) As per Article 68 it shall be the responsibility of the Economic and Social Council to set up: commissions in economic and social fields for the promotion of human rights. The Commission on Human Rights and the Commission on the Status of Women are the subsidiary bodies of the Economic and Social Council. h) Paragraph (c) of Article 76 stipulates that one of the basic objectives of the 'Trusteeship System' is to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.

The U.N. Charter did not contain a specific Charter on human rights and so an attempt was made to fill them out by drawing up the "Universal Declaration of Human Rights and Fundamental Freedoms" " in 1948 and with a view to implement the Universal Declaration, the European Convention for the Protection of Human Rights and Fundamental Freedoms,

the African Charter on Human and People's Rights, and the American Convention on Human Rights, and finally the International Covenants on Human Rights were adopted.

## **2.4 UNIVERSAL DECLARATION OF HUMAN RIGHTS AND THE COMMISSION ON HUMAN**

### **RIGHTS**

The idea for the protection of human right and fundamental freedoms was conceived in the 'Atlantic Charter' in 1941 and the "Declaration of the United Nations" in 1942. The first documentary use of the expression "Human Rights" is to be found in the Charter of the United Nations adopted at San Francisco on 25th June 1945. The preamble of the Charter, setting up an international organisation called the United Nations, declares that the U.N. shall have in its objects, inter alia, a firm faith in fundamental human rights.

When the founders of the United Nations met at the San Francisco Conference in 1945 to draft the Charter of the U.N; the Latin American States wanted the Conference to discuss an International Bill of Human Rights. Panama wanted it to be incorporated as a part of the Charter. But the super powers were not interested in precise legal obligations and international action on human rights. As a result, the Charter contained a number of provisions, which are vague and are of a general nature for the promotion and protection of human rights and fundamental freedoms.

To implement the provisions of the U.N. Charter concerning human rights, the General Assembly of the United Nations decided to prepare an international Bill on Human Rights. With a view to achieve this, the General Assembly of the United Nations requested the Economic and Social Council on January 29, 1946 to get a report on the study conducted by the Commission on Human rights.

The Commission as determined by its terms of reference prepared recommendations and reports on the following items.<sup>14</sup>

#### 1. International Bill of Rights

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<sup>14</sup> G.S. Bajwa, Human rights in India implementation and Violation, 1st ed. (New Delhi: Anmol Publications. 1395) 74.

2. International declarations and conventions on civil liberties, the status of women  
  
etc.
3. The prevention of discrimination on grounds of race, sex, language or religion.
  
4. The protection of minorities.
  
5. Other matters concerning human rights.

The Commission began work in January 1947, under the Chairmanship of Mrs. Franklin D. Roosevelt. In its first session, the Commission on Human Rights established a sub-commission for the Prevention of Discrimination and Protection of Minorities. The Commission in the same session appointed a committee known as Drafting Committee for the preparation of the draft of an International Bill of

Rights. It drafted the Universal Declaration of Human Rights, which was adopted by the General Assembly on December 10, 1948. Using the Declaration as basis, the Commission prepared an International Covenant on Civil and Political Rights and an International Covenant on Economic and Social and Cultural Rights in 1966.

The Universal Declaration of Human Rights was adopted in 1948 and the two International Covenants were adopted in 1966 codifying the two sets of rights outlined in the Universal Declaration. International Covenant on Civil and Political Rights and the International Covenant on Economic Social and Cultural Rights came into force in 1976. Later the General Assembly also adopted two Optional Protocols on Civil and Political Rights. The Optional Protocol to the International Covenant on Civil and Political Rights, 1966 came into force on March 23, 1976 and the second Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of Death Penalty in 1989 came into force on July 11, 1991. The two International Covenants, together with the Universal Declaration of Human Rights and the Optional Protocols, comprise the 'International Bill of Human Rights'. Thus

the International Bill of Human Rights is a collective term applied to five major international instruments.<sup>15</sup>

The Preamble of the Universal Declaration incorporated a form of language in tune with the spirit of natural law by inserting, 'whereas recognition of the inherent dignity and of equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world.' Keeping this declaration always in mind, it shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction on. The Universal Declaration dealt not only with civil and political rights, but also with social and economic rights.

#### **2.4.1 Civil and Political Rights in the universal declaration**

Articles 2 to 21 deal with those civil and political rights, which have been generally recognized throughout the world. These are as follows:

1. Right to life, liberty and security of persons (Article 3)
2. Freedom from slavery or servitude (Article 4)
3. Prohibition against torture, inhuman or degrading treatment or punishment (Article 5)
4. Recognition as a person before the law (Article 6)
5. Equality before the law and equal protection of the law without any discrimination (Article 7)
6. Effective remedy before the national tribunals (Article 8)
7. Freedom from arbitrary arrest, detention or exile (Article 9)

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<sup>15</sup> H.O. Agarwal, Human Rights, 7th ed. (Allahabad: Central Law Publications, 2004) 30.

8. Right to a fair and public hearing by an independent and impartial tribunal (Article 10)
9. Presumption of innocence until proved guilty in a public trial with all guarantees necessary for defense in criminal cases (Article 11)
10. Freedom from ex-post facto laws (Article 11)
11. Right to privacy, family, home and correspondence (Article 12)
12. Right to freedom of movement and residence within the borders of a State (Article 13)
13. Right to leave any country, including his own and to return to his country (Article 13)
14. Right to seek and to enjoy in other countries asylum from persecution (Article 14)
15. Right to a nationality (Article 15)
16. Right to marry and to found a family (Article 16)
17. Right to own property (Article 17)
18. Right to freedom of thought, conscience and religion (Article 18)
19. Right to freedom of opinion and expression (Article 19)
20. Right to freedom of peaceful assembly and association (Article 20)
21. Right to participate in the Government of his country (Article 21)

#### **2.4.2 Economic and Social Rights in the Universal Declaration**

Articles 22 to 27 of the Declaration guarantee the following economic and social rights:

1. Right to social security (Article 22)
2. Right to work and free choice of employment (Article 23)
3. Right to rest and leisure (Article 24)
4. Right to a standard of living adequate for the health of himself and of his family (Article 25)
5. Right to education (Article 26)
6. Right to participate in cultural life (Article 27)
7. Right to good social and international order (Article 28)

The Declaration laid down under Article 29 contains certain limitations to these rights and freedoms, by providing that everyone has duties to the community in which alone the final and full development of his personality is possible. Paragraph 2 of Article 29 provides that these rights shall be provided to the individuals subject to just requirements of morality, public order and the general welfare in a democratic society. This condition made the rights provided in the Declaration not absolute.

## **2.5 ADOPTION OF THE TWO INTERNATIONAL COVENANTS**

The General Assembly on 16<sup>th</sup> December 1966 adopted the two Covenants, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.<sup>16</sup> It also adopted an Optional Protocol to the International Covenant on Civil and Political Rights aiming at the abolition of the death penalty.<sup>17</sup>

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<sup>16</sup> United Nations General Assembly Resolution 2200 A (XXI), December 16 1966

<sup>17</sup> 6 United Nations General Assembly Resolution 441128. December 15, 1989.

### **2.5.1 The Covenant on Civil and Political Rights**

The Covenant on Civil and Political Rights that consists of 53 Articles is divided into six parts. Article 1 which refers to the right of peoples to self determination states that all people have the right to determine freely their political status and freely pursue their economic, social and cultural development and may, for their own ends, freely dispose of their natural wealth and resource without prejudice to any obligations arising out of international economic co-operation, based upon the principles of mutual benefit and international law. The Article, further states that in no case may a person be deprived of his own means of subsistence, and that the 'States Parties' shall promote the realization of the right of self determination and shall respect that right. The Covenant on Economic, Social and Cultural Rights also stipulated the above provisions in to under Article 1.

Part II stipulated the rights and obligations of the 'States Parties' to the Covenant. It included the obligations of the States to take necessary steps to incorporate the provisions of the Covenant in the domestic laws and to adopt such legislative or other measures as may be necessary to give effect to the rights recognised in the Covenant. The States Parties ensure equal right of men and women to the enjoyment of all civil and political rights.

### **2.5.2 Substantive Rights**

Part III deals with the specific rights of the individuals and the obligations of the States Parties.

1. The right to life (Article 6)
2. Freedom from inhuman or degrading treatment (Article 7)
3. Freedom from slavery, servitude and forced labour (Article 8)
4. Right to liberty and security (Article 9)



5. Right of a detainee to be treated with humanity (Article 10)
6. Freedom from imprisonment for inability to fulfill a contractual obligation (Article 11)
7. Freedom of movement and the right to choose one's residence (Article 12)
8. Freedom of aliens from arbitrary expulsion (Article 13)
9. Right to a fair trial (Article 14)
10. Non-retroactive application of criminal law (Article 15)
11. Right to recognition as a person before the law (Article 16)
12. Right to privacy, family, home or correspondence (Article 17)
13. Freedom of thought, conscience and religion (Article 18)
14. Freedom of opinion and expression (Article 19)
15. Prohibition of propaganda of war (Article 20)
16. Right to peaceful assembly (Article 21)
17. Freedom of association (Article 22)
18. Right to marry and found a family (Article 23)
19. Rights of the child (Article 24)
20. Right to take part in the conduct of public affair, to vote and to be elected (Article 25)
21. Equality before the law (Article 26)
22. Rights of minorities (Article 27)

The above rights set forth in the Covenant are not absolute and are subject to certain limitations. While the formulation of the limitations differed in so far as details are concerned from Article to Article, it could be said that by and large the Covenant provided that rights should not be subjected to any restrictions except those which were provided by law, and were necessary to protect national security, public order, public health or morals or the rights and freedoms of others.

### **2.5.3 Covenant on Economic, Social and Cultural Rights**

The International Covenant on Economic, Social and Cultural Rights consists of 31 Articles divided into five parts. Part I deals with rights of peoples to self-determination as provided in Article I of the Covenant on Civil and Political Rights. Other rights of the individuals are enumerated in Part III of the Covenant which include the following:

1. Right to work (Article 6)
2. Right to just and favorable conditions of work (Article 7)
3. Right to form and join trade unions (Article 8)
4. Right to social security (Article 9)
5. Right relating to motherhood and childhood, marriage and the family (Article 10)
6. Right to adequate food, clothing, housing and standard of living and freedom from hunger (Article 11)

7. Right to physical and mental health (Article 12)

8. Right to education including a plan for implementing compulsory primary education (Article 13)

9. Right relating to science and culture.

#### **2.5.4 Optional Protocol to the Covenant on Civil and Political Rights: 16 December, 1966**

The International Covenant on Civil and Political Rights and the Optional Protocol are separate instruments. But they are related to each other inasmuch as only the State Parties to the Covenant can become parties to the Protocol. Both the Covenant and Protocol that came into force simultaneously on 23, March 1976 provide the individuals the right to make petitions before the Human Rights Committee. The Protocol provides a right to the State Parties to denounce it at any time by sending a notification to the Secretary General of the United Nations. Articles 1, 2 and 3 refer to the sources, subject matter and admissibility of communications. The Human Rights Committee is competent to receive communications from individuals.

#### **2.5.5 Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of Death Penalty**

On 25th November 1981, the General Assembly decided to consider the idea of elaborating a draft of a second Optional Protocol to the International Covenant on Civil and Political rights." With the efforts of the General Assembly and the Commission on Human Rights, a second Optional Protocol to the International Covenant on Civil and Political Rights was concluded in 1987 by which the State Parties to the Covenant, if they so desired, could take on the additional obligation of abolishing the death penalty. Death penalty involve an inevitable element of suffering and humiliation. It is a violation of human rights - the right to life and the right not to be subjected to cruel, inhuman, or degrading treatment. Further, the execution of death sentence is again an act of torture. The Protocol came into force on 11th JULY 1991. 13y 2<sup>nd</sup> November 2003 the Protocol had as many as 50 State Parties. Article 6 of the Covenant on Civil and Political Rights had referred to the desirability of the abolition of death penalty, as it is one of the measures for the enjoyment of the right to life. In order to abolish death penalty at the international level, the second Optional Protocol to the International Covenant on Civil and Political Rights was adopted by the General Assembly or) 15th December 1989.<sup>18</sup>

#### **2.5.6 Draft Optional Protocol to the Covenant on Economic, Social and Cultural Rights**

The Economic and Social Council by a resolution 1711985 established a committee on Economic, Social and Cultural Rights in 1985. The committee since 1990 has devoted attention to the possibility of elaborating such an Optional Protocol and has discussed the issue at length on several occasions. At its sixth session in 1991, the committee supported the drafting of an Optional Protocol in order to ensure the practical implementation of tie Covenant. The Vienna Conference on Human Rights gave added impetus to this initiative by asserting the declaration and programmed of action that the Committee should follow. The Committee prepared a (draft Optional Protocol in 1996 at its 15lh session, but it has not been officially adopted of the General Assembly.

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<sup>18</sup> United Nations General assembly Resolution 441128, December 15, 1989

## **2.6 INTERNATIONAL JUDICIAL SYSTEM (INTERNATIONAL CRIMINAL COURT)**

The International Court of Justice has jurisdiction to the extent of deciding the cases of States only. Article 34(1) of the statute of the International Court stipulates that only States may be parties in cases before the Court. It means individuals have no access to the court. Neither the statute nor the rule of the court permits individuals to file a petition before the court unless the State sponsors it .

The Statute of the International Criminal Court, which came into force on July 1, 2002 and inaugurated on March 11, 2003 is likely to serve the useful purpose of curbing serious human rights violations. The Statute of the court is commonly called "Rome statute."<sup>19</sup> Article 5 lays down that the court shall have jurisdiction to decide on the most serious crimes i.e. (a) the crime of genocide (b) crimes against humanity (c) war crimes (d) the crime of aggression. Article 7 of the Statute lays down that "crimes against humanity" means murder, extermination, enslavement, deportation or forcible transfer of population, imprisonment or other severe deprivation of physical liberty in violation of the fundamental rules of international law, torture, rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization or any other form of sexual violence, persecution against any identifiable group, or gender enforced disappearance of persons, the crime of apartheid, or other inhuman acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health.

## **2.7 OFFICE OF THE U.N. HIGH COMMISSIONER FOR HUMAN RIGHTS (OHCHR)**

In connection with the programme for reform of the United Nations, the office of the UN High commissioner for Human Rights and the Centre for Human Rights were consolidated into a single office of the United Nations High Commissioner for Human Rights (OHCHR) on 15 September 1997. It is located in Geneva. The High Commissioner advises the Secretary General on the policies of the UN in the area of human rights.

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<sup>19</sup> Rome Statute of the International Criminal Court was adopted by the United Nations Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Final Act of July 17, 1998.

## **Functions**

- a) The OHCHR promotes universal enjoyment of all human rights
- b) The office plays a leading role in human rights issues
- c) The office promotes international co-operation for human rights.
- d) The office stimulates and co-ordinates action for human rights
- e) The office promotes universal ratification and implementation of international standards
- f) The office assists in the development of new norms
- g) The office supports human rights 'Organ and Treaty' monitoring bodies
- h) The office responds to serious violations of human rights
- i) The office undertakes preventive human rights actions
- j) The office promotes the establishment of national human rights infrastructures
- k) The office provides education, information, advisory services and technical assistance in the field of human rights

## **2.8 MONITORING OF HUMAN RIGHTS**

There are at least six core human rights treaties, which have set up committees to perform the task of monitoring States Parties in compliance with their obligation, which are:

1. Human Rights Committee (HRC) by the International Covenant on Civil and Political Rights; (ICCPR)
2. Committee on Economic, Social and Cultural Rights (CESCR) by the International Covenant on Economic Social and Cultural Rights (ICESCR)
3. Committee on the Elimination of Discrimination against Women (CEDAW) by the Convention on the Elimination of all forms of Discrimination Against Women.
4. Committee Against Torture (CAT) by the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment.
5. Committee on the Rights of Child (CRC) by the Convention on the Rights of the Child
6. The Committee on the Racial Discrimination (CRD) by the Convention on the Elimination of all forms of Racial Discrimination.

Resolution 1503 (XLIII) adopted by the Economic and Social Council in 1970 allows individuals and non-governmental agencies to make petitions to the Human Rights Commission and its sub Commission on Prevention of Discrimination and Protection of Minorities and on situations which appear to reveal a consistent pattern of gross and reliably attested violations of human rights" and fundamental freedom.<sup>20</sup>

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<sup>20</sup> Resolution No. 1503 (XLVIII) adopted by the Economic and Social Council in 1970

## **2.9 DECLARATION ON THE RIGHT TO PROTECT HUMAN RIGHTS**

The Universal Declaration of Human Rights laid down the rights of human beings. It did not stipulate the means by which these rights can be promoted and protected. Protection of the universally recognized human rights itself requires certain rights to be given to the individual, groups and organs of the States despite the fact that the prime responsibility and duty to promote and protect human rights lie with the State. The right to promote and protect human rights is essential for the prevention of violations of human rights. In order to provide this right to individuals and other groups in the States, the General Assembly on the recommendation of the Economic and Social Council adopted a resolution entitled 'Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society' to promote and protect universally recognised human rights and fundamental freedoms often referred to as the Declaration of the Human Rights Defenders on 9th December, 1998." Some of the rights laid down in the Declaration are:

1. Everyone has the right to promote and to strive for the protection of human rights (Article 1)
2. Each State has a prime responsibility and duty to protect, promote and Implement all human rights by adopting necessary measures (Article 2)
3. Each State shall adopt necessary legislative, administrative and other steps to ensure that the right to protect human rights is effectively guaranteed (Article 2)
4. Everyone has the right to meet or assemble peacefully, to form, join and participate in non-governmental organisations, associations or groups and to communicate with non-governmental or intergovernmental organisations for the purpose of promoting and protecting human rights (Article 5).
5. Everyone has the right to know, seek, obtain, receive and hold information about all human rights including the access to information as to how those rights are given effect in domestic, legislative, judicial and administrative systems (Article 6)



6. Everyone has the right to submit to Governmental bodies and agencies and organizations concerned with public affairs, criticism and proposal for improving their functioning (Article 8)

7. Everyone has the right to benefit from an effective remedy and to be protected in the event of the violation of the right to promote and protect human rights (Article 9).

