CHAPTER 61

BLOCKADE*

Meaning and Definition of 'Blockade'.—As pointed out by Starke "A blockade occurs when a belligerent bars access to the enemy coast or part of it for the purposes of preventing ingrees or egress of vessels or air-crafts of all nations." [1] According to Oppenheim : "It is blocking of men of war of the approach to the enemy coast or a part of it for the purpose of preventing ingress and egress of vessels or aircrafts of all nations."[2]

Pacific blockade has already been discussed earlier. There is a difference between Pacific Blockade and this type of blockade. Pacific blockade is a peaceful means of settlement of international dispute. It is used during peace time. On the contrary, blockade with which we are concerned in this Chapter is an act of war. This is a common thing during war that the belligerent States blockade the coast of each other so as to check the ingress and egress of the ship. Thus we see, that the blockade with which we are presently concerned is an act of war and is enforced in accordance with the rules of war. "The law as to blockade represents a further restriction on the freedom of neutral States as to trade with belligerents." [3]

Essential elements of blockade**

(1) It should be done by men of war.
(2) Through it whole of coast or a part of the coast of the enemy can be blockaded.
(3) The ingress and egress of the ships should be prevented through blockade.
(4) Blockade is an act of war.
(5) Blockade should be such that no discrimination is made between the ships of different countries.

In addition to the above elements of blockade, following conditions also deserve special mention :

(i) *Effectiveness.*—Blockade to be binding must be effective. It was laid down in the Declaration of Paris, 1856, that a blockade to be binding must be effective. It is also necessary for blockade that as much force should be used as necessary for preventing the ingress of the ships of enemy States. In the famous case named, *The Franciska,*[4] it was laid down that the concerned are a ".....must be watched by a force sufficient to render the egress or ingress dangerous, the force must be sufficient to render the capture of vessels attempting to come in or come out most probable." [5] Although International Law provides that sufficient force should be used for blockade, there is no provision of international law to ascertain as to how much force should be used. According to Lord Cockburn, "In the eye of law, a blockade is effective if the enemy's ships are in such numbers and position as to render breaking the blockade a matter of danger, although some vessels may succeed in getting through." [6] During the Cremean War of 1854, only one

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* See also for I.A.S. (1974), Q. No. 10 (b) ; I.A.S. (1964), Q. No. 9 ; P.C.S. (1969), Q. No. 3(a) ; I.A.S. (1958), Q. No. 8.

1. J. G. Starke, Introduction to International Law, Tenth Edition (1989) p. 594.
2. L. Oppenheim, International Law, Vol. II. Seventh Edition, p. 768 ; See also Julius Stone, Legal Control of International Conflict (1954), p. 492.
3. Starke, note 1, at p. 594.

** See also for P.C.S. (1976), Q. No. 8 ; P.C.S. (1985), Q. 8.

4. (1855) 2 E.C.C. and Ad., 113.
5. Ibid, at p. 120.
6. *Geipel* v. *Smith,* (1872) L.R. 7

British ship was able to blockade successfully the Russian port of Riga which was 120 miles away. One of the essential elements of the blockade, therefore, is that it should be enforced by sufficient force, but it is not clear as to how much force should be used and there is nothing to indicate the number of ships to be used for the enforcement of an effective and binding blockade.

(ii) *Continuous Maintenance.*—There should be continuous maintenance of blockade. If the ships enforcing blockade go away then it will be deemed as if blockade has been ended. It is therefore necessary that the warship should remain present to enforce the blockade.

(iii) *Proper establishment.*—The blockade should be properly established.

(iv) *Impartiality.*—It is also provided that the country enforcing the blockade should not discriminate in between the ships of different countries. All the ships of different countries should be stopped without any discrimination.

(v) *Declaration and notification.*—As pointed out by Starke, it is an established rule of international law that a blockade must be properly declared and notified to the neutral States with a specific statement as to geographical limits of the coastline to which access is barred." [7]

(vi) *Exemption to neutral ports.*—Certain exemptions are provided to neutral ports during the blockade.

(vii) *Geographical limits of blockaded area.*—It is also necessary that the geographical limits of the blockaded areas should be clearly determined and specified.

Violation of Blockade.—Since from the point of view of the belligerent State declaring blockade, violation of blockade is a criminal act, it is not justified when the ship concerned has no knowledge of blockade. According to the practice prevalent in America and Britain, blockade is considered established only when it is notified locally and diplomatically. In accordance with the practice prevalent in France and Italy, a blockade can be said to be violated only after the prior warning has been given to the ships entering the blockaded area. There is a great controversy among the writers in regard to violation of Blockade and the practices of States also differ. The better and balanced view seems to be that the blockade should be properly declared and notified. A State may be held guilty of violating the blockade only if it has been given prior intimation of the blockade. Reference may be made here to the case of *The Franciska.*[8] The facts of this case may be summarised as follows :—

The Francisca, a ship belonging to Denmark, was sailing on Baltic Sea towards Riga. At that time, Britain had Blockaded Russian ports during Cremean War. British Government had declared that only her ships could go through Baltic Sea for the purpose of trade. Similar declarations were made by Russia and France. Consequently the trade of even neutral States was stopped in the area. *The Francisca* was caught by Britain on the charge of violation of Blockade. The owners of the ship argued that the ship was ordered to go to Riga prior to the declaration of blockade and that they did not intend to violate the blockade for they had no knowledge of the blockade. But the court did not accept this argument because the captain of the ship had come to know about blockade before leaving the earlier port. But despite this the court decided in favour of the owners of the ship because the blockade was not being enforced impartially. It was lifted or relaxed for belligerent States but was tightened or strictly enforced for neutral States. The court, therefore, declared it invalid.

Consequences of Violation of Blockade.—It is generally recognised that the ship attempting to violate blockade may be caught. Since there is no unanimity as to whether violation or attempts to violate should be continuous, there is great controversy in this connection. It is, however, certain that after seizure it should be produced before the Prize Court. The Sailors of the Ship may be detained for a temporary period because they may be produced as witnesses. About three centuries ago, the Sailors could be

7. Starke, note 1, at p. 595.
8. (1855) 2 E.C.C. and Ad. 113.

imprisoned. This practice was abolished in eighteenth century. In the present period, sailors cannot be imprisoned and they are released immediately after the decision of the court. For violation of blockade only the ship and its cargoes can be seized. The practice of States, however, varies in this respect.[9]

End of Blockade

A blockade will be deemed to have ended under the following circumstances :

(1) If the war comes to an end.
(2) If the country enforcing blockade withdraws the blockade.
(3) If there is continuous violation of blockade and it ceases to be effective.
(4) Blockade is also deemed to have ended when the country enforcing the blockade conquers the State whose coast is being blockaded.
(5) When the State enforcing blockade is defeated in the war.
(6) When the fleet of the ship enforcing blockade moves away from the area to be blockaded, it is deemed as if the blockade has ended.

A leading case relating to blockade is the *Zamora,* (1916).

The Zamora (1916).—[10]*Zamora was a Swedish maritime ship. During the first World War, it was carrying rubber and food materials from New York to Stockholm. It was stopped and seized by the British ship and was taken to a British port. Britain claimed that the cargoes of Zamora could be seized as they were contraband. The matter relating to this was submitted to the adjudication of the Prize Court. While the case was pending for a decision of the Prize Court, the Procurator-General by issuing an order requisitioned more than half of the cargoes of the Zamora which was claimed to be contraband. The cargoes requisitioned included timber and copper and was seized on the ground that they were required for the successful prosecution of war and other matters of national security. The owners of the ship protested against this. The Prize Court, however declared the order of the British Government valid. The owners of the ship filed an appeal in the Judicial Committee of the Privy Council. Lord Parker, delivering the judgment on behalf of their Lordships of the Judicial Committee of the Privy Council, set aside the order of the lower courts and invalidated the order of requisition of copper by Procurator-General of England. It was laid down that the Prize Court is a national court but it decides cases in accordance with the principles and rules of international law. The Judicial Committee of the Privy Council held that a British Prize Court had to apply international law of prize even though it conflicted with an order in council. The British Prize Court would however, be bound by a British statute.[11] As aptly remarked by Oppenheim, "There is no doubt that a British Prize Court, being a municipal tribunal, would be bound to apply an Act of Parliament inconsistent with the law of Nations. But then, as the court said in *The Zamora,* the Prize Court 'would no longer be administering International Law' and it would to that extent 'be deprived of its proper function as a Prize Court." [12] A state may, however, order its Prize Courts to apply the rules of International Law and when no statutes are enacted or regulations are given, Prize Courts have to apply International law.[13]

Strategic and Commercial Blockade.—It has been indicated earlier that blockade is an act of war through which the sea coasts of the enemy States are partly or completely blockaded. The chief objective of this is that supplies of food materials, etc., may not reach the enemy country so that the enemy may be defeated or may be compelled to accept the conditions of the other belligerent State. This is called strategic blockade. On the other hand, blockade may also be peaceful or commercial. A commercial blockade is one, the objective of which is to prevent the sea coast of enemy for the purpose of trade. Commercial blockade, strictly speaking is not an act of war.

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9. L. Oppenheim, International Law, Vol. II, Seventh Edition, p. 790.
10. (1916) 2 A.C. 77; See also Chapters on "Right of Angary" and "Prize Courts."
* See also for I.A.S. (1959) Q. No. 6 (d).
11. Ibid, at p. 93.
12. Oppenheim, note 98, p. 871.
13. Ibid, at p. 485.

Long distance Blockade*.—Long distance blockade was started for the first time in the First World War. It was a new method of blockade. During the First World War, Germany laid contact mines under the seas. In reaction to this Britain declared North Sea as area of danger and laid contact mines in it. As a reaction to it, Germany declared the seas throughout the British Island as war areas and declared that if the ship of any country entered that area it would be destroyed. In reply to this, Britain declared that if the ship of any enemy State entered that area its owners shall be treated as enemies, and it shall be destroyed. Consequently, both Germany and Britain adopted the new methods of long distance blockade. Some neutral countries (the prominent among them being America) opposed this type of blokade and contended that it was not a legal blockade. Great Britain, however, contended that it was a legal blockade and argued that it was the blockade adopted under special circumstances. However, on the pressure exercised by America and certain other neutral States, the long distance blockade was ended in the First World War, but it was again resorted to during the Second World War. "The 'long distance' blockade was reinstituted in 1939 in the Second world War, and its rational justification was likewise the necessity for waging 'total' economic warfare against the enemy. In both wars, France took action similar to that of Great Britain. Without Great Britain's predominant naval power in relation to the enemy the blockade could not have been enforced." [14] As pointed out by Oppenheim : "Thus viewed, measures, regularly and uniformly, repeated in successive wars in the form of reprisals and aiming at the economic isolation of the opposing belligerent must be regarded as a development of the latent principle of the law of blockade, namely that the belligerent who possesses the effective command of the sea is entitled to deprive his opponent of the use thereof for the purpose either of navigation by his own vessels or of conveying on neutral vessels such goods as are destined to or originated from him." [15] Prof. Julius Stone also subscribes to this view. In his view the long distance blockade should be viewed in the changed context of the present century and should not be considered as the violation of traditional international law.[16]

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* See also for I.A.S (1977), Q. No. 7(a) ; P.C.S. (1965), Q. No. 7(b).

14. Starke, note 1, at p. 596.
15. Oppenheim, note 2, at pp. 796-97.
16. See Legal Controls of International Conflict, pp. 508-510.

CHAPTER 62

UNNEUTRAL SERVICE AND RIGHT OF VISIT AND SEARCH

Unneutral Service*

As pointed out by Starke, ".....the doctrine of unneutral service.....is the duty of owners or persons incharge of neutral vessels or air-crafts not by any acts or conduct on their part to employ a vessel or air-craft for objects or purposes (other than carriage of contraband or breach of blockade) which may advance belligerent interests of one State and injure the same interests of the opponent." [1] It is often said that unneutral service is connected with the rights and duties of the neutral citizens during naval war and consequently it is deemed to be related to the doctrine of contraband. The position is, in fact, a little different. The doctrine of unneutral service is wider than the doctrine of contraband. While contraband is limited only to naval war, the doctrine of unneutral service besides being connected with the naval war may also be connected with aerial warfare. The belligerent State which is affected by unneutral service may stop such ships and remove the persons and the cargoes of the ship. In serious cases, the ship can also be seized as a prize and may be produced for adjudication before a Prize Court. Unneutral service includes both persons and things. If a neutral State is carrying some private person for the service of enemy then it will be deemed to be Unneutral service. The State affected by such service may take necessary action against it. In the famous *Caroline case,*[2] it was decided that the ground that the ship had been compelled to carry the armed forces of enemy State could not be deemed to be valid ground. Similarly, in another case the *Oro-Zembo,*[3] which was seized when war was going on between England and Netherland, the owners of the ship had contended that they know nothing about the unneutral service, but this argument was also rejected by the court and it was ruled that necessary action could be taken irrespective of the ignorance of the owners of the ship relating to unneutral service. The facts of this case are as follows :—

Oro-Zembo was an American ship. In 1807, under the command of the Dutch Government, it was taking three Dutch military officials and 2 officers of Civil Service to Batavia. At that time war was going on between Britain and Holland. Britain seized this ship on the ground of unneutral service. The court held that even if the captain of the ship is unaware of the ship being engaged in unneutral service and assists or helps the enemy, the belligerent State can seize such ship. The Court further added that the number of military personnel is immaterial because it is possible that a few high ranking military officials may be more important than a large number of soldiers.

Similarly if a neutral merchant ship performs the service of sending spies in enemy State then it will be called unneutral service. In the view of Prof. Oppenheim, in respect of unneutral service, it is necessary to establish or prove that the persons concerned were acquainted with the nature of the cargoes being sent and yet they sent or transported it and used their ship for this purpose. As pointed out earlier, goods can be seized and persons can be arrested on the charge of unneutral service. Persons can also be made prisoners of war for performing unneutral service and may be punished accordingly. "The more usual guilty activities of unneutral service are transport of members of the enemy armed forces, carriage of despatches to the enemy, taking a direct part in the hostilities, operating under Charter to the enemy, and the transmission of intelligence in the interest of the enemy." [4]

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* See also for I.A.S. (1961), Q. No. 12 (c) ; P.C.S. (1965), Q. No. 9 ; P.C.S. (1977), Q. No. 8.

1. J. G. Starke, An Introduction to International Law, Tenth Edition (1989), p. 586.
2. Moore Digest, 11 S. 217.
3. (1807) 6 Ch. Rob 430.
4. Starke, note 1, at p. 586.

Distinction between unneutral service and contraband.—There are some points of differences between contraband and unneutral service. According to Lawrence, there is difference in the nature of their functions. Contraband goods are carried or transported for commercial purposes and their chief objective is to earn profits. On the other hand, unneutral service is unconnected with commerce or trade. It is more connected with war. The second difference is this that in contraband only goods can be sent whereas under unneutral service persons may also be sent. For seizure of contraband goods it is necessary that its destination should be the enemy territory or State, but it is not necessary in case of unneutral service. The punishment awarded for unneutral service and contraband goods also differs. According to Prof. Oppenheim, ordinarily contraband goods are not directly used in the service of the enemy whereas unneutral service may ordinarily be directly used in the service of the enemy State.[5]

Distinction between unneutral service and hostile service.—There are some points of difference between unneutral service and hostile service although there are also several similarities between the two. The Declaration of London, 1909, laid down the following essential elements of hostile service :

(1) Direct participation of the neutral State in the war;
(2) Its being under the control of the agent or government of enemy State;
(3) Its being under the government of enemy State; and
(4) Carrying of armed forces of the enemy State or to send secret messages in the interest of the enemy State.

Unneutral service may also possess the above-mentioned four elements, but if the above mentioned four elements are present in unneutral service it assumes a very serious form and the affected State acquires the rights to seize the ship and its cargoes.

Right of visit and search*

As observed by Starke, "co-extensive with the right of seizing contraband or of capturing ships in breach of blockade, belligerents have by long established custom of the right to visit and search neutral vessels on the high seas in order to determine the nature of the cargo and to check the destination and neutral character of the vessel." [6] In the view of Starke, the right of visit and search should be very cautiously exercised so that there should be the least inconvenience to the neutral ships. But if there are suspicious circumstances in respect of the ship then in order to take a thorough search of the ship, the ship can be taken to the port and, if necessary, may be submitted for the decision of the Prize Court.[7]

The leading case relating to the right of visit and search is *The Maria*[8] wherein it was laid down that each belligerent State possesses the right of visit and search. Under this right, belligerent State may visit any neutral State ship in open Sea and if necessary it may search in order to ascertain the nature of the cargoes on the ship. This right can also be exercised against the private ship. Ordinarily this right is not exercised against public ships and the ships of neutral State.

The right of visit and search may be exercised by warships and military aircraft of belligerents. This right may be exercised only after the outbreak and before the end of war. If a neutral merchantman resists visit or search, it may be captured and confiscated.

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5. Oppenheim, International Law, Vol. II, Seventh Edition, p. 832.
* See also for I.A.S. (1957), Q. No. 6 (h).
6. Starke, note 1 at p. 597.
7. Ibid.
8. (1805), 5 Ch. Rob. 365.

CHAPTER 63

PRIZE COURTS*

The enemy properties seized in the sea on violation of the rules of blockade or contraband are called prize. But it should be noted here that simply by seizing such properties or ships as prize, the belligerent State does not acquire the ownership over them. In order to acquire ownership over such goods or ships, the general practice is that such goods or ships are produced before the courts which are called Prize Courts. These courts determine the validity of the seizure of the goods or ships. They determine whether the goods or ships have been validly seized, or not. If they decide that the goods or ships have been validly seized, then the belligerent State which seized them acquires ownership. Such goods are called lawful Prize. Once the Prize Court decides that the goods or ships have been validly seized, the matter in regard to these goods ceases to be the matter of international law and becomes a matter of State law. According to Oppenheim, one of the main objects of Prize Courts is the wish of the belligerents to be guarded by a decision of a Court against claims by neutral states regarding alleged unjustified capture of neutral vessels and goods.

Nature of Prize Courts.—Though Convention XII of the Second Hague Conference provided for the establishment of an International Prize Court, it is now well recognized that Prize Courts are national courts. They acquire validity from State law. They are not international courts. It was laid down in the famous case of the *The Zamora*[1] that the British Prize Courts are, in fact, national tribunals. They acquire validity from national orders and notifications. Thus we see that the prize courts are the national courts but they decide the cases in accordance with the rules and principles of international law. In this way, they are different from national courts. They are open for the people of all the nations. They cannot be instituted in neutral territory. They can be instituted by belligerents in their own territory or in any part of territory under military occupation.

Jurisdiction of Prize Courts.—The Prize Courts derive jurisdiction from the belligerent State which establishes them. The belligerent State establishes these courts because it is necessary for them to get the validity of the goods or ships seized by them. Since Prize Courts are national courts the State law and notifications are binding upon them.

Law applied by Prize Courts.**—As pointed above, the Prize Courts are National Courts but they decide cases submitted before them in accordance with the principles and rules of international law. But since they are established by the State law and derive jurisdiction from national orders and notifications, in fact, they apply the State law or the utmost that can be said is that they apply international law as followed and applied in that particular State. In the leading case the *Zamora,*[2] it was laid down that the Prize Courts are bound by the Acts and Statutes of the Parliament, but they are not bound by such orders of King-in-Council as are contrary to the provisions or rules of international law or the effect of which is to modify international law. Thus in short it may be said that Prize Courts decide cases in accordance with International law.[3] But in case the provisions of International law are inconsistent with the provisions of the statute or law laid down by the Parliament, then they apply the law laid down by the Parliament. As pointed out by Prof. Oppenheim, the Prize Courts are in fact not international Courts, but national

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* See also for I.A.S. (1968), Q. No. 10 ; I.A.S. (1965), Q. No. 10 ; I.A.S. (1961), Q. No. 10 ; I.A.S. (1955), Q. No. 12 ; P.C.S. (1970), Q. No. 9 ; P.C.S. (1968), Q. No. 10(a) ; P.C.S. (1965), Q. No. 4 ; C.S.E. (1979), Q. No. 11 (a) (ii) ; C.S.E. (1985), Q. 5 (d) ; P.C.S. (1987), Q. 10 (b).

1. (1916) 2 A.C. 77, For facts and law applied see also Chapter on "Blockade".

** See also for I.A.S. (1977), Q. No. 7(b).

2. (1916) 2 A.C. 77.

3. See also the Maria (1799) 1 C. Rob. 340; The Recovery (1807) 6 C. Rob. 341.

Courts. Further, it may be noted that under international law each State has a duty to make such rules and laws for Prize Courts as may be in accordance with the rules and principles of international law. Pitt Cobbett has also expressed the view that Prize Courts are essentially national courts, but their aim is to enforce international law.

A leading case in regard to the jurisdiction of Prize Courts is *The Appam.*[4] A brief discussion of the facts and principles laid down in this case will not be out of place here.

The Appam[5]

The Appam was a British ship which was seized by German ships in 1916 during the First World War. The German officers took the ship under their control, placed it under the authority and control of German officers and took it to the nearest American port. Till this time, America was a neutral State. The German officers requested the Secretary of State of America to detain the ship and its crew in the American port for an indefinite period. America rejected this request and released the crew of the ship. Subsequently the owners of the ship, the Appam, filed a suit in the Admiralty Court of America for the recovery of the ship and its cargoes. The owners of the ship contended that (a) Taking of ship as a prize to neutral port was contrary to international law; (b) It was contrary to American Law; and (c) It was contrary to the laws of neutrality. In reply to the above contentions the respondent, Germany contended that (a) taking of ship seized as prize to a neutral port is not contrary to the international law, (b) detention of the ship in a neutral port is beyond the jurisdiction of the judicial court, and lastly (c) proceedings have been started against the Appam in a Prize Court of appropriate jurisdiction in Germany. The American court decided the case in favour of the owners of the ship. The court held that taking of the Appam (seized as prize) to the American port was a violation of American neutrality. It was also the violation of international law as applied in America. Lastly, the court laid down in clear terms that it had the jurisdiction to decide the case because it involved the violation of the neutrality of America. The court concluded that the moment the Appam entered the American waters, Germany ceased to have any legal claim over it.

Ransom of Prize.—As indicated above, it is necessary to produce the prize before a Prize Court. But international law does not forbid the ransoming of the captured vessel. This may be done either directly after the capture, or after the vessel has been conducted to port, but before adjudication. The practice of accepting and paying ransom grew up in the sixteenth century. This practice has now been prohibited by municipal law of many countries.

Loss of Prize.—The State which seized a prize acquires ownership over the prize only after the validity of its seizure is accepted by the Prize Court. But under certain circumstances a prize may be lost. A prize is lost under the following conditions :—

(1) when the escapes through being rescued by her own crew;
(2) when the captor intentionally abandons her; and
(3) when she is recaptured.[6]

When a captured vessel is intentionally abandoned by her captor and afterwards its possession is taken by a neutral vessel or by her home state, the question whether the original ownership revives through abandonment is a matter to be determined by municipal law. So is the case with recapture of the vessel.[7]

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4. 243 U.S. 124.
5. Ibid.
6. Oppenheim, International Law, Vol. II, Seventh Edition, p. 494.
7. Ibid, at pp. 494-95.

Part VII

HUMAN RIGHTS

CHAPTER 64

UNIVERSAL PROTECTION OF HUMAN RIGHTS

I. Introduction

What are Human Rights?—Broadly speaking human rights may be regarded as those fundamental and inalienable rights which are essential for life as human being. Human rights are the rights which are possessed by every human being, irrespective of his or her nationality, race, religion, sex, etc., simply because he or she is a human being. Human rights are thus those rights which are inherent in our nature and without which we cannot live as human beings. Human rights and fundamental freedoms allow us to fully develop and use our human qualities, our intelligence, our talents, and our conscience and to satisfy our physical, spiritual and other needs. They are based on mankind's increasing demand for a life in which the inherent dignity and worth of each human being will receive respect and protection. "Human rights are sometimes called fundamental rights or basic rights or natural rights. As fundamental or basic rights they are the rights which cannot, rather must not, be taken away by any legislature or any Act of the government and which are often set out in a Constitution. As natural rights they are seen as belonging to men and women by their very nature. They may also be described as 'common rights' for they are rights which all men and women in the world would share, just as the common law in England, for example, was the body of rules and customs which, unlike local customs, governed the whole country.[1]

Since human rights are not created by any legislation, they resemble very much the natural rights. Any civilized country or body like the United Nations must recognise them. They cannot be subjected to the process of amendment even. The legal duty to protect human rights includes the legal duty to respect them. Members of the U.N. have committed themselves to promote respect for and observance of human rights and fundamental freedoms.[2] International concern with human rights as enshrined in the United Nations charter is not a modern innovation. It is, in fact, "heir to all the great historic movements for man's freedom to the enduring elements in the tradition of natural law and natural rights and in the most of the world's great religions and philosophies, and the findings of contemporary science about interrelations of simple respect for human dignity and other individual and community values."[3]

II. U.N. and Human Rights

U.N. Charter and Human Rights[4]

The Charter of the United Nations represents a significant advancement so far as faith in and respect for human rights is concerned. The appalling atrocities of the Nazis against the Jews and against other races during the Second World War led to a strong movement for the international protection of fundamental human rights, and the Charter contains numerous references to them.[5] As a matter of fact, with the horrors perpetrated by Nazi and Fascist leaders still in their minds, the makers of the Charter were determined

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1. J.E.S. Fawcett, *The Law of Nations* (Alien Lane, The Penguin Press, London, 1968), p. 151.
2. Lauterpacht, *International Law and Human Rights*, op cit, at p. 152.
3. M. S. Mc Dougal and Bebr, "Human Rights, in the United Nations," *A.J.I.L.* Vol. 56 (1964), p. 604.
4. See for. I.A.S. (1991), Q. No. 1; P.C.S. (1975), Q. No. 7; P.C.S. (1969), Q. No. 6.
5. J. L. Briefly, The Law of Nations, Sixth Edition (1963), p. 292.

that the rights of the individual be made an international concern.[6] "Human rights are mentioned for the first time...in any international treaty (not counting the treaties for the protection of minorities concluded after the First World War, which related to the rights of special groups but not to human rights in general)—because the drafters of the Charter were...looking behind the facts of war to its causes, that is to say, to the existence of dictatorship which makes wars possible."[7]

The provisions concerning human rights run throughout the U.N. Charter "like a golden thread." Much of the credit for this goes to the determined lobbying by non-governmental organisations at the San Francisco Conference.[8] The delegates of some of the States at the San Francisco Conference were in favour of the adoption of even stronger provisions concerning human rights. An attempt, which proved abortive, was also made to incorporate in the U.N. Charter an International Bill of Human Rights.

Provisions of the Charter Concerning Human Rights[9]

Human rights would occupy a significant Chapter in any story of the U.N.[10] Their place in the original conception of the U.N. is underlined in the Charter and there are as many as seven references in the Preamble; among purposes of the U.N. (Article. 1.3); among the responsibilities of the General Assembly [Article 55 (c)]; among the objectives of the International Economic Co-operation [Article 13 (2)]; among the functions of the ECOSOC [Article 62 (2)] as a responsibility of one ECOSOC's Commission (Article 68); and among the objectives of the Trusteeship system [Article 76 (c)]. The provisions of the U.N. Charter concerning human rights provide a foundation for and an impetus to further improvement in the protection of human rights.[11] They indicate the wide possibilities of the international recognition of human rights.[12]

The Preamble of the U.N. Charter begins with the words, "We the people of the United Nations" and to say the least, these words are neither superfluous nor have crept in the preamble incidentally. The framers of the Charter were really serious and did not rest with the using of these words in the preamble but went on to give content to these words in numerous provisions concerning human rights, elimination of colonialism, non-self-governing territories, economic and social co-operation, etc. In this context, the words "We the people of the United Nations" : are very meaningful. They show the objectives which the framers of the Charter wanted to achieve. After having made this significant innovation in an international treaty, the preamble further reaffirms "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women."

Secondly, Article 1 provides that it is one of the purposes of the U.N. "to achieve international co-operation in solving international problems of an economic, social, cultural or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion." Thus Article 1 puts the promotion of respect for human rights on the same

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6. Stephen S. Goodspeed, The Nature and Functions of International Organisation, Second Edition (1967), p. 516.
7. A. H. Robertson, The Law of International Institution in Europe (1961), pp. 52-53.
8. See Humphrey, The U.N. Charter and the "Universal Declaration of Human Rights" In Laurd (ed). The International Protection of Human Rights (London 1967).
9. See also I.A.S. (1979) Q. 9 (a), see particularly the comments on Articles 55 and 56 given on next two pages.
10. Louis Henkin, "The U.N. and Human Rights", Int. Orgn., Vol. XXI, No. 3 (Summer 1965), p. 504.
11. Jan Brownlie, Principles of Public International Law (Second Edition, 1973), p. 552.
12. L. Oppenheim, International Law, Vol. 1, Eighth Edition (1970), Edited by H. Lauterpacht. p. 783; See also Oppenheim's International Law, Ninth Edition, Vol. 1, Edited by Sir Robert Jennings and Sir Artiur Watts Longman Group U.K. Ltd. and Mrs. Tomoko Hudson, 1992, p. 988.

level as the maintenance of international peace and security as a purpose of the U.N.[13]

Thirdly, it is one of the responsibilities of the General Assembly to initiate studies and make recommendations for the purpose of "promoting international co-operation in the economic, social, cultural, education and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion."[14] The further responsibilities, functions and powers of the General Assembly with respect to aforementioned matters are set forth in Chapters IX and X of the Charter.[15]

Fourthly,[16] with a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect, for the principle of equal rights and self-determination of people." Article 55 charges the U.N. to promote "universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion."[17] This provision is further strengthened by Article 56 under which "All Members *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." In the view of Ian Brownile, Principles of Public International Law, Second Edition (Clarenden Press, Oxford, 1973), p. 553." As treaty provisions applicable to the organization and its members these prescriptions are of paramount importance. Article 55 is perhaps oblique—the United Nations shall promote.' However, Article 56 is stronger and involves the members; and the political and judicial organs of the United Nations have interpreted the provisions as a whole to constitute legal obligations."[18] Thus, Articles 55 and 56 bind member States to observe and respect human rights. This view finds support from the interpretation of these provisions given by the world Court.[19] The International Court of Justice gave its opinion in the context of the observation of human rights in a territory having an international status but as pointed out by Egon Schwelb, the pledge contained in Articles 55 and 56 is of wider significance and is not confined to the observance of human rights in a territory having International importance.[20]

Fifthly, the Charter of the U.N. has empowered the Economic and Social Council to make recommendations for the purpose of promoting respect for, and observance of human rights and fundamental freedom for all.[21]

Sixthly, the Charter imposes upon the Economic Council the responsibilities, to "set up commissions in economic and social field for the promotion of human rights, and such other commissions as may be required respect for the performance of its functions."[22]

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13. John P. Humphrey, "The International Law of Human Rights in the Middle Twentieth Century." The Present State of International Law (1973), p. 75 at p. 84.
14. Article 13 (1) (b).
15. Article 13 (2) : Chapter IX deals "International Economic Co-operation" and Chapter X entitled "The Economic and Social Council" contains provisions relating to function and powers of the ECOSOC.
16. See also for C.S.E. (1979), Q. 9 (a).
17. Article 55 (c).
18. See the Adv. op. on Nambia : I.C.J. Reports (1971), at pp. 56-57. See further Schwelb, 66 AJ. (1972), pp. 337-51.
19. See Advisory opinion of the I.C.J. on the Legal Consequences of the Continued Presence of South Africa in Nambia, (1971), [I.C.J. Rep. 1971), p. 16.
20. "The International Court of Justice and the Human Rights Clauses of the Charter", A.J.I.L., Vol. 66 (1972) at p. 346 et seq.; see also Report of the Committee of Human Rights to the International Law Commission (New York Conference, 1972).
21. Article 62-3.
22. Article 68.

Seventhly and lastly, one of the basic objectives of the trusteeship in accordance with the purposes of the U.N. laid down in Article 1 of the Charter, shall be to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion to encourage recognition of the interdependence of the peoples of the world.[23]

There is a controversy as to whether the provisions of the Charter concerning human rights create obligation on the members. Some authors are of the view that "the Charter clauses only contain a pious injunction to co-operate" and do not impose any obligations.[24] On the other hand, a number of authors contend that the Charter "imposes upon the members of moral and, however imperfect, probably a legal duty."[25] The latter argument seems to be justified because "a pledge to co-operate in promoting at least implies a negative obligation not so to act as to undermine human rights; for this reason South Africa's racial segregation policies appear to be out of harmony with her obligations under the Charter."[26] However, "the Charter did, of course, greatly weaken the content of the Charter clauses, and so an attempt was made to fill them out by drawing up in 1948 the 'Universal Declaration of Human Rights and Fundamental Freedoms."[27] and with a view to implement the Universal Declaration Conventions such as the European Convention on Human Rights, the American Convention on Human Rights and finally the International Covenants on Human Rights were adopted.

Human Rights and Domestic Jurisdiction[28]

One of the problems that arises in the way of implementation of the Human Rights programme is the question of domestic jurisdiction. Article 2 (7) of the U.N. Charter prohibits the U.N. "to intervene in matters which are essentially within the domestic jurisdiction of any State or shall require the Members to submit such matters to settlement under the present Charter : Some authors have expressed the view that the prohibition contained in Article 2 (7) of the Charter reduces to a minimum the protection of human rights on part of the U.N. But this view does not seem to be correct and the question of domestic jurisdiction does not arise in the case of implementation of the provisions of Human Rights Covenants.[29] It may be noted that the domestic and international aspects are closely interwoven. Almost every problem that concerns international relation must

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23. Article 76 (c).
24. See for Example A.H. Robertson, The Law of International Institutions in Europe (1961), p. 53, wherein he says that Charter provisions fail "short of an actual guarantee"; See also J. G. Starke, Introduction to International Law, Eighth Edition (1977), p. 393. See also Manley O. Hudson, "Charter Provisions on Human Rights", A.J.I.L., Vol. 44 (1950), p. 543. Mike M.K. Yin, "Charter Provisions Concerning Human Rights", India Quarterly Vol. 28 (1972); J.L. Kunz, "The U.N. Declaration of Human Rights", A.J.I.L., Vol. 43 (1949), p. 291.
25. L. Oppenheim, International Law, Vol. 1, Eighth Edition, p. 740; Ninth Edition of Oppenheim's International Law, However, adds : "Nevertheless, the provisions of the Charter on the subject do not themselves signly a full and effective guarantee of human rights on the part of International society. In particular, the Charter lacks both a precise definition of these rights and provision for their observance—although the abstacle of detailed definition of the content of obligations under the Charter provisions is less of an obstacle to their application as obligation in the case of a general and notorious practice by a State than it would be in the case of an individual complaint," Note 12, at p. 989.
26. J.L. Briefly, The Law of Nations Sixth Edition (1963), Edited by Sir Humphrey Waldock, p. 293.
27. *Ibid.*, at pp. 393-94.
28. See also for O.S.E. (1981), Q. 5 (b).
29. See for example M.S. Mc Dougal and Leighton, The Rights of man in the World Community, Constitutional and Rational World Community, 14 L. & Cont. Prob. (1949), p. 490 at p. 504, see also Dr. N. A. Noor Mohammad, "The Human Rights Programme of the United Nations and the Domestic Jurisdiction Clause", AIR 1958, Journal Sections, p. 89.

come within the domestic boundaries of one nation and may cross over into another and create an international problem.[30] Therefore a matter is not essentially one of the domestic jurisdiction if it has become the subject of international obligation undertaken by the State. Human Rights and fundamental freedoms, having become the subject of a solemn International obligation and a fundamental purpose of the Charter, are not any longer a matter which is essentially within the domestic jurisdiction of the Members of U.N.[31]

It may also be noted that Article 2 (7) which contains the prohibition in rspect of domestic jurisdiction provides an exception in respect of the application of enforcement measures under Chapter VII of the Charter. Thus if violations of human rights give rise to a dispute or situation which poses a threat to international peace and security, the Security Council may take enforcement measures under Chapter VII. But as pointed out by an eminent author,[32] the organisation will act, as many resolutions particularly in matters relating to Southern Africa show, even if there is no threat to the peace. In such cases the pleas of domestic jurisdiction under Article 2 (7) of the Charter has been no obstacle. In the prevailing view, gross violations of human rights are not essentially within the domestic jurisdiction of States, nor, it would seem, are actions which the U.N. has taken intervention in the technical legal sense."

U.N. BODIES PRIMARILY CONCERNED WITH HUMAN RIGHTS

(A) U.N. Commission on Human Rights.—The Comission on Human Rights established by the Economic and Social Council in February, 1946 is "the nearest approach to permanent machinery for the supervision of the problem of protection"[33] of human rights. It is one of the six Functional Commissions established by the Economic and Social Council. Under its terms of reference, the Commission was directed to prepare recommendations and reports on :

(i) an International Bill of Human Rights;
(ii) International conventions or declarations on civil liberties; the status of women, freedom of information and similar other matters;
(iii) the protection of minorities;
(iv) the prevention of discrimination on the basis of race, sex, language or religion; and
(v) other matters concerning human rights.

The Commission's terms of reference are extensive, under them it may deal with any matter concerning human rights. The Commission makes studies and recommendations either on its own initiative or at the request of the General Assembly or by the Economic and Social Council the members of the Commission are elected for three years' term and meets annually for a period of five or six weeks. All Commission decisions are made by a majority of the members present and voting. The Commission submits a report on each session to the Economic and Social Council. Originally the Commission consisted of 18 members. The membership was increased to 21 in 1962 and to 32 in 1966. Subsequently, the membership was further increased to 43 and then finally to 53. In May, 1982, India was re-elected for a new term of three years beginning from January 1, 1983.

One-third of the seats on the 53 Member Commission are open to election every year. On Thursday, 3rd May, 2001 four nations competes to fill three western vacancies for three-year terms of the Commission for the first time since the inception of the Commission in 1947 the U.S. had to suffer the mortification of being voted off the U. N.

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30. Lauterpacht, International Law and Human Rights, op. cit. p. 176.
31. *Ibid.* at p. 178.
32. John. P. Humphrey, "The International Law of Human Rights in the Middle Twentieth Century," in the present State of International Law (1973), p. 75 at p. 85.
33. Jan Brownlie, *Principles of Public International Law*, Second Edition (1973), p. 554.

Human Rights Commission. The U.S. could secure only 29 votes while France, Austria and Sweden procured 52, 41 and 32 votes respectively. Other States which were elected to Commission were : Armenia, Bahrain, Chile, Crotia, Mexico, Pakistan, Sierra Leone, Sudan, Togo and Uganda.

Yet another setback to the U.S. that took place on 20th January, 2003 was that Libya was overwhelmingly elected to chair the UN Human Rights Commission. Thus North African country ruled by President Muammar Gaddafi, which was under fire for years from human rights activists, would preside at the March 17th-April, 2003 session of Commission which meets annually to survey the human rights situation around the world. Even though the U.S. broke with tradition and forced a vote, for the first time since the Commission was founded in 1947, because the U.S. said that it could not "reward Libya's terrible conduct", yet the Libyan candidate, diplomat and former journalist Najat Al-Hajjaj, won 33 votes in a secret ballot of the 53 country commission with 17 States abstaining and three voting 'no' including the U.S.

In order to assist in its work, the Commission has established a number of subsidiary bodies, such as, the Sub-commission on Prevention of Discrimination and Protection of Minorities the Ad Hoc Committee on Periodic Reports, the Ad Hoc Working Group of Experts on Human Rights in Southern Africa and Other Working Groups charged with particular tasks.

The Commission, as per its reference, makes studies, prepares recommendations and drafts international instruments concerning human rights. It also undertakes special tasks assigned to it by the General Assembly on the Economic and Social Council, including the investigation of allegations concerning violations of human rights and the handling of communications relating to such violations. It also cooperates closely with all other United Nations' bodies having competence in the field of human rights.

The Commission receives thousands of private complaints. It transmits them to the Governments concerned and asks them to reply and comment thereon. It has played an active role in investigating alleged violence of human rights. The principal functions performed by the Commission have been the preparation of the texts of the Universal Declarations of Human Rights, the Convention on the Political Rights of Women, drafts covenants on Human Rights supplementing the Universal Declaration. It also publishes Yearbook on Human Rights. It holds its sessions annually and performs important functions in the field of human rights.

(B) Sub-Commission on Prevention of Discrimination and Protection of Minorities.—At its very first session in 1947, the Commission on Human Rights established the Sub-commission on Prevention of Discrimination and Protection of Minorities. Its items of reference which were extended in scope by the Commission of Human Rights in 1949 are :

(a) to undertake studies, particularly in the light of Universal Declaration of Human Rights, and to make recommendations to the Commission on Human Rights concerning the prevention of discrimination of any kind relating to human rights and fundamental freedoms and the protection of racial, national, religious and linguistic minorities, and

(b) to perform any other functions entrusted to it by the Economic and Social Council or the Commission on Human Rights.

The Sub-commission on Prevention of Discrimination and Protection of Minorities consists of 26 persons selected by the Commission on Human Rights, normally for three years in their capacity as individuals and not as representatives of their respective States. The Sub-commission submits a report on each session to the Commission on Human Rights.

(C) Commission on the Status of Women.—The Commission on the Status of Women is a functional Commission of the Economic and Social Council (ECOSOC) established by the Council in 1946. The functions of the Commission are :

(a) to prepare recommendations and reports to the ECOSOC on promotion of women's rights in political, economic, civil, social and educational fields; and

(b) to make recommendations to the Council on urgent problems requiring immediate attention in the field of women's rights with the object of implementing the principle that men and women shall have equal rights and to develop proposals to give effect to such recommendations. Originally the Commission on the Status of Women was composed of 15 members. Subsequently the membership was increased to 21 and then to 32 and finally to 45. Thus at present the Commission is composed of 45 representatives of U.N. members elected by the ECOSOC for three-year term. It meets bienially for session of three weeks. As in the case of Commission on Human Rights, the Commission on the Status of Women adopts its own resolutions and recommends draft resolutions and declarations for adoption by the ECOSOC. The Commission submits a report on each session to the Council.

The Commission on the Status of Women has done valuable work for promoting the rights of women in political, economic, civil, social and educational fields and in achieving the goal of women having rights equal to those of men.

(D) U. N. Commissioner for Human Rights.—In a landmark decision on 20th December, 1993, the General Assembly created the position of U.N. High Commissioner for Human Rights by passing a resolution.[34] It can be reckoned as a turning point in U.N. action in the Human Rights. The High Commissioner would be appointed by the Secretary-General for a four-year term subject to the approval by the General Assembly. The High Commissioner will report, annually to the Commission on human rights and through the Economic and Social Council to the General Assembly, with a branch office in New York. The High Commissioner's principal location will be in Geneva, while creating the post of High Commissioner of Human Rights, the resolutions of the General Assembly specified that for "impartial, objective, non-selective performance of the duties, the person to be appointed to this august office must be a "person of high moral standing and personal integrity" and must possess expertise in the human rights field and an understanding of diverse cultures under the direction and authority of the Secretary-General, the High Commissioner will "promote and protect the effective enjoyment by all of all civil, cultural, economic, political and social rights" and "will play an active role in removing the current obstacles, and in meeting the challenges to the full realization of all human rights" and will prevent violations throughout the world.

Within two months after the creation of the post of a High Commissioner for Human Rights, the General Assembly on 14th February, 1994 unanimously approved the appointment of Jose Ayala Lasso to the new post. A former Foreign Minister of Ecuador, he was his country's permanent Representative to the U.N. just prior to his appointment. The person holding the post of High Commissioner for Human Rights will cost the U.N. 1-47 million dollar in two years. His rank will be that of an Under-Secretary-General of the U.N. Mr. Jose Ayala Lasso assumed the office of High Commissioner for Human Rights on April 5, 1994.

The responsibilities of the High Commissioner would include :

(i) strengthening and streamlining existing human rights mechanisms.

(ii) engaging in dialogue with all Governments to secure respect for all human rights;

(iii) coordinating human rights; promotion and protection activities throughout the UN system, including UN education and public information programmes;

(iv) supervising the centre for Human Rights;

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34. General Assembly Resolution 48/141 of December 20, 1993.

(v) to promote and protect the effective enjoyment by all of civil, cultural, economic, political and social rights;

(vi) to play an active role in removing the current obstacles and in meeting the challenges to the full realization of all human rights;

(vii) to provide advisory services, technical and financial assistance in respect of the human rights to States at their request, and

(viii) to take steps for the enhancement of international cooperation for the promotion and protection of human rights.

(F) Other U.N. Bodies primarily concerned with human rights.—In addition to the above U.N. bodies, there are other U.N. bodies primarily concerned with human rights such as special of 24 on Decolonization, Special Committee Against Apartheid, Special Committee to investigate Israeli Practices Affecting Human Rights of the Population of the Occupied Territories, Committee on the Exercise of the Inalienable Rights of the Palestinean People, Committee on the Elimination of Racial Discrimination, Human Rights Committee, U.N. High Commissioner for Refugees. This list is simply illustrative and by no means exhaustive.