8. Individuals, non-governmental organizations and relevant institutions have an important role to play in making the public more aware of questions relating to human rights through activities such as education, training and research in these areas and to strengthen further, inter alia, understanding, tolerance, peace and friendly relations among nations and among all racial and religious groups, bearing in mind the various backgrounds of the societies and communities in which they carry out their activities (Article 16).

9. Individuals, groups, institutions and non-governmental organizations have an important role to play in promoting human rights and contributing, as appropriate, to the promotion of the right of everyone (Article 18).

10. The State has responsibility to promote and facilitate the teaching of human rights at all levels of education and to ensure that all those responsible for training lawyers, law enforcement officers, the personnel of the armed forces and public officials include appropriate elements of human rights teachings in their training programmes (Article 15).

11. No one shall participate by act or by failure to act in activities violating human rights and no one shall be subjected to punishment or adverse action of any kind for refusing to do so (Article 10).

12. Everyone has the right, individually and in association with others, to participate in peaceful activities against violations of human rights (Article 12).

## **2.10 KEY INTERNATIONAL CONVENTIONS ON HUMAN RIGHTS**

### **2.10.1 Genocide**

The term 'Genocide' is derived from the Greek term 'genos' (race) and the Latin verb caedere meaning to kill or to cut down. The General Assembly of the U.N. adopted the Convention of the Prevention and Punishment of genocide.<sup>21</sup> In December 1948. It came into force on January 12, 1951. As on October 10, 2001, the Convention had 133 State Parties.

### **2.10.2 Apartheid**

"Apartheid" was condemned by the United Nations as "a crime against humanity" in 1966. An international Convention on the Suppression and Punishment of the Crime of Apartheid was concluded on 30th November 1973.<sup>22</sup> The Convention came into force on 18 July 1976.

### **2.10.3 Apartheid in sports**

The General Assembly adopted the International Declaration Against Apartheid in Sports on 14th December 1977. On 10th December 1985, the General Assembly adopted the International Convention Against Apartheid in sports.

### **2.10.4 Torture and other Cruel, inhuman or Degrading Treatment or Punishment**

The General Assembly on 9th December 1975 adopted a Declaration on the protection of all persons from being subjected to torture and other cruel, inhuman or degrading treatment or punishment. On 10th December 1984 a Convention, known as the Convention Against Torture and Other Cruel or Inhuman or Degrading Treatment or Punishment was adopted by the General Assembly

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<sup>21</sup> United Nations General Assembly Resolution, December 9, 1948

<sup>22</sup> United Nations General Assembly Resolution 3068 (XXVIII), November 30, 1973

### **2.10.5 Slavery and Slave Trade**

Under the auspices of the League of Nations, the International Slavery Convention was adopted on 25th September 1926. In 1953, the Protocol amending the Slavery Convention on 25th September 1926 was adopted which transferred to the United Nations, the functions and powers that had been undertaken by the League of Nations.

### **2.10.6 Forced Labour**

In order to suppress forced labour, a Convention was conducted for the abolition of forced labour, which was adopted by the General Conference of the International Labour Organisation on 25th June 1957. It came into force on 17th January 1959.

### **2.10.7 Traffic in Persons and Prostitution**

In order to curb traffic in persons, a Convention for the Suppression of the Traffic in Persons and the Exploitation of Women was concluded on 2nd December 1949, under the auspices of the United Nations.<sup>23</sup>

### **2.10.8 Elimination of Racial Discrimination**

To make the provisions on racial discrimination binding on the States a Convention was adopted by the General Assembly on 21 December 1965, known as International Convention on the Elimination of all forms of Racial discrimination.

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<sup>23</sup> United Nations General Assembly Resolution 317 (IV), December 2, 1949

### **2.10.9 Elimination of Discrimination Against Women**

As early as 1946 the Commission on the Status of Women was established to deal with women's issues. The General Assembly on 7<sup>th</sup> November 1967 adopted a declaration on the Elimination of Discrimination Against Women and in order to implement the principles set forth in the 46 Declaration, a Convention on the Elimination of all forms of Discrimination Against Women was adopted by the General Assembly on 18<sup>th</sup> December 1979.<sup>27</sup> In addition to the above Conventions three Conferences were held during the U.N. sponsored International Women's Decade (1976-1985), in Mexico City in 1975, in Copenhagen in 1980, and in Nairobi in 1985. The fourth World Conference on women held in 1995 (4-15 September 1995) in Beijing commonly called Beijing Conference stated that women's rights are human rights.<sup>24</sup>

### **2.10.10 Rights of the Child**

The Universal Declaration of Human Rights stipulated under paragraph 2 of Article 25 that childhood is entitled to special care and assistance. The above principle along with other principles of the Universal Declaration concerning the child were incorporated in the Declaration of the Rights of the Child adopted by the General Assembly on 20<sup>th</sup> November 1959. The Convention on the Rights of the Child was adopted by the General Assembly by consensus on the 30<sup>th</sup> Anniversary of the Declaration on 20<sup>th</sup> November, 1989, which came into force on 2<sup>nd</sup> September 1990.

### **2.10.11 Right of the Persons Belonging to National or Ethnic, Religious and Linguistic Minorities**

The Covenant on Civil and Political Rights under Article 27 provided that persons belonging to ethnic, religious and linguistic minorities shall not be denied the right to enjoy their own culture, to profess and practice their own religion, or to use their own language. Inspired by the above, the General Assembly on 18 December 1992 adopted the Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic minorities.

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<sup>24</sup> United Nations General Assembly Resolution 2106 (XX), December 21, 1965

## **2.11 INTERNATIONAL HUMAN RIGHTS LAW**

International human rights law, which applies at all times including during situations of emergency and conflict, sets out the basic protections that all individuals are entitled to. It is the duty of states to respect, ensure and fulfill these rights.

International human rights law is the body of international law intended to promote and protect human rights at the international and domestic levels.

As a form of international law, international human rights law is primarily made up of treaty law - legally binding agreements between State parties - and customary international law - rules of law derived from the consistent practice of States. While international treaties and customary law form the mainstay of international human rights law, other instruments, such as declarations, guidelines and principles adopted at the international level contribute to its understanding, implementation and development.

### 2.11.1 Enforcement

Enforcement of international human rights law can occur at either a domestic or an international level. States that ratify human rights treaties commit to respecting, protecting and fulfilling those rights, and ensuring that their domestic law is compatible with international standards. When domestic law fails to provide a remedy for human rights abuses, injured parties may be able to resort to international mechanisms for remedy.

### 2.11.2 International human rights law and international humanitarian law

International human rights law is closely related to, but distinct from international humanitarian law. They are complimentary since the substantive norms they contain are often similar or related. However, international human rights law applies at all times, including during situations of emergency and conflict. International humanitarian law is a legal regime that only applies to armed conflicts, including occupation, when both legal regimes apply in tandem.

### 2.11.3 Modern development of human rights

Modern international human rights law has developed since the drafting of the United Nations Universal Declaration of Human Rights (UDHR), in December 1948. Drafted as 'a common standard of achievement for all peoples and nations', the Declaration spells out civil, political, economic, social and cultural rights that all human beings are entitled to. It has been widely accepted as providing the fundamental norms of human rights that everyone should respect and protect.

The UDHR, together with the International Covenant on Civil and Political Rights (ICCPR) and its two Optional Protocols, and the International Covenant on Economic, Social and Cultural Rights (ICESCR), form the International Bill of Human Rights.

Since 1945, a series of international human rights treaties and other instruments have been adopted, conferring legal form on inherent human rights and further developing the body of international human rights. These include:

- The Convention on the Prevention and Punishment of the Crime of Genocide (CPCG);
- The Convention Relating to the Status of Refugees (CSR);
- The Convention on the Elimination of All Forms of Racial Discrimination (CERD);
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);
- The United Nations Convention Against Torture (CAT);
- The Convention on the Rights of the Child (CRC);
- The International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families (ICRMW);
- The Convention on the Rights of Persons with Disabilities (CRPD);
- The International Convention for the Protection of All Persons from Enforced Disappearance (ICCPED).

In addition to the International Bill of Rights and the core human rights treaties listed above, there are many other universal instruments relating to human rights

#### **2.11.4 State obligations and procedure**

International human rights law prescribes obligations which states are bound to respect. Through ratification of international human rights treaties, governments undertake to put into place domestic measures and legislation compatible with their treaty obligations. By becoming parties to international treaties, states assume obligations and duties under international law to respect, protect and fulfill human rights.

The obligation to respect means that states must refrain from interfering with or curtailing the enjoyment of human rights. The obligation to protect requires states to protect individuals and groups against human rights abuses. The obligation to fulfill means that states must take positive action to facilitate the enjoyment of basic human rights.

#### **2.11.5 Monitoring mechanisms**

In order to monitor the compliance of states with their obligations, the United Nations system has created mechanisms that examine state parties' compliance with the specific treaty obligations. These mechanisms include the Human Rights Council and bodies created under the international human rights treaties that consist of independent experts. The majority of these bodies receive secretariat support from the Office of the High Commissioner for Human Rights (OHCHR). Similar mechanisms do not exist for the monitoring of compliance with international humanitarian law.

#### **2.11.6 Human rights council**

The Human Rights Council is composed of 47 elected United Nations Member States, empowered to prevent abuses, inequity and discrimination, protect the most vulnerable, and expose the perpetrators of human rights violations. The Council established Special Procedures (or mechanisms) to address either specific country situations or thematic issues across the globe. Special Procedures are either an individual –a special rapporteur or representative, or independent expert—or a working group. They are prominent, independent

experts working on a voluntary basis and are appointed by the Human Rights Council. There are currently 30 thematic mandates and eight country mandates. All report to the Human Rights Council on their findings and recommendations.

### **2.11.7 Human rights treaty bodies**

There are currently ten human rights treaty bodies - committees of independent experts - created in accordance with the provisions of the treaty that they monitor. Nine of these treaty bodies monitor implementation of the core international human rights treaties while the tenth treaty body, the Subcommittee on Prevention of Torture, established under the Optional Protocol to the Convention against Torture, monitors places of detention in state parties to the Optional Protocol.

Additionally, there are several other United Nations bodies which are concerned with the promotion and protection of human rights.

### **2.11.8 Regional monitoring and enforcement mechanisms**

Beyond the UN system, there are regional systems of international human rights law that complement national and international human rights law by protecting and promoting human rights in specific areas of the world. There are three key regional human rights instruments: the African Charter on Human and Peoples' Rights; The American Convention on Human Rights; and the European Convention on Human Rights.

### **2.11.9 Monitoring of human rights by NHRIs as defined by international instruments**

#### **1. Background**

The UN General Assembly adopted the Paris Principles in 1993 in its Resolution 48/134.3 The global principles adopted govern the status and functioning of independent national human rights institutions (NHRIs). The Paris Principles (1993: 3(b)) prescribe that NHRIs shall ensure the effective implementation of international human rights standards and work to



ensure that national legislation, regulations and practices conform to the fundamental principles of human rights (1993: 3(a)(i)). NHRIs shall protect and promote universal respect for and observance of human rights and fundamental freedoms (1993: Preamble).

In the same year, the World Conference on Human Rights held in Vienna, had adopted the Vienna Declaration and Programme of Action which encouraged the establishment and strengthening of NHRIs. Anticipating the occasion of the fiftieth anniversary of the Universal Declaration of Human Rights in 1998, the Vienna Declaration asked all states, organs and agencies of the United Nations system related to human rights, to report to the Secretary-General of the United Nations, on the progress made in the implementation of the Vienna Declaration and to submit a report to the General Assembly at its fifty-third session, through the Commission on Human Rights and the Economic and Social Council. (Vienna Declaration, 1993: 100) In the same vein, it asked regional and national human rights institutions, as well as non-governmental organisations, to present their views to the Secretary-General on the progress made in the implementation of the Vienna Declaration. In addition, the Vienna Declaration (1993: 100) stressed that ‘special attention should be paid to assessing the progress towards the goal of universal ratification of international human rights treaties and protocols adopted within the framework of the United Nations system.’

The World Conference on Human Rights reaffirmed the ‘important and constructive role played by national institutions for the promotion and protection of human rights, in particular in their advisory capacity to the competent authorities, their role in remedying human rights violations, in the dissemination of human rights information, and education in human rights.’ (1993: 36) The Vienna Declaration encouraged ‘the establishment and strengthening of national institutions, having regard to the “principles relating to the status of national institutions” and recognising that it is the right of each state to choose the framework which is best suited to its particular needs at the national level.’ (1993: 36)

Monitoring of human rights is regarded as one of the core areas of work for NHRIs. All international human rights instruments include sections on national monitoring, primarily targeted at organs of the state, to ensure that an analysis of how the state is complying with ratified obligations is undertaken. National human rights institutions are organs of the state, but at the same time independent institutions with their mandates (often) conferred through

Acts of Parliament. Monitoring is, in many ways, at the heart of the work of NHRIs, as such monitoring of human rights often provides the basis for recommendations and advice to the political system. While monitoring may take many forms and require extensive resources, there is limited guidance and perhaps even discussion on the scientific quality and validity of monitoring results of NHRIs, as well as very limited guidance in identifying monitoring methodologies for NHRIs. This is problematic as it leaves NHRIs in a vacuum with no clear concepts or models for monitoring, which can, and often does, backfire on the credibility of NHRIs when they present their reports on the status of human rights in their respective countries. Both states and NHRIs are often criticised for the quality of their monitoring and thus it is also relevant to look deeper into how this can be addressed.

In this light, the chapter will describe the role of NHRIs and how monitoring of rights is legally defined in some of the main international human rights instruments such as the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT). It will also describe what role has been afforded to NHRIs in this regard, for example as National Prevention Mechanisms in the Optional Protocol to the Convention against Torture, as well as in other more recent instruments such as the Convention on the Rights of Persons with Disabilities. It will also shed further light on the discussion as to what monitoring concepts, if any, are applied in the main international human rights instruments, what role monitoring plays within the policy cycle and, finally, it will present the most important aspects of monitoring.

#### **a) Understanding the role of NHRIs**

NHRIs are founded on the vision set forth in the Universal Declaration of Human Rights (United Nations, 1948) and further developed in the international human rights conventions promoting respect for and observance of human rights and fundamental freedoms and in recognition of the universality, indivisibility and interdependence of all human rights (Paris Principles, 1993). NHRIs accordingly work on the basis of international human rights policies (declarations/soft law) as well as international human rights legislation (conventions/hard law).

As a result of states' international cooperation, NHRIs' promotion, protection, and implementation of human rights standards takes place at national, regional and global levels.<sup>4</sup>

The Paris Principles provide that appropriate arrangements shall be made at the national level to ensure the effective implementation of international human rights standards. In addition, national and international cooperation is assumed to be an essential part of effective human rights implementation (United Nations, 1993: Preamble).

The purpose of a NHRI is to constitute the national focal point and centre of expertise for promotion and protection of human rights. The NHRI must have special expertise concerning promotion and protection of human rights generally and specifically in relation to declarations and conventions ratified by the national parliament in question.

Based on the human rights expertise, the NHRI is tasked with being a national advisor to the parliament, judiciary, government and all other institutions, organs and organisations of the state, which has chosen by law to establish a NHRI in accordance with the UN Paris Principles. According to these principles, the provision of advice by the NHRI can be upon request or upon its own initiative.

The UN has a specific interest in the development of competent and capable NHRIs in all member states as well as in their cooperating individually, in networks and with the UN system in general, thus optimising in as many ways as possible the work to promote and protect human rights. This international cooperation is mutually reinforcing and enhances the exchange of expertise across borders. The Paris Principles set forth and recommend that the NHRI mandate can be expanded to include specific and specialised tasks. For example, in Denmark this applies to the areas of disability, gender equality and equal treatment in relation to ethnicity and race.

In international cooperation, the NHRI can function as a catalyst for human rights implementation processes in other countries. The NHRI can act as a clearing house between the state and civil society and even between the state, civil society and the private sector in human rights matters. International recognition through cooperation will strengthen the legitimacy of the NHRI and thus enhance its potential effect and impact as an advisor, both nationally and internationally, as the quality and effect of the institution's deliveries are based on a combination of theory and practice.

Paris Principles-compliant NHRIs typically have a legal mandate which can be formulated into six main functions or services as follows:

1. Advise parliament, government and other bodies on human rights issues;
2. Monitor the human rights situation and provide evaluation of policies and their impact on human rights;
3. Support victims of human rights violations, specifically in relation to cases regarding discrimination based on race and ethnicity;
4. Research on human rights;
5. Education on human rights;
6. Communication on human rights in order to raise awareness, provide information and address public opinion.

## **2. Understanding or misunderstanding monitoring concepts**

According to both the Office of the United Nations High Commissioner for Human Rights (OHCHR, 2001) and United Nations Development Programme (UNDP-OHCHR, 2010) monitoring refers to the activity of observing, collecting, cataloguing and analysing data and reporting on a situation or event. The aim of monitoring can be to document human rights abuses so as to recommend corrective action or to be preventive and educational, or it may serve the purpose of human rights advocacy. The two abovementioned publications outline what monitoring means in the context of NHRIs and also what types of activities can be undertaken in relation to the monitoring mandate of NHRIs. There are a variety of publications explaining what monitoring entails. Of particular importance are those mentioned above, as well as UN publications on the topic, such as the ‘Training Manual on Human Rights Monitoring’ (OHCHR, 2001). They also determine what is particularly relevant to the work of a NHRI.

Human rights monitoring is defined as ‘the active collection, verification and immediate use of information to address human rights issues’ (OHCHR, 2001: 3). Human rights monitoring includes gathering information about incidents, observing events (elections, trials, demonstrations, etc.), visiting sites such as places of detention and refugee camps, discussions with national authorities to obtain information and to pursue remedies and other

immediate follow-up. Monitoring is considered important because it provides concrete evidence of what is occurring. Monitoring also provides periodic and regularly-collected data, sheds light on trends, signals progress or deterioration, and suggests areas for priority action. In addition, monitoring is generally carried out over an extended period of time, and ought to be of an ongoing nature (UNDP-OHCHR, 2010: 33 and 185). According to this publication, (2010: 33) NHRIs monitor human rights generally, with regard to selected issues, or both. Some have programmes to monitor the situation of specific groups.

The Paris Principles do not, in fact, include the term ‘monitoring’ in their description of the responsibilities of NHRIs. They describe (1993: 3(a)) that the NHRI can submit to organs of the state ‘any matters concerning the promotion and protection of human rights’ in any form and further specify that NHRIs shall examine the legislative and administrative provisions in force, as well as bills and proposals, and shall make such recommendations as they deem appropriate in order to ensure that these provisions conform to the fundamental principles of human rights. The NHRI shall, if necessary, recommend the adoption of new legislation, the amendment of legislation in force and the adoption or amendment of administrative measures (1993: 3(a)(i)). The Paris Principles are very broad, and the NHRI must carry out an ‘examination’ of legislation and ‘prepare’ reports on the national situation with regard to human rights in general, and on more specific matters. They further state (1993: 3(a)(iv)) that the NHRI should draw the attention of the government to situations in any part of the country where human rights are violated and make proposals to it for initiatives to put an end to such situations and, where necessary, express an opinion on the positions and reactions of the government. This provides the NHRI with a very broad mandate, but also leaves them with little guidance as to how this should or could in fact be carried out.

Turning to the international conventions,<sup>5</sup> Article 19 of the CAT provides that state parties shall submit ‘reports on the measures they have taken to give effect to their undertakings under this Convention, [...]’ (United Nations, 1984: Article 19). Thereafter the States Parties shall submit supplementary reports every four years on any new measures taken and such other reports as the Committee may request.’ In short, state reports must include any new measures taken and any further information which is requested by the monitoring body under the CAT.

Under the Optional Protocol to the Convention against Torture (OPCAT), Article 17 on National Preventive Mechanisms (NPM) states that, ‘each state party is obliged to maintain, designate or establish [...] one or several independent national preventive mechanisms for the prevention of torture at the domestic level. This mechanism should be functionally independent and the state should consider Paris Principle NHRIs for the assignment’ (United Nations, 2002: Article 17).

The assignment under the NPM is described by OPCAT to include that the NPM should ‘regularly examine ‘the treatment of the persons deprived of their liberty in places of detention’ (Article 19a) ‘make recommendations to relevant authorities to improve the situation’ (Article 19b) and ‘submit proposals and observations concerning existing draft legislation’ (Article 19c).<sup>6</sup>

This work is done ‘with a view to strengthening, if necessary, their protection against torture and other cruel, inhuman or degrading treatment or punishment’ (Article 19 (a)) and ‘with the aim of improving the treatment and the conditions of the persons deprived of their liberty and to prevent torture and other cruel, inhuman or degrading treatment or punishment, taking into consideration the relevant norms of the United Nations’ (Articles 19 (a) (b) and (c)).

While the aim of monitoring under OPCAT is well described, there is limited direction on to how to examine regularly. Article 20, however, provides that both qualitative and quantitative data is needed as the NPM should have access to:

[...] all information concerning the number of persons deprived of their liberty in places of detention [...], as well as the number of places and their location’ [...] ‘information referring to the treatment of those persons as well as their conditions of detention [including] the opportunity to have private interviews with the persons deprived of their liberty without witnesses, either personally or with a translator if deemed necessary, as well as with any other person whom the national preventive mechanism believes may supply relevant information. (United Nations, 2002: Article 20)

The quote indicates, that there is some guidance on the methodology, for example, the opportunity to conduct private interviews with detainees is highlighted and thus reports should aim to include this type of information.

Both the ICCPR and ICESCR, are silent on how monitoring should take place, but describe the submission procedure for state reports under the conventions. The reporting guidelines laid down in these two main conventions provide detailed guidance as to how the various articles are to be interpreted and which questions need to be addressed when reporting under each article. Generally, the focus is to a large extent on legal and administrative provisions in national legislation. There is less focus on evidence-based implementation data. NHRIs often facilitate civil society organisations' (CSOs) submission of shadow reports under these conventions. This facilitating role includes that CSOs have access to technical assistance in relation to reporting guidelines and understand the provisions of the conventions as well as the international reporting cycle.

Under the Convention on the Rights of Persons with Disabilities (CRPD), the state is obliged to set up an independent monitoring mechanism to promote, protect and monitor the implementation of the Convention. It is further stated that the: 'civil society, in particular persons with disabilities and their representative organizations, shall be involved and participate fully in the monitoring process' (United Nations, 2006: Article 33 (3)).

In an expert paper from 2006 developed by the UN ad hoc Committee on the setting up of an international monitoring mechanism under the CRPD entitled 'Existing monitoring mechanisms, possible relevant improvements and possible innovations in monitoring mechanisms for a comprehensive and integral international convention on the protection and promotion of rights and dignity of persons with disabilities', (UN Ad Hoc Committee, 2006) the objectives of monitoring are outlined in a rather detailed manner. Thus, it is worth investigating the concepts applied by the UN experts drafting the disability monitoring mechanism as it is one of the most recent monitoring mechanism and as there has been a process in connection with the Disability Convention to bring innovation into monitoring part of the Convention.

The paper outlines that the first step is to ensure a proper diagnosis of the existing situation by using specific national and local benchmarks/goals against which performance in a given area can be assessed periodically. It also points out that quantitative as well as qualitative information is useful in tracking progress over time, particularly in regard to those treaties which allow for progressive realisation. This is described as the first purpose, namely to ensure that such 'diagnosis' takes place. (UN Adhoc Committee, 2006: 5) It is interesting that the word 'diagnosis' is being used as this term stems from the scientific tradition, applying a

positivist methodology with a clear method and many steps to be observed. Under all circumstances, the term does not fit well into the description of what is needed to obtain the ‘diagnosis.’ Rather it makes more sense to use the term and methodology for ‘baseline’ studies.

The second purpose of monitoring, according to the expert paper, is to provide the basis for targeted policy making<sup>7</sup> by the state parties by providing the basis for effective evaluation of progress made towards the realisation of the obligations contained in the treaty (United Nations, Adhoc Committee, 2006: 6). By this, the experts underline that the monitoring should in fact enable policy-making. They point to monitoring as a tool for policy making, which is of course not a new consideration, but provides a hint in relation to discussions about the level upon which monitoring should take place. It points to a more structural, strategic approach, than monitoring on a more individual-based level. Later in this chapter, a proposal for a framework addressing this issue will be presented.

The expert paper highlights further purposes of monitoring, which include that it should create opportunities for new partnerships between the duty bearers and rights holders (United Nations, Adhoc Committee, 2006: 7), create opportunities for capacity building and awareness raising (2006: 8), and protect victims when national remedies fail (2006: 9).

The focus is on how inclusion and participation of rights holders in the process of monitoring contributes to the promotion, protection and fulfillment of the rights. Repeatedly, the value of the role of NHRIs in the monitoring process is also stressed with reference to other general comments under other international human rights conventions such as the Convention on the Rights of the Child (CRC) and ICESCR, even if it is only under OPCAT that NHRIs in many cases are designated as the national prevention mechanism.

However, the point is that with broad national consultations with rights holders and NHRI participation, national monitoring contains an in-built ‘political’ process ensuring ownership of problems identified and solutions presented. In a sense, it is this process which ensures the ‘full picture’ in relation to the human rights situation and which can lead to an appropriate balancing of priorities.

### **3. Monitoring by NHRIs as an important element of the policy cycle – the PRIME**



## **model**

Regardless of the form of government, one could argue, social and political developments take place in a five-step-process where each step consists of a number of sub-processes depending on the form of government and social and political culture. Monitoring in general and carried out by NHRIs in particular, thus, is embedded in a broader political

process. The first step is the determination of the POLICY. The second step is the development of a set of rules (REGULATION/LEGISLATION). The third step consists of making possible and enforcing compliance with the given set of rules (IMPLEMENTATION). The fourth step consists of measuring whether the set of rules is implemented and how adjustments take place (MONITORING). The fifth step is an assessment of whether the given set of rules and methods of implementation have the desired effect in the form of social behaviour in accordance with the political intent (EVALUATION).

## **2.12 CONCLUSION**

The analysis of various human rights provisions of the United Nations with special reference to the composition, function and procedure followed by the organs of the United Nations for the implementation of human rights, reveals the legal character of these provisions and the actual work done by all the principal organs of the U.N. The Economic and Social Council has contributed much to the protection of human rights through its various Commissions. The International Court of Justice, the International Criminal Court and the National Courts repeatedly quote the human rights provisions of the U.N. Charter. The U.D.H.R., the I.C.C.C.P.R. and the I.C.E.S.C.R. constitute a triad, often referred to as the 'Magna Carta of Humanity'.

Despite the numerous activities of the U.N. for the promotion and observance of human rights, many violations and denials of human rights still obtain all over the world. The concept of "National Sovereignty" continues to be a formidable obstacle in the observance of

human rights. If the international community has a future, the United Nations will have to adjust itself to new circumstances. Though the United Nations have contributed much to the promotion, protection and observance of human rights yet there remains much more to be done. It has "sown for days ahead;" it has achieved more than what might have been expected, less than what might have been hoped.<sup>25</sup>

Kofi Annan, Secretary General of the United Nations in his message to the world on the 5th anniversary of the Universal Declaration told humanity what its message is for the generation ahead.

It is the universality of human rights that gives them their strength. It endow!; them with the power to cross any border, climb any wall, defy any force. The struggle for universal human rights has always and everywhere been the struggle against all forms of tyranny and injustice - against slavery, against colonialism, against apartheid. It is nothing less and nothing different today. Young friends all over the world, You are the ones who must realize these rights, now and for all time. Their fate and future is in your hands. Human rights are your rights. Seize them. Defend them. Promote them. Understand them and insist on them. Nourish and enrich them. They are the best in us. Give them life.

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<sup>25</sup> O Louis Henkin, "The United Nations and Human Rights," 12. Org. Vol.1, XXI, No.3, (Summer, 1965): 504

## **CHAPTER 3**

### **HUMAN RIGHTS IN INDIA - AN OVERVIEW**

#### **3.1 INTRODUCTION**

Since the days of the Indus Valley Civilization, Indian culture has been the product of a synthesis of diverse cultures and religions that came into contact with the enormous Indian sub continent over a very long stretch of time. As Jawaharlal Nehru writes, there is "an unbroken continuity between the most modern and the most ancient phases of Hindu thought extending over- three thousand years."<sup>26</sup>

The rights of man have been the concern of all civilizations from time immemorial. "The concept of the rights of man and other fundamental rights was not unknown to the people of earlier periods."<sup>27</sup> The Babylonian Laws and the Assyrian laws in the Middle East, the "Dharma" of the Vedic period in India and the jurisprudence of Lao-Tze and Confucius in China, have championed human rights throughout the history of human civilization.

The Indian concept perceives the individual, the society and the universe as an organic whole. Everyone is a child of God and all fellow beings are related to one another and belong 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."<sup>28</sup>

#### **3.2 ORIGIN AND DEVELOPMENT OF HUMAN RIGHTS IN INDIA**

The Buddhist doctrine of non-violence in deed and thought says Nagendra Singh, "is a humanitarian doctrine par excellence, dating back to the third century B.C." Jainism too contained similar doctrines. According to the Gita, "he who has no ill will to any being, who is friendly and compassionate, who is free from egoism and self sense and who is even-

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<sup>26</sup> Jawaharlal Nehru. The Discovery of India, 2nd ed. (New Delhi: Jawaharlal Nehru Memorial Fund, 1992) 88.

<sup>27</sup> Attar Chand, Politics of Human Rights and Civil Liberties - A Global Survey (Delhi: UDH Publishers, 1985) 45.

<sup>28</sup> Jawaharlal Nehru 420

mindful in pain and pleasure and patient" is dear to God. It also says that divinity in humans is represented by the virtues of non-violence, truth, freedom from anger, renunciation, aversion to fault-finding, compassion to living beings, freedom from covetousness, gentleness, modesty and steadiness -the qualities that a good human being ought to have. The historical account of ancient Bharat proves beyond doubt that human rights were as much manifest in the ancient Hindu and Islamic civilizations as in the European Christian civilizations. Ashoka, the prophet Mohammed and Akbar cannot be excluded from the genealogy of human rights.<sup>29</sup>

### **3.2.1 Ancient Hindu Law of Human Rights**

Scholars who have spent long time in lucubration on the Hindu "Dharmasastras" and the "Arthasastras" and other legal treatises of the past have discovered an amazing system, which, inter alia, regulates the duties of Kings, judges, subjects and judicial as well as legal procedures. The central concept is Dharma, the functional focus of which is social order. The message is "Dharma" as the supreme value, which binds kings and citizens, men and women. Human rights gain meaning only when there is an independent judiciary to enforce rights. Here, the Dharmasastras are clear and categorical.<sup>30</sup>

The independence of the judiciary was one of the outstanding features of the Hindu judicial system. Even during the days of Hindu monarchy, the administration of justice always remained separate from the executive. It was, as a rule, independent both in form and spirit. It was the Hindu judicial system that first realized and recognized the importance of the separation of the judiciary from the executive and gave this fundamental principle a practical shape and form. The case of Ananthapindika v. Jeta reported in the Vinaya-pitaka, is a shining illustration of this principle. According to it, a Prince and a private citizen submitted their cases before the law court and the court decided against the Prince. The Prince accepted the decision as a matter of course and as binding on him. The evolution of the principle of separation of the judiciary from the executive was largely the result of the Hindu conception of law as binding on the sovereign. Law in Hindu jurisprudence was above the sovereign. It was the "Dharma." The laws were then not regarded so much as a product of supreme

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<sup>29</sup> Yogesh K. Tyagi, "Third World Response to Human Rights," Indian Journal of International Law, Vol. 21, No.1 (January - March 1981): 120-121

<sup>30</sup> V.R. Krishna Iyer, The Dialectics and Dynamics of Human Rights in India: Yesterday Today and Tomorrow, Tagore Law Lectures (New Delhi: Eastern Law House, 1999) 115

Parliaments and Legislatures as at present. Certain laws were regarded as above all human authority. Such, for instance, were the natural laws, which no Parliament, however supreme, could abolish.

"The State was not sacerdotal, nor even paternalistic; even the King was subject to the law, as any other citizen and the 'Divine Right' of Kings known to western political science was unknown to India. On the whole, the aim of the ancient Indian State may be said to have been less to introduce an improved social order, than to act in conformity with the established moral order."<sup>31</sup> Duty is not a tyrant, but a symbol of dignity to be discharged with affirmative joy. The realization of this vast perspective is assured in the Dharmasastras by the wonderful scheme or co-ordination of conduct adapted to different conditions, status and situations of life. The scope of dharma takes in its vast sweep human rights as well.