III. Universal Declaration of Human Rights

The Universal Declaration of Human Rights[35] was adopted by the General Assembly by a vote of 48 to nil with eight abstentions.[36] The Declaration has been hailed "as an historic event of the profound significance and as one of the greatest achievements of the United Nations."[37] The Declaration "...is the mine from which other conventions as well as national constitutions protecting these rights have been and are being quarried."[38] As noted above, the Declaration on Human Rights was prepared by the Commission on Human Rights in 1947 and 1948 and was adopted by the General Assembly on December 10, 1948. When the Univesal Declaration of Human Rights was adopted, it was a most eloquent expression of hope by a world emerging from the most devastating war in the history of human race. The experience gave the Universal Declaration a momentum that is reflected in the boldness of this document destined for a world of peace where the right to live in peace has become a reality for all.[39] On December 10, 1998, 50th anniversary of Universal Declaration of Human Rights was celebrated all over the world.

Preamble of the Universal Declaration of Human Rights.—One of the main reasons for the inclusion of the provisions concerning human rights in the U.N. Charter was the bitter experience which the mankind had undergone during the First and Second World Wars when large scale violations of human rights were made. That is why, the preamble of the United Nations Charter expresses the determination "to save succeeding generations from the scourge of war" which twice in our lifetime has brought untold sorrow to mankind, and "to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women..." Thus large-scale violations of human rights during two World Wars, epecially the Second World War, including the Nazi atrocities were fresh in the minds of the framers of the U.N. Charter. That is why, one of the first decisions that the General Assembly took was to prepare an International Bill of Human Rights and for this purpose asked the Economic and Social Council for a study by the Commission of Human Rights. The large scale violations of human rights including the Nazi atrocities were also fresh in the minds of those drafted

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35. Gen. Ass. Resolution 217-A (111) of 10, December, 1948 : Gen. Ass. Official Records, Third Session, Part I, Resolutions (U.N. Dec. A/810), pp. 71-77.
36. The eight abstentions were : Bylorussian, SSR, Czechoslovakia, Poland, Saudi Arabia, South Africa, Ukrainian SSR, USSR and Yugoslavia.
37. Sir H. Lauterpacht, *International Law and Human Rights*, p. 394.
38. J.E.S. Fawcett, *The Law of Nations*, (1968), p. 158; See also Percy E. Corbett, *The Growth of World Law* (1971), pp. 181-182.
39. U. N. Chronicle, Vol. XXV, No. 1 (March, 1988), p. 46.

and adopted the Universal Declaration of Human Rights. These are echoed and reflected in the wordings of the Preamble. It was also natural for the framers of the Preamble to affirm "their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women," because they considered, and rightly too, it to be the "foundation of freedom, justice and peace is the world." It is in this context that we have to see and understand preamble of the Universal Declaration of Human Rights which is as follows :

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

Whereas disregard and contempt for human rights have resulted in barbarous acts which have outraged the conscience of mankind, and the advent of a world in which human beings shall enjoy freedom of speech and belief and freedom from fear and want has been proclaimed as the highest aspirations of the common people.

Whereas it is essential, if man is not to be compelled to have recourse, as a last resort to rebellion against tyranny and oppression, that human beings should be protected by the rule of law.

Whereas it is essential to promote the development of friendly relation between nations.

Whereas the people of the United Nations have in the Charter reaffirmed their faith in fundamental human rights, in the dignity and worth of the human person and in the equal rights of men and women and have determined to promote social progress and better standards of life in larger freedom.

Whereas Member States have pledged themselves to achieve, in co-operation with the United Nations, the promotion of universal respect for and observation of human rights and fundamental freedoms.

Whereas a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge,

Now therefore,

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

Scheme of the Enumeration of the Rights and the Rights Enumerated in the Declaration.—The Universal Declaration consists of a Preamble as noted above and Articles 30 covering both civil and political rights and economic, social and cultural rights. The Preamble refers to the "faith in fundamental human rights in the dignity and worth of the human person and the equal rights of men and women" which the peoples of the U.N. have reaffirmed in the Charter of the U.N. and their determination "to promote social progress and better standards of life in larger freedom." It also refers to the pledge taken by the Member States "to achieve, in co-operation with the United Nations, the promotion of universal respect for the observance of human rights and fundamental freedoms." Through the Preamble, the General Assembly proclaimed the Universal Declaration of Human Rights "as a common standard of achievement for all peoples and all nations to the end that every individual and every organ of the society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the peoples of territories under their jurisdiction". The Preamble also notes the reasons which impelled the General Assembly

to proclaim the Declaration of Human Rights and also the need for such proclamation and after having stated this in the Preamble, the General Assembly goes on to proclaim the rights—civil and political as well as economic, social and cultural. It may be noted that the Declaration is neither addressed to nations nor to Member States but to every individual. This is in keeping with the words "We the peoples of the United Nations" with which the preamble of the U.N. Charter commences. The rights proclaimed in the Universal Declaration of Human Rights may be classified into following four categories :

(i) General (Articles 1 and 2)
(ii) Civil and Political (Articles 3 to 21)
(iii) Economic, Social and Cultural Rights (Articles 22 to 27) and
(iv) Concluding (Articles 28 to 30)

(i) General.—Article 1 of the Universal Declaration provide that all human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood. Article 1 thus proclaims the inherent freedom and equality in dignity and rights of all human beings.

According to Article 2, everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

Furthermore no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self governing or under any other limitation of sovereignty.

As noted above, a remarkable thing about the Universal Declaration is that it is neither addressed to nations nor Member States of the U.N. but to every individual. This is evident from Articles 1 and 2. Article 29 also deserves mention in this respect.

(ii) Civil and Political Rights.—The civil and political rights enumerated under the Declaration include the following :

(1) Right to life, liberty and security of person.[40]
(2) Prohibition of slavery and slavery trade.[41]
(3) Prohibition of torture, cruel, inhuman or degrading treatment or punishment.[42]
(4) Right to be recognized as a person before law.[43]
(5) Equality before the law and equal protection of law against any discrimination in violation of the Declaration.[44]
(6) Right to effective remedy by the competent national tribunals.[45]
(7) Prohibition of arbitrary arrest, detention or exile.[46]
(8) Right to a full equality to a fair and public hearing by an independent and impartial tribunal.[47]
(9) Right to be presumed innocent until proved guilty according to law in public trial.[48]
(10) Freedom from *ex-post facto* laws.[49]

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40. Article 3.
41. Article 4.
42. Article 5.
43. Article 6.
44. Article 7.
45. Article 8.
46. Article 9.
47. Article 10.
48. Article 11, para 1.
49. Article 11, para 2.

(11) Freedom from arbitrary interference with privacy, family, home, correspondence or attack on honour or reputation and right to protection by law against such interference.[50]
(12) Right to freedom of movement and residence within the borders of State.[51]
(13) Right to leave any country, including his own, and to return to his country.[52]
(14) Right to seek and enjoy in other countries asylum from prosecution in respect of political crimes.[53]
(15) Right to nationality.[54]
(16) Freedom from arbitrary deprival of nationality and right to change nationality.[55]
(17) Right to marry and to found a family and equal rights as to marriage, during marriage and at its dissolution.[56]
(18) Right to own property and freedom from arbitrary deprival of property.[57]
(19) Right to freedom of thought, conscience and religion.[58]
(20) Right to freedom of opinion and expression.[59]
(21) Right to freedom of peaceful assembly and association.[60]
(22) Right to take part in the government of his country.[61] and
(23) Right to equal access to public service in his country.[62]

(iii) Economic, Social and Cultural Rights.—Economic, Social and Cultural Rights are enumerated in Articles 22 to 27. They are :

(1) Right to social security and the right to realization of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.[63]
(2) Right to work, free choice of employment, just and favourable conditions of work and protection against unemployment.[64]
(3) Right to equal pay for equal work.[65]
(4) Right to just and favourable remuneration.[66]
(5) Right to form and to join trade Unions.[67]
(6) Right to rest and leisure.[68]
(7) Right of living adequate for the health and well-being of himself and his family;[69]

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50. Article 12.
51. Article 13, para 1.
52. Article 13 para 2.
53. Article 14.
54. Article 15, para 1.
55. Article 15, para 2.
56. Article 16, para 1.
57. Article 17.
58. Article 18.
59. Article 19.
60. Article 20.
61. Article 21, para 1.
62. Article 21, para 2.
63. Article 22.
64. Article 23, para 1.
65. Article 23, para 2.
66. Article 23, para 3.
67. Article 23, para 4.
68. Article 24.
69. Article 25, para 1.

(8) Right of all children to enjoy same social protection.[70]
(9) Right to education.[71]
(10) Right of parents to choose the kind of education for their children.[72]
(11) Right to participate in cultural life of the community.[73] and
(12) Right to protection of moral and material interests resulting from any scientific, literary or artistic production of which he is the author.[74]

(iv) Concluding or Miscellaneous Articles.—Articles 28 to 30 may be referred as concluding or miscellaneous Article because they do not fit in any of the above three categories. For example, Article 28 provides that everyone is entitled to a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized. Besides this Article 29 (1) is an exception because this is the only provision in the whole Declaration which speaks of duties. Article 29 (1) provides that everyone has duties to the community in which alone the free and full development of his personality is possible. However, Article 29 (2) makes it clear that in the exercise of his rights and freedoms, everyone shall be subject only to such limitations as are determined by law solely for the purpose of securing due recognition and respect for the rights and freedoms of others and of meeting the just requirements of morality, public order and the general welfare in a democratic society. Article 29 (3) further provides that these rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations.

The last Article of the Declaration, namely, Article 30, incorporates a rule of interpretation or a saving clause by providing that nothing in this Declaration may be interpreted as implying for any State, group or person any right to engage in any activity or to perform any act aimed at the destruction of any of the rights and freedoms set forth herein.

Influence of the Universal Declaration of Human Rights (General).—Since its adoption the Universal Declaration has exercised a powerful influence, both internationally and nationally, it has been rightly pointed out, that "Whatever its legal quality, the Declaration has set a standard by which national behaviour can be measured and to which nations can aspire. The Declaration has helped to give contour and content to the generalities of the Charter reflecting the spirit and the needs of the day."[75] Fawcett has also remarked "The U.N. Declaration on Human Rights in 1948 was a public, and indeed a global proclamation of "a common standard of achievement for all peoples and all nations'...it (*i.e*, The Declaration) is the mine from which other conventions as well as national constitutions protecting these rights have been and are being quarried."[76] As a result of the Univesal Declaration, "The subject of human rights has fostered so much international legislation of the highest value that as legal topic it has no parallel today...Human rights have covered a wide variety of different aspects of life ranging from genocide and prevention of discrimination to freedom of information, association, status of women, refugees, etc. Thus the subject is all embracing and in this respect no other topic can be said to have this all embracing character affecting the life of a common man.[77]

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70. Article 25, para 2.
71. Article 26, para 1.
72. Article 26 para 3.
73. Article 27, para 1.
74. Article 27, para 2.
75. Louis Henkin, "The Unitd Nations and Human Rights" *Int. Orgn.*, Vol. XXI, No. 3 (Summer, 1965), p. 504.
76. J.E.S. Fawcet, *The Law of Nations*, (1968), p. 156.
77. Dr. : Nagendra Singh, *Recent Trends in the Development of International Law and Organisation Promoting Inter-State Cooperation* (University of Geneva, Inaugural Nehru Lecture, 1969), p. 175.

The provisions of the Universal Declaration on Human Rights are cited as justification for actions taken by the U.N. They have also inspired international conventions both within and outside the U.N. In a large number of instances, the Universal Declaration has been used as a conduct and a yardstick to measure the degree of respect for and compliance with the international standard of human rights.

The provisions of the Universal Declaration on Human Rights were transformed into international conventional law in the International Covenants on Human Rights. Which alongwith the Universal Declaration on Human Rights are known as International Bill on Human Rights, adopted by the General Assembly on December, 16, 1966. Later on they were signed and ratified by large number of States. Besides this, a considerable number of other international conventions were prepared, adopted and put into effect after 1948 to implement the rights and freedoms proclaimed in the Universal Declaration on Human Rights. The preambles of those conventions often specifically refer to the Declaration or reproduce the relevant provisions of the Declaration in the text of the conventions. Some of these conventions are of a world wide character, others are of a regional or bilateral character.

In an ongoing effort based on principles contained in the Declaration, the U.N. has adopted some 50 other legal instruments on human rights. These include convention on Genocide, Slavery, Torture, Racial Discrimination, Apartheid, protection of refugees, children, discrimination against women, protection of the rights of all migrant workers and members of their families, conventions relating to Humanitarian Laws of War, etc.

The rights and freedoms enshrined in the Universal Declaration on Human Rights have been incorporated in various Declarations adopted by the U.N., such as. Declaration on the Rights of the Child (1959); Declaration on the Granting of Independence to Colonial Countries and Peoples (1960); Declaration on the Elimination of all Forms of Racial Discrimination (1963); Declaration on Elimination of Discrimination against Women (1967); Declaration on Territorial Asylum; Declaration on Social Progress and Development (1969); Declaration on the Rights of Mentally Retarded Persons (1971); Declaration on the Use of Scientific and Technological Progress in the Interest of Peace and for the Benefit of Mankind (1975); Declaration on the Rights of Disabled Persons (1975); Declaration on Protection of all Persons from being subjected to Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1975); Declaration on the Rights of Child (1975); U.N. Declaration on the Elimination of All Forms of Intolerance and Discrimination Based on Religion or Belief (1981); Declaration on the Human Rights of Individual who are not Nationals of the Country in which they live (1985); Declaration on the right to Development (1986); Vienna Declaration on Human Rights (1993); Declaration on the Elimination of Violence Against Women (1993) and Copenhagen Declaration and Programme of Action on Social Development (1995); Declaration on Terrorism.

More Important than the above declarations are various International Conventions which have been influenced and inspired by the Universal Declarations on Human Rights because these conventions create legally binding obligations. Examples of such International Conventions are : Convention for the Suppression of the Traffic in Persons and of the Exploitation or Prostitution of others (1949); Convention on the Status of Refugees (1951); Convention on the Prevention and Punishment of the Genocide (1951); Convention on the Political Rights of Women (1952); Convention on the Status of Stateless Persons (1954); Supplementary Geneva Convention for Abolishing Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956); Convention on the Nationality of Married Womens (1957); Convention on the Forced Labour (1957); Convention Concerning Discrimination in respect to Employment and Occupation (1960); Convention on the Reduction of Statelessness (1961); Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962); International Convention on the Elimination of All Forms of Racial Discrimination (1966); International Covenant on Civil and Political Rights (1966); International Covenant on Economic, Social and Cultural Rights (1966); Optional Protocol to the International Covenant on Civil and

Political Rights (1966); Protocol Relating to the Status of Refugees (1967); International Convention on Suppression and Punishment of the Crimes of Apartheid (1973); International Convention Against Taking of Hostages (1977); Convention on the Elimination of All Forms of Discrimination Against Women (1979); Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment (1984); Convention on the Rights of Child, (1989); Convention on the Protection of the Rights of all Migrant Workers and Members of Their Families (1990).

The Judges of the International Court of Justice have cited to the provisions of the Universal Declaration of Human Rights in a number of cases, such as, the Asylum case (*Colombia* v. *Peru)* [1950]; *Anglo-Iranian Oil Co.* Case (1955); and *Nottebohm* case.

An important example of regional convention is the European convention for the protection of Human Rights and Fundamental Freedom signed at Rome on 4th November, 1950. The preamble of the European Convention proclaims that it was agreed to by the States parties "to take the first steps in the collective enforcement of certain of the rights stated in the Universal Declaration", and it contains detailed provisions on the most of the Civil and Political rights set forth in the Declaration. Indeed the European Convention on Human Rights is the first convention for the enforcement of the rights and freedoms mentioned in the Universal Declaration. Later on some other Regional Conventions, such as, European Social Charter (which was signed on October 18, 1961 and came into force on February 26, 1965), American Convention on Human Rights (which was signed on November 22, 1969 and came into force on July 11, 1978), African Charter on Human and Peoples Rights (which was adopted on June 27, 1981 and came into force on October 21, 1986) and Arab Commission on Human Rights were concluded.

Influence of the Universal Declaration on National Constitutions, Municipal laws and Court decisions.—The provisions of the Universal Declaration of Human Rights have influenced various national constitutions enacted after the adoption of the Universal Declaration. For example, the Constitutions of Algeria, Burundi, Cameroon, Chad, Democratic Republic of Congo, Dhaomey, Guniea, Gabon, Ivery Coast, Madagaskar, Mali, Mauritiana, Niger, Senegal, Togo and Upper Volta (when attained independence between 1958 and 1964), the peoples of these countries solemnly affirmed their devotion to the principles and ideals of the Universal Declaration. The principles and ideals of Declaration are also found in municipal law in a number of law and decrees enacted in various countries. The Indian Constitution bears the impact of the Universal Declaration and this has been recognised by the Supreme Court of India. While referring to the Fundamental Rights contained in Part III of the Constitution in *Kesavanand Bharti* v. *State of Kerala,*[78] Sikri, C. J. of the Supreme Court observed : "I am unable to hold that these provisions show that some rights are not natural or inalienable rights. As a matter of fact, India was a party to the Universal Declaration of Human Rights...and that Declaration describes some fundamental rights as inalienable. "Even the Soviet Constitution could not escape the influence of the Universal Declaration Chapter 7 of the draft Soviet Constitution contained "the Basic Rights, Freedoms and Duties of Citizens of the U.S.S.R.". Thus the political rights and freedoms of the Soviet citizens were "far more comprehensively formulated"[79] in the Constitution.

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78. AIR 1973 SC 1461, 1536; *See also* Patanjali Sastri, C. J. in *State of West Bengal* v. *Subodh Gopal,* AIR 1954 SC 92 : 1954 SCR 587, 596; *per* Hidayatullah, J. in *Ujjamabai* v. *State of U.P.,* (1963) ISCR 778 , 926-927 : AIR 1962 SC 1621 ; *Moti Lal* v. *State of U.P.,* ILR (1951) 1 All 269, 387-388 : AIR 1951 All 257 (FB) : *Per* S. K. Das. *J. in Basheshar Nath* v. *CIT,* (1959) Supp. 1 SCR 528, 605 : AIR 1959 SC 149.

79. *See* Report of Leonid Brezhnev, CPSU. General Secretary and Chairman of the Constitution of C.P.S.U. Central Committee on May 24, 1977, reproduced in *New Times,* Vol 24 (June 1, 1977), pp. 21-33 at p. 30; for draft Constitution see *Ibid* pp. 34-48.

Legal Significance of the Universal Declaration of Human Rights.— There is a great controversy in regard to the legal significance of the Universal Declaration. On the one hand, there are those writers who subscribe to the view that the Univesal Declaration is not a legally binding instrument. On the other hand, there are some writers who have expressed the view that the Declaration might not have been binding when it was adopted in 1948 but it has now become binding or assumed legal implications. Besides these two views, there are a number of authors who have expressed the view that although the Universal Declaration is not legally binding yet it has a great moral and political force behind it and serves as a general guide, code of conduct or yardstick from which the actions of men and women and nations are judged so far as the respect for and observance of human rights are concerned.

According to Palmer and Perkins,[80] "The declaration is merely a statement of principles, not a legally binding instrument; but it has become one of the best known international documents, and it has often been referred to in resolutions of the U.N., the Specialized Agencies, regional arrangements and other international organizations, and in national constitutions, legislation, and Court decision. *It is a beacon light for all mankind*, even though it has been honoured more often in the breach than in the observance." In the view of Starke,[81] "...the Declaration could not and did not purport to be more than manifesto, a statement of ideals, a 'path-finding instrument'...Yet it has had a remarkable influence on further developments, at both the international and domestic levels, as is reflected in the number of instances of conventions and other instruments referring to, or invoking, its provisions." Oppenheim also subscribes to this view. According to him, "...the Declaration is not an instrument which is legally binding either directly or indirectly. In particular, there is no warrant for assuming that it can properly be resorted to for the interpretation of the provisions of human rights and fundamental rights."[82] The ninth edition of Oppenheim's International Law[83] adds "However, in the years since its adoption, the widespread acceptance of the authority of the Declaration has led some to the opinion that while the Declaration as an instrument is not a treaty, its provision may have come to the embodiment of new rules of customary law in the matter." In the view of Lauterpacht, the moral authority and influence of an international pronouncement of this nature must be in direct proportion to the degree of sacrifice of the sovereignty of States which it involves.[84] Most of the writers who subscribe to the view that the Universal Declaration is not a legally binding instrument, however, concede that it "has gained considerable authority as a general guide to the content of fundamental rights and freedoms as understood by members of the United Nations, and it is important as providing a connecting link between different concepts of human rights in different parts of the world."[85] Ian Brownile[86] goes a step ahead and writes : "The Declaration is not a

80. *International Relations—The World Community in Transition*, Third, Indian Edition (1970), p. 370; *See also* Max Sorensen's *Merwal of Public International Law* (1968), p. 501; V.K. Krishna Iyer, "Mass Expulsion as violation of Human Rights" *I.J.I.L.* Vol. 13 (1973), p. 169; Percy E. Corbett, The Growth of World Law (Princeton, New Jeresy, 1971), p. 203; J.E.S. Fawcett, The Law of Nations (Allen Law), (The Penguin Press, London, 1968), p. 156.

81. Starke's *International Law*, Eleventh Edition (Butterworths, 1994), Edited by I.A. Shearer, p. 330.

82. Oppenheim's, *International Law*, Vol. 1, Eighth Edition, Edited by H. Lauterpacht. p. 745; and Note 2 and p. 1003.

83. Oppenheim,s *International Law*, Ninth Edition, Vol. 1, Edited by Sir Robert Jennings and Sir Arthur Watts, Longman Group U.K. Ltd. and Mrs. Tomoko Hudson, (1992), p. 1003.

84. Sir H. Lauterpacht, *International Law and Human Rights*, p. 419.

85. J.L. Brierly, *The Law of Nations*, Sixth Edition, Edited by Sir Humphrey Waldock (1963), p. 294; *See also* Fawcett, The Law of Nations (1968), p. 156.

86. *Basic Documents in International Law*, Second Edition (Oxford University Press, 1972), p. 144; Emphasis added.

legally binding instrument as such, and some of its provisions depart from existing and generally accepted rules. Nevertheless some of its provisions either constitute general principles of law [See the Statute of International Court of Justice, *infra,* Article. 38 (1) (c)] or represent elementary considerations of humanity. More important is its status as an *authoritative guide produced by the General Assembly to the interpretation of the Charter. In this capacity, the Declaration has considerably indirect legal effect and is regarded by the Assembly and by some jurists as a part of the law of the United Nations.*"[87] This observations is significant because it indicates the shift that is taking place in the view of the writers in respect of the legal value of the Universal Declaration.