As Nagendra Singh remarks:

The individual in ancient India existed as a citizen of the State and in that capacity he had both rights and obligations. These rights and duties have largely been expressed in terms of duties (Dharma) - duties to oneself, to one's family, to other fellowmen, to the society and the world at large. 55 The basis of ancient human rights jurisprudence was Dharma - the ideal of ancient Indian legal theory was the establishment of socio-legal order free from traces of conflicts, exploitations and miseries. Such a law of "Dharma" was a model for the universal legal order.<sup>32</sup>

There are many references in the Vedas, which throw light on the existence of human rights in ancient India. The Vedas proclaim liberty of body (Tan), dwelling house (Skridhi), and life (Jibase). In 1367 B.C. Bahmani and Vijayanayar Kings are stated to have entered into an agreement for the humane treatment of prisoners of war and the sparing of lives of the enemy's unarmed subjects." Human rights have always occupied a place of paramount importance in India's rich legacy because >>12 India believed in the principle, "Vashudhaiva-kutumbakam, i.e. welfare of all. Justice Rama Jois eloquently sums up this legacy thus:

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<sup>31</sup> P.B. Gajendra Gadkar, *The Historical Background and Theoretic Basis of Hindu Law - The Cultural Heritage of India. Vol.II* (Bombay: Asia Publishing House, 1965) 421

<sup>32</sup>S.N. Dhyani, *Fundamentals of Jurisprudence: The Indian Approach* (Allahabad: Central Law Agency, 1992) 79.

According to Rajadharma, the King was given the power only to enforce the law. Dharmasastras did not confer on or recognise any legislative power in the King. This is the most important distinction between Kingship in India and the concept of Kingship in the West. But under the Kingship as recognised and established under the Dharmasastras, the laws were those laid down by the Dharmasastras themselves. They did not authorise the King to lay down new laws or emend provisions of the Dharmasastras. On the other hand, Dharmasastras also laid down the laws governing the conduct of the King himself (rajadharma).<sup>33</sup>

Legal literature of the Hindu period owes much to the distinguished law givers of the times as well as to the two EPICS and the Arthashastra (Kautilya) and Sukranitisara. We are not concerned with the legal history of 56 the India of those days, which was quite advanced but with the constellation of rights and duties, which institute human rights. Kautilya's Arthashastra asserts that "in the happiness of the subjects lies the happiness of the King, and what is beneficial to the subjects is his own benefit. Kautilya also disapproved of the theory of royal absolutism and subordinated the King also to the law. Similarly, Shantiparva prescribes that a king may be punished if he does not follow the path of the Dharma.

Kautilya, the author of the celebrated political treatise Arthashastra not only affirmed and elaborated the civil and legal rights first formulated by "Manu," but also added a number of economic rights. He categorically ordained that the King should also provide the orphan, the aged, the infirm, the afflicted and the helpless with maintenance. He shall provide subsistence to the helpless, the expectant mothers and the children they give birth to. To quote P.V. Kane in ancient Indian thought, "there were no acts of Parliament guaranteeing services to the people. The public opinion, the views of eminent writers and the practice of the best Kings created an atmosphere in which it was thought that it was imperative for the King representing the State to encourage learning and to give employment to the unemployed."<sup>34</sup>

In the Post-Vedic period, the rise of Buddhism and Jainism were certainly a reaction against the deterioration of the moral order as against the rights of the privileged class. Life was more human and liberal in the Post-Vedic era. After Buddha, Emperor Ashoka protected and secured the most precious of human rights, particularly the right to equality, fraternity, liberty

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<sup>33</sup> Rama Jois, Legal and Constitutional History of India, Part I (New Delhi: Universal Law Publishing Co. Ltd. 2001) 13.

<sup>34</sup> 6 S.N. Dhyani 45.

and happiness. Ashoka successfully established a welfare State and made provisions for securing basic freedoms. 57 Ashoka, the champion of civil liberties, allowed even the forest folk in his domain to enjoy security of life, peace of mind and enjoy their life on par with other people in the society. Torture and inhuman treatment of prisoners were prohibited under Ashoka's benign dispensation.

### **3.2.2 Human Rights in the Islamic Era**

The downfall of the Rajput administration gave rise to the advent of Muslim rule in India. It was under Muizz-ud-Din that the first Muslim Empire was founded in India. The Muslim invasion of India created a new situation wherein the Muslim rulers or Sultans followed a policy of discrimination against the Hindus. So the significance of Muslim rule in India was counter-productive to harmony, justice and equality. M.K. Nawaz is objective enough to qualify his conclusion with the observation that 'Islamic law' at least in its traditional interpretation, considers certain human being as more equal than others.<sup>35</sup> There was one law for the Muslims (the faithful) and another for the Hindus (the Kafirs or the infidels) and as a result the principle of equality was not given much importance.

The Muslim conquerors like Mahmud Ghaznavi and others made frontal attacks on ancient Hindu way of life and religion. With the Mughal rulers, especially with Akbar a new era began in the Mughal history of India in the field of human rights as a result of his policy of 'Universal Reconciliation and Tolerance.' The European travelers who visited Ashoka's empire highly appreciated his zealous regard for rights and justice. His justice-loving tradition was followed by his son Jehangir too. The trend initiated by Akbar came to be reversed by Aurangzeb, though the Marathas and the Sikhs oppose and fought the fanaticism of Aurangzeb.

### **3.2.3 Human Rights in British India**

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<sup>35</sup> Yogesh K. Tyagi 123

The modern version of human rights jurisprudence may be said to have taken birth in India at the time of the British rule. When the British ruled India, resistance to foreign rule manifested itself in the form of demand for fundamental freedoms and the civil and political rights of the people, Indians were humiliated and discriminated against by the Britishers. The freedom movement and the harsh repressive measures of the British rulers encouraged the fight for civil liberties and fundamental freedoms.

Under the British rule, human rights and democracy were suspect and socialism was an anathema. In the Indian cultural history, the British colonial period remains the Indian equivalent of the 'Dark Ages'. Lord Macaulay rejected the ancient Indian legal political system as 'dotages of brahminical superstition', and condemned ancient legal heritage and its inner core as an 'immense apparatus of cruel absurdities'.<sup>36</sup> Lord Wellesley condemned the Indians as vulgar, ignorant, rude and stupid and Lord Cornwallis described as an axiom that every native of Hindustan is corrupt. The English East India Company debarred Indians from high offices and deprived them of their political, social and economic rights. The impression creaked in the Indian minds was that their sacred inalienable human rights and vital interests had been ignored, denied, and trampled upon for the sake of England and the English rulers.

Mahatma Gandhi organized the people of India under his leadership and launched his non-violent struggle to achieve self-government and fundamental rights for themselves. Lokmanya Tilak advocated that "freedom was the birth right of Indians for which they will have to fight." It was because of the stiff opposition from the people of India that the Charter Act of 1813 was enacted to promote the interest and happiness of the native inhabitants of India. Similarly, the Government of India Act, 1833 was passed to allow the Indians to enjoy some political rights. The proclamation of Queen Victoria on 1<sup>st</sup> November 1858 contained some principles of state policy, which were similar to fundamental rights in nature. The concrete demand for fundamental rights came logically in the wake of the nationalist movement, which coincided with the birth of the Indian National Congress in 1885. The Constitution of India Bill 1895 known as the "Home Rule document" prepared by the Indian National Congress paved the way for a constitution guaranteeing everyone of the citizens the basic human rights like freedom of expression, inviolability of one's own house, right to property and equality before law.<sup>37</sup>

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<sup>36</sup> S.N. Dhyani 143.

<sup>37</sup> S.Subramanian, Human Rights. International Challenge. Vol.1 (New Delhi: Manas Publication. 1997) 56



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

### **3.2.4 Motilal Nehru Committee**

In 1925 the Indian National Congress finalized the draft of Common Wealth of India 6 11 adopting a 'Declaration of Rights.' The Madras Session of the Congress held in the year 1927 - demanded incorporation of a 'Declaration of Fundamental Rights' in any future constitutional framework. A committee under Motilal Nehru was appointed by the National Congress to study the fundamental rights. It is interesting 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 by the Motilal Nehru Committee Report<sup>38</sup> were:

- a) Personal liberty, inviolability of dwelling place and property
- b) Freedom of conscience, and of profession and practice of religion
- c) Expression of opinion and the right to assemble peaceably without arms and to form associations
- d) Free elementary education
- e) Equality for all before the law and rights
- f) Right to the writ of Habeas Corpus
- g) Protection from punishment under ex-post facto laws
- h) Non-discrimination against any person on grounds of religion, caste or creed in the matter of public employment.
- i) Equality of right in the matter of access to and use of public roads, wells etc.
- j) Freedom of combination and association for the maintenance and implementation of labour and economic factors
- k) Right to keep and bear arms
- l) Equality of rights to man and woman.

The Simon Commission appointed by the British Government in 1927, however, totally rejected the demands voiced by the Nehru Committee reports. In 1930 the Congress Working

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<sup>38</sup> S. Subramanian 56 & 57

Committee gave the clarion call for the attainment of 'Purna Swaraj.' The Karachi Session of the Congress in 1931 adopted a detailed programme of fundamental rights. The Government of India Act, 1935 was passed without any bill of rights much to the disappointment of the Indian leaders. It was the 'Sapru Committee' of 1945 that subsequently stressed the need for a written code of fundamental rights and the Constituent Assembly raised a forceful demand for the inclusion of human rights in the Constitution.

### **3.2.5 Constituent Assembly and Human Rights**

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 gave primary importance to human rights. To quote Guha, "The demand for a declaration of fundamental rights arose from four factors."<sup>39</sup>

1. Lack of civil liberty in India during the British rule
2. Deplorable social conditions, particularly affecting the untouchables and women
3. Existence of different religious, linguistic, and ethnic groups encouraged and explicated by the Britishers
4. Exploitation of the tenants by the landlords

The Constituent Assembly incorporated in the Constitution of India the substance 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 making, the General Assembly proclaimed and adopted the Universal Declaration of Human Rights, which surely influenced the framing of India's Constitution. Viewed from the Indian standpoint, human rights have been synthesized, as it were, not as an integrated fabric by the Preambular promises and various Constitutional clause of the National Charter of 1950.<sup>40</sup>

## **3.3 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 elaborate fundamental laws ever adopted.

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<sup>39</sup> Sunil Deshta and Ms. I

<sup>40</sup> A.B.M. Mafizul Islam Patwaris, Fundamental Rights and Personal Liberty in India, Pakistan and Bangladesh, 1st' ed. (New Delhi: Deep and Deep Publications, 1991) 63

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 authority from the will of the people. It gives a feeling that they all are equal "irrespective of the r 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 dignity of the individual and the unity and integrity of the nation to ail its citizens.

### 3.3.1 India and the Universal Declaration

India was a signatory to the Universal Declaration of Human Rights. A number of fundamental rights guaranteed to the individuals in Part III of the Indian Constitution are similar to the provisions of the Universal Declaration of Human Rights. The following chart makes it very clear.

#### Civil and Political Rights in the Universal Declaration of Human Rights and in the Indian Constitution

No	Name of Rights	Universal Declaration	Indian Constitution
1.	Equality before law	Article 7	Article 14
2	Prohibition of discrimination	Article 7	Article 15(1)
3.	Equality of opportunity	Article 21(2)	Article 16(1)
4.	Freedom of speech and expression	Article 19	Article 19(1) (a)
5.	Freedom of peaceful assembly	Article 20(1)	Article 19(1) (b)
6.	Right to form associations or unions	Article 23(4)	Article 19(1) (c)
7	Freedom of movement within the border	Article 13 (1)	Article 19(1) (d)

8	Protection in respect of conviction for offences	Article 11(2)	Article 20 (1)
9	Protection of life and personal liberty	Article 3	Article 21
10	Protection of slavery armed forced labour	Article 4	Article 23
11	Freedom of conscience and religion	Article 18	Article 25(1)
12	Remedy for enforcement of rights	Article 8	Article 32
13	Right against arbitrary arrest and detention	Article 9	Article 22
14	Right to social security	Article 22	Article 29(1)

The table below shows that most of the economic, social and cultural rights proclaimed in the universal Declaration of Human Rights have been incorporated in part IV of the Indian Constitution.

**Economic, Social and Cultural Rights in the Universal Declaration of Human Rights and in the Indian Constitution**

No.	Universal Declaration of Rights	Article in the Universal Declaration	Article in the Indian Constitution
1	Right to work, to just and favorable conditions of work	Article 23 (1)	Article 41
2.	Right to equal pay for equal work	Article 23(2)	Article 39 (d)
3.	Right to education	Article 26(1)	Articles 21(A), 41, 45 & 51A(k)

4.	Right to just and favorable remuneration	Article 23(3)	Article 43
5.	Right to rest and leisure	Article 24	Article 43
6.	Right of everyone to a standard of living adequate for him and his family	Article 25(1)	Article 39(a) & Article 47
7.	Right to a proper social order	Article 28	Article 38

In *Keshavananda Bharati v. State of Kerala*,<sup>41</sup> the Supreme Court observed, "The Universal Declaration of Human Rights may not be a legally binding instrument but it shows how India understood the nature of human rights at the time the Constitution was adopted." In the case of *Jolly George Varghese v. Bank of Cochin*<sup>42</sup> the point involved was whether a right incorporated in the Covenant on Civil and Political Rights, which is not recognised in the Indian Constitution, shall be available to the individuals in India. Justice Krishna Iyer reiterated dualism and asserted that the positive commitment of the State Parties ignites legislative action at home but does not automatically make the Covenant an enforceable part of the 'Corpus Juris' in India. Thus, although the Supreme Court has stated that the Universal Declaration cannot create a binding set of rules and that even international treaties may at best inform judicial institutions and inspire legislative action. Constitutional interpretation in India has been strongly influenced by the Declaration. In the judgment given in the *Chairman, Railway Board and others v. Mrs. Chandrima das*,<sup>43</sup> the Supreme Court observed that the Declaration has the international recognition as the Moral Code of Conduct having been adopted by the General Assembly of the United Nations. The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, if need be, into the domestic jurisprudence. In a number of cases the Declaration has been referred to in the decisions of the Supreme Court and State High Courts.

India ratified the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights on March 27, 1979. The Optional Protocol to the International Covenant on Civil and Political Rights, 1989, however, was not ratified by India.

## **The Constitutional and Institutional Framework of Human Rights in India**

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<sup>41</sup> 4 A.I.R. 1973 S.C. 1461 at 1510.

<sup>42</sup> A.I.R. 1980S.C.4708.474.

<sup>43</sup> 6 A.I.R. 2000 (I) S.C. 2E5

### **3.4 FUNDAMENTAL RIGHTS AND HUMAN RIGHTS**

The judicially enforceable fundamental rights which encompass all seminal civil and political rights and some of the rights of minorities are enshrined in part III of the Constitution (Articles 12 to 35). These include the right to equality, the right to freedom, the right against exploitation, the right to freedom of religion, cultural and educational rights and the right to Constitutional remedies.

Fundamental rights differ from ordinary rights in the sense that the former are inviolable. No law, ordinance, custom, usage, or administrative order can abridge or take them away. Any law, which is violative of any of the fundamental right, is void. In *ADM Jabalpur v. Shukla*,<sup>44</sup> Justice Beg observed "the object of making certain general aspects of rights fundamental is to guarantee them against illegal invasion of these rights by executive, legislative, or judicial organ of the State." Earlier, Chief Justice Subba Rao in *Golak Nath v. State of Punjab*<sup>45</sup> had rightly observed, "Fundamental rights are the modern name for what have been traditionally known as natural rights."

The Supreme Court of India recognises these fundamental rights as 'Natural Rights' or 'Human Rights'. While referring to the fundamental rights contained in Part III of the Constitution, Sikri the then Chief Justice of the Supreme Court, in *Keshavananda Bharati vs State of Kerala* observed "I am unable to hold these provisions to show that rights are not natural or inalienable rights. As a matter of fact India was a party to the Universal Declaration of Rights . . . and that Declaration describes some fundamental rights as inalienable." The Chief Justice Patanjali Shastri in *State of West Bengal v. Subodh Gopal Bose* <sup>46</sup>referred to fundamental rights as those great and basic rights, which are recognised and guaranteed as the natural rights inherent in the status of a citizen of a free country.

Article 14 of the Indian Constitution proclaims the general right of all persons to equality before the law, while Article 15 prohibits the State from discriminating against any citizen on grounds of religion, race, caste, sex or place of birth, and prohibits any restriction on any

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<sup>44</sup> A.I.R. 1976 S.C. 1207 at 1293

<sup>45</sup> A.I.R. 1967 S.C. 1643 at 1656

<sup>46</sup> A.I.R. 1954 S.C. 92 at 96

citizen's access to any public place, including wells and tanks. Equality of opportunity for all citizens in matters of public employment is guaranteed under Article 16. Article 17 abolishes untouchability and makes its practice an offence punishable under law. Both Articles 15 and 16 enable the State to make special provisions for the advancement of socially and educationally backward classes, for such castes and tribes as recognized in the Constitution (known as the Scheduled Castes and Scheduled Tribes) require very special treatment for their advancement. Article 18 abolishes all non-military or non-academic titles.

The right to freedom guaranteed to all citizens under Article 19 encompasses the right to freedom of speech and expression, the right to assemble peaceably without arms, the right to form associations or unions, the right to move freely throughout the territory of India, the right of residence, and the right to practice any profession, or to carry on any occupation, trade or business. The protection of a person in respect of conviction of offences under article 20 includes protection against ex post facto criminal laws, the principle of authorities convict and the right against self-incrimination. Article 21, the core of all fundamental rights provisions in the Indian Constitution, ordains: "No person shall be deprived of his life or personal liberty except according to procedure established by law." Article 21A was added to the Constitution by the Eighty Sixth Constitutional Amendment Act 2002. Article 21A proclaims "the State shall provide free and compulsory education to all children of the age of six to fourteen years in such manner as the State may, by law, determine." The rights of a person, arrested and detained by the State authorities, are provided in Article 22. These include the, right to be informed of the grounds of arrest, the right to legal advice and the right to be produced before a magistrate within 24 hours of arrest (except where one is arrested under a preventive detention law). The right against exploitation includes prohibition of trafficking in human beings and forced labour (Article 23), and prohibition of employment of children below 14 years of age "to work in any factory or mine or in any other hazardous employment."

Subject to public order and morality, all persons are equally entitled to freedom of conscience and the right to profess, practice and propagate religion (Article 25). Every religious denomination or section also has the right to establish and maintain religious institutions and manage their religious affairs (Article 26). No one may be compelled to pay any religious taxes (Article 27). The wholly State-funded educational institutions are barred from imparting religious instructions (Article 28).



The rights of any section of citizens or a minority to promote its distinct language, script or culture, to have access to State-funded educational institutions (Article 29), and to establish and maintain educational institutions of its choice (Article 30) are also guaranteed.

The right to Constitutional remedies is essentially the right to move the Supreme Court of India for enforcement of the above rights (Article 32). The Supreme Court is vested with wide Constitutional powers in this regard.

They include the power to issue directions, orders or writs for the enforcement of the fundamental rights (Article 32(2)). State (i.e. provincial) High Courts too have identical powers (Article 226). As laws inconsistent with or in derogation of the rights conferred by part III of the Constitution are void (Article 13), the Courts have the power to adjudge the Constitutional validity of all laws. Furthermore, by virtue of Article 141, the law declared by the Supreme Court shall be binding on all courts in India.

Fundamental rights guaranteed under the Indian Constitution may be divided, for the sake of convenience, into two categories viz., specified fundamental rights and other fundamental rights (rights not specifically enumerated).

### **3.4.1 Specified Fundamental Rights**

Many rights enshrined in the Covenant on Civil and Political Rights have been recognised specially in the Indian Constitution as 'fundamental rights.' They may be referred to as "Specified" fundamental rights because they are mentioned in the Constitution by name. The following table shows the different Articles of the International Covenant on Civil and Political Rights and the Indian Constitution wherein identical rights are stipulated.

#### **Different Articles of the International Covenant on Civil and Political Rights and the Indian Constitution**

No.	Fundamental Rights	Covenant on Civil and Political Rights	Indian Constitution

1	Forced labour	Article 8(3)	Article 23
2	Equality before law	Article 14(1)	Article 14
3.	Prohibition of discrimination	Article 26	Article 15
4	Equality of opportunity t3 public service	Article 25(C)	Article 16(1)
5	Freedom of speech and expression	Article 19(1) & (2)	Article 19(1) (a)
6.	Right for peaceful assembly	Article 21	Article 19(1) (b)
7.	Right to freedom of association	Article 22(1)	Article 19(1) (c)
8.	Right to move freely within the territory of a State	Article 12(1)	Article 19(1) (d) & (e)
9	Protection in respect of conviction of offences	Article 15(1)	Article 20(1)
10.	Protection from prosecution and punishment	Article 14(7)	Article 20(2)
11.	Not to be compelled to testify against himself	Article 14(3)(g)	Article 20(3)
12.	Right to life and liberty	Article 6(1) & 9(1)	Article 21
13.	Right to child education	Article 25(1)	Article 21(A)
14,	Protection against arrest and detention	Article 9(2)(3) & (4)	Article 22
15.	Freedom of conscience .and religion	Article 18(1)	Article 25

### 3.4.2 Fundamental Rights for Citizens only

The Indian Constitution has classified fundamental rights into two categories:

- 1) Fundamental rights which are available to citizens only;
- 2) Fundamental rights available to all persons residing within the territory of India for the time being and subjected to its jurisdiction. The first of the category, which is available to the citizens includes:

1. Article 15 relating to prohibition of discrimination on grounds of religion, race,

caste, sex or place of birth

2. Article 16 relating to equality of opportunity for all citizens in matters of public appointment
3. Article 19 relating to protection of rights
  - a) freedom of speech and expression
  - b) to assemble peaceably and without arms
  - c) to form associations or unions
  - d) to move freely throughout the territory of India
  - e) to reside and settle in any part of the territory of India and
  - f) Article 19(1) (f) relating to the right to own and acquire property was deleted by the Constitution 42nd Amendment Act 1978 with effect from 20-06-1979
  - g) To practise any profession or to carry on any occupation, trade or business
4. Article 29 relating to protection of interests of minorities. The second category of fundamental rights comprise the remaining fundamental rights which use the word 'Person.' In *Hans Muller of Nuremburg v. Superintendent Presidency Jail Calcutta* it was laid down in the judgment that Article 19 applies only to citizens. Fundamental rights mentioned in Article 19, which contains the right to "basic freedoms", are available only to the citizens of the country. The word 'citizen' that occurs in the above Article has not been used in a sense different from that in which it has been used in part II of the Constitution dealing with citizenship. In *Anwar v. State of Jammu and Kashmir*<sup>47</sup> it was held that non-citizens could not claim fundamental rights provided under Article 19.

In *Chairman Railway Board and others v. Chandrima Das*<sup>48</sup> the Supreme Court has observed that:

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<sup>47</sup> A.I.R. 1971 S.O. 337

<sup>48</sup> A.I.R. 2000 (1) S.C. 280

Fundamental rights\* are available to all the persons of this country and those who are not citizens of this country and who come here as tourists or in any other capacity, are entitled to the protection of their lives in accordance with the Constitutional provisions. They also have a right to life in this country. Thus they also have the right to live with human dignity so long as they are here in India. Article 14 which guarantees equality before law and equal protection of laws within the territory of India is applicable to "person" who would also include both the "citizens" of this country and non-citizens. In this case, a Bangladeshi national Mrs. Khatun was gang raped by the Railway employees in a room at the Yatri Niwas of the Howrah Railway Station in West Bengal. The Calcutta High Court allowed compensation of a sum of rupees 10 lakhs to her for having been gang raped. Upholding the decision of the High Court, the Supreme Court held that as a national of another country, she could not be subjected to a treatment, which was below the dignity, nor could she be subjected to physical violence at the hands of Government employees who outraged her modesty. According to the tone and the tenor of the language used in Article 21, they are available not only to every citizen of this country but also to a person of another country. The Apex Court also held that since the word 'life' has been used in Article 21 of the Constitution as a basic human right in the same sense as understood in the Universal Declaration of Human Rights of 1948, there is no reason why it should be given a narrow meaning.

Article 39(a) and Article 44 of the Directive Principles of State Policy contained in part IV of the constitution are for the citizens only.

### **3.4.3 Other Fundamental Rights (Unremunerated Fundamental Rights)**

A number of rights, which are stated in the Covenant, are not laid down in part III of the constitution. The Indian Constitution has specifically enumerated all the fundamental rights. In *Birma v. State of Rajasthan* it was held that "treaties which are part of international law do not form part of the Law of the land, unless explicitly made so by the legislative authority." Further in *Shiv Kumar Sharma and others v. Union of India* the Delhi High Court held that in India treaties do not have the force of law, and consequently obligations arising there from will not be enforceable in municipal courts unless backed by legislation. In *A. D. M. Jabalpur v. Shukla* the Supreme Court by a majority of four to one, held that the Constitution of India did not recognise any natural or common law rights other than that expressly conferred in the Constitution.

The attitude of the Supreme Court has changed especially after 1978. The courts on many occasions by accepting the rule of judicial construction have held that regard must be paid to International Conventions and norms for constructing domestic law. In *Maneka Gandhi v. Union of India*<sup>49</sup> Justice Bhagwati in the Special Bench for the Supreme Court observed that: The expression 'personal liberty' in article 21 is of the widest amplitude and it covers a variety of rights, which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19. No person can be deprived of his right to go abroad unless there is a law made by the State prescribing the procedure for so depriving him, and the deprivation is effected strictly in accordance with such procedure.

The following are the rights contained in the Covenant on Civil and Political Rights. They are available to the citizens of India through judicial decisions, though they are not specifically mentioned in the Constitution.

1. Right to travel abroad (Article 21)

The right to travel abroad is a guaranteed right under Article 12 paragraph (2) of the Covenant on Civil and Political Rights. In *Sathwant Singh Sawhney v. D. Ramanathan*, Assistant Passport Officer, New Delhi, High Court held that the right to go abroad is part of an individual's personal liberty within the meaning of Article 21.

2. Right to privacy (Articles 21 and 19 (1) (d)). This right is stipulated under Article 17 paragraph (1) of the Covenant on Civil and Political Rights. In *Kharak Singh v. State of Uttar Pradesh* it was held by the Supreme Court that the 'domiciliary visits' is an infringement of the right to privacy and is violative of the citizen's fundamental rights of personal liberty guaranteed under Article 21.

3. Right against solitary confinement

4. Right to human dignity

5. Right to free legal aid in a criminal trial

6. Right to speedy trial

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<sup>49</sup> A.I.R. 1978 S.C. 597

7. Right against handcuffing
8. Right against delayed execution
9. Right against custodial violence
10. Right against public hanging
11. Right to health care or doctor's assistance
12. Right to shelter
13. Right to pollution free environment
14. Freedom of the press
15. Right to know
16. Right to compensation
17. Right to release and rehabilitation of bonded labour
18. Right of inmates of protection homes
19. Right of not to be imprisoned for inability to fulfill a contractual obligation. In *Jolly George Varghese v. Bank of cochin*<sup>40</sup> it was held by the Supreme Court that to cast a person in prison because of his poverty and cosequent inability to meet his contractual liability is a violation of Article 21

#### **3.4.4 Right to Child Education**

Right to Child Education (Article 21 A) is a new human right, which is included in the Constitution by the Eighty Sixth Constitution Amendment Act, 2002. In order to make the right to free and compulsory education to a child, the Constitution's ~3'~ Amendment Bill 1997 was introduced in Rajya Sabha to insert a new article 21 A in the Constitution. However, the Bill was withdrawn on November 27, 2001. The Constitution 93rd Amendment Bill 2001 was introduced and passed by unanimous vote in the Lok Sabha on November 28, 2001 and the Rajya Sabha on May 14, 2002 with formal amendments as 86th Constitutional amendment. According to Article 21(A), the State shall provide free and compulsory

education to all children of the age of six to fourteen years in such manner as the State may, by law, determine.

Before the Constitutional process started for making the right to education a fundamental right, the Supreme Court in *J.P. Unnikrishnan and others v. The State of Andhra Pradesh*<sup>50</sup> held that every citizen of this country has the right to free education until he completes the age of fourteen years.

### **3.5 DIRECTIVE PRINCIPLES OF STATE POLICY AND HUMAN RIGHTS** **(JUDICIALLY NON- ENFORCEABLE RIGHTS)**

Judicially non-enforceable rights in Part IV of the Constitution are chiefly those of economic and social character. However, Article 37 makes it clear that their judicial non-enforceability does not weaken the duty of the State to apply them in making laws, since they are nevertheless fundamental in the governance of the country. Additionally, the innovative jurisprudence of the Supreme Court has now read into Article 21 (the right to life and personal liberty) many of these principles and made them enforceable.<sup>51</sup>

The duties of the State encompass securing a social order with justice, social, economic and political, striving to minimize and eliminate all inequalities (Article 38), securing for "the citizens, men and women equally" the right to an adequate means of livelihood (Article 39 (a)), distribution of ownership and (control of community resources to subserve the common good (Article 39(b)), prevention of concentration of wealth and means of production to the common detriment (Article 39(c)), securing equal pay for equal work for both men and women (Article 39(d)), preventing abuse of labour, including child labour (Article 39(e)), ensuring of child development (Article 39(f)), ensuring of equal justice and free legal aid

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<sup>50</sup> A.I.R. 1993 S.C. 645 at 733.

<sup>51</sup> 42 Justice Sujatha V. Manohar, "Judiciary and Human Rights," *Indian Journal of International Law* (Vol. 36, No.1.2, 1996): 39-54

(Article 39 A), organisation of village democracies (Article 40), provision of the right to work, education and public assistance in case of unemployment, old age sickness and disability (Article 41), provision of humane conditions of work (Article 42), living wage and a decent standard of life (Article 43), securing participation of workers in the management of industries (Article 43A), provision of a uniform civil code for the whole country (Article 44), provision for early child care and education to children below the age of six years. The State shall Endeavour to provide early childhood care and education for all children until they complete the age of six years (Article 45), promotion of educational and economic interest of the weaker sections of the people and their protection from injustice and all forms of exploitation (Article 46), raising the standard of living, improving the level of nutrition and public health and prohibition of intoxicating drinks and of drugs (Article 47), scientific reorganisation of animal husbandry and agriculture (Article 48) conservation of environment, forests and wildlife (Article 48A), protection of monuments and things of artistic or historical importance (Article 49), separation of judiciary from the executive (Article 50) and promotion of international peace and security (Article 51 ).

### **3.6 FUNDAMENTAL DUTIES AND HUMAN RIGHTS**

Part IV(A) of the Constitution embodies the Eleven Fundamental Duties of every Indian citizen (Article 51-A). These are: the duties to respect the Constitution and its institutions, to live by the noble ideals of the freedom struggle, to protect the sovereignty and integrity of India, to defend the country, to promote communal harmony, to renounce practices derogatory to the dignity of women, to preserve the cultural heritage, to protect and improve the natural environment, to have compassion for living creatures, to develop the scientific temper, to safeguard public property and abjure violence and to strive towards excellence in all spheres of individual and collective activity. 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 as the case may be, ward between the ages of 6 and 14 years."

It would appear that parts III, IV and IV(a) of the Constitution heavily depend upon the judiciary for their interpretation and application. The various 'reasonable restrictions' clauses in Part III, Article 21, and the seldom-used Part IV-A have given the judiciary ample scope



for the Judicial Review of administrative and legislative action. Indeed, Article 21 has allowed it to act as analyst in prodding the State to implement the directive principles in so far as they directly bear upon "life and personal liberty."

### **3.7 POLITICAL RIGHTS AND HUMAN RIGHTS**

India is the largest representative democracy in the world, based on universal adult suffrage, providing every Indian of at least eighteen years of age the right to vote. The Constitution provides for direct elections to the House of the People of the Central Parliament, i.e. the Lok Sabha and the State Provincial) Legislative Assemblies, once in every five years at the latest. The members of the State Legislatures do the elections to the Council of States, i.e. Rajya Sabha, which is the upper house of Parliament. The elected members of Parliament and State Legislative Assemblies elect the President. Both the Houses of Parliament together elect the Vice-President.

The right to vote, the right to contest elections, and the conduct of elections are all governed by the Constitution (Part XV) as well as special laws like the Representation of the People Act, 1951. The Constitution provides for an independent Election Commission (Article 324), which has in fact acquitted itself quite admirably in the recent elections, both provincial as well as parliamentary, and set an agenda for clean elections and elimination of the criminal - politician nexus.

### **3.8 INSTITUTIONAL FRAMEWORK AND HUMAN RIGHTS**

India is divided into twenty-eight States and seven Union (centrally administered) territories. The Constitution provides for division of legislative functions between Parliament and the State Legislatures. 97 items are placed under Parliament, 66 items are allocated for State Legislatures and 47 are made subject to concurrent jurisdiction of both, with the power of Parliament overriding in case of overlapping legislation (Article 246 and the seventh Schedule of the Constitution). Parliament has power to make laws, inter alia, on preventive

detention (Item 9, Union List, and item 3, Concurrent list), offences against laws in respect of any matter in the Union List (Item 93), and any matter not enumerated in any of the three lists (Item 97 and Article 248). Public order (Item 1), prisons and reformatories (Item 3), relief to the disabled and the unemployed (Item 9), and industries other than those declared by Parliament to be controlled by the Union (Item 24) are among the items in the State List. The Police is a State subject (Item 2), whereas deployment of any armed forces of the Union or any other force under the control of the Union is in the Union List (Item 2-A). Criminal law and procedure (Items 1 and 2), preventive detention for reasons connected with the security of the State, the maintenance of public order, the maintenance of essential supplies and services (Item 3), transfer of prisoners (Item 4), actionable wrongs, civil procedure (Item 13), economic and social planning (Item 20), labour matters (Items 22, 23 and 24), education (Item 25), and factories (Item 36) are in the Concurrent List. Further, Article 253 empowers parliament to make laws for implementation of any treaty, notwithstanding the above distribution of legislative powers.

The executive power of the Union is invested with the Prime Minister and his 'Cabinet' who are responsible to the Parliament. The executive power of a State is vested with the Chief Minister and his Cabinet who are responsible to the State Legislative Assembly. The President of India on the advice of the Prime Minister appoints the Governor, the head of a State. There is a common civil service for the whole of India, whose officers head the Union administration and nonmilitary security forces, and also the State administrations and Police forces. There is mobility between the Union and State senior positions.

The judiciary is presided over by the Supreme Court. The State judiciary is under the control of a High Court, which in certain respects enjoys even broader powers than the Supreme Court, although the law declared by the Supreme Court binds it. In the scheme of the Constitution, there exists a separation of powers among the legislature, the executive and the judiciary, with the judiciary being fiercely independent of the other two, charged with the task of enforcing the constitutional norms, including human rights, and adjudicating upon all inter-individual, inter-institutional disputes.