Constituting Authoritative Interpretation of Charter and new Rules of Customary International Law.—Some writers have expressed that the Universal Declaration possesses legal value. In view of the significant and revolutionary developments that have taken place in the field of human rights, this view has gained much ground; it has much to recommend itself and merits serious consideration. In the view of Judge Nagendra Singh, "...The Declaration, therefore was not mere resolution of the General Assembly but a continuation of the charter and had the dignity of the charter."[88] Another eminent author, Prof Lois B. John[89] has also aptly remarked that "any violation of the Declaration was the violation of the principles of the Charter".[90] Further, "The Declaration was adopted unanimously (with 8 abstentions) and thus constitutes the authoritative interpretation of the Charter, which is binding upon members to the extent the Charter is *binding* should an organ of the U.N. find that a particular member has failed to promote the observance of one of the rights listed in the Declaration such a statement would constitute of finding that the Member has violated Articles 55 and 56 of the Charter."[91]

This interpretation finds support from the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples which proclaimed that all States shall "observe faithfully and strictly the provisions of the Charter of the United Nations, the Universal Declaration on Human Rights and the present Declaration."[92] It was further confirmed by the 1963 Declaration on the Elimination of All Forms of Racial Discrimination which provided that every State "shall fully and faithfully observe...the Universal Declaration of Human Rights" and the two other Declarations.[93]

Reference may also be made here to the meeting of unofficial Assembly for Human Rights in Montreal in March, 1968 which proclaimed that the Universal Declaration of Human Rights *constitute an authoritative interpretation of the charter of highest order and*

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87. *See also* Ian Brownlie, *Principles of Public International Law,* Second Edition (Clarendon Press, Oxford, 1973), p. 554; Corfu channel case (Merits IEJ Reports (1949), p. 4 at p. 22. A. O. Obilade has also written : "Although the Declaration itself has no legal force. State practice as reflected. some General Assembly resolutions has reflected a growting tendency on the part of the States to regard the Declaration as legally binding." In "The Individual As a Subject of International Law", *I.J.I.L.* Vol. 14 (1974), p. 90 at p. 95.

88. Recent Trends in the Development of International Law and Organisation Promoting Inter-State Cooperation and World Peace (1969), p. 160.

89. "The Development of the Charter of the United Nations : "The Present State of International Law" C Kulwar The Netherlands, (1973), p. 39 at p. 53.

90. See Louis B. John, "A Short History of the U.N. Documents on Human Rights. "Commission; to study, the organisation of Peace". In the U.N. and Human Rights (1968), pp. 59-72.

91. John, *See Supra* note 90, p. 54; emphasis supplied.

92. *Ibid* ; Para 7 of the G.A. Resolution 1514 (XV) of 14th December, 1960. G.A. Official Records. Eighteenth Session Supp. No. 15 (1964), pp. 35-37.

93. *Ibid,* Article II of the Declaration, approved by G.A. Resolution, 1904 (XV III) of 20th November, 1953; G.A. Official Records, Eighteenth Session, Suppl, No. 15 (1964), pp. 35-37.

has over the years become part of customary international law."[94] The same conclusion was reached by the official International Conference on Human Rights, Teheran (April-May, 1968) which proclaimed that the Universal Declaration *"Constitutes an obligation for the members of the international community."*[95] This was endorsed by the General assembly of the U.N. in December, 1968 as an "important and timely reaffirmation of the principles embodied in the Universal Declaration on Human Rights"[96] Thus, as remarked by Jhon"[97] "Whatever might have been situation in 1948, the three Declarations (referred to above including the Universal Declaration) *have now become binding documents, constituting not only authoritative interpretation of the relevant provisions of the charter but also new rules of international law binding on all States."*

The Universal Declaration was adopted by the General Assembly in 1948 by 48 votes to nil with 8 abstentions. Since then this Declaration has been reaffirmed in almost all resolutions of General Assembly and all International Treaties relating to human rights. This has led to the development of customary law or new international law in respect of human rights on the basis of International practice or international standard of States. It is also significant to note that at present there are as many as 189 members of the U. N. When such a large majority of sovereign States passes a resolution on human rights reaffirming faith in Univesal Declaration, it definitely leads to legal implications or binding effect. This has actually happened in case of Universal Declaration of Human Rights.

The Universal Declaration which was originally conceived as a statement of objectives to be achieved by Government and as such, not part of binding law, has now (50 years later) been accepted by so many States to be an international standard against which their behaviour is measured.[98] Indeed the Universal Declaration has become legally binding constituting an authoritative interpretation of the Charter and as new rules of customary international law binding on all States. To some extent at least the Declaration has by custom recognised, as laying down rules binding upon States.

IV. The International Bill of Human Rights

On the recommendation of the Third Committee, the General Assembly unanimously adopted the two International Covenants, namely, the International Covenant on Civil and Political Rights and International Covenant on Economic, Social and Cultural Rights on December 16, 1966.[99] While the Covenant on Civil and Political Rights, 1966 was adopted by 106 votes to *nil,* the International Covenant on Economic, Social and Cultural Rights was adopted by 105 votes to *nil.* The General Assembly also adopted an optional Protocol to the International Covenant on Civil and Political Rights, 1966, by 66 votes to 2 with 38 abstentions. After 23 years, *i.e.* in December, 1989, the General Assembly adopted yet another Protocol *i.e.,* Second Optional Protocol to the International Covenant on Civil and Political Rights, on December 15, 1989.

Composition of the International Bill of Human Rights.—The International Bill of the Human Rights comprises of the following :

(1) The Universal Declaration of Human Rights, 1948.
(2) The International Covenant on Civil and Political Rights, 1966.
(3) The International Covenant on Economic, Social and Cultural Rights, 1966.

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94. *Ibid;* at p. 55; Montreal Statement of the Assembly for Human Rights (New York 1963), p. 2; reprinted in 9 Journal of International Commission of Jurists No. 1 (June, 1968), p. 94 at p. 95.
95. Final Act of the International Conference on Human Rights (UN DOC A/Con F, 324/41. U.N. Publ. E. 68 XI V 2, p. 3 at p. 4, para 2, referred in *ibid.*
96. G. A. Resolution 2442 (XXIII), 19th December, 1968.
97. *Supra* Note 90.
98. U.N. Chronicle, Vol. XXV, No. 1 (March, 1988), p. 45.
99. See Gen. Assembly Resolution 2200 A (XXI), December, 1903.

(4) The Optional Protocol to the International Covenant on Civil and Political Rights, 1966.

The keystone of the two covenants is the Universal Declaration of Human Rights which was adopted by the General Assembly on 10th December, 1948. The Covenants generally elaborate on the rights set forth in the Universal Declaration of Human Rights 1948. The Universal Declaration has already been discussed in earlier chapter.

Entry into Force of the two Covenants and the Optional Protocols.— The International Bill on Human Rights, a major undertaking, which began at the inception of the organisation, entered into force on 23rd March, 1976. Both the Covenants were adopted by the General Assembly on December 16, 1966. They were opened for signature on December 19, 1966 each of the covenant required 35 ratifications or accessions before coming into force. The optional protocol to the International Covenant on Civil and Political Rights, 1966, required ratification or accession by ten States; Its coming into force was also subject to the coming into force of the International Covenant on Civil and Political Rights, 1966. The Covenant on Economic, Social and Cultural Rights, 1966 entered into force on January 3, 1976. Thereafter, on 23rd March, 1976 the International Covenant on Civil and Political Rights, 1966 after having received the requisite number of ratifications. The Optional Protocol to the International Covenant on Civil and Political Rights, 1966, came into force on March 23, 1976. By the end of 1998, the Covenant on Civil and Political Rights had 140 parties, the Covenant on Economic, Social and Cultural Rights had 138 parties and the optional Protocol had 92 parties.

China had also signed the Covenant on Economic, Social and Cultural Rights. On 28th February, 2001 China ratified the Economic Covenant. On 27th March, 2001, China formally informed the U.N. that it would abide by the treaty but made it clear that it opted out of a clause allowing workers to form independent trade workers.

It may also be noted that the second optional protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of Death Penalty was adopted on December 15, 1989. As provided by Article 8, Paragraph 1, it was to come into force three months from the date of the deposit of the tenth instrument of ratification or accession. This requirement was fulfilled on July 11, 1991 and therefore the Second Optional Protocol came into force on July 11, 1991.

U. S. Failure to ratify International Covenants on Human Rights.— While the United States of America accuses other nations of not adhering to human rights, it has so far failed to ratify the International Covenant on Economic, Social and Cultural Rights, 1966. Only a year back it has ratified the International Covenant on Civil and Political Rights, 1966. As regards the Economic Covenant, the U.S. still maintains that the rights covered under the Covenant are not Human Rights. This is despite the fact that so far 138 States have become parties to this covenant : Other conventions on human rights which the U.S. have failed to ratify are : International Convention on the Suppression and Punishment of the Crime of Apartheid, 1973; International Convention on the Elimination of All Forms of Racial Discrimination, 1965, Convention Against Torture and Other Inhuman or Degrading Treatment or Punishment, 1984; and the Convention on the Elimination of All Forms of Discrimination Against Women, 1979.

After making a global survey of 161 countries, Amnesty International has said that the U.S. is one of the used biggest violators of human rights. The forms of torture in prisons and excessive force by police in America are almost unparallelled. The Amnesty International has said, "The world has witnessed Human Rights violations of allies being greeted with silence while of declared enemies were met with public condemnation sometimes backed with action." The U.S. is mainly concerned with the safety of Americans and mostly acts on the principle of 'might is right'. The notorious case of beating of a black motorist in March, 1991 by four Police Officers of Los Angeles brought into limelight the use of excessive force. The examples of physical brutality, unjustified shootings, ill-treatment of jail inmates are numerous yet frequently it does not fail to censure other countries including India, whose record of human rights is far better than

America's for alleged violations of human rights. Americans therefore, deserve to be reminded frequently the sayings : Examples are bettrr than precepts and that one who lives in a house of glass should not throw stone upon others. As compared to America's belated accession to the Covenant on Civil and Political Rights, 1966, India acceded to International Covenant on Civil and Political Rights, 1966, as well as International Covenant on Economic, Social and Cultural Rights, 1966 on March 27, 1979.

International Covenant on Civil and Political Rights, 1966.—The International Covenant on Civil and Political Rights, 1966 comprises of 53 Articles divided into VI Parts. For the convenience of study, these Articles may be classified into following categories :

(a) Preamble
(b) General (Articles 1 to 3 and 5)
(c) Rights in Emergency (Article 4).
(d) Substantive Rights (Articles 6 to 27).
(e) Implementation of Enforcement Machinery (Articles 28 to 45).
(f) Interpretation of Saving Provision (Articles 46 to 47).
(g) Final or concluding provisions, regarding ratification, of accession of the covenant, amendments, etc.

(*a*) *Preamble.*—The keystone of the Covenant on Civil and Political Rights, 1966 are the charter provisions concerning the human rights and the Universal Declaration of Human Rights, 1948, which is rightly reckoned as the mine from all instruments on human rights have quarried. That is why "considering that in accordance with the principles proclaimed in the Charter of the United Nations, recognition of the inherent dignity and of the equal and inalienable rights of all the members of the human family is the foundation of freedom, justice and peace in the World, "the State parties to the Covenant recognize" that these derive from the inherent dignity of the human person" and "that in accordance with the universal declaration of human rights, the ideal of free human beings enjoying civil and political freedom and freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his civil and political rights, as well as his economic, social and cultural rights". Moreover, "considering the obligations of States under the Charter of the United Nations to promote universal respect for, and observance of, human rights and freedoms," and "realizing that the individual, having duties to other individuals and to the community to which he belongs, is under a responsibility to strive for the promotion and observation of the rights recognized in the present covenant", the States parties to the present covenant agreed upon the article incorporated in the covenant.

(*b*) *General (Articles 1 to 3 and 5).*—Articles 1 to 3 and 5 of Part I and Part II of the Covenant are general. Article 1 provides that all peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.[100] All peoples may for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of natural benefit and international law. In no case may a people be deprived of its own means of subsistence.[101] Further, the State parties to the present covenant, including those having responsibility for the administration of non-self Governing and Trust Territories shall promote the realization of the right of self-determination, and shall

100. Article 1, paragraph 1.
101. Article 1, para 2.

respect that right, in conformity with the provisions of the Charter of the United Nations.[102]

Through Article 2 which occurs in Part II of the Covenant, each State party to the Covenant "undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as, race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[103] Where legislative or other measures do not exist to give effect to the rights recognized in the Covenant, each State party undertakes to take the necessary steps, in accordance with its constitutional processes and with provisions of the present Covenant, to adopt such legislative or other measures to give effect to the rights.[104] Further, each State party to the Covenant undertakes :

(a) to ensure that any person whose rights or freedoms recognized in the Covenant are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in official capacity;

(b) to ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State and to develop the possibilities of judicial remedy;

(c) to ensure that the competent authorities shall enforce such remedies when granted.[105]

Through Article 3, the State parties to the Covenant undertake to ensure the principle of equal right of men and women to the enjoyment of all civil and political rights set forth in the Covenant.

Article 5 makes it clear that nothing in the Covenant may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms recognized herein or at their limitation to a greater extent than is provided for in the present Covenant.[106] Further, there shall be no restriction upon or derogation from any of the fundamental human rights recognized or existing in any State party to the present Covenant pursuant to law, conventions, regulations or custom on the pretext that the present Covenant does not recognize such rights or that it recognizes them to a lesser extent.[107]

(*c*) *Civil and Political Rights in Emergency.*—Public Emergency which threatens the life of the nation require emergent or exceptional measures which may not be normally permissible. Article 4 of the Covenants, therefore, permits the State parties to take measures, during such emergency provided that the existence of which is officially proclaimed, derogating from their obligation under the covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination on the ground of race, colour, sex, language, religion or social origin.[108] But it is made clear that this provision will not permit the State parties to make any derogation from Article 6 (dealing with inherent right to life), Article 7 (Prohibition of torture or cruel, inhuman or degrading treatment or punishment etc.), Article 8 (Paragraphs 1 and 2—dealing with prohibition of slavery, slave trade or servitude), Article 11 (prohibition of

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102. Article 1, para 3.
103. Article 2, Part 1.
104. Article 2, para 2.
105. Article 2, para 3.
106. Article 5, para 1.
107. Article 5, para 2.
108. Article 4, para 1.

imprisonment merely on the ground of inability to fulfil a contractual obligation), Article 15 (Prohibition of punishment on any criminal offence not constituting a criminal offence under national or international law and *post facto* laws), Article. 16 (recognition everywhere as a person before law), and Article 18 (dealing with freedom of thought, conscience and religion).[109] It is further provided that any State Party which avails the right of derogation shall inform other parties of the covenant of such derogation and reasons thereof and shall also inform the date on which such derogation is permitted.[110]

(*d*) *Substantive Civil and Political Rights.*—Articles 6 to 27 of Part III of the Covenant enumerate specific substantive civil and political rights. They are :

(i) Right to life (Article 6);

(ii) Prohibition of torture or cruel, inhuman or degrading treatment or punishment and prohibition of medical or scientific experimentation without free consent (Article 7);

(iii) Prohibition of slavery, slavery trade, servitude, forced or compulsory labour (Article 8);

(iv) Right to liberty and security of person and freedom from arbitrary arrest or detention (Article 9);

(v) Right of all persons deprived of their liberty to be treated with humanity and with respect for the inherent dignity of the human person (Article 10);

(vi) Prohibition of imprisonment merely on the ground of inability to fulfil a contractual obligation (Article 11);

(vii) Right to liberty of movement and freedom to choose residence and right not to be arbitrarily deprived of entering his own country (Article 12);

(viii) Freedom of aliens lawfully in the territory of a State Party to Covenant from arbitrary expulsion (Article 13);

(ix) Right to equality before the courts and tribunals; right to a fair and public hearing; and right of everyone charged with a criminal offence to be presumed innocent until proved guilty according to law (Article 14);

(x) Non-retroactive application of criminal law (Article 15);

(xi) Right to be recognized everywhere as a person before the law (Article 16);

(xii) Right of everyone not to be subjected to arbitrary or unlawful inference with his privacy, family, home or correspondence and freedom from unlawful attacks on his honour and reputation (Article 17);

(xiii) Freedom of thought, conscience and religion (Article 18);

(xiv) Right to freedom of opinion and expression (Article 19);

(xv) Prohibition of propaganda of war and advocacy of national, racial or religious hatred constituting incitement to discrimination, hostility or violence (Article 20);

(xvi) Right of peaceful assembly (Article 21);

(xvii) Right to freedom of association including the right to form and join trade unions for the protection of interests (Article 22);

(xviii) Right to marry and to found a family (Article 23);

(xix) Right of every child to be protected according to his status as minor on the part of his family, society and the State, and the right of every child to acquire a nationality (Article 24);

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109. Article 4, para 2.

110. Article 4, para 3.

(xx) Right of every citizen to take part in the conduct of public affairs, to vote and to be selected, and to have access, on general terms of equality, to public service in his country (Article 25);

(xxi) Equality before law (Article 26); and

(xxii) Right of ethnic, religious or linguistic minorities to enjoy their own culture, to profess and practise their own religion, or to use their own language (Article 27).[111]

The rights set forth in the Covenant on Civil and Political Rights are not absolute and are subject to limitations. While the formulation of the limitations differs as far as details are concerned from article to article, the Covenant, by and large, provides that the rights shall not be subject to restrictions except those specified by law, and those which are necessary to protect national security, public order, public health or morals, or the rights and freedoms of others. Some of the rights are not subject to any specific restrictions, for example, the right to freedom or thought, conscience and relation, as distinct from the right to manifest religion or belief, and the right to hold opinions without interference, as distinct from the right to freedom of expression.[112] In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the State Parties to the Covenant on Civil and Political Rights may make measures derogating from the obligations under the Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin, on the other hand, some of the rights are considered by the Covenant to be so essential that no derogation from them may be made even in time of public emergency. These rights and the right to life, the right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment, the prohibition of slavery and servitude, the prohibition of imprisonment merely, on the ground of failure of liability to fulfil a contractual obligation, the principle *nulla poena sine lege*, the right of everyone to recognition as a person before the law, and freedom of thought, conscience and religion.[113]

(*e*) *Implementation or Enforcement Machinery (Articles 28 to 45).*—The implementation or enforcement machinery is provided under Part IV of the Covenant. The Covenant provides for the establishment of an eighteen-member Human Rights Committee.[114] The Committee performs the functions of implementation of the human rights in following ways :

(i) The Reporting procedure,[115]

(ii) The Inter-State Communication system;[116]

(iii) Conciliation Commission;[117] and

(iv) Individual's Communication system.[118]

The last mentioned measure of implementation, namely individual's communication system does not find mention in the Covenant on Civil and Political Rights. It finds mention in optional Protocol to the International Covenant on Civil and Political Rights. This measure of enforcement of human rights is available only to those individuals whose

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111. The subject of minorities was not included in the Universal Declaration because the General Assembly stated at that time that its complexity made a uniform solution difficult.

112. *The United Nations and Human Rights* (United Nations, New York, 1973), p. 83.

113. *Ibid.*, at pp. 83-84.

114. Article 28.

115. *See* Articles 44 and 41.

116. *See* Article 41.

117. *See* Article 42.

118. *See* Article 1 of Optional Protocol to International Covenant on Civil and Political Rights, 1966.

States are parties to the Covenant on Civil and Political Rights, 1966 as well as optional Protocol to the Covenant on Civil and Political Rights.[119] Article 2 of the optional Protocol to the International Covenant on Civil and Political Rights provides that individuals who claim that any of their rights enumerated in the Covenant have been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

(*f*) *Interpretation or Saving Provisions (Articles 46 and 47).*—Part V comprising of Articles 46 and 47 deals with interpretation or saving provision. For example Article 46 provides that nothing in the present Covenant shall be interpreted as impairing the provisions of the Charter of the United Nations and of the constitutions of the Specialized Agencies which define the respective responsibilities of the various organs of the United Nations and the Specialized Agencies in regard to the matters dealt with in the present Charter. Article 47 further provides that nothing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources.

(*g*) *Final or Concluding Provisions (Articles 48 to 53).*—Part VI (comprising of Articles 48 to 53) deals with final or concluding provisions. These provisions are relating to signature, ratification, accession, etc. of the Covenant by State Parties[120] coming into force of the Covenant,[121] application,[122] amendment to the Covenant,[123] etc.

As noted above, the International Covenant on Civil and Political Rights, which was adopted by the General Assembly, on December 19, 1966, came into force on January 3, 1976. At present it has been subscribed by as many as 140 State Parties. The optional Protocol came into force on March 23, 1976 and at present has 92 parties.

International Covenant on Economic, Social and Cultural Rights.—Besides preamble the International Covenant on Economic, Social and Cultural Rights comprises of 31 Articles divided into five parts. For the sake of covenience of study the provisions of the Covenant may be divided into following heads :

(a) Preamble
(b) General (Articles 1 to 5)
(c) Substantive Rights (Article 6 to 15)
(d) Measures for implementation (Articles 16 to 25)
(e) Final or Concluding Provisions (Articles 26 to 31).

(*a*) *Preamble.*—The Preamble of the Covenant on Economic, Social and Cultural Rights, 1966, is almost same as the preamble of the Covenant on Civil and Political Rights which has been referred earlier. The reason of this similarity is that common source for both the covenants are U.N. Charter provisions and Universal Declaration of Human Rights, 1948.

(*b*) *General (Articles 1 to 5).*—Articles 1, 3 and 5 of the Covenant on Economic, Social and Cultural Rights, 1966, are also similar to Articles 1, 3 and 5 of the Covenant on Civil and Political Rights with the only difference that in Article 3 speaks of the enjoyment of all economic, social and cultural rights in place of civil and political rights. Article 2 of the Covenant on Economic, Social and Cultural Rights, 1966 (hereinafter to be referred as the "Economic Covenant") provides the following :

(1) Each State Party to the present Covenant undertakes to take steps, individually and through internal assistance and cooperation, especially economic and technical, to the maximum of its available resources, with a

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119. *See* Article 1 of Optional Protocol to International Covenant on Civil and Political Rights, 1966.
120. *See* Article 48.
121. *See* Article 49.
122. *See* Article 50.
123. *See* Article 51.

view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

(2) The State Parties to the present covenant undertake to guarantee that the rights enunciated in the present covenant will be exercised with discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

(3) Developing countries with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the present Covenant to non-nationals.

Through Article 4 of the Economic Covenant the State parties to the Covenant recognize that, in the enjoyment of those rights provided by the State in conformity with the present Covenant, they may subject such rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare in a democratic society.

The obvious reason for the difference in the contents of the above article is the difference in the nature of the rights of both the Covenants and because economic, social and cultural rights are by their nature more vague as compared to civil and political rights.