To monitor the implementation of the Constitutional objectives for the welfare of the weaker sections of the nation, the Central Government has appointed a National Commission for Minorities, a National Commission for Scheduled Castes and Scheduled Tribes and a

National Commission for Women. The National Human Rights Commission (N.H.R.C.) came into being in 1993 by virtue of the Protection of Human Rights Act. N.H.R.C. has become an agency to reckon with, and has carved out a place for itself in the mosaic of Indian national institutions for implementation of human rights. The freedom of the Press has been monitored chiefly by the Press council of India since 1979.

### **3.9 JUDICIARY AND HUMAN RIGHTS**

Of the three organs of Government, the judiciary has become a vanguard of human rights in India. It performs this function mainly by innovative interpretation and application of the human rights provisions of the Constitution. The Supreme Court of India has in the case *Ajay Hasia v. Khalid Mujib*<sup>52</sup> declared that it has a special responsibility, "to enlarge the range and meaning of the Fundamental rights and to advance the human rights jurisprudence."

As has already been pointed out the Supreme Court of India and the State High Courts have broad powers under the Constitution to enforce the fundamental rights and they have liberally interpreted these powers. The major contributions of the judiciary to the human rights jurisprudence have been two-folds:

(a) the substantive expansion of the concept of human rights under Article 21 of the Constitution, and (b) the procedural innovation of Public Interest Litigation.

#### **Expansion of Article 21**

Article 21 reads as follows, protection of life and personal liberty — "No person shall be deprived of his life or personal liberty except according to the procedure established by law." The expansion of Article 21 of the Constitution has taken place in two respects.

- a) The expression "the procedure established by law" received a new interpretation not intended by the founding fathers of the Constitution. In 1950, the very first year

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<sup>52</sup> A.1.R. 1981 S.C. 487 at 493

of the Constitution, the Supreme Court in the case *A.K. Gopalan v. State of Madras*,<sup>53</sup> reflecting on the intentions of the Constitution-makers, held that “procedure established by law” only meant that a procedure had to be set by law enacted by a Legislature. This phrase was deliberately used in Article 21 in preference to the American

“Due Process” clause. Three decades later, in *Maneka Gandhi v. Union of India* case, the Supreme Court noted that “the Supreme Court rejected its earlier interpretation and holds that the procedure contemplated under Article 21 is a right, just and fair procedure, not an arbitrary or oppressive procedure. The procedure, which is reasonable and fair, must now be in conformity with the test of Article 14 — “in effect it has become a Due Process.” There is no doubt that the experience of National Emergency (1975-1977) prompted the court to go all out for vindication of human rights. Since then every case of infringement of rights by the Legislature has undergone judicial scrutiny in terms of the new interpretation laid down in the *Maneka Gandhi*’s case. Further, this approach has led to procedural due process innovations such as the right to claim legal aid for the poor and the right to expeditious trial.

- b) The judiciary interprets “the right to life and personal liberty” to encompass all basic conditions for a life with dignity and liberty. Such an approach allows it to come down heavily on the system of administration of criminal justice and law enforcement. It also brings into the fold of Article 21 all those directive principles of state policy that are essential for a “life with dignity.”

Thus, the judiciary has interpreted “Life” to include the right to possession of each organ of one’s body and a prohibition of torture or inhuman or degrading treatment by Police. In the *Francis Coralie Mullin v. The Administrator, Union Territory of Delhi*<sup>54</sup> case, the Supreme Court held that “life” couldn’t be restricted to mere animal existence, or physical survival. The right to life means the right to live with dignity and all that goes with it — the basic necessities of life such as adequate nutrition, clothing, shelter and facilities for reading, writing and expressing oneself.

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<sup>53</sup> A.I.R. 1950 S.C. 27

<sup>54</sup> A.I.R. 1978 S.C. 597.

Many of the Article 21 cases that came before the High Courts and the Supreme Court often reveal a “shocking state of affairs and portray a complete lack of concern for human values.” The *Hussainara Khatoon v. Home Secretary, Bihar* case:<sup>55</sup>

It has been held by the Supreme Court that though speedy trial is not specifically enumerated as a fundamental right, it is implicit in the broad sweep and content of Article 21, which deals with the ‘right to life and liberty’. Justice Bhagwati held “if a person is deprived of his liberty under a procedure which is not ‘reasonable’, ‘fair’ or ‘just’, it would fall foul of Article 21. There can, therefore, be no doubt that speedy trial, and by speedy trial we mean reasonably expeditious trial, is an integral and essential part of the fundamental right to life and liberty enshrined in Article 21. It was also held by the Supreme Court that ‘detention in jail for a period longer than what they would have been sentenced for, if convicted, is illegal as being a violation of their fundamental right under Article 21 of the Constitution

*Deoraj Khatri v. State of Bihar* case raised the case of Police brutality in which 80 suspected criminals were brutally blinded during Police investigation (Bhagalpur Blinding case). The Supreme Court condemned it as a “barbaric act and a crime against mankind.” In *Sheela Barse v. The State of Maharashtra* case the Court was confronted with the custodial violence against women and it laid down certain guidelines against torture and ill treatment of women in Police custody and jails

The Supreme Court has also read into Article 21 a right to monetary compensation for deprivations of the right to life and liberty suffered at the hands of the State. This was highlighted in the *Rudal Shah v. State of Bihar* case.<sup>50</sup> The emergence of the right to compensation has nullified one of the reservations made by India in its instrument of accession to the human rights Covenants, which stated that the Indian law did not recognize such a right in the event of right deprivation.

The health problems of workers in the asbestos industry led the Supreme Court in the case *Paramanand Katra v. Union of India* to rule that the right to life and liberty under Article 21 also encompasses the right of the workers to health and medical aid. The right to life has been held to include the right to receive instant medical aid in case of injury and the right of a child to receive free education up to the age of fourteen.

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<sup>55</sup> A.I.R. 1979 S.C. 1360 at 1369

### 3.9.1 Public Interest Litigation and Human Rights

Public Interest Litigation — an expansion of class action under the common law — is a procedural innovation, which the Indian judiciary has by now fairly perfected on the basis of a concept borrowed from the United States. The rule of '*Iocus standi*' normally dictates that he who approaches the court must prove his legal standing vis-à-vis the claim he seeks to vindicate, usually in terms of a legal right or a legal obligation violated by the defendant/respondent causing thereby some injury or damage to him for which law provides a remedy. On the other hand, the public interest litigation is based on the principle that:

We cannot write off the weaker victims of injustices; the court's door when they knock shall open... How can a bonded laborer working in a stone quarry ever know of moving the Supreme Court?, asks Justice Krishna Iyer, a redoubtable public interest activist judge of the Supreme Court of the seventies. He explains that public interest litigation, chiefly, in the realm of public law assists 'all people concerned with governmental lawlessness, negligence of the administration, environmental pollution, public health, product safety, consumer protection and social exploitation being served by professionals like lawyers and public interest lobby\*. working for 'reform of decision-making processes in Government and outside, affecting the public at large'. Public Interest Law offers new challenges and opportunities for the committed lawyers and social groups to serve the unequal segments of society better. This sensitive development is part of democracy (of the disabled) and of the movement to vindicate social justice through professions for the people. As a result, 'judges with a vision have new universes to behold, and mansions of people's justice to build. <sup>56</sup>

Justice Krishna Iyer realises that the public interest litigation is likely to be abused. Hence he advised that the court should *prima facie* be satisfied that the information laid before it is of such a nature that it calls for examination. By looking at the credentials of the informant, the specific nature of the allegation, the gravity or seriousness of the complaint, and any other relevant circumstances should also be derived. It should also use its own wide investigative faculties as appropriate for the situation.<sup>3</sup>

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<sup>56</sup> V.R. Krishna Iyer, "Judiciary, Law, Justice and Litigation," The Hindustan Times (12 February 1995): 13

Ever since the public interest litigation came to be promoted by the Supreme Court, there has been an ongoing debate in the country between its supporters and opponents. In the *Sun// Batra v. Union of India* case,<sup>4</sup> the Supreme Court entertained a letter from Batra, a prisoner, complaining about the treatment meted out to a fellow prisoner in a jail. The letter activated the Court to deal with a wide variety of issues such as solitary confinement in jails, conditions of under-trial prisoners, sexual exploitation, sexual exploitation of blind girls in Schools, detention of mentally ill persons, minimum wages, illegal sale of babies, bonded labour, environmental protection, ill-treatment of fresher's in Colleges, better roads, land entitlement, conditions of children in children's homes, treatment of inmates of care homes, conditions of mental hospitals and deaths at alleged Police encounters. As the court opened its doors wide shedding procedure formalism, many of these issues repeatedly came before it as well as many others such as torture of young prisoners, Police brutality like blinding of suspects during investigation, custodial violence against women prisoners, deaths in Police custody, handcuffing of accused persons facing trials and fetters on incarcerated prisoners.

As the legal procedure became demoralized, the court evolved new devices to assist it in dealing with public interest litigation, such as special inquiry, fact-finding commission, scheme remedies and post- decisional monitoring. A motion-wide Legal Aid Scheme came to be established on the initiative of the Supreme Court.

In 1982 the Supreme Court promised to examine a range of relevant issues concerning the public interest litigation procedure. An examination of these issues may be useful to streamline the public interest litigation law and practice with a view to discouraging abuses. As Justice Krishna Iyer remark •: it is “too late to burke PIL, but always welcome to reaffirm, and refine, eliminate the entropy and abuse of the process.”<sup>56</sup> It is quite possible that the burden of a backlog of cases awaiting adjudication is what worries the Court. But this is never a reason when ‘we the People’ of India demand social justice, reminds Justice Iyer.<sup>57</sup>

The judiciary should never bite more than it can chew, Justice Sujata Manohar strikes a note of caution in the context of Article 21 of the Constitution. Article 21 embodies a judicially enforceable right. Therefore, it should essentially be a right capable of being protected by a judicial order. A right

not capable of such enforcement, if spelled out from Article 21... may result in the trivialization of court's pronouncements and may encourage the habit of ignoring them... Every human right may not be capable of judicial enforcement.<sup>5</sup> It points out the limits and limitations of judicial activism

Taking into account the particular nature of public interest litigation, the Supreme Court of India in a public interest litigation, *D.K. Basu v. State of West Bengal* issued guidelines to be followed in all cases for arrest and detention by the State interrogatory agencies till legal provisions are made on that behalf as preventive measures.

**The Guidelines are:**

1. The Police personnel carrying out the arrest and handling the interrogation of the arrestee should bear accurate, Visible and clear identification and name tags with their designations. The particulars of such Police personnel who handle interrogation of the arrestee must be recorded in a register.
2. The Police officer executing the arrest shall prepare a memo at the time of arrest and shall be attested by at least one witness. This may be either a member of the family of the arrested or a respectable person of the locality from where the arrest is made. It shall be countersigned by the arrestee and shall contain the time and date of arrest.
3. A person who has been arrested or contained and is being held in custody in a Police Station or interrogation centre or other lockups, shall be entitled to have one friend or relative or other person known to him or having interest in his welfare being informed as soon as possible that he has been arrested and is being detained in a particular place, unless the attesting witness of the memo of arrest is himself such a friend or a relative of the arrestee.
4. The time, place of arrest and venue of custody of an arrestee must be notified by the Police when the next friend or relative of the arrestee lives outside the District or town through the Legal Aid Organisation in the district and the Police Station of the area concerned telegraphically within 8-12 hours of the arrest.
5. The person arrested must be made aware of his right to have someone informed of his arrest or detention as soon as he is put under arrest or is detained.
6. An entry must be made in the diary at the place of detention regarding the arrest of the person which shall also disclose the name of the next friend of the person who has been informed of the arrest and the names and particulars of the Police officials in whose custody



the arrestee is.

7. The arrestee should, where he so requests, be also examined at the time of his arrest: and the major and minor injuries if any present on his body and must be recorded at that time. The 'Inspection of memo' must be signed by both the arrestee and the Police officer effecting the arrest and a copy shall be provided to the arrestee
8. The arrestee should be subjected to medical examination every 48 hours during his detention in custody by a doctor from a panel of approved doctors appointed by the Director, Health Services of the State concerned or Union Territory. He should prepare such a panel for all tehsils and Districts as well
9. Copies of all the documents including the memo of arrest referred to above should be sent to the Magistrate for his record. The arrestee may be permitted to meet his lawyer during interrogation though the latter may not be present throughout interrogation.
10. A Police control room should be provided at all District and State headquarters so that information regarding the arrest and the place of custody of the arrestee can be communicated by the Officer carrying out the arrest within 12 hours of effecting the arrest and at the Police control room it should be displayed on a conspicuous notice board.

The Supreme Court also insists that the requirements that flow from Articles 21 and 22 (1) of the Indian Constitution are to be strictly followed. These would apply with equal force to other Government agencies including the Directorate of Revenue Intelligence, Directorate of Enforcement, Coast Guard, Central Reserve Police Force (C.R.P. F), Border Security Force (B.St.F.) the Central Industrial Security Force (C.I.S.F), the State Armed Police, Intelligence agencies, such as the Intelligence Bureau, RAW, central Bureau of Investigation (C.B.I.) and C.I.D. These guidelines are only a few out of a large number of judgements of the apex court in which the court upheld the human rights of the oppressed individuals.

### **3.10 MEDIA AND HUMAN RIGHTS**

The Information Media is an important arm of any modern democratic polity through which the people exercise their freedom of information. The freedom of information, the democratic right to know, is crucial in making all other human rights effective and providing an important safeguard for the enjoyment of all those rights. Traditionally, the vehicle of public information was the Press. Today it is called the media, which include the press, the radio, the television and the internet. The "Fourth Estate" plays a crucial role in a large democracy like India where about 1500 different types of newspapers are circulated

The period of National Emergency saw for the first time, the gagging of the free press. Many then depended on the BBC for 'impartial' news about India. It is no wonder that the freedom of the Press or media became a watchword after emergency.

Disposing of a case of contempt of court against the editors of two newspapers, the Supreme Court remarked:

It is the duty of a true and responsible journalist to provide the people with accurate and impartial presentation of news and his views after dispassionate evaluation of facts and information received by him and to be published as a news item. The editor of a newspaper or a journal, the court said, has a greater responsibility to guard against untruthful news and its publication. If the newspaper publishes what is improper, mischievously false or illegal and abuses its liberty, it must be punished by a court of law. While a free and healthy press is indispensable to the functioning of a true democracy, the court said, "the freedom of the press is subject to reasonable restraints."<sup>57</sup>

Since the 1970's the media in India have played a central role in sensitizing people with information about governance, development, science and technology, foreign relations and so on. However, of late it has also come in for criticism, as highlighted by the above Supreme Court decision. There has been a decline in journalistic credibility, as noted by the Chairman of the Press Council of India himself in a seminar. Senior journalists feel that the media shies away from important 'people's issues' like tribal issues, that it is losing social content and becoming a consumer product with a manager overshadowing the editor. While the media is "a vital leverage to keep the rulers in

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<sup>57</sup> "Don't Misuse Press Freedom," The Hindustan Times (20 September 1990): 12. The case about a false report condemnatory of the judiciary, involved the editors of the Tribune and the Punjab Kesari, two newspapers)

check," it has failed "to educate people to assert their claim to the right to information," observes another senior journalist. The press also has come in for rough treatment by terrorists, insurgents, and some individual politicians. The Chairman of the Press Council condemned increasing commercialism and corrupt practices emphasizing the need to arrest them.<sup>64</sup> The media also has a tendency to launch "trials by the media," even sentencing by the media, even while a court proceeding is underway.

Considering the totality of the impact of the media during the past two decades, despite the above pitfalls, one must recognize that the contribution of the media in revealing and highlighting human rights causes has been most impressive. A colonial law relating to official secrecy, the Official Secrets Act, 1923, however, remains an impediment in the effective exercise of the freedom of information.

### **3.11 SOME OTHER MEASURES OF PROTECTION OF HUMAN RIGHTS UNDER INDIAN LAW**

1. The Protection of Civil Rights Act, 1955
2. Suppression of Immoral Traffic in Women and Girls Act, 1956
3. Maternity Benefit Act, 1961
4. Dowry Prohibition Act, 1961
5. Equal Remuneration Act, 1976
6. Bonded Labour (Abolition) Act, 1976
7. Employment of Children Act, 1938 (Amended in 1985)
8. The Child Labour (Prohibition and Regulation) Act, 1986
9. Juvenile Justice Act, 1986
10. Indecent Representation of Women (Prohibition) Act, 1986
11. Sati (Prevention) Act, 1987
12. The Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989
13. The National Commission for Women Act, 1990
14. The National Commission for Minorities Act, 1992
15. The National Commission for Scheduled Castes and Scheduled Tribes Act, 1993
16. The National Commission for Backward Classes Act, 1993
17. The Mental Health Act, 1987
18. The Persons with Disabilities (Equal opportunities, Protection of Rights and Full Participation) Act, 1995.

### **3.12 CONCLUSION**

The Indian Constitution is a document rich in human rights jurisprudence. This is an elaborate charter on human rights ever framed by any State in the world. Part III of the Indian Constitution may be characterized as the 'Magna Carta' of India. The Judiciary in India plays a significant role in protecting human rights. The Indian Courts have now become the courts of the poor and the struggling masses and left open their portals to the poor, the ignorant, the illiterates, the downtrodden, the have-nots, the handicapped and the half-hungry, half-naked countrymen.

## **CHAPTER 4**

### **THE PROTECTION OF HUMAN RIGHTS ACT, 1993 AND THE NATIONAL HUMAN RIGHTS COMMISSION**

#### **4.1 INTRODUCTION**

The United Nations Educational Scientific and Cultural Organization (UNESCO) mooted the idea of the creation of an impartial institution for the protection of human rights in the States as early as 1946. In pursuance of the resolution of the General Assembly adopted in 1966, the Economic and Social Council requested the Human Rights Commission of the United Nations to consider the question of creating a National Commission of Human Rights to perform certain functions related to the observance of the International Covenants on Human Rights. The question was taken up by the Commission in 1970 and it recommended that the question of establishment of National Commission of Human Rights in each Member State of the United Nations ought to be decided by each Government of the Member State keeping in view the traditions and institutions of each country. The Commission in 1978 again emphasized the need for the creation of a National Institution. But all these attempts, however, were fruitless.

Realizing the importance of such an institution or commission, the World Conference on Human Rights in 1993 urged Governments to strengthen national structures and institutions of society, which play a role in promoting and safeguarding human rights. The Vienna Declaration and Programme of Action adopted by the World Conference prompted a number of States to establish such institutions.

#### **4.2 HISTORICAL BACKGROUND**

The Western countries, America in particular, criticized India on the violation of human rights by Indian armed forces and para-military forces, especially, in the State of Jammu and Kashmir. In the early 1990's India felt the need for establishing a commission as a positive response to the criticisms of the foreign Governments in the context of political unrest and violence in Punjab, Jammu and Kashmir, the North-East and Andhra

Pradesh. Though it is now a well-recognized fact that terrorism is a serious violation of human rights. America, never missed the opportunity to criticize India, whenever Indian security forces sought to deal sternly with extremists and ultras. America claims to be the champion of human rights all over the world. America's practices of human rights are discriminatory. They use human rights as an instrument to harass and even coerce other States. At the same time, America criticises India and China for alleged violations of human rights. America has adopted a liberal and biased attitude regarding human rights violations in Pakistan, even though Pakistan's record in upholding human rights is not only unsatisfactory but also deplorable. America also pressurizes international financial institutions, which grant loans, not to give or grant loans or financial aid to such States. In addition to the pressure from foreign countries, there was a strong demand from the domestic front as well for the creation of a National Human Rights Commission. All these led the Government to enact a law to establish a Human Rights Commission. The Government's proposal to establish the Commission was of course sudden and without due deliberations. The President of India on September 27, 1993 promulgated an Ordinance for the creation of a National Human Rights Commission.

Justice Ranganath Mishra, the former Chief Justice of India, was appointed the Chairperson of the Commission on October 12, 1993. Justice M.N. Venkatachaliah, the former Chief Justice of India assumed office on November 26, 1996 as the Chairperson after the retirement of Justice Ranganath Mishra. Justice J.S. Verma, the former Chief Justice of India became the Chairperson on November 4, 1999 when Justice Venkatachaliah attained the age of 70 years. After the retirement of Justice J.S. Verma on January 16, 2003, the former Chief Justice of India Justice A.S. Anand was appointed the Chairperson of the Commission.

### **4.3 PROTECTION OF HUMAN RIGHTS ACT, 1993 (ACT 10, 1994)**

The Human Rights Commission Bill introduced in the Lok Sabha on May 14, 1992 was referred to the Standing Committee on Home Affairs of the Parliament. The President of India promulgated an Ordinance, which established a National Commission on Human Rights on September 27, 1993, owing to pressure from foreign countries as well as from the domestic front. Thereafter, a Bill on Human Rights was passed in the Lok Sabha on December 18, 1993 to replace the ordinance promulgated by the President. The Bill became an Act, having received the assent of the President, on January 8, 1994 (Act 10 of 1994) and was published in the Gazette of India, Extraordinary Part II, Section I, on January 10, 1994. Thus, the Protection of Human Rights Act (No. 10 of 1994) came into force. Article 1(3) provided that the Act should be deemed to have come into

face on the 28th day of September 1993. Section 1(2) states that the Act is extended to the whole of India and that it shall apply to the State of Jammu and Kashmir only in so far as it pertains to the matters related to any of the entries enumerated in List I or List III in the Seventh Schedule of the Constitution applicable to that State. The purpose of the enactment is laid down in the Preamble of the Act i.e., it provides for the establishment of a National Human Rights Commission, State Human Rights Commissions in States and Human Rights Courts for better protection of human rights.

#### **4.3.1 Definition of Human Rights under the Act**

Section 2(d) of the Act defines human rights as the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India. The above definition, however, limits the scope of the functioning of the National Human Rights Commission. India, therefore, ratified the two Covenants - International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. But the Covenants are not directly enforceable as law before the Indian courts. The definition of human rights under the Protection of Human Rights Act 1993 limits human rights strictly to the fundamental rights embodied in part III of the Constitution, which are enforceable by the courts in India. A pertinent question naturally arises here: why was the Commission established for the protection of fundamental rights when they are being constitutionally guaranteed and are enforceable by the courts. It appears that the main purpose of the enactment was to provide a better protection of human rights.

#### **4.4 NATIONAL HUMAN RIGHTS COMMISSION (N.H.R.C.)**

Chapter II of the Act deals with the constitution of the National Human Rights Commission (N.H.R.C.). Section 3 of the Act lays down that the Central Government shall constitute a body known as the National Human Rights Commission. N.H.R.C. is an eight-member body. The Commission consists of:<sup>58</sup>

- a) adjudged an insolvent or
- b) engaged during his term of office in paid employment outside the duties of his office or
- c) unfit to continue in office by reason of infirmity of mind or body or
- d) of unsound mind and stands so declared by a competent court.
- e) convicted and sentenced to imprisonment for an offence which in the opinion of the president involves moral turpitude

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<sup>58</sup> Protection of Human Rights Act 1993 (Act 10, 1994), Section 3(2)

#### **4.4.1 Powers and Functions**

The functions of the Commission are as follows :

1. The Commission shall inquire suo motu or on a petition presented to it by a victim or any person on his behalf into complaints of (a) violation of human rights or abatement thereof or (b) negligence in the prevention of such violation by a public servant.
2. The Commission may intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court.
3. The Commission shall visit, under intimation to the State Government, any jail or any other institution under the control of the State Government here persons are detained or lodged for purposes of treatment, reformation or protection to study the living conditions of the inmate; and make recommendations thereon.
4. The Commission shall review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and will recommend measures for their effective implementation.
5. The Commission shall review the factors, including acts of terrorism that inhibit exercise of one's human rights as well as the safeguards currently in force and make appropriate recommendations.
6. The Commission shall study the treaties and other international instruments on human rights and make recommendations for their effective implementation.
7. The Commission will undertake and promote research in the field of human rights.
8. The Commission shall spread human rights literacy among various sections of society and promote awareness of the safeguards available for the protection of these rights through publications, media, seminars and other available means.
9. The Commission shall encourage the efforts of non-governmental organisations and institutions working in the field of human rights.
10. The Commission may perform any other function it may consider necessary for the promotion of human rights.
11. The Commission shall submit an annual report to the Central Government and to the State Government concerned and may at any time submit special reports on any matter, which in its opinion, is of such urgency or importance that it shall not be deferred till the submission of the annual report. The Central Government and the State Government shall cause the annual and special reports of the Commission to be laid before each House of Parliament or the State Legislature respectively 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



12. The Commission shall perform functions pursuant to the directions issued by the Supreme Court in exercise of the jurisdiction under Article 32 of the Constitution. The Supreme Court in *Paranjit Kaur v. State of Punjab* stated, "the Commission would function pursuant to the directions issued by this Court and not under the Act under which it is instituted."~ In deciding the matters referred by this Court, National Human Rights Commission is given a free hand and is not circumscribed by any condition. Therefore, the jurisdiction exercised by the National Human Rights Commission in these matters is of a special nature not covered by enactment of law, and thus acts *sui generis*.

The Commission while inquiring into complaints shall have all the powers of a civil court trying a suit under the Code of Civil Procedure of 1908, and in particular in respect of the following matters: (a) summoning and enforcing the attendance of witnesses and examining them on oath; (b) discovery and production of any document, (c) receiving evidence on affidavits, (d) requisitioning any public record or copy thereof from any court or office, (e) issuing commissions for the examination of witnesses or documents and (f) any other matter which may be described.~ The Commission has the power to request any person to furnish information on such points or matters as, in the opinion of the Commission, may be useful for, or relevant to, the subject matter of the inquiry and any person so requested shall be deemed to be legally bound to furnish such information within the meaning of Section 176 and Section 177 of the Indian Penal Code. The Commission or any other officer, not below the rank of a Gazette Officer, specially authorized by the Commission, may enter any building or place where the Commission has reason to believe that any document relating to the subject-matter of the inquiry may be found, and may seize any such document or take extracts or copies from there."<sup>59</sup>

The Commission may, after completing the inquiry recommend to the appropriate Government or authority to take action against the person concerned where the inquiry discloses the violation of human rights. It may also recommend the appropriate Government or authority to grant necessary 'interim relief to the victim or to his family members. The Commission may approach the Supreme Court or the High Court concerned to pass such directions, orders or writs as that court may deem necessary.<sup>60</sup> The Commission provides a copy of the inquiry report to the petitioner or his representative. It shall also send a copy of its inquiry report together with its recommendations to the Government concerned or authority that shall, within a month, forward to the Commission its comments on the report, including the action taken or proposed to be taken. The Commission shall publish its inquiry report together with the comments of the Government or authority concerned, if any, and the action taken or proposed to be taken by the appropriate authority on the recommendations of the

<sup>59</sup> Human Rights Act, Section 13(3)

<sup>60</sup> Human Rights Act, Section 18(2) & (3)

Commission. The Commission in accordance with the power conferred on it by sub-section (2) of Section 10 of the Act made the regulations, which are called National Human Rights Commission (Procedure) Regulations, 1994. These Regulations came into force with effect from March 1, 1994. Regulation No. 8 dealing with procedure for making complaints was substituted by N.H.R.C. (Procedure) Amendment Regulations, 1996.<sup>61</sup>

#### **4.5 PROCEDURE FOR DEALING WITH COMPLAINTS**

Regulation 8 of the National Human Rights Commission (Procedure) Regulations, 1994 lays down the following procedure for dealing with complaints of alleged violation of 'human rights':

1. All complaints in whatever form received by the Commission shall be registered and assigned a number and placed for admission before a bench of two members constituted for the purpose not later than two weeks of receipt thereof. Ordinarily complaints of the following nature are not entertainable by the Commission:
  - a) in regard to events which happened more than one year before the making of complaints.
  - b) with regard to matters which are sub-judice
  - c) which are vague, anonymous or pseudonymous
  - d) which are of frivolous nature; or
  - e) those which are outside the purview of the Commission
2. No fee is chargeable on complaints.
3. Every attempt should be made to disclose a complete picture of the matter leading to the complaint and the same may be made in English or Hindi to enable the Commission to take immediate action. To facilitate the filing of the complaints, the Commission shall, however, entertain complaints in any language included in the Eighth Schedule of the Constitution. It shall be open to the Commission to ask for further information and affidavits to be filed in support of allegations whenever considered necessary.
4. The Commission may, in its discretion, accept telegraphic complaints and complaint conveyed through fax.
5. The Commission shall have the power to dismiss a complaint *in limine*.
6. Upon admission of a complaint, the Chairperson/Commission shall direct whether the matter could be set down for inquiry by it or should be investigated into.

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<sup>61</sup> Published in Gazette of India (Extraordinary) Part II, section I, November 71, 1996

7. On every complaint on which the Chairperson/Commission takes a decision to either hold an inquiry or investigation, the Secretariat shall call for report/comments from the Government/authority concerned giving the latter a reasonable time therefore.
8. On receipt of the comments of the authority concerned, a detailed note on the merits of the case shall be prepared for consideration of the Commission.
9. The directions and recommendations of the Commission shall be communicated to the Government/authority concerned and the petitioner as provided in Section 18 and 19 of the Act.
10. The Commission may, in its discretion afford a personal hearing to the petitioner or any other person on his behalf and such other person or persons, as in the opinion of the Commission should be heard, for appropriate disposal of the matter before it and, where necessary call for records and examine witnesses in connection with it. The Commission shall afford a reasonable hearing, including opportunity of cross-examining witnesses, if any, in support of the complaint and leading of evidence in support of his stand to a person whose conduct is enquired into by it or where in its opinion the reputation of such person is likely to be prejudicially affected.
11. Where investigation is undertaken by the team of the Commission or by any other person under its discretion, the report shall be submitted within a week of its completion or such further time as the Commission allows. The Commission may, in its discretion, direct further investigation in a given case if it is of the opinion that investigation has not been proper or the matter requires further investigation for ascertaining the truth or enabling it to properly dispose the matter. On receipt of the report, the Commission on its own motion, or if moved in the matter, may direct inquiry to be carried by it and receive evidence in course of such inquiry.
12. The Commission or any of its members when requested by the Chairperson may undertake visits for an on-the-spot study and where such study is undertaken by one or more members, a report thereon shall be furnished to the Commission as early as possible.

#### **4.5.1 Steps After Inquiry**

After the inquiry under the Act is complete the Commission may take any of the following steps.<sup>62</sup>

1. Where the enquiry discloses the Commission of violation of human rights, or negligence in the prevention of violation of human rights by a public servant, it may recommend to the Government or the authority concerned the initiation of proceedings for prosecution or such actions the Commission deems fit against the person or persons concerned.

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<sup>62</sup> Human Rights Act, Section 18 (1-6)

2. Approach the Supreme Court or the High Court concerned for such direction, order or writs a!; that court might deem necessary.

3. Recommend to the Government or the authority concerned for the grant of such immediate interim relief to the victim or the members of his family, as the Commission may consider necessary.

4. Subject to the provisions of Clause (5) provide a copy of the inquiry report to the petitioner or is representative

5. The Commission shall send a copy of its enquiry report together with its recommendations to Government or the authority concerned and the Government authority concerned 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.

6. The Commission shall publish its enquiry report together with the comments of the Government or the authority concerned, if any, and the action taken or proposed to be taken by the Government or the authority concerned on the recommendations of the Commission.

Regulation 11 of the National Human Rights Commission (Procedure) Regulations, 1994 further provides that report of follow-up action shall be submitted to the Commission at every subsequent sitting indicating therein the present stage of action on each item on which the Commission has taken a decision in any of its earlier meeting, except the items on which no further action is called for.

#### **4.5.2 Procedure with Respect to Armed Forces**

Section 19 of Protection of Human Rights Act, 1993 provides:

1. Notwithstanding anything contained in this Act, while dealing with complaints of violation of human rights by members of armed forces, the Commission shall adopt the following procedures, namely:

a. it may, either on its own motion or on receipt of a petition, seek a report from the Central Government

b. 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.

2. 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.

3. 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

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

It is stated that the members of the armed forces and the paramilitary forces cannot be regarded as persons above the law. They should come under the purview of the N.H.R.C. as they have, in the past, committed a number of acts, which amount to serious violations of human rights. Excesses of the army or the para-military forces in Kashmir and North East are likely to be curbed if the N.H.R.C. starts taking up cases against them on the complaint of the families of victims. Lack of jurisdiction over military and para-military forces has been pointed out in International forums as a serious infirmity affecting the credibility of the N.H.R.C. This has led the N.H.R.C. to recommend to the Government for the exclusion of para-military forces from the meaning of the word 'armed forces'. However, the Government have not yet accepted the recommendations.

#### **4.6 STATE HUMAN RIGHTS COMMISSIONS (S.H.R.C'S)**

The Protection of Human Rights Act under Chapter V also provides for the setting up of State Human Rights commission<sup>63</sup> in States consisting of a Chairperson who has been a Chief Justice of a High Court, one member who is, or has been, a Judge of a High Court, one member who is, or has been a District Judge in that State and two members to be appointed from amongst persons having knowledge of or practical experience in matter relating to human rights. The Governor shall appoint the Chairperson and other members of the Commission.

The State Commission is empowered to perform all those functions, which have been entrusted to the National Human Rights Commission. However, paragraph C of Section 29 excludes the study of treaties and other International Instruments on human rights from the purview of S.H.R.C. The study of such treaties and the eligibility to make recommendations for their effective implementation are the exclusive domain of the N.H.R.C. The State Commission may inquire into violations of human rights only in respect of matters related to any of the entries enumerated in List II and III in the Seventh Schedule of the constitution.~Section 36(1) of the Act, however, states that the State Human Rights Commission shall not enquire into any matter which is pending before a National Commission or any other statutory Commission duly constituted under any law in force.