(*c*) *Substantive Economic, Social and Cultural Rights (Articles 6 to 15).*—Part III of the Economic Covenant (comprising of Articles 6 to 15) deals with Economic, Social and Cultural Rights. They are :

(i) Right to work freely chosen (Article 6);

(ii) Right to the enjoyment of just and favourable conditions of work (Article 7);

(iii) Right to form trade unions and join the trade union of choice (Article 8);

(iv) Right to social security, including social insurance (Article 9);

(v) Right relating to family, motherhood, childhood and of young persons to protection and assistance and the right of free consent to marriage (Article 10);

(vi) Right to adequate standard of living for himself and his family including adequate food, clothing and housing, and to the continuous improvement of living conditions (Article 11);

(vii) Right to the enjoyment of the highest attainable standard of physical and mental health (Article 12);

(viii) Right to education—including compulsory and free primary education (Article 13);

(ix) Undertaking to implement the principle of compulsory education free of charge of all within a reasonable number of years (Article 14); and

(x) Right to (i) take part in cultural life; (ii) enjoy the benefits of scientific, progress and its applications; and (iii) benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author. (Article 15)

(*d*) *Measures for Implementation.*—State parties to the Covenant have an obligation to submit to the Secretary-General of the U.N. reports on the measures which they have adopted and the progress made. The Secretary-General shall then transit copies of report to the Economic and Social Council.[124] The Economic and Social Council (ECOSOC) may transmit the reports to the Commission on Human Rights for study and general

124. Article 16.

recommendations.[125] The ECOSOC may submit from time to time to the General Assembly reports with recommendation of general nature and a summary of the information received from the State parties to the present Covenant and the specialized Agencies in the measures taken and the progress made in achieving general observance of the rights recognized in the present covenant.[126] Last but not the least, the State parties to the Covenant agree that international action for the achievement of the rights recognized in the present Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and the technical meetings for the purpose of consultation and study organized in conjunction with the governments concerned.[127]

A perusal of the above measures shows they are weak, rather much weaker than their counterparts in the Civil and political fields. The obvious reason lies in the inherent nature of economic, social and cultural rights. The development of such rights depends upon so many factors. It may differ from region to region and from country to country. It is not possible to prescribe strong measures for the implementation of such rights nor is it possible to prescribe a time-bound programme for the achievement of these rights.

(*e*) *Final or concluding provisions (Articles 26 to 31).*—Part V of the Economic Covenant (comprising of Articles 26 to 31) deals with final or concluding Articles. It deals with provisions, such as, signature, ratification, accession (Article 26), entry into force (Article 27), application (Article 28), amendments (Article 29) and authentic language of the texts of the Covenant (Article 31).

Universal Declaration of Human Rights and the two covenants on Human Rights, 1966.—Apart from the provisions of the U.N. Charter concerning human rights, the keystone of the Covenants is the Universal Declaration of Human Rights, 1948, which interprets, extends and elaborates the provisions of the Charter. Generally, the two Covenants elaborate on the rights set forth in the Universal Declaration. But there are rights which are proclaimed in the Universal Declaration but are not incorporated in the Covenants and *vice versa* there are certain rights not proclaimed in the Universal Declaration but are incorporated in the Covenants.

Rights proclaimed in the Universal Declaration but not incorporated in the Covenants.—Rights set forth in the Declaration and not incorporated in the Covenant are the right of everyone to own property alone as well as in association with others and the prohibition of arbitrary deprivation of property, the right of every one to seek and enjoy in other countries asylum from persecution, and the right of everyone to a nationality and the right not to be arbitrarily deprived of one's nationality. The Covenant on Civil and Political Rights, however, affirms the right of every child to acquire a nationality.[128]

Rights, not proclaimed in the Universal Declaration but included in the Covenants.—The most important right regulated in both the Covenants and not contained in the Universal Declaration is the right of people to self-determination and related rights, including the right of peoples freely to dispose to their natural wealth and resources.[129] While the Universal Declaration does not deal with the question of minorities, the Covenant on Civil and Political Rights (hereinafter referred to as the "Civil Covenant") provides that in those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to prefer and practise

125. Article 19.
126. Article 21.
127. Article 23.
128. *U. N. Monthly Chronicle*, Vol. XIII, No. 4 (April 1976), p. 50.
129. *See* Article 1 of both the Covenants.

their own religion or to use their own language.[130] Owing to the fact that many provisions of the covenants are more detailed than the provisions of the Universal Declaration, the Covenants deal with aspects of matters otherwise not covered by the Universal Declaration but are not expressly mentioned in the Declaration. Whereas the Universal Declaration proclaims the right to form and to join trade unions,[131] the regulation on the same right in Article 8 of the Covenant on Economic, Social and Cultural Rights is more detailed and specifically requires State parties to undertake to ensure the right to strike, provided that it is exercised in conformity with the law of the particular country.[132]

Relationship Between the Two Covenants.—There is a close relationship between the two Covenants because for both the Covenants the key source of rights is the Universal Declaration of Human Rights. The preamble of both the Covenants are the same so is the case with Articles 1, 3 and 5. The preamble of the Civil Covenant recognizes the need for creation of conditions wherein everyone may enjoy "his civil and political rights as well as his economic, social and cultural rights." The preamble of the Economic Covenant also recognises the same need so that everyone may enjoy "his economic, social and cultural rights, as well as his civil and political rights." Thus they are supplementary to each other. Human rights and fundamental freedoms are indivisible. The realisation of civil and political rights is impossible without the enjoyment of economic, social and cultural rights. This relationship between the civil and political rights and economic, social and cultural rights contained in the Civil Covenant and the Economic Covenant respectively was recognized by the International Conference on Human Rights which was held from April 22 to May 13, 1968 at Tehran in connection with the observance of the International year for Human Rights, which marked the twentieth anniversary of the Universal Declaration of Human Rights. The Conference was attended by 84 States. The realization of this relationship and their interdependence was reiterated by the General Assembly in a resolution in 1977.[133] This was finally affirmed by the Second World Conference on Human Rights held at Vienna from June 14 to 25, 1993. It was in the agenda of the Conference to consider the relationship between development, democracy and unrival enjoyment of all human rights, keeping in view the interelationship and indivisibility of economic, social, cultural, civil and political rights.[134] The Vienna Declaration adopted in the conference affirmed that all human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis. While the significance of the national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it was the duty of States regardless of their political, economic and cultural systems to promote and protect all human rights.[135] Further, democracy, development, and respect for human rights are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their political, economic, social and cultural systems, and their full participation in all aspects of their lives.[136]

Optional Protocol to the International Covenant on Civil and Political Rights, 1966.—Though, the optional Protocol to the International Protocol to the International Covenant on Civil and Political Rights, 1966, it will be desirable to discuss here briefly the optional Protocol because it is one of the four constituents of the International Bill on Human Rights.

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130. *See* Article 27 of the Civil Covenant.
131. *See* Article 23, paragraph of the Universal Declaration.
132. *The United Nations and Human Rights,* (United Nations, 1973), p. 82.
133. *See* General Assembly Resolution 32/130 of December 16, 1977.
134. *See U.N. Chronicle,* Vol. XXX, No. 2 (June, 1993), p. 52.
135. *U. N. Chronicle* , Vol XXX, No. 3 (September, 1993), p. 56.
136. *Ibid,* at p; 57.

The purpose of adopting the optional Protocol has been made clear in the preamble. The preamble to the optional Protocol states that "*considering*" that in order further to achieve the purposes of the Covenant on Civil and Political Rights and the implementation of its provisions it would be appropriate to enable the Human Rights Committee set up in Part IV of the Covenant to receive and consider as provided in the present Protocol, communications from individuals claiming to be the victims of violations of any of the rights set forth in the Covenant. State Parties to the optional Protocol have agreed to adopt Articles 1 to 14. This is further clarified by Article 1 which says that a State party to the Covenant (*i.e.* the Civil Covenant) that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communications from individuals subject to its jurisdiction who claim to be victims of violation of by that State Party of any of the rights set forth in the Covenant. No communication shall be received by the Committee if it concerns a State Party to the Covenant which is not a party to the present Protocol. Article 2 further provides that subject to the provisions of Article 1, individuals who claim that any of the rights enumerated in the Covenant has been violated and who have exhausted all available domestic remedies may submit a written communication to the Committee for consideration.

The Committee then, considers communications received in the light of all written information made available to it by the individual and by the State Party concerned. The Committee forwards its views to the State Party concerned and to the individual.[137] The Committee includes in its annual report a summary of its activities under the present Protocol to the General Assembly of the U.N. through the Economic and Social Council.[138]

The Optional Protocol came into force on March 23, 1976, *i.e.* three months after the date of the deposit with the Secreatary-General of the U.N. of the tenth instrument of ratification or instrument of accession.[139] At present the Optional Protocol has 92 parties.

Critical Appraisal and Significance of the International Bill of Human Rights.—Adoption of the International Covenant on Human Rights and of the optional Protocol in December, 1966 and their entry into force on 23rd March, 1976 and the establishment of the Human Rights Committee represented the successful outcome of the long and persistent effort by the United Nations to translate the lofty aims and principles of the Universal Declaration of Human Rights into binding instruments of International Law.[140] There is not even a shade of doubt that the two Covenants have legal force as treaties for the parties to them and institute a detailed codification of human rights.[141]

The two International Covenants on Human Rights have come for sharp criticism by certain author. It is pointed out by their very nature the human rights cannot be universal for they differ from region to region and from State to State in view of the economic, social and political conditions of the people. Though there is much force in the criticism, yet it cannot but be noted that there is nothing which prevents the States of different regions to adopt Regional Conventions on Human Rights, such as, European Convention on Human Rights, American Convention on Human Rights, African Charter on Human and Peoples Rights and Arab Commission on Human Rights and which especially the European Convention on Human Rights, have proved to be greatly successful. But even for such conventions there must be universal or international standard or yardstick. It is here

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137. Article 5 of the Optional Protocol.
138. Article 6 *ibid* and Article 45 of the Civil Covenant.
139. *See also* Article 9 of the optional Protocol.
140. *See U. N. Monthly Chronicle*, Vol. XIV No. 4 (April, 1977), p. 49.
141. *See also* Ian Brownlie, *Principles of International Law*, Second Edn. (1993), p. 555.

particularly, the International Bill of Human Rights has rendered a signal service for promotion in respect for human rights and protection thereof.

It is also pointed out that though the two Covenants on Human Rights seek to lay down universal human rights, although they have not yet become universal. This criticism lacks any force and has nothing to commend itself. Rather credit must be given and the pains taken to draft International Bill of Human Rights must be considered to be praiseworthy because within a period of two decades since when the two Covenants came into force they have been ratified by most of the States—The Civil Covenant has been ratified by 140 States parties whereas the Economic Covenant has been ratified by 138 States. That is to say more than 75% of the States have already signed the two Covenants. The way progress in this connection is being made, they will become universal in a near future. Moreover, it cannot be forgotten that the Universal Declaration of Human Rights, 1948, which is a constituent of the International Bill of Human Rights has become universal.

The two Covenants are also sometimes criticized for omission of certain rights such as those relating to property, the right everyone to seek and enjoy in other countries asylum from persecution etc. This criticism ignores the existence of different ideologies and policies of the governments of different States. Moreover, it cannot be forgotten that in universal treaties like the two Covenants can be incorporated which are generally acceptable to all the State parties. Even though there is a device of making reservations yet experience has shown that too many reservations, as it happened in the case of Convention on the Prevention and Punishment of the Crime of Genocide, 1951, may destroy the purpose and objective of the Convention.

As regards the criticism that the two Covenants have not become universal and are binding only on the State parties who have ratified them, has been aptly observed, "The fact that the Covenants came into force only in respect of the parties ratifying them or procedures of enforcement are optional, should not make us under-estimate the great significance of these Covenants and the procedures of implementation as giant steps in the expansion of International jurisdiction at the cost of the domestic jurisdiction of States. These great steps were made, be noted, against the sharp opposition of some States on the ground that the proposed measures of implementation would constitute "intervention" in the domestic jurisdiction of the Member States. But overwhelming majorities repeatedly overruled such objections and even noted down some amendments seeking to delete from the draft Covenant the provisions objected to by the minority."[142]

Since the International Covenants on human rights are generally based on the Universal Declaration, a case can be made for their provisions being authoritative interpretation of the Charter even for non-parties to the Covenants in so far as they incorporate (and do not deviate from the Universal Declaration) the rights proclaimed in the Universal Declaration. As pointed out by Ian Brownlie, "The Universal Declaration of Human Rights has been regarded as a preliminary step toward more elaborate formulation of standards in relation to human rights in instruments which would have undoubted legal force as treaties for non-parties to them...The nature of the subject matter is such that *even for non-parties the content of the Covenant represent authoritative evidence of the content of the concept of human rights as it appears in the Charter of the United Nations.*"[143]

Corbett has observed that "in the field of human rights the twenty years' drive to convert the Universal Declaration into binding conventions has ended in the weak compromises of the two draft conventions adopted by the General Assembly of the United

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142. M. S. Rajan, *The Expanding Jurisdiction of the United Nations* (N. M. Tripathi Pvt Ltd., Bombay, 1982), p 100.

143. *Basic Documents in International Law,* Edited by Ian Brownlie, Second Edition (Oxford University Press, 1972), p. 150; emphasis added.

Nations in 1966. A less coercive order for this sensitive area of sovereignty could hardly have been contained. Yet so vary are governments of external interference in their relations with their nationals that in the three years in which those Covenants have been awaiting ratifications (1969) only 6 States have deposited their instruments of acceptance. The record has its uses as a gauge of official attitudes towards supernational authority."[144] Although the International Covenants came into force in 1976 and by the end of 1998 the Civil Covenant had as many as 140 parties and the Economic Covenant had 138 parties (*i.e.* at the average of more than 4 ratifications per year), there is still some force in the observation of Corbett in respect of the attitude of States towards supernational authority. In the view of another eminent author, "The Covenants, particularly the Covenant on Civil and Political Rights, fall short of the expectations of the early years of the United Nations so far as their substantive provisions are concerned. The measures of implementation of the Civil Covenant are considerably weaker than those the originators of the project had in mind and, with one exception (the right of petition set forth in the protocol) also weaker than the proposals submitted to the General Assembly through the Economic and Social Commission by the Commission on Human Rights in 1954. They embody the maximum what governments were prepared to agree to in 1966. There is no reason to assume that they would accept more today."[145]

Thus instead of making a futile exercise in attempting to persuade States to agree to incorporate stronger implementation measures, efforts should be made to persuade more and more States to become parties to the international covenants and optional Protocol on human rights. It may also be noted here that a formidable hurdle in the proper implementation of the Covenants on Human Rights is that even those States which have signed and ratified these, have not spectifically adopted them through their Legislature for application in the internal or State field. This problem has been highlighted by the Supreme Court of India in *Jolly George Varghese* v. *The Bank of Cochin*[146] by observing : "...the basic human rights enshrined in the international covenants may at best inform judicial institutions and inspire legislative action within Member States, but apart from such deep reverence, remedial action at the instance of the aggrieved individual is beyond the area of judicial authority. 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 of India." However, the Supreme Court has made it clear that the provisions of the international covenants which are consistent with Part III of the Constitution containing fundamental rights, they can be enforced. The International Covenants on Human Rights have greatly influenced the development of Human Rights jurisprudence.

V. Measures for Implementation of Human Rights

It is proposed to discuss below the measures for implementtion of human rights under the following :

(1) U.N. Commission on Human Rights.

(2) International Covenant on Economic, Social and Cultural Rights, 1966

(3) International Covenant on Civil and Political Rights, 1966.

(4) Optional Protocol to the Covenant on Civil and Political Rights, 1966

(5) Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of Death Penalty (1989).

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144. Percy E. Corbett, *The Growth of World Law* (Princeton, New Jersey, Princeton University Press (1971), p. 203.

145. Egon Schwelb, "Entry into force of the International Covenants on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights", A.J.I.L, Vol. 70 (1976), p. 511 at p. 518.

146. AIR 1980 SC 470, 474.

1. Under the U.N. Commission on Human Rights.—An individual of any member State of the United Nations who feels to be the victim of the violation of Human Rights can send a petition to the U.N. Commission on Human Rights through the Secretary-General of the U.N. Resolution 1235 (XXII) of the Economic and Social Council adopted in 1967 conferred upon the Commission the competence also to "examine information relevant to gross violations of human rights" and for this purpose to study "situations which deal a consistent pattern of violations of human rights. Exercising this power the Commission has undertaken public investigations against particular States for alleged violation of human rights.

The Commission receives thousands of private complaints for alleged violation of human rights. It transmits them to the Governments of the Member concerned asking them and comment thereon. While doing so it does not divulge the identity of the complainant unless the complainant gives his consent for transmitting his name. Complaints about the discrimination against Minorities are transferred to the Human Rights Commission's, Sub-Commission on the Prevention of Discrimination and Protection of Minorities to report thereon. This has become possible by virtue of Resolution 1503 (XXVIII) of the Economic and Social Council authorising the said Sub-Commission to appoint a Working Group to examine private individual petitons received and to submit report to the Sub-Commission which show a "consistent patterns of gross and reliably attested violations" of human rights. Similarly, the complaints pertaining to the discrimination against women are referred to Sub-Commission on Status of Women.

Appraisal.—The scope and competence of the Commission of Human Rights is very wide. Indeed it is near universal because while individual's communication system provided under the optional Protocol to International Covenant on Civil and Political Rights is available only to the individuals of State Parties of the Civil Covenant which are parties to the optional Protocol whereas individual communication system available under the Human Rights Commissions is available to individuals of all member States of the U.N.

However, it has to be conceded that the Commission has no competence to enforcements. Its recommendations have no binding force. Its findings are simply recommendatory. Several times the members of the Commission have expressed the feelings of frustration that the Commission can hardly do anything except taking note of the complaints of the alleged violation of human rights and comments thereon of the Governments of States concerned. It may, however, be noted that public opinion is an important factor that takes part in the implementation of rules of International Law. Indeed public opinion is the greatest sanction behind International Law. In the modern period of democracy, no State would like to be criticized for violation of human rights in public forum as that of Commission. Therefore, on receiving the copies of the complaints for the alleged violation of human rights, either the States mend their ways or they send satisfactory replies this leads to promotion for respect and protection of human rights. It has been noted with satisfaction that the number of governments sending replies to the complaints transmitted to by the Commission through the Secretariat is increasing every year. Thus the existing procedure cannot be said to be altogether ineffective.

2. Under the International Covenant on Economic Social and Cultural Rights, 1966.—Implementation of the Economic Covenant consists of a system of reporting. State parties to the Economic Covenant have undertaken the obligation to submit reports on measures adopted by them and the progress made in achieving the general observance of the rights recognized therein.[147] All reports are submitted to the Secretary-General of the U.N. who shall transmit copies to the ECOSOC for consideration in accordance with the provisions of the Covenant. The Secretary-General shall also transmit to the specialized Agencies copies of the reports, or any relevant parts therefrom, from State parties to the Covenant which are also members of these specialized Agencies in so far as these reports or parts therefrom relate to any matters

147. Article 16, paragraph 1 of the Economic Covenant.

which fall within the responsibilities of the said Agencies in accordance with their constitutional instruments.[148] The State parties to the Covenant are required to furnish their reports in stages, in accordance with a programme to be established by the Economic and Social Council within one year of the entry into in force of the Covenant after consultation with the State parties and the specialized Agencies concerned.[149] The Economic and Social Council (ECOSOC) may transmit to the Commission on Human Rights for study and general recommendation or for information the reports concerning human rights submitted by State and the specialized Agencies.[150] After a general recommendation is made by the Commission on Human Rights, the State parties to the Covenant and the Specialized Agencies concerned may submit comments. But such comments are not submitted to the Commission. They are submitted to ECOSOC.[151] The ECOSOC may submit from time to time to the General Assembly reports and recommendations of a general nature and a summary of the information received from State parties to the Covenant and the specialized Agencies on the measures taken and the progress made in achieving general observance of the rights recognized in the Covenant.[152] Thus the system of reporting is the only measure of implementation and also the only machinery provided for by the Economic Covenant. Probably, that is why, State parties to the Economic Covenant agree that international action for the achievement of the rights recognized in the Covenant includes such methods as the conclusion of conventions, the adoption of recommendations, the furnishing of technical assistance and the holding of regional meetings and technical meetings for the purpose of consultation and study organized in conjunction with the governments concerned.[153]

As remarked by Egon Schwelb,[154] "one of the difficult problems is, indeed the relationship between the reporting system under the Economic Covenant and existing reporting arrangements in the field of human rights. Since 1956 States have been transmitting to the United Nations reports describing developments and the progress achieved in the field of human rights, not on the basis of treaty obligations, but in compliance with the recommendations of the Economic and Social Council. Since 1972 this has been done in a six-year cycle. States are asked to report on Economic, Social and cultural Rights once every six years.[155] It is clear that the reporting programme under the Economic Covenant cannot be synchronized with the Council resolution under which States are asked to report on economic, social and cultural rights every six years. Such an arrangements would be contrary to the spirit and also to the letter of the Economic Covenant."

Appraisal.—The implementation of the human rights under the Economic Covenant through system of reporting is weak and has many limitations. This is because of the general nature of obligation undertaken by the State parties to the Convenant. As compared to Article 2 of the Covenant on Civil and Political Rights, Article 2 of the Economic Covenant is much weaker, general and vague. While, under Article 2 of the Civil Covenant each State party to the Covenant undertakes "to *respect* and to *ensure* to all individuals within its territories and subject to its jurisdiction the rights recognized in the present covenant...", under Article 2 of the Economic Covenant each State party to the

148. Article 16, para 2.
149. Article 17.
150. Article 19.
151. Article 20.
152. Article 21.
153. Article 23.
154. "Entry into force of the International Covenants on Human Rights and the Optional Protocol to the Covenant on Civil and Political Rights," A.J.I.L., Vol. 70 (1976), p. 517.
155. *See* ECOSOC Res. 624 (XXII), August 1, 1956; 888-B (XXXIV), July 24, 1962; 1074-C (XXXIX), July 28, 1965; 1230 (XLII), June 6, 1967), and 1956 (L), May 21, 1971.

covenant simply "*undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources,* with a view to *achieving progressively* the full realisation of the rights recognized in the present Covenant by all *appropriate* means including particularly the adoption of legislative measures." Because of the very nature of economic, social and cultural rights, binding obligations as contrasted to civil and political rights could not be enacted. The implementation of economic, social and cultural rights depends upon the State of development in economic, progress of the State concerned. That is why, Article 2 speaks of "achieving progressively the full realization of the rights recognized in the Covenant." By undertaking to submit "reports on the measures they have adopted and made in achieving the observance of the rights recognized" in the Economic Covenant, the State parties have accepted some obligations in this respect. This will promote and strengthen international co-operation among States. Thus even though the system of reporting has several limitations and is definitely a very weak method of enforcement yet it promotes international co-operation. Moreover, the Economic Covenant recognizes and promotes international responsibility for "providing assistance such as furnishing of technical assistance "for the achievement of rights recognized in the Economic Covenant.

3. Under the International Covenant on Civil and Political Rights, 1966.—The machinery for implementation under the Covenant on Civil and Political Rights, 1966 (*i.e.*, the Civil Covenant) is a Human Rights Committee to carry out the functions provided in the Covenant before we take up the different ways or methods through which the Human Rights Committee (hereinafter to be referred as "The Committee"), it will be desirable to discuss briefly the composition, etc. of the Committee.

Human Rights Committee.—The Human Rights Committee established under the Civil Covenant consists of eighteen members, who are nationals of State parties to the Covenant having "high moral character and recognized competence in the field of human rights" preferably having legal experience. The members of the Committee are elected and serve in their personal capacity.[156] The members of the Committee are elected by secret ballot from list of persons possessing the above qualification (as perscribed under Article 28) and nominated for the purpose by the State Parties to the Covenant. Each State Party to the Covenant may nominate not more than two persons who are its nationals and such persons shall be eligible for renomination.[157] The Committee may not include more than one nationals of the same State. In the election of the Committee, consideration shall be given to the equitable geographical distribution of membership and to the representation of the different forms of civilization and of the principal legal systems.[158]

The members of the Committee are elected for a term of four years and shall be eligible for re-election in case they are renominated. But the terms of nine of the members elected at the first election shall expire at the end of two years; immediately after the first election, the names of these nine members shall be chosen by lot by the chairman of the meeting referred in Article 30, paragraph 4.[159] According to Article 30, the initial election shall be held no later than six months after the date of entry into force of the Covenant.[160] At least four months before the date of each election to the Committee, other than an election to fill a vacancy declared in accordance with Article 34, the Secretary-General of

156. Article 28 of the Civil Covenant.
157. Article 29.
158. Article 31.
159. Article 32.
160. Article 30, para 1.

the U.N. shall address a written invitation to the State Parties to the Covenant to submit their nomination for membership of the Committee within three months.[161] The Secretary General of the U.N. shall prepare a list in alphabetical order of all the persons thus nominated, and shall submit it to the State parties to the present Covenant no later than one month before the date of each election.[162] Thereafter election of the members of the Committee shall be held at a meeting of the State parties to the Covenant convened by the Secretary-General at the Headquarters of the U.N. At that meeting, for which two-thirds of the State parties to the Covenant shall constitute a quorum, the person elected to the Committee shall be those nominees who obtain the largest number of votes and an absolute majority of votes of the representatives of State parties present and voting.[163]

In view of the above provision, after coming into force of the Civil Covenant, the State parties to the Covenant met for the first time on September 20, 1976 and elected 18 members of the Committee. The term of the members of the committee began w.e.f. January 10, 1977.

Methods or ways of Implementation.—The 18-member Human Rights Committee implements the human rights recognized under the Civil Covenant in following three ways :

(1) The System of Reporting

(2) Inter-State Communications system

(3) Conciliation Procedure.

(1) *The system of Reporting or Reporting procedure.*—Article 40 of the Civil Covenant which deals with the Reporting procedure provides that State parties to the covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized in the Covenant and on the progress made in the enjoyment of these rights. State parties are required to submit the said reports within one year of the entry into force of the covenant and therefore whenever the committee so requests.[164] All reports are submitted to the Secretary-General of the U.N., who transmits them to the Committee for consideration. Reports to be submitted by the State parties are required to indicate the factors and difficulties, if any, affecting the implementation of the Covenant.[165] The Secretary-General may, after consultation with the Committee, transmit to the specialiazed Agencies concerned copies of such reports as may fall within their field of competence.[166] The Committee studies the reports submitted by State parties and then transmits its reports and such general comments as it considers appropriate, to the State parties. The Committee may also transmit to the Economic, and Social Council these comments along with the copies of the reports of the State parties.[167] The State parties may submit to the Committee observations on any Covenants that the Committee made.[168]

The main difference between the Economic Covenant and the Civil Covenant is that while under the former the instrumentality of implementation is the Economic and the Social Council, under the latter, this function is performed by the Human Rights Committee. The main difference between the Human Rights Committee and the U.N. Human Rights Commission is that the latter, *i.e.*, the Commission is open to all the

161. Article 30, para 2.
162. Article 30, para 3.
163. Article 30, para 4.
164. Article 40, para 1.
165. Article 40 para 2.
166. *Ibid.*, Para 3.
167. *Ibid.*, Para 4.
168. *Ibid.* para 5.

member States of the U.N. in case of the former, *i.e*, Committee the obligation to submit reports is limited only to the State parties to the Civil Covenant.

As noted above, the reports to be submitted by the State parties to the Committee are required "to indicate the factors and difficulties, if any affecting the implementation" of the Covenant so as to enable the Committee to keep in touch with each State party regarding the implementation of the rights recognized in the Covenant and for this purpose the representative of the State Party concerned whose report is considered is permitted to be present at the meeting of the Committee. This facilitates a dialogue between the Committee and State Parties concerned with the view to ensure the implementation of the rights recognized in the Covenant.

Thus the 18-member body monitors implementation of the International Covenant on Civil and Political Rights, 1966, It reviews the steps taken by States for the implementation of the rights recognized in the Covenant and the progress achieved in this connection. For example, in its first session for 1988 held in New York from 21st March to 8th April, 1988, it reviewed steps taken by Australia, Central African Republic, Ecuador, Guinea and France. The Committee sometimes takes a specific right for consideration. For example in the said session the right to individual privacy was the subject of action by the Committee. The Committee adopted a "general comment" relating to right to privacy. The Committee stated that as all persons live in society, the protection of privacy is necessarily relative. Correspondence ought to be delivered without interception and without being opened or otherwise read. Surveillance, whether electronic, or otherwise interception telephonic, telegraphic and other forms of communication, wire-tapping and recording of conversations are prohibited. Searches of a home should be for necessary evidence only and not amount to harassment. Personal and body searches should be carried out in a dignified manner. Personal information on computers, data banks and other devices, whether by public authorities or private individuals or bodies must be regulated by law.

Appraisal.—The 18-member Human Rights Committee is a watchdog body to ensure that State parties apply the International Covenant on Civil and Political Rights. It receives so many reports every session that it is not able to complete consideration of all the reports in that session. For example in its session held at Geneva from 11th to 29th July, 1988. The Committee faced a 400 per cent increase in its work load and in view of the financial crisis it hardly had the resources needed to deal with such workload. If the reports submitted by States are not promptly considered, the implementation of rights under the Covenant would suffer a set back. Often reports submitted by State parties are not complete and exhaustive. State conceals vital matters and do not disclose the whole truth. But under the Civil Covenant there is no provision for ascertaining the correctness of the reports. Besides this, delays are caused by the Committee transmitting its reports and general covenants to the States thereby defeating much of the purpose for which the reporting procedure seeks to achieve.

It is also pointed out and rightly too, that although under the Civil Covenant there is an obligation of the State Parties to submit reports, there is no express obligation to comply with the reports and comments of the Committee. Article 40, para 5 provides that the State Parties may submit to the Committee observations on this said comments of the Committee. It is not clear as to what will happen thereafter. This is a very serious omission in the Covenant. Clear provision should have been made that if the Committee does not accept the observation of the State Parties concerned, the reports and comments of the Committee would be binding on the State Parties. However, indirectly atleast the reports and comments of the Committee help to build up international public opinion against violation or non-compliance of the covenant, and a State party would prefer to mend its ways rather than it be censured or criticized in international forums for violation of human rights. It may be noted here that the Committee may also transmit to the Economic and Social Council (Article 40, para 4) and the ECOSOC may in its turn transmit the same to the General Assembly which is the most representative organ. Thus the reporting

procedure, though weak, goes a long way to ensure the implementation of human rights under the Civil Covenant.

Last but not the least, as compared to Human Rights Commission, the Human Rights Committee is not a part of the United Nations. While Human Rights Commission is a subsidiary body established by the General Assembly under Article 22 of the Charter, the Human Rights Committee is an independent body, even though it is serviced by the U.N. Secretariat. Being a body established by the Civil Covenant, it can have only powers which are conferred upon it by the Covenant. There is no provision in the Covenant giving binding power to the reports and comments of the Committee. It can only review, criticize, and comment on the reports submitted by State Parties to the Covenant. It does all this to ensure the implementation of the Human Rights recognized in the Covenant. The State Parties to Civil Covenant have, under Article 2, undertaken "to respect and to ensure to all individuals within its territories and subject to its jurisdiction the rights recognized in the present covenant...". They should, therefore, co-operate with the Committee to achieve this purpose and objective of the Covenant. Without such co-operation the Committee cannot perform its functions successfully and effectively.

(2) *Inter-State Communication System.*—Besides the aforementioned reporting system, the Civil Covenant also provides for system of State to State or inter-State communication. This system is based on the concern of all State Parties to the Covenant that the rights recognized by the Covenant are implemented. If one State party finds that some other State party is not implementing the provisions of the Covenant, it may send a communication to the Human Rights Committee in this connection. But this system is optional and operates only if a State party declares that it recognized the competence of the Human Rights Committee to receive and consider communications that a State Party claims that another State Party is not fulfilling its obligations under the Covenant. Further the optional system is based on the principle of reciprocity and it operates only when a State which has made declaration recognizing the competence of the Human Rights Committee in regard to itself is authorized to set the procedure in motion with regard to another State party which has also recognized the competence of the Committee. The Committee cannot receive a communication concerning a State Party which has not made such a declaration. This provision relating to inter-State communication is provided in Article 41 of the Civil Covenant. The procedure for dealing with the communication, is also laid down under Article 41.

If a party to the Civil Covenant considers that another State Party is not giving effect to the provisions of the Covenant, it may, by written communication, bring the matter to the attention of the State Party within three months after the receipt of the communication, the receiving State shall afford the State which sent the communication an explanation or any other statement in writing clarifying the matter including reference to domestic procedure and remedies taken, pending or available in the matter.[169] If this matter is adjusted to the satisfaction of both the State Parties, the matter ends here and the Human Rights Committee does not come in the picture . But if the matter is not adjusted to the satisfaction of both the State Parties concerned within six months after the receipt by the receiving State of the initial communication, other States may refer the matter to the Committee, by notice given to the Committee and to the State.[170]

As referred above, the competence of the Committee in respect of inter-State Communication depends on the condition of reciprocity *i.e.*, both the State Parties concerned must have made a declaration that they recognize the competence of the Committee to receive and consider communication to the effect that another State is not fulfilling its obligation under the Covenant. Besides this, yet another condition, namely, exhaustion of local remedies must be fulfilled before the Committee deals with the matter.

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169. Article 41 (1) (a).

170. Article 41 (1) (b).

That is to say, before dealing or considering the matter, the committee has to ascertain that all available domestic remedies have been invoked and exhausted in the matter. But this condition or rule will not apply where the application of the remedies is unreasonably prolonged.[171]

After having satisfied the above conditions, the Committee holds closed meeting while examining communications[172] and the State Parties concerned are entitled to be represented and to make submissions orally and/or in writing during such examination.[173] The Committee shall make available its good offices to the State parties concerned with a view to friendly solution of the matter on the basis of respect for human rights and fundamental freedoms as recognized in the Covenant.[174] The Committee may also call upon the State Parties concerned to supply any relevant information[175] within twelve months of the date of receipt of notice, *i.e.*, initial communication, the Committee shall : (i) if a solution is reached, a brief statement of the facts and of the solution reached; (ii) if a solution is not reached, then a brief statement of the facts and the written submissions and record of the oral submissions made by the State Parties concerned shall be attached to the report. In every matter, the report shall be communicated to the State Parties concerned.[176] In case the solution is not reached, the next course is to adopt conciliation procedure under Article 42 but that can be done only with the prior consent of State parties concerned.

The provisions of Article 41 as noted above could come into force when ten State Parties to the Civil Covenant made declarations under Article 41, para 1. This requirement was fulfilled on March 28, 1979 when ten States submitted their declarations with the Secretary-General of the U.N. Subsequently 21 more States did the same by the end of 1990. A declaration made under Article 41, para 1, may be withdrawn at anytime by notification to the Secretary-General. Such a withdrawal, however, shall not prejudice the consideration of any matter which is the subject of a communication already transmitted under this Article.[177]

Appraisal.—The inter-State communications provided by the Civil Covenant suffers from several weaknesses and defects. The role of the Committee is confined to making available to State Partie concerned its good offices. It has no power to make even recommendations or comments on the communication regarding the non-observance of the rights recognized under the Covenant much less taking a decision in the matter. Secondly, a State Party may withdraw its declaration at any time by notification to the Secretary-General. The freedom to withdraw its declaration further weaken the inter-State communication system. Thirdly, sending communication against a friendly State may adversely affect the relationship and as such frequent use of this procedure is most unlikely. Since the system of inter-State system depends upon reciprocity, State parties having conflicts or not having friendly relations are not likely to submit declarations accepting this procedure. That is why, till recently Article 41 has not even once been utilized. Last but not the least, inter-State communication provided under Article 41 lacks teeth. It is conspicuous of the absence of provision for reference to a judicial body or for arriving at a decision following judicial procedures. The only recourse left to the Committee after finding that no solution is reached is to avail the conciliation procedure but even that is dependent upon the prior consent of the State Parties concerned.

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171. Article 41 (1) (c).
172. Article 41 (1) (d).
173. Article 41 (1) (g).
174. Article 41 (1) (e).
175. Article 41 (1) (g).
176. Article 41 (1) (h).
177. Article 41 (2).

(3) *Conciliation Procedure.*—If an inter-State Communication provided under Article 41, is not resolved to the satisfaction of the State Parties concerned, the Committee may, with the prior consent of the State Parties concerned, appoint an *ad hoc* conciliation commission so as to make available to the State Parties concerned the good offices of the Commission with a view to make an amicable solution of the matter on the basis with respect for the present Covenant.[178] The Commission shall consist of five persons acceptable to the State Parties concerned. If the State Parties concerned fail to reach an agreement within three months on all or part of the composition of the Commission, the members of the Commission concerning whom no agreement has been reached shall be elected by secret ballot by a two-third majority vote of the Committee from among its members.[179] The members of the Commission shall serve in their personal capacity. They shall not be nationals of the State Parties concerned, or of a State not party to the Civil Covenant or a State Party which has not made a declaration under Article 41.[180] In short, the conciliation procedure is available only to those State Parties to the Civil Covenant who have made declaration under Article 41.

The Conciliation Commission shall elect its own Chairman and adopt its own rules of procedure.[181] The U.N. Secretariat shall also service the Commissions appointed under Article 42.[182] The information received and collected by the Committee shall be made available to the Commission and the Commission may call upon the State Parties concerned to supply any other relevant information.[183] After the Commission has fully considered the matter but in every event not later than twelve months after having been seized of the matter, it shall submit to the Chairman of the Committee a report for communication to the State Parties concerned. In case the Commission is unable to complete the consideration of the matter within twelve months, it shall confine its report to a brief statement of the status of its consideration of the matter. In case, however, an amicable solution on the basis of respect for human rights as recognized in the present Covenant is reached, the Commission shall confine its report to a brief statement of the facts of the solution reached. But if solution as aforesaid is not reached, the Commission's report shall embody its findings on all questions of fact relevant to the issues between the parties concerned, and its views on the possibilities of an amicable solution of the matter. This report shall also contain the written submissions and a record of the oral submissions made by the State Parties concerned. In such a case the State Parties concerned shall, within three months of the receipt of the report, notify the Chairman of the Committee whether or not they accept the contents of the report of the Commission.[184]

The Committee shall submit to the General Assembly of the U.N. through the Economic and Social Council, an annual report of its activities.[185]

Appraisal.—Conciliation procedure is limited to the matters referred to the Committee in accordance with Article 41 and especially to those State Parties who have made declarations under Article 41 with respect to inter-State communication. That is to say, conciliation procedure may be used if a matter referred to the Committee in accordance with Article 41 is not resolved. Thus the scope of the conciliation procedure, *i.e,* solution of the matters through *ad hoc* conciliation that may be appointed by the Committee under Article 42 is very limited. Moreover, in the conciliation procedure,

178. Article 42 (1) (a).
179. Article 42 (1) (b).
180. Article 42 (2).
181. Article 42 (3).
182. Article 42 (5).
183. Article 42 (6).
184. Article 42 (7).
185. Article 45.

solution of the matter referred to the Commission etc. is consensual, *i.e.*, depending upon the consent the State Parties in respect of everything including the appointment of the Commission. The Commission simply makes available to the State Parties its good offices with a view to arrive at an amicable soluton of the matter its report or views are not binding upon the State Parties. Yet another weakness of the conciliation procedure is that it is dependent upon inter-States communiction provided under Article 41. Since so far the inter-State communication has not been used even once, the question of the use of conciliation procedure does not at all arise.

(4) *Other Methods of Implementation.*—The Covenant on Civil and Political Rights, 1966, does not prohibit the State Parties to the Covenant from having recourse to other procedures for setting a dispute in accordance with general and special agreements in force between them. This is expressly made clear by Article 44 of the Civil Covenant which also makes it clear that the provisions of the Civil Covenant shall apply without prejudice to the procedures prescribed in the field of human rights by or under the constituent instruments and the conventions of the United Nations and of the Specialized Organisations.

4. Under Optional Protocol to the International Covenant on Civil and Political Rights, 1966—Individual's communication system.—In addition to the aforementioned three methods of implementation of the rights recognized under the Covenant on Civil and Political Rights, 1966 (or the Civil Covenant), a fourth method, *i.e.* individual's communication system is provided under the optional protocol to the Covenant on Civil and Political Rights, 1966 (hereinafter to be referred as the optional Protocol). This method of implementation is available to State Parties to the Civil Covenant who are also parties to the optional Protocol. Thus the optional Protocol is necessarily and invariably related to the Civil Covenant. This is clear from the preamble of the optional Protocol through which its State Parties make it clear that "considering that in order further to achieve the purposes of the Covenant on Civil and Political Rights and the implementation of its provisions it would be appropriate to enable the Human Rights Committee set up in Part IV of the Covenant to receive and consider as provided in the present Protocol, communication from individual, claiming to be the victims of violations of any of the rights set forth in the Covenant" have agreed to provisions of the optional Protocol, *i.e*, from Article 1 to Article 14).

Article 1 of the Optional Protocol provides that a State Party to the Covenant that becomes a party to the present Protocol recognizes the competence of the Committee to receive and consider communication from individuals subject to its jurisdiction who claim to be the victims of a violation by that State party of any rights set forth in the Covenant. No comunication shall be received by the Committee if it concerns a State Party to the Covenant who is not a party to the Optional Protocol.

In Order to avail the above method of implementation, *i.e*, individual's communication system following conditions must be satisfied :

(1) The competence of the committee to receive and consider communication is limited to the individuals whose States are parties to Optional Protocol as well as Covenant on Civil and Political Rights.[186]

(2) The communication of the said individual must concern the rights enumerated in the Civil Covenant.[187]

(3) Before submitting a written communication to the Committee, the individuals must have exhausted all available domestic remedies.[188]

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186. *See* Article 1 of the optional Protocol.
187. Article 2 of the optional Protocol.
188. *Ibid* and Article 5 (2) (b).

(4) A communication submitted under the optional Protocol must not be anonymous nor must it be an abuse of the rights of submission or incompatible with the provisions of the Civil Covenant.[189]

(5) The Committee shall not consider any communication from individual unless it has ascertained that the same matter is not being examined under another procedure of international investigation or settlement.[190] This condition is aimed at preventing the committee to take up simultaneous consideration of communication by individuals which is being considered by other Human Rights bodies, such as, European Commission under the European Convention of Human Rights.

Communication submitted by the individuals under the optional Protocol shall, be brought by it to the attention of the State Party alleged to be violating any provisions of the Covenant. Thereafter, within six months, the receiving party shall submit to the Committee written explanations or statements clarifying the matter and the remedy, if any, that may have been taken by that State.[191] The Committee shall consider communication received under the optional Protocol in the light of all written information made available to it by the individual and by the State Party concerned.[192] and shall hold closed meetings when examining communications under the optional Protocol.[193]

After the Committee brings the communication received from the individual to the attention of the State Party alleged to have violated the provisions of the Civil Covenant, such State Party is expected to make available to the Committee, within six months, written explanations or statements clarifying the matters and the remedy if any, that may have been taken by that State. If such a State Party fails to respond, it will not prevent from reaching a decision. For example, in *Netto* case[194] the complant was submitted by the niece, Anna Maria Garcia Lanza de Netto, Netto's case of two Uruguyan nationals, Beatriz Weismann (aunt) and Alcides Lanza (uncle). It was alleged that both her aunt and uncle had been arbitrarily arrested and were detained for a total period of three years and during this period they had been tortured. The Uruguayan Government pointed out that the remedies, under Uruguayan law, had not been exhausted and that action was taken under Uruguayan law, in particular the prompt security measures. But the Committee during its Ninth Session (March 17 to April 3, 1980) rejected this ground for "the Covenant (Article 4) does not allow national measures derogating from its provisions except in strictly defined circumstances. The Uruguayan Government did not make any submissions of fact or law to justify such derogation. The admissibility of the communication was objected by the Uruguayan Government also on the ground that the matter was already under examination by the Committee. The fact that the Uruguayan Government did not make any submission of fact or law, did not prevent the Committee to proceed ahead and give its finding. In view of the fact that the Government did not furnish the Committee requisite information, the committee could not but draw appropriate conclusion on the basis of information available before it. According to the Committee, the facts of the case disclose violations of the International Covenant on Civil and Political Rights, in particular "of Articles 7 and 10 (1), because of the treatment which they received during their detention; of Article 9 (3) both because they were not upon their assert brought promptly before a judicial officer and because they were not brought to trial within a reasonable time; of Article 9 (4) because they had no effective access to legal assistance, they were not brought to trial within a reasonable time, and further because

189. Article 3, optional Protocol.
190. Article 5 (2) (a).
191. Article 4, *Ibid.*
192. Article 4, paragraph 1.
193. *Ibid*, 3.
194. 35 UN GAOR Supp. (NO-40) 111, Report of the Human Rights Committee.

they were tried in circumstances in which irrespective of the legislative provisions they could not effectively enjoy the safeguards for trial.

And finally as to the eventual release of "Beatriz, Weismann and Alcides Lanza, the Committee noted with satisfaction that they had been released the Committee added, "...it is nevertheless of the view that the State party is under an obligation to provide them with effective remedies, including compensation, for the violation of which they have suffered and to take steps to ensure that similar violations do not occur in the future."

After the Committee has completed the consideration of the communication, the Committee shall forward its views to the State party concerned and to the individual.[195] The Committee shall include in its annual report under Article 45 of the Covenant a summary of its activities under the optional Protocol.[196] It may be remembered that under Article 45 of the Covenant the Committee is required to submit to the General Assembly of the United Nations through the Economic and Social Council, an annual report on its activities. Thus the report of the Committee gets wide publicity and helps to build a strong public opinion against the violation of human rights recognized in the Covenant. It is probably one of the important factors which makes the State parties to comply with the findings of the Committee even though they are not binding and are referred as "views"[197] under the optional Protocol, and are published as annexures to its annual report.

The Committee has considered a number of communications of individuals who claimed to be the victims of a violation of any of the rights set forth in the Covenant. For example, in *Ambrosini* case which was first case considered by the Committee during its ninth session (July 30 to August 17, 1979), the communication (*i.e.*, complaint) was submitted by a Uruguayan national, resident of Mexico, on her own behalf as well as on behalf of her husband, step father and mother. Her case was that she was detained in Uruguay on April 25, 1975 and tortured psychologically and otherwise. She was not at all produced before a Judge and was released on May 3, 1975. Similarly, her husband step father and mother were arrested on April 3, 1975, October 22, 1975 and January 20, 1976, respectively and were subjected to various kinds of tortures. The Committee considered the communication and after ascertaining the facts came to the conclusion that the Uruguayan Government had violated the provisions of the Covenant. It expressed the view that it was the obligation of the Uruguay as a State party to the optional Protocol to take immediate steps to ensure observance of the provisions of the Covenant and also to ensure that similar violations do not take place in future and to provide effective remedies to the victims.

A majority of cases considered by the Committee were against Uruguay. *Netto case* has already been referred earlier. In another case, namely, that of *Ewardo Dante Santullo Valcada* considered by the Committee in eighth session (October 15 to 26, 1979). According to the communication submitted by *Ewardo Dante Santullo*, he was arrested at Montevideo on September 8, 1976 and after being taken to the headquarters of the Investigation and Intelligence Department, he was accused of receiving the clandestine newspaper Carta. He was subjected to various forms of torture. During detention he was not allowed to avail the services of a legal counsel nor could he move for the want of *habeas corpus*. After going through the information made available by the individual concerned and the State Party concerned, the Committee expressed the view that the State Party concerned had failed to fulfil its obligations under the Civil Covenant. In this case, its State Party had not adduced any evidence to show that Valcada's allegation of ill-treatment was properly investigated. The Committee, therefore, expressed the view that the State Party had violated the provisions of the Civil Covenant.

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195. Article 5, para 4 of the optional Protocol.
196. Article 6, *ibid.*
197. *See* Article 5, para 4.

The Committee also considered cases of individual's communication from Canada, Mauritius, Finland, etc. For example, in *Lovelace* case[198] the Committee expressed the view that the provision of Canada's Indian Act under which an Indian woman was prohibited from returning to her native Indian reserve on the break of her marriage to a non-Indian, was violative of the provisions of Article 27 of the Civil Covenant. In the *Mauritian Women's case,*[199] the Committee found that the provision of Mauritian Legislation which placed Mauritian women at a disadvantageous position (by putting them at the risk of deportation) in respect of their marriage to foreign husbands, but Mauritian men married to foreign women were not put at such a risk, was contrary to Articles 2 (1), 3 and 26 read with Articles 17 (1) and 23 (1) of the Civil Covenant. In yet another case, namely, *Vuolanne* v. *Finland,*[200] the Committee had before it Finish domestic law, which prohibited recourse to courts by an individual against an unfavourable military disciplinary action. The Committee expressed the view that the said Finish law was violative of the Civil Covenant.

Appraisal.—As aptly remarked by Egon Schwelb, "Form the point of view of principle the entry into force of the optional Protocol on the right of individual petition is probably the most revolutionary of the series of events...In the course of the many years during which the United Nations dealt with the International Bill of Rights, there had until 1966, never been a majority for making the right of individual petition a part of it. Proposals to recognise the right to petition an International authority were made on several occasions, but none was accepted."[201] In the view of other eminent writers[202] "In recent times, individuals have in fact gained, for remedy of deprivations, either direct or derivative access to some transnational arenas of authoritative decision, such as, the U.N. Commission on Human Rights (through the Sub-Commission on Prevention of Discrimination and Protection of Minorities), the Committee on the Elimination of Racial Discrimination, the European Commission on Human Rights, and the Inter-American Commission on Human Rights, and such access promises to increase significantly in the future, especially as the optional Protocol to the International Covenant on Civil and Political Rights comes into operation. Yet the prospect of further direct access by individuals to authoritative arenas, though encouraging, remains far from adequate. As long as the States remain the most important and most effective participants in transnational processes of decision espousal of claims by States for deprivations suffered by individuals would appear indispensable to full protection. Remedy through claim by a protecting State and through individual petition need not be mutually incompatible. They can be made to reinforce each other for the better defence and fulfilment of the human rights of the individual."

The Human Rights Committee has rendered a signal service in the redressal of grievance of the Human Rights of the individual under the individual's communication system although it is able to devote very little time because most of its time and energies are devoted to the consideration of State reports. Due to its pre-occupation with State reports etc., number of communications alleging violation of human rights remain pending. However, whatever little it has done in the field of individual's communication system, it has already made an impact. It has helped development of a body of case of the Committee on such matters as equality of treatment between sexes,[203] ethnic

198. 1981 Report of the Human Rights Committee, p. 166.
199. 1981 Report of the Human Rights Committee, p. 134.
200. 1985 Report of the Human Rights Committee, G.A.O.R. 44th Session, Supp. 40, p. 249.
201. "Entry into Force of the International Covenants on Human Rights and the Optional Protocol to the International Covenant on Civil and Political Rights." *A.J.I.L.* Vol. 70 (1976), pp. 514-515.
202. Myre S. McDougal, Harold D. Lasswell and Lungchu Chen, "The Protection of Aliens Form *Discrimination and World Public Order :* Responsibility of States conjoined with Human Rights," *AJIL,* Vol. 70 (1976), p. 432 pp. 456-57.
203. *See* Aumeeruddy-C Ziffra case—R9/35 (1981) v. Mauritius and Mauritian Women case, 1981; Report of the Human Rights Committee, p. 134.

minorities,[204] freedom or religion,[205] torture, detention and fair trial[206] etc. It is also significant to note that there has also been compliance of the decisions of the Committee. For example, Canada, Finland and Mauritius have in compliance with the decision of the Committee amended their national law. However, there have also been a few cases of non-compliance, such as, that of Uruguay who has shown reluctance to amend its national law in accordance with its commitment to International Covenant on Civil and Political Rights.

Despite the useful work performed by the Committee, the number of individuals communications (complaints) submitted to it is few, rather negligible. During the last decade, it has received on average of 50 communications per year. This figure is just negligible in view of the wide spread violations of human rights all over the world. It is, therefore, necessary that wide publicity must be given of the remedial or other measures of protection of human rights by Committee. The non-governmental organisations, such as, Amnesty International can play a very vital role in this respect. They ought to publicize those cases in which remedial measures have proved to be effective.

Last but not the least the individual communication system must not be judged on its limitation or a few successes it has so far been able to achieve. It must be judged on the basis of innovative remedial measure for deprivation of the human rights of individuals. It has made an auspicious and benign beginning. Efforts should be made to further improve and build upon the system which now exists with consistent the sincere efforts, it may be possible to give some more teeth to the Human Rights Committee. It must be noted with satisfaction that individuals have now access to some international authority in respect violations of human rights. There was a time when it was recognized that a State could treat its subject any way it liked. Now the individuals can directly submit a communication (complaint) alleging violation of human rights even against their own State. This development has taken place withim a few decades after the establishment of the United Nations. There is no reason to believe that this movement will stop at this. It must be taken to its logical end by giving teeth to bodies, such as, Human Rights Committee, providing separate international judicial adjudication of human rights violation and giving access to individuals to international Court of Justice by amending its Statute.

5. Under the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of Death Penalty (1989).—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.[207] On December 15, 1989, the General Assembly adopted the Second Optional Protocol to the International Covenant on Civil and Political Rights Aiming at the Abolition of Death Penalty.[208] (hereinafter referred as "the Second Optional Protocol). According to Article 8, para 1, the Second Optional Protocol was to enter into force three months after the date of the deposit with the Secretary-General of the United Nations of the tenth instrument of ratification or accession. This requirement was fulfilled on July 11, 1991, and on that date it came into force. At present it has 33 State Parties.

As the title of the Second Optional Protocol suggests, it is mainly and exclusively aimed at or concerned with the abolition of death penalty. The parties to the Second Optional Protocol have, in the preamble, expressed to belief that "the abolition of the death penalty contributes to the enhancement of human dignity and progressive development of human rights. The Second Optional Protocol elaborates, extends and

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204. *See Lovelace case*—R 6/24 (1981) v *Canada* [1981 Report of the Human Rights Committee].
205. *See* Harikainen Case—R 40 (1981) v *Finland.*
206. *See* R 2/8 : *Netto Case*, 35 UN GAOR Supp. (No. 40) 111, Report of the Human Rights Committee.
207. *See* Resolution No. 36/95 of 25th November, 1981.
208. *See* G. A. Resolution 44/128, December 15, 1989.

interprets Article 3 of the Universal Declaration of Human Rights, 1948 and Article 6 of the Civil Covenant. Article 3 of the Universal Declaration says that "Everyone has the right to life, liberty and security of person." Article 6, Paragraph 1 of the Covenant on Civil and Political Rights, 1966, provides that every human being has the inherent right to life. This right shall be protected by law. No one shall be arbitrarily deprived of life. Paragraph 2 of Article 6 further provides that in countries which have not abolished the death penalty, sentence of death may be imposed for the most serious crimes in accordance with the law at the time of the Commission of the crime and not contrary to the provisions of the Civil Covenant and to the Convention on the Prevention and Punishment of the Crime of Genocide. The penalty can only be carried out pursuant to a final judgment rendered by a competent court. Paragraph 5 of Article 6 further provides that sentence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.

Article 1 of the Second Optional Protocol seeks to extend the provisions by providing that no one within the jurisdiction of a State Party to the Second Optional Protocol shall be executed. Further each State Party shall take all necessary measures to abolish the death penalty within its jurisdiction. The Second Optional Protocol is so serious and sincere about achieving its aims *i.e.*, the abolition of Death Penalty "t", that a very limited right to reservation has been permitted Article 2 of the Second Optional Protocol provides that no reservation is admissible to the Second Optional Protocol, except for a reservation made at the time of ratification or accession that provides for the application of death penalty in time of war pursuant to a conviction for most serious crime of a military nature committed during wartime.

The Second Optional Protocol is necessarily and invariably related to the International Covenant on Civil and Political Rights and the (First) Optional Protocol. The machinery for implementation, therefore, is also the same, namely the Human Rights Commission.

Methods of Implementation.—The Second Optional Protocol provides for following three ways of implementation :

(1) The Reporting System

(2) Inter-State Communication System

(e) Individual's Communication System.

1. The Reporting System.—As in the case of Civil Covenant, in the Second Optional Protocol also, State Parties are under obligation to send reports to the Human Rights Committee regarding the measures taken by them to implement the Protocol. Article 3 of the Second Optional Protocol provides that the State Parties to the present Protocol shall include in the reports they submit to the Human Rights Committee in accordance with Article 40 of the Covenant, information on the measures that they have adopted to give effect the present Protocol.

2. Inter-State Communication System.—Similar to the Civil Covenant, the Second Optional Protocol also provides inter-State communication as a measure of implementation of the right recognized in the Second Optional Protocol. Article 5 of the Optional Protocol provides that with respect to the State Parties to the Covenant that have made a declaration under Article 41 of the Civil Covenant the competence of the Human Rights Committee to receive and consider communication when a State Party claims that another State Party is not fulfilling its obligations *shall extend to the provisions of the present Protocol* (*i.e.* Second Optional Protocol), unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession. That is to say, a State Party to the Civil Covenant which has made a declaration under Article 41 of the Covenant may complain to the Committee that another State Party, which has made a similar declaration under Article 41, is not fulfilling its obligation, namely, to abolish the death penalty or executing persons within its jurisdiction.

3. **Individual's Communication System.**—Similar to the State Parties to the International Covenant on Civil and Political Rights, 1966 (or the Civil Covenant) who are also parties to the (First) Optional Protocol to the Civil Covenant, the Second Optional Protocol also permits individuals to submit communications to the Committee alleging violations of their human rights under the Second Optional Protocol. Obviously, therefore, this method of implementation can be availed only by those individuals whose States are Parties to the Second Optional Protocol as well as Parties to the Civil Covenant and (First) Optional Protocol. This is clear from Article 5 which provides that with respect to the State Parties to the First Optional Protocol to the International Covenant on Civil and Political Rights adtopted on 16th December, 1966, the *competence of the Human Rights Committee to receive and consider communications from individuals subject to its jurisdictions shall extend to the provisions of the present protocol. (i.e., the Second Optional Protocol),* unless the State Party concerned has made a statement to the contrary at the moment of ratification or accession.

Appraisal.—The Second Optional Protocol is necessarily related to the Civil Covenant. Article 6 of the Second Optional Protocol says that the provisions of the present protocol shall apply as additional provisions to the Civil Covenant (*i.e.,* Covenant on Civil and Political Rights, 1966). The reporting procedure provided under Article 3 of the Second Optional Protocol refers to Article 40 of the Civil Covenant and provides that State Parties to the Second Optional Protocol shall include in the reports they submit to the Human Rights Committee, in accordance with Article 40 of the Civil Covenant information on the measures that they have adopted to give effect to the present protocol. So is the case with Article 4 of the Second Optional Protocol which refers to Article 41 of the Civil Covenant in respect of inter-State Communications. Article 5 of the Second Optional Protocol which extends the competence of the Human Rights Committee to receive and consider communication from individuals can be availed only by those individuals whose State Parties besides being parties to the Second Optional Protocol are also parties to the Civil Protocol and the (First) Optional Protocol. Thus Article 5 of the Second Optional Protocol is necessarily related to the Civil Covenant as well as (First) Optional Protocol.

The Second Optional Protocol aims at the abolition of death penalty. Article 3 of the Universal Declaration of Human Rights, deals with indirectly at least, abolition of death penalty because it provides that everyone has the right to life, liberty and security of person. Article 6 of the Civil Covenant which, deals with every human being's inherent right to life includes abolition of death penalty and also expressly deals with it. Thus the Second Optional Protocol interprets, elaborates and extends the provisions of Universal Declaration and the Civil Covenant which are constituent parts of the International Bill of Human Rights, can also be said to be a part of the International Bill of Human Rights. Let us hope and believe as the State Parties to the Second optional Protocol did in the Preamble that "the abolition of death penalty contributes to enhancement of human dignity and progressive development of human rights."

VI. Important World Conferences on Human Rights

International Conference on Human Rights or Tehran Conference (22nd April to 13th May, 1968).—The first global conference on human rights was held at Tehran (Iran) from 22nd April to 13th May, 1968. The first world conference was held in connection with the observance of the International Year for Human Rights and marked the twentieth anniversary of the Universal Declaration of Human Rights. This conference was convened to review the progress which had been made in the field of human rights since the adoption of the Universal Declaration of Human Rights, to evaluate the effectiveness of the methods used by the United Nations in the field of human rights, and to formulate and prepare a programme of further measures to be taken subsequent to the celebration of the twentieth anniversary of the Universal Declaration. The Tehran Conference was attended by the representatives of 84 State Governments. The Conference adopted the Proclamation of Tehran and 26 resolutions. These resolutions,

and the general principles set out in the proclamation, gave new directions to most of the subsequent work of the United Nations in the field of human rights. The Proclamation stressed the indivisibility of human rights and fundamental freedoms and made it clear that the enjoyment of economic, social and cultural rights is necessary for the full realization of civil and political rights. Later on this indivisibility was affirmed in the Vienna Conference on Human Rights, 1993.

The Proclamation asked the States to fulfil their obligations of promotion and encouragement of human rights and fundamental freedoms for all without any distinction as to race, colour, sex, language, religion, political or other opinions. Further, since the primary aim of the U.N. in the field of human rights is the achievement of maximum freedom and dignity by each individual, the laws of each and every country should accordingly grant each individual freedom of expression, information, conscience and religion and provide for the right of each individual to participate in the political, economic, social and cultural life of his country. Last but not the least, the Proclamation reaffirmed the determination to enforce effectively the principles of the Charter of the U.N. and of other international conventions concerning human rights and fundamental rights and accordingly asked all the States to do the same.

World Conference on Human Rights, Vienna (14th to 25th June, 1993) or Vienna Conference.—The World Conference on Human Rights was held at Vienna from 14th to 25th June, 1993. This World Conference was held some 25 years later after the International Conference on Human Rights (or Tehran Conference) held at Tehran (Iran) in 1968 to assess the progress achieved under the Universal Declaration on Human Rights (1948) and had laid the foundation for subsequent work in the field of human rights at the international level.

The Conference called for specific measures designed to strengthen international human rights instruments and their monitoring mechanism and to improve co-ordination of UN activities for the furtherance of human rights. The Conference condemned ethnic cleansing. The Conference also adopted two declarations one on Bosnia and Herzegovina and the other on Angola. The Conference recommended that the General Assembly at its next session consider, as a matter of priority, the question of the establishment of a High Commissioner for Human Rights for the protection and promotion of all human rights. The Conference supported the creation of an International Criminal Court to bring those responsible for serious violations of humanitarian law to justice as individuals. The International Law Commission was encouraged to continue work on an International Criminal Court.

Vienna Declaration.—Vienna Conference adopted a two-part Vienna Declaration and a six-part 150 paragraph Programme of Action. The Declaration consists of 16 preambular paragraphs and 39 operative paragraphs. The main points of Vienna Declaration are following :

(i) Universality and Indivisibility of Human Rights.—All human rights are universal, indivisible, interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis while the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind. It held that it was the duty of States, regardless of their political, cultural systems, to promote and protect all human rights.

(ii) Right to self-Determination.—Vienna Declaration reaffirmed the right of all peoples to self-determination recognizing the right of peoples to take any legitimate action, in accordance with the Charter to realize their inalienable right of self-determination. The declaration, however, hastened to add that "this shall not be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent

States conducting themselves in compliance with the principle of equal rights and self-determination of peoples."

(iii) Effective International measures to guarantee and monitor implementation of human rights of peoples under foreign occupation.—The declaration calls for effective international measures to guarantee and monitor the implementation of human rights of people under foreign occupation. It also calls for effective legal protection against the violation of their human rights, in accordance with human rights norms and international law particularly the 1949 Geneva Convention on the Protection of Civilian Persons in Time of War and other applicable norms of humanitarian law.

(iv) Democracy, Development and Respect for Human Rights.—The declaration states that democracy, development and respect for human rights are interdependent and mutually reinforcing. Democracy is based on the freely expressed will of the people to determine their own political, economic, social and cultural systems, and their full participation in all aspects of life.

(v) Right to Development.—Vienna Declaration reaffirms the right to development, established in the Declaration on the Right to Development, as a universal and inalienable right and an integral part of fundamental human rights. While development facilitates the enjoyment of human rights lack of it may not be invoked to justify abridgement of internationally recognized human rights. The adoption of a far reaching consensual language on the right to development including for the first time that development is an inalienable right is an important achievement of the conference.

(vi) Alleviation of external debt burden of developing countries.—The declaration calls on international community to make all efforts to help alleviate the external debt burden of developing countries to supplement efforts of their Governments to attain the full realization of economic, social and cultural rights of their people.

(vii) Unilateral measures creating obstacles to Trade Relations.—The declaration calls on States to refrain from any unilateral measure not in accordance with international law that created obstacles to trade relations among states and impeded the full realization of human rights. It affirmed that "food should not be used as a tool for political pressure".

(viii) Gender-based violence and all forms of sexual harassment and exploitation.—The declaration observes that gender-based violence and all forms of sexual harassment and exploitation, including those resulting from cultural prejudice and international trafficking were incompatible with the dignity and worth of human person and must be eliminated. That could be achieved by legal measures and through national action and international co-operation in economic and social development, education, safe maternity and health care, and social support.

(ix) Right of minorities.—The Declaration states that persons belonging to minorities have the right to enjoy their own culture, to practice their own religion and to use their own language in private and in public and without interference or any form of discrimination.

In addition to the foregoing, the Declaration encourages States to accede to international human rights instruments, and to avoid as far as possible, to resort to reservations. The importance of ensuring the universality, objectivity and non-selectivity of the consideration of human rights issues was reaffirmed. The declaration urged Governments, UN system as well as other multilateral organization to considerably increase the resources allocated to programmes aimed at the establishment and strengthening of national legislation, national institutions and related infrastructures which upheld the rule of law and democracy; electoral assistance ; human rights awareness through training, teaching and education ; popular participation and civil society. The declaration underlined the importance of objective, responsible and impartial information about human rights and humanitarian issues. The declaration also

encouraged the increased involvement of the media, for whom freedom and protection should be guaranteed within the framework of national law.

One of the greatest achievements of the Vienna Declaration is the proposal to establish a post of High Commissioner for Human Rights. *Secondly,* while the Declaration has reaffirmed the right of self-determination, it has made it clear that this right cannot be used to dismember or unsettle the established States. *Thirdly,* the Declaration calls upon the international community to enhance co-operation to combat terrorism. It also noted that terrorism and its linkage in some countries to drug trafficking are aimed at the destruction of human rights, democracy, territorial integrity, security of States and destablishing of legitimately constituted Governments. *Fourthly,* its adoption of right to development as an inalienable right is indeed a great achievement. *Fifthly* its emphasis on prosecution and punishment of persons responsible for the crime of ethnic cleansing is really praiseworthy. So is the case with affirmation of universality, indivisibility and interdependence of human rights affirmation and that food should not be used as a tool for political pressure ; affirmation of rights of minorities ; affirmation that democracy, development and respect for human rights are independent and mutual reinforcing etc.

Fourth World Conference on Women, Beijing (China) [4th-15th September, 1995].—Fourth World Conference on Women held at Beijing (China) from 4th to 15th September, 1995. The Beijing Conference is the fourth in a series of UN sponsored global conference on women which laid the foundation in the field of human rights of women who constitute nearly half of the world population The First World Conference on Women was held in Mexico City in 1975 which highlighted the themes of "Equality, Development and Peace". These themes were furthes developed during the U.N. Decade for Women (1976-1985). The second world conference on women convened in Copen Hagan in 1980 which added three sub-themes; or Education, Employment and Health". The Third World Conference on Women, held in Nairobi in 1985, incorporated those themes into the Nairobi Forward-looking Strategies for the Advancement of Women to the year 2000. The Fourth Conference held at Beijing (China) from 4th to 15th September, 1995 carried forward the themes of "Equality, Development and Peace" which highlighted the first UN Conference on Women, held in Mexico City in 1975.

The Forward-looking strategies provided a framework for action at all levels to promote empowerment of women and their enjoyment of human rights. The goals of the strategies which were intended to be implemented by the year 2000, include equal rights for women, the abolition of slavery and prostitution, establishment of a legal minimum age for marriage and punishment for female infanticide.

Thus moving into the 21st Century, the drive for women's rights has accelerated and taken in a powerful global momentum. Within two decades, *i.e.* since the First World Conference on Women in Mexico city in 1975, the campaign for equality between women and men has witnessed significant changes and undeniable advances. Internationality, many treaties have been entered into and State Governments on their part have adopted various legislations. A pertinent question arises as to whether these advances have improved the everyday life of the average woman? A direct answer is not possible. Though it cannot be denied that there has been definite improvement yet millions of individual women continue to face discrimination in social, political and cultural spheres. The position is mixed. In 1993 only six women around the world headed Government and in 1995 only 6 of the 185 ambassadors to the UN were women. In some field the situation continues to be grim. According to an estimate, two-thirds of the world's illiterates are women and they are getting educated at a slower rate than men. On average women's salaries are 30 to 40% lower than those of men for the same work. Half a million women die each year from complications due to child birth, and another 1,00,000 from unsafe abortions. Violence against women is pervasive, from the United States where a woman is battered every 18 minutes, to India, where five women are burnt in dowry-related disputes each day.

In order to assess the progress and shortfalls of the past two decades and identify action to be taken into the next century on Beijing Conference or Fourth-World Conference on Women was held from 4th to 15th September, 1995. It adopted platform for action, concentrating on key issues identified as obstacles to the advancement of women throughout the world. It also determined priority actions to be taken by the international community including the UN, between 1996 and 2001 for the advancement of women. The Conference also mobilized women and men at both the policy making and grassroots levels to achieve those objectives.

VII. Key International Covenants on Human Rights

We have discussed earlier International covenants on Human Rights which alongwith Universal Declaration of Human Rights and Optional Protocol to the International Covenant on Civil and Political Rights constitute International Bill of Human Rights. The International Bill of Human Rights which "constitute a detailed codification of Human Rights" has ushered in a new era in the field of human rights. However, it cannot but be admitted that though it has laid a solid foundation for further development of human rights, it does not constitute the whole of human rights. There are various other international legally binding conventions on human rights in different fields. It will, therefore, be desirable to discuss briefly International Conventions on human rights other than those which constitute International Bill of Human Rights. These conventions can be divided into two broad categories—Conventions Relating to Inhuman, Cruel and Degrading Acts; and Conventions on Vulnerable Groups. It is proposed to discuss these conventions in a chronological order so as to have an overall idea of progressive development of human rights in different fields.

Conventions Relating to Inhuman, Cruel and Degrading Acts

1. Convention on the Prevention and Punishment of the Crime of Genocide (1948).[209]

Conventions relating to Humanitarian Laws of War.—The following four conventions along with Additional Protocol constitute the humanitarian laws of war:

2. Geneva Convention Relating to the Treatment of Prisoners of War (12th August, 1949).[210]

3. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (12th August, 1949)

N.B.—For this please see chapter on "Laws of Land Warfare".

4. Geneva Convention of 12th August, 1949 further Amelioration of the Condition, of Wounded, Sick and Ship-wrecked Members of Armed Forces of Sea.

N.B.—This has already been discussed in chapter on "Laws of Maritime Warfare".

5. Geneva Convention Relating with Protection of Civilians in Time of War (12th August, 1949)

N.B.—For this please see chapter on "Belligerent Occupation."

6. Protocol Additional to the Geneva Conventions of 12th August, 1949 and Relating with Protection of Victims of International Armed Conflicts.

N.B.—For this please see chapters on "Laws of Land Warfare, "Laws of Maritime Warfare" and "Belligerent Occupation."

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209. This has already been discussed in detail earlier in chapter on "Genocide."

210. For this please see chapter on Laws of Land Warfare.

7. International Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitution of others (December 2, 1949).

This Convention was adopted on 2nd December, 1949. It was opened for signature on 31st March, 1950. It entered into force on 25th July, 1951. At present there are 72 State Parties to the Convention.

8. International Convention on the Elimination of All Forms of Racial Discrimination (1985).

This Convention was adopted by the General Assembly on 21st December, 1965. It came into force on 4th January, 1969. At present it has as many as 151 State Parties.

9. International Convention on the Suppression and Punishment of the Crime of Apartheid (1973).

This convention was adopted on 30th November, 1973 and was opened for signature by the General Assembly of the U.N. The Convention declared that "Apartheid" is a crime against humanity and that inhuman acts resulting from the policies and practices of apartheid and similar practices of racial segregation and discrimination are crimes violating the principles of international law, in particular the purposes and principles of the Charter of the U.N. and constituting a threat to the International peace and security.

10. International Convention Against Apartheid in Sports (1985).

This convention was adopted by the General Assembly on 10th December, 1985. The Convention entered into force on 2nd April, 1988. Presently, it has 58 State Parties.

11. International Convention Against the Taking of Hostages (1979).

The General Assembly adopted this Convention on 17th December, 1979.

12. Conventions Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (1984).

This convention was adopted by the General Assembly on 10th December, 1984. This convention entered into force on 26th June, 1957 and at present it has 110 State Parties.

13. Second Optional Protocol to the International Covenant on Civil and Political Rights. Aiming at the Abolition of Death Penalty (1989)

This protocol was adopted in 1989 and came into force on 11th July, 1991. At present it has 38 State Parties.

14. Option Protocol to the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (2002)

On December 18, 2002, the General-Assembly of the U.N. adopted optional Protocol to the Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment and called upon all States that have signed, ratified or acceded to the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment to sign and ratify or accede to the optional Protocol.

The optional Protocol provides for the establishment of *sub-committee on Prevention*,[211] which shall consist of ten members. After the fiftieth ratification of or accession to the present Protocol the number of members of the sub-committee on Prevention shall increase to twenty five.

The sub-committee shall :

(a) visit the places referred to article 4 (*i.e.* places where persons are or may be deprived of their liberty, either by virtue of an order given by a public authority, or

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211. *See* Article 5 of the Protocol.

at the instigation or with its consent or acquiescence) and make recommendations to States Parties concerning the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment ;

(b) In regard to the national preventive mechanism :

(i) Advise and assist States Parties, when necessary, in their establishment ;

(ii) Maintain direct and if necessary confidential contact with the national preventive mechanisms and offer them training and technical assistance with a view to strengthening their capacities ;

(iii) Advise and assist them in the evaluation of the needs and the means necessary to strengthen the protection of persons deprived of their liberty against torture and other cruel, inhuman or degrading treatment or punishment ;

(iv) Make recommendations and observations to the States with a view to strengthening the capacity and the mandate of the national preventive mechanisms for the prevention of torture and other cruel, inhuman or degrading treatment or punishment.

(c) Co-operate, for the prevention of torture in general, with the relevant United Nations organs and mechanisms as well as with the international, regional and national institutions or organisations working towards the strengthening of the protection of all persons against torture and other cruel, inhuman or degrading treatment or punishment.[212]

In order to enable the sub-committee to fulfil its mandate, States Parties to the present Protocol have to undertake certain obligations.[213]

Upon ratification, States Parties may make a declaration postponing the implementation of their obligations under Part III or Part IV, of the present Protocol.[214]

The present Protocol shall enter into force in the thirtieth day after the date of deposit with the Secretary-General of the United Nations of the twentieth instrument ratification or accession.[215]

Last but not the least, the Protocol provides that no reservations shall be made to the present Protocol.[216]

Conventions Relating to Vulnerable Groups

1. The Convention on Status of Refugees, 1951.

The General Assembly adopted this convention on 28th July, 1951. It has 96 State Parties. In 1967 a protocol to this convention was also adopted.

2. Convention on the Political Rights of women (1952)

3. The Convention Relating to the Stateless Persons (1954).

This convention has adopted on 28th September, 1954. It came into force on 6th June, 1960. At present, it was 44 State Parties.

4. The Convention on the Reduction of Statelessness (1961).

N.B.—For this please see chapter on "Nationality".

5. Convention on the Nationality of Married Women (1957)

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212. Article 11 of the Protocol.
213. See Article 14.
214. See Article 24.
215. Article 28.
216. Article 30.

6. Convention on the Elimination of All Forms of Discrimination Against Women (1979).

Adopted by the General Assembly on 18th December, 1979, the Convention entered into force in 1981. At present it has as many as 163 State Parties.

7. Covention on the Rights of the Child (1989).

This convention was adopted on 20th November, 1989. At present it has as many as 191 States Parties.

8. International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990).

The General Assembly adopted this convention on 18th December, 1990.

CHAPTER 65

REGIONAL PROTECTION OF HUMAN RIGHTS

I. EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS (1950)

The European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred as "ECHR") was signed at Rome on November, 1950. It entered into force in September, 1953. There are 22 parties to it. They are : Austria, Belgium, Cyprus, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Liechtenstein, Luxembourg, Malta, the Netherlands, Norway, Portugal, San Marino, Spain, Sweden, Switzerland, Turkey, and the United Kingdom. A State to become a party of ECHR must be a member of Council of Europe. Eleven Protocols to ECHR have also been signed, either, adding the rights recognised in convention or amending the convention. For example, Protocol I, which was signed on March 20, 1952 and entered into force on May 18, 1954, adds certain new rights such as right to peaceful enjoyment of one's possessions, and right to education. It also includes an undertaking of the State Parties to hold free elections at reasonable intervals by a secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. Protocol II which was signed on May 6, 1963 and came into force on September 21, 1970, enabled the Court of Human Rights to give advisory opinion at the request of Committee of Minister on legal question with regard to the interpretation of ECHR and Protocols. Protocol III, which was signed on May 6, 1963 and came into force on September 22, 1970, amended certain articles, namely, Articles 29, 30 and 34 of ECHR. Protocol IV was signed on September 16, 1963 and entered into force on May 2, 1969. It added certain rights such as no person can be expelled from a State of which he/she is a national, (ii) Right to choose residence and liberty of movement and (iii) right not to be imprisoned for failure to pay debts. Having been signed on January 20, 1966 and came into force. Protocol V amended the Convention regarding procedure of election of members of the Commission and the Court. Protocol VI, which came into force in March, 1985, abolished death penalty except in respect of acts committed in time of war or of imminent threat of war. The Protocol does not permit any reservation on derogation from this provision.

Protocol VII to the ECHR, which entered into force on November 1, 1988 added the right of review of a conviction by a higher court (Article 2). Protocol VIII, which came into force on January 1, 1990, enabled the Commission to set up chambers or committees. Protocol IX came into force on October 1, 1994 allows individual applications to refer cases to Court under certain conditions. Protocol X having been signed on March 25, 1992 amended Article 32, para 1 by deletion of the words "of two-thirds' therefrom. That is to say, now matter shall be decided by the Committee of Ministers by simple majority instead of two-thirds' majority as was earlier provided. Lastly, Protocol XI, which was signed on May 11, 1994 made several changes to improve the implementing machinery so as to enhance its efficiency for the protection and observation of human rights. Thus the Convention has been amended several times by above-mentioned Protocols adding the rights recognized in the Convention, enabling the European Court of Human Rights to give advisory opinions on matters relating to interpretation of the Convention and allowing use of special chambers abolishing the death penalty and providing certain procedural safeguards for expulsion of aliens thereby improving the procedural efficiency of the European Commission on Human Rights. The European Convention comprises of 66 Articles, divided into five sections.

Rights and Freedoms Recognized under ECHR.—Under Article 1 of the Convention (*i.e.*, ECHR) the State Parties to the Convention undertake to secure to everyone within their jurisdiction the rights and freedoms defined in Section 1 of the Convention. Thereafter Section I enlists and defines the following rights and freedoms :

(1) Right to life. (Article 2).

(2) Freedom from torture or inhuman or degrading treatment or punishment. (Article 3).

(3) Freedom from slavery or servitude. (Article 4, para 1).

(4) Freedom from, forced or compulsory labour. (Article 4, para 2).

(5) Right to liberty and security of person (Article 5, para 1) including right of arrested person to be informed of the reasons of his arrest and of any charge against him (Article 5, para 2), to be brought before a judge and to be entitled to trial within reasonable time (Article 5, para 3) and right of victims of arrest or detention in contravention of the provisions of this Article to an enforceable right to compensation. (Article 5, para 5).

(6) Right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (Article 6, para 1) including presumption of innocence of a person charged with a criminal offence until proved guilty according to law (Article 6, para 2) and certain specified minimum rights of everyone charged with a criminal offence (Article 6, para 3).

(7) Non-retroactive application of criminal law under national or international law, (Article 7).

(8) Right to respect for private and family life, home and correspondence (Article 8, para 1).

(9) Right to freedom of thought, conscience and religion including freedom to change religion or belief, and freedom either alone or in community with others and public or private, to manifest religion or belief, in worship, teaching, practice and observance subject only, to the interests of public safety, for the protection of public order, health or morals, or for the protection of the rights and freedoms of others, (Article 9).

(10) Right to freedom of expression including freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontier (Article 10, para 1).

(11) Right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests (Article 11, para 1).

(12) Right of men and women of marriageable age to marry and to found a family, according to the national laws governing to exercise of this right (Article 12).

(13) Right to have an effective remedy before a national authority against violations of rights and freedoms set forth in this Convention (Article 13).

(14) Right of every natural or legal person to the peaceful enjoyment of his possessions (Article 1, Protocol I).

(15) Right to education (Article 2, Protocol I).

(16) Right to have free elections at reasonable intervals by secret ballot under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature. (Article 3, Protocol I).

(17) Right not to be expelled from a State of which a person a national. (Article 3, Protocol IV).

(18) Freedom from collective expulsion from a State (Article 4, Protocol IV).

(19) Abolition of death penalty. (Article 7, Protocol 6).

(20) Right of review of a conviction by a higher Court (Article 2, Protocol VII).

It is made clear in Article 14 of ECHR that the enjoyment of the rights and freedoms set forth in this convention shall be secured without discrimination on any ground, such as, sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status. Article 15, para 1 provides that in time of war or public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this convention to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law. But under this provision no derogation shall be permissible from Article 2, except in case of death resulting from lawful acts of war, or from Articles 3, 4 (paragraphs 1 and 7) (Article 15, para 2). Moreover, any State Party availing itself of this right of derogation is required to keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary-General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are being fully executed (Article 15, para 3). Last but not the least, Article 16 provides that nothing in Articles 10 (right to freedom of expression); 11 (right to freedom of peaceful assembly and to freedom of association) and 14 (non-discrimination including on the ground of national or social origin in the enjoyment of rights and freedoms set forth in the Convention) shall be regarded as preventing, the High Contracting Parties from imposing restrictions on the political activity of aliens. That is to say, despite the provisions of Articles 10, 11 and 14, State Parties to the Convention can impose restrictions on the political activity of aliens.

It may be noted that ECHR was drafted long before the International Covenant on Human Rights. It contains only civil and political rights. Even in respect of civil and political rights there are certain rights which are contained in the International Covenant on Civil and Political Rights, such as, the right not to be imprisoned merely on the ground of inability to fulfil a contractual obligation. (Article 11), right of everyone to be recognized everywhere as a person before the law (Article 16), right of every child to acquire a nationality (Article. 24), and prohibition of propaganda of war and any advocacy of national, racial or religious hatred that constitutes to discrimination, hostility or violence (Article 20) but these rights are conspicuous by their absence from the ECHR. In other words, the International Covenant on Civil and Political Rights is more exhaustive in the enumeration of civil and political rights than the ECHR.

Implementation of the Rights and Freedoms Recognized in ECHR.— The implementation of the European Convention can be divided into following two parts :

(i) The old System.

(ii) The New or Present System.

(i) The Old System.—The old system continued upto 31st October, 1998. Protocol XI of the European Convention abolished the European Convention on Human Rights. The provisions relating to Commission in the European Convention were deleted. Under the old system which lasted upto 31st October, 1998, there were two institutions for the implementation of the provisions of the Convention. They were :

(1) A European Commission of Human Rights hereinafter referred as 'the Commission';

(2) A European Court of Human Rights, hereinafter referred to as 'The Court'.

(1) European Commission of Human Rights.—The Commission consisted of a number of members equal to that of the High Contracting Parties but no two members of the Commission may be the nationals of the same State.[1] The member of the Commission were elected by the Committee of Ministers of the Council of Europe, by an absolute majority of votes, from a list of names driven up by the Bureau of the Assembly.[2] The members of the Commission were elected for a period of six years.[3] They are entitled for re-elections. The members were to sit in their individual capacity.[4] The election was so managed as to relieve half of the members of the original convention every three years.

Inter-State Communications.—The Commission received inter-State Communications as well as individual communications alleging breaches of the provisions of the Convention. As regards inter-State communications, any High Contracting Party might refer to the Commission, through the Secretary-General of the Council of Europe, any alleged breach of the provisions of the Convention by another High Contracting Party.[5]

Individual Communication.—As regards individual Communications, any person, non-governmental organization or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention could send a petition to the Commission through the Secretary-General of the Council of Europe. But this was subject to the condition that the High Contracting Party against which the complaint has been lodged had declaration that it recognized the competence of the Commission to receive such petitions.[6] For individual Communication's System to come into force the Convention requires that six State parties must have made such a declaration. This requirement was fulfilled in July, 1955 after six States had made the said declaration. The Convention provides that those of the State Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right.[7] Such a declaration may however be made for a specific period.[8]

Condition of Individual Communication.—A petition submitted under Article 25 to be admissible must not be :

(a) anonymous, or

(b) substantially the same as matter which has already been examined by the Commission, or

(c) have already been submitted to another procedure or international investigation or settlement and it contains no relevant new information, or

(d) incompatible with the provisions of the present convention, manifestly ill-founded, or an abuse of the right of petition.[9]

Besides the above conditions in case of individual petition, all types of petitions must fulfil the following two conditions :

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1. Article 20.
2. Article 21 (1).
3. Article 22 (1).
4. Article 23.
5. Article 24.
6. Article 25, para 1.
7. *Ibid.*
8. Article 25, para 2.
9. Article 27.

(i) all domestic remedies must have been exhausted according to the generally recognized rules of international law and

(ii) must have been submitted within a period of six months from the date on which the final decision was taken.[10]

Though the Commission had been active and has dealt with large number of applications, the great majority of these have been declared inadmissible under the Convention due to failure to exhaust local remedies, lapse of period of six months and on other grounds. One of the greatest achievements of the European Convention, however, is that "it demonstrates beyond the shadow of doubt that international law has developed from the positions stated so lucidly by Openheim (*i.e.*, ...since the law of Nations is a law between States and since individuals cannot be subject of this law." In this view although law of Nations provides certain rights of individuals, they do not enjoy any guarantee of such rights whatever from the law of nations; 'International Law, Vol. I, p. 346) fifty-six years ago to a point where an individual not only has rights under international law but can himself bring a case before an (international organ even against his own government."[11] Bowett has also remarked : "The acceptance of the principle that individuals may directly petition the Commission is perhaps the most striking of all the innovations of the Convention. There have been instances of individuals having a *locus standi* before the international tribunals before, but never on so grand a scale and so as to secure compliance by States with obligations assumed by treaty towards individuals as such. It is, of course, a perfectly logical step to take once one grasps the fact that, under this Convention, it will normally be against their own State that they wish to petition. Hence the inappropriateness of the traditional method whereby the State takes up the claim of its nationals against another State."[12]

Thus the most distinctive feature of the European Convention for the Protection of Human Rights and Fundamental Freedoms is the optional procedure under Article 25, whereby an individual claiming to be a victim of a violation of one of the rights guaranteed by the Convention could present a complaint against his own (or another) government to the Convention for investigation. Individual is given direct access to an international tribunal and is recognized as having the standing necessary to pursue his rights under International law.[13]

Donnelly's case.—Article 26, however, contains a limitation on the jurisdiction of the Commission by providing that it may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognized, rules of International Law and within six months from the date on which final decision was taken. A few more limitations are further contained in Article 27 and have been referred above. In this Convention reference may be made to *Donnelly et, I.* v. *The United Kingdom*,[14] decided by the European Commission of Human Rights. It related to the serious allegations of brutality and torture in Northern Ireland which arose immediately following the introduction of internment without trial by the Government of Britain on August 9, 1971. In May, 1972, Gerald Donnelly and six other individuals of Northern Ireland filed

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10. Article 26.

11. A.H. Robertson, The Law of International Institutions in Europe (1961), p. 68; *See also* Fawcet, The Law of Nations (1968), p. 162.

12. D.W. Bowett, the Law of International Institutions, Fourth Edition, First Indian Reprint, 1993, p. 292.

13. "Individual Applications under the European Convention as Human Rights and the Concept of the Administrative Practice; The *Donnelly* case, "A.J.I.L., Vol. 68 (1974), p. 440; *See* also J.E.S. Fawcett the Application of the European Convention on Human Rights (1969), pp. 276-88.

14. Application Nos. 5577/72; 5533/72, 43 Collection of Decisions 122 (1973).

application with the European Convention, alleging violations of Article 3 of the Convention. The Commission was requested to determine "whether or not such specific acts and administrative practices are incompatible with the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Commission held that under Article 25, the Commission was entitled only to receive petitions from alleged victims of violations of the Convention and hence it was incompetent to examine whether or not the rights of any individually other than the said seven applicants had been violated. However, it added, "...neither Article 25, nor any other provisions of the Convention, *inter alia*, Article 27 (1) (a) prevent an individual applicant from raising before the Commission a complaint in respect of an alleged administrative practice in breach of the Convention provided that he brings *prima facie* evidence of such a practice, and of his being a victim of it."[15] Further, "...where an applicant under Article 25 submits evidence, *prima facie*, substanding both the existence of an administrative practice, which he alleges to be contrary to Article 3 and his claim to be a victim of acts part of the practice. The domestic remedies rule in Article 26 does not apply to that part of his application."[16] The Commission, however, expressed its inability to grant any form of declaratory relief at the stage of determining the admissibility of the application.[17] Thus, "...an individual was not limited, as was argued by the United Kingdom, to raising only those specific actions which resulted in the violation of his own particular rights : Provided he is a direct victim of the alleged administrative practice which he seeks to raise before the Commission, there is no bar to his putting into issue the compatibility with the Convention of such a practice (or legislative measures)"[18] Further, "At a time when it could be argued that so many conventions and procedures which purport to protect human rights are deliberately empty premises lacking realistic enforcement provisions, the admissibility decision in the *Donnelly's* case is a welcome and meaningful advance."[19]

In case the Commission accepted a petition referred to it, it with a view to ascertaining the facts undertake with the representatives of the parties an examination of the petition and if need be, an investigation, for the effective conduct of which the States concerned are required to furnish all necessary facilities, after an exchange of a view with the Commission.[20] The Commission places itself at the disposal