The Commission is required to submit its annual report to the State Government and it may submit at any time special reports on any matter, which in its opinion is of such urgency or importance that it cannot be

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<sup>63</sup> Human Rights Act, Section 21 (2) (a-d)

deferred till the submission of the annual report. The State Government shall submit these reports before each House of State Legislature with a memorandum of action taken and the reasons for non-acceptance of the recommendations, if any.<sup>64</sup>

The States having their own S.H.R.Cs are Jammu and Kashmir, Himachal Pradesh, Punjab, Rajasthan, Madhya Pradesh, Chhattisgarh, Maharashtra, Kerala, Tamil Nadu, West Bengal, Assam and Manipur. Uttar Pradesh, from where the N.H.R.C. receives maximum number of complaints of human rights violations every year, set up a S.H.R.C. in October 2002. Similarly, Orissa and Bihar Governments have also issued Notifications for constituting S.H.R.Cs in their respective States. It is to be noted that certain State Governments have informed the N.H.R.C. of their difficulty in establishing the Commissions because of financial constraints or due to the non-availability of retired Chief Justice or Justices of the High Court whose presence is essential to the proper composition of the five member Commission envisaged under the provisions of Section 21(2) of the Protection of Human Rights Act of 1993.

The N.H.R.C. in its 1998-99 report has recommended that the State level Commissions be established as early as possible, where they do not yet exist. It is indeed desirable that every State should set up S.H.R.C. in view of the fact that the issue of promotion and protection of human rights of people in a civilized society is a matter of prime concern because in spite of various Constitutional and legal safeguards and institutional mechanism for upholding the fundamental rights of the people such rights are often violated. The Chairperson of the National Human Rights Commission has written to all Chief Ministers in respect of this matter and reminded them frequently of the necessity of constituting the S.H.R.C. The National Human Rights Commission in its 1999-2000 report has observed that it is disappointed with the slow pace with which State Governments are acting to constitute S.H.R.Cs. The Commission has also noted that not all the State Human Rights Commissions, that have been established, are being appropriately supported through the provision of adequate financial and manpower resources. Greater political will is, therefore, required at the State level, combined with encouragement from the Central Government (and the major political parties to proceed conclusively in this direction. If State Human Rights Commission is established in the States and their work is co-ordinated with that of the N.H.R.C. much confusion and duplication could be averted.

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<sup>64</sup> " Human Rights Act, Section 28

## **4.7 HUMAN RIGHTS COURTS IN DISTRICTS**

Chapter VI of the Act comprising Sections 30 and 31 makes the provisions relating to the creation of Human Rights Courts in each district.<sup>65</sup>

The setting up of Human Rights Courts in every District of the country for the speedy trial of offences arising out of violation of human rights is a novel provision of the Act. Section 30 of the Act provides for the setting up of Human Rights Courts by the State Governments, with the concurrence of the Chief Justice of the High Court by Notification, specifying for each District a Court of Sessions to be a Human Rights Court. For every Human Rights Court, the State Government in accordance with Section 31 of the Act shall appoint a Public Prosecutor or an advocate who has been in practice as an advocate for not less than seven years for the purpose of conducting cases in the Human Rights Courts. Such a person shall be called a 'Special Public Prosecutor'.

It is, however, to be noted that it is not mandatory for the States to create Human Rights Courts in each and every District as Section 30 of the Act expressly uses the expression the State Government 'may set up the Courts'. However, in order to provide speedy trial of offences arising out of violations of human rights, it is desirable that States particularly where human rights violations take place in large numbers should establish such courts. In the past such courts were Notified in the States of Andhra Pradesh, Assam, Sikkim, Tamil Nadu and Uttar Pradesh. Tamil Nadu and Assam have constituted Human Rights Courts in Chennai and Guwahati respectively. In Uttar Pradesh, the Governor notified Human Rights Courts with the concurrence of the Chief Justice of the High Court of Allahabad. The court has been lying dormant since 1995 due to the non-appointment of Special Public Prosecutors. Section 30 of the Protection of Human Rights Act of 1993 does not lay down the jurisdiction and procedures to be followed by such court.

The National Human Rights Commission in its 1998-99 reports has drawn attention to the ambiguity regarding the precise nature of offences that could be tried by these courts. It has recognized that substantive amendments to Section 30 of the Act are necessary to enable the courts to execute a speedy trial of the offences arising out of the violations of human rights. These courts cannot serve any fruitful purpose until a comprehensive legislation is passed to that effect.

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<sup>65</sup> Human Rights Act, Section 30

#### **4.8 RECOMMENDATIONS OF THE COMMISSION (N.H.R.C.)**

By the end of December 2000, the Commission submitted seven reports to the Government along with a number of recommendation suggesting steps to make the functioning of the Commission more effective for the promotion and protection of human rights. Some of the recommendations are:

1. The Commission recommended amendments to the Protection of Human Rights Act, 1993 to ensure more autonomy to the Commission so that it can grant relief to the victims or to their family members.

2. The Commission recommended ratification of the 'Convention against Torture and other Forms of Cruel, Inhuman and Degrading Treatment or Punishment' adopted by the United Nations In December 1984, which came into force in June 1987.<sup>66</sup>

3. The Commission recommended for making reforms and educating the Police. It recommended that serious action be taken on the second report of the Police Reforms Commission, 1979 including those that suggest the insulation of the investigative function of the Police from political pressure.

4. Custodial crimes are particularly heinous and revolting as they reflect betrayal of trust by a public servant against defenseless persons. The Commission recommended that the Indian Prison Act of 1894 should be revised. The Commission has prepared a new 'All India Jail Manual' for making reforms in the prison system. The Commission in its 1999-2000 report recommended that in order to bring about qualitative improvement in prison administration officers of proven integrity and competence should be selected.

5. The Commission expressed the view that to make people aware of their human rights there is the need for an effective movement which unfortunately is not in force, in spite of the existence of a large number of N.G.Os.

6. The Commission stated that one of its priorities relating to human rights is to improve the status of the Scheduled Castes and Scheduled Tribes and of the minorities. The Commission opined that the nation requires a vast programme of social regeneration to deal with ancient societal wrongs

7. The Commission suggested that the dialogue between policy makers, the security forces, and human rights proponents be sustained. This can contribute greatly to clarity of thought and action in dealing with insurgency and terrorism.

8. The Commission recommended that the para-military forces and the Army make it a point to report directly to the Commission any instance of death or rape occurring while a person is in their custody.

9. The Commission recommended that the right to education be enforced if the nation is to prove its seriousness in the efforts to end child labour.

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<sup>66</sup> India signed the Convention on October 14, 1997



10. It suggested that both the Doordarshan and the All India Radio should increase their involvement in enhancing human rights awareness.

11. The Commission recommended a further step aimed at increasing awareness of human rights in the country like the inclusion of questions relating to such rights in the general knowledge paper of the Civil Services Examinations. The Commission pointed out that this would lead to a greater sensitization on human rights issues and give impetus to the nation's attempts at fostering a culture of human rights among aspiring civil servants of the country.

12. The Commission in its 1998-1999 and 1999-2000 reports recommended the early setting-up of State Human Rights commissions. It has repeatedly approached the States, which have not yet set up S.H.R.Cs to take action to set up institutions at an early date.

13. The Commission in its 1998-1999 report recommended that a time bound programme be embarked upon for the speedy clearance of criminal cases in the courts through the High Courts of the respective States which alone have exclusive control over the subordinate judiciary.

14. The Commission in its 1999-2000 report recommended that the reports of the Commission be promptly placed before Parliament and be allowed to be released to the public.

15. The Commission in its 1999-2000 report recommended that the Government of India should undertake comprehensive steps to root out untouchability by implementing the provisions of the Protection of Civil Rights Act, 1976 and the Prevention of Atrocities against Scheduled Castes and Scheduled Tribes Act, 1989 more vigorously than hitherto.

16. The Commission in its 1999-2000 report recommended the improvement of certain aspects of the administration of criminal justice in India.

#### **4.9 AN EVALUATION OF N.H.R.C.**

The National Human Rights Commission has earned considerable prestige and reputation by its suo motu action. In fact its very first action related to the Bijbehara incident<sup>67</sup> (in Jammu and Kashmir) in which there were press reports of death of about 60 civilians as a result of firing by the security forces. In the first meeting of the Commission held on 17 November 1, 1993, it issued suo, motu notice to the Government of India

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<sup>67</sup> Annual Report, N.H.R.C. 1993-1994: 11 & 12

seeking a report on the incident. Upon investigation, it recommended disciplinary proceedings against 14 members of the security force, prosecution after a magisterial enquiry, payment of compensation and review of the circumstances and conditions of deployment of security forces. Another development is the use of N.H.R.C, by the Supreme Court of India as an investigative arm of the Court. On a public interest complaint regarding the cremation by the Punjab Police of several dead bodies as they were "unclaimed" in the past few years, the Supreme Court described the issue as "a flagrant violation of human rights on a mass scale" and asked the Commission to launch a thorough probe to "determine all the issues raised by the petitioner including the question of compensation.

#### **4.10 CONCLUSION**

Even though the Commission can neither render decisions like a regular court nor can its decisions be enforced like judgments, nevertheless the National Human Rights Commission cannot be branded as a weak or 'Impotent Body'. Headed by a former Chief Justice of India and consisting of Judges of the Supreme Court and chief justices of High Courts, it commands great respect. The N.H.R.C. is a statutory body and derives its power and authority from an Act of the Indian Parliament. Its work in the field of prevention of custodial deaths, rape and torture has been quite praiseworthy: N.H.R.C's direction to all District Magistrates and Superintendents of Police to report to the Commission all incidents of custodial deaths or rape within twenty four hours has made salutary impacts in preventing such incidents. If the denial of human rights were analyzed, one would find a combination of political, economic, social, psychological and moral factors responsible for the same to a large extent. These factors along with many other deep-rooted customs and superstitions may be regarded as the fundamental causes for the denial of human rights.

## **CHAPTER 5**

### **CONCLUSION AND SUGGESTIONS**

#### **5.1.INTRODUCTION**

The evolution, the development and the Constitutional and institutional framework of human rights in India in general and the role-played by the Human Rights Commission in particular have been discussed in the foregoing chapters of the dissertation. The philosophy of 'Human Rights' in India has traversed a long way, yet the progress through the historical path has always remained gradual and never lost its link with the past. Indian history attests to the fact that human rights jurisprudence occupied a place of prime importance in India's rich legacy of historical tradition and culture. The promulgation of the Constitution by the people of India on 26<sup>th</sup> January 1950 ushered in a heroic development of the philosophy of human rights in India. The concept of making India's Constitution a viable instrument of the Indian people's salvation, and securing to all persons the basic human rights, is implicit in the Preambular Promises, Fundamental Rights, Directive Principles and various other provisions in the Constitution. Most of the Articles of the Universal Declaration of Human Rights and the two International Covenants are the building blocks of our Constitutional framework.

In tune with the changing global scenario, the Government of India enacted the Protection of Human Rights Act in 1993. The Act provides for the Constitution of a National Human Rights Commission (N.H.R.C.) with jurisdiction all over India.

As has already been pointed out, this dissertation entitled "Human rights commission : a critical study" is divided into five chapters including the introduction and the conclusion. A chapter-wise summary in brief is given below. The first chapter of the dissertation is an Introduction, which provides the contents of the study, its purposes and the hypotheses, and also the research methodology followed in the dissertation. The methodology followed has been historical, theoretical and analytical. The second chapter deals with "The Origin and Development of Human Rights in the Global Scenario." This chapter examines the International Declaration of Human Rights, the United Nations and Human Rights and the International Covenants of Human Rights. The third chapter "Human Rights in India - An over vie" elaborately discusses the origin and development of human rights in India and the Constitutional framework of human rights in India. The fourth chapter of the dissertation entitled, "The Protection of Human Rights Act, 1993 and the National Human Rights Commission" deals with the Protection of Human Rights Act and the role-played by the National Human Rights Commission for the protection of human rights. This chapter evaluates the entire study and also proposes an agenda in the form of suggestions and recommendations.

The major hypotheses guiding the investigation are recapitulated below:

1. In modern times human rights are regarded as the most important rights.
2. The United Nations provides a good background for the development of human rights.
3. Human rights are found in ancient Indian thought.
4. The Indian Constitution itself contains ample provisions for the protection of human rights.
5. The Protection of Human Rights Act 1993 and the Constitution of National Human Rights

Commission encourage protection of human rights. However, the N.H.R.C. is a weak body that suffers from inherent weaknesses.

6. The Judiciary in India has expanded the scope of Article 21 of the Constitution - "No person shall be deprived of his life or personal liberty except according to the procedure established by law."

7. The Supreme Court is the most important protector of human rights in India.

## **5.2 CONCLUSION AND FINDINGS**

1. Human rights are rooted in ancient thought and in the philosophical concepts of 'Natural Law' and 'Natural Rights' of man.

2. The United Nations has provided a fertile ground for the development and protection of human rights all over the world.

3. The Universal Declaration of Human Rights adopted by the General Assembly of the United Nations on both December 1948 and the two international Covenants viz., the international Covenant on Civil and Political Rights and the international Covenant on Economic, Social and Cultural Rights and their Optional Protocols constitute the basic and authentic document of human rights known as the "International Bill of Rights."

4. Human rights jurisprudence had occupied a place of prime importance in ancient India's rich legacy of historical tradition and culture.

5. Human rights have been synthesized in the Constitution of India by the preambular promise the fundamental rights, the directive principles of state policy, the fundamental duties and other constitutional and institutional framework, though they are not referred to by that name. Most of the rights enumerated in the Universal Declaration of Human Rights and the international Covenant on Civil and Political Rights have also found a place in the Indian Constitution.

6. The judiciary is one of the major protectors of human rights in India. Through its various historic pronouncements the Supreme Court of India has recognised the 'Fundamental Rights' as 'Natural Rights or Human Rights.'

7. The substantive contribution of Indian judiciary to human rights jurisprudence has been two fold: a) The Expansion of Article 21 of the Constitution and (t) the procedural innovation of "Public Interest Litigation." The expression 'Life or Personal Liberty' in Article 21 was given a broad and **liberal** interpretation by the Supreme Court of India. The term "personal liberty" covers a wide gamut of rights, which are contained in the international Covenant on Civil, and Political Rights, which are available to the citizens of India despite the fact that they are not specifically mentioned in the Constitution.

8. The Protection of Human Rights Act 1993 (Act 10 of 1994) and the Constitution of the National Human Rights Commission under the Act advance the protection of human rights in India. It creates a sense of human rights awareness among the people of India, despite the fact that the N.H.R.C. is a weak and powerless body, with only recommendatory powers.

9. The narrow and limited definition given to the term 'human rights' under the Protection of Human Rights Act 1993 restricted the scope, meaning, ambit and operation of human rights in India. As per Section 2(d) of the Act 'human rights means "the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in International Covenant and enforceable by courts in India."

### **5.3 RECOMMENDATIONS AND SUGGESTIONS**

This study reveals that the Human Rights Commission has by and large played its role quite effectively and has always upheld the basic principles of human rights by promoting, protecting and implementing human rights. It has investigated a number of cases involving serious human rights violations, and submitted reports to the Government with a number of recommendations suggesting measures to be taken to curb such human rights violations. However, the work of the Commission is least effective, and is far from satisfactory. The following suggestions are made in order to ensure the efficacy and efficiency of the Kerala State Human Rights Commission.

If these recommendations are conceded, it will strengthen human right commission so that everyone can live with dignity and honour in our society. With the said avowed goal in mind the researcher would like to propose the following suggestions and recommendations.

- 1.** The narrow interpretation and limited definition given to the term 'human rights' in Section 2(d) of the Protection of Human Rights Act 1993 may be amended so as to include those rights enshrined in the

Universal Declaration of Human Rights and in the International Covenants within the ambit of the term 'human rights.

2. Provision may be made to grant financial and administrative autonomy to the Commission, so as to enable it to grant compensation to the victims of human rights violations or his/her family members from its own fund or to realise the amount from the person or persons who are responsible for the violation of human rights
3. Considering the non availability of retired Chief Justices of High Courts to be appointed as Chairperson of a State Human Rights Commission, under Section 21(2) (a) of the Protection of Human Rights Act 1993, the provision may be amended to enable the appointment of a retired High Court or Supreme Court Judge as Chairperson of the Commission.
4. Armed forces and paramilitary forces may be brought under the purview of the relational as well as State Human Rights Commissions.
5. The provision for appointment of the non-judicial 'members' in the State Human Rights Commission as stipulated in Section 21(2) (d) of the Protection of Human Rights Act may be amended so as to appoint persons with legal qualifications and special knowledge or practical experience in the field of human rights as members. It would be advisable to include a woman also among the five members.
6. In order to ensure an independent and impartial investigation into the alleged violations of human rights without fear or favor, the investigation team of the State Human Rights Commission may be headed by a retired judge.
7. More powers should be accorded to the National Human Rights Commission and the State Human Rights Commission so as to make them function more effectively.

For the better protection of Human Rights the researcher proposes certain amendments to that Indian Constitution.

a) The Indian Judiciary feels handicapped in the matter of further development and a liberal interpretation of the "Right to Life" laid down in Article 21 due to the presence of the term "Procedure Established by Law" whereby the Indian courts can only check the 'fairness of the procedure' and not 'substances of the law' in the strict sense of the term. To curb human rights violations the expression 'Procedure Established by Law' in Article 21 may be replaced by 'Due process of Law.'

b) The Indian Constitution may be amended so as to include all human rights strictly in accordance with the Universal Declaration of Human Rights and the International Covenants.

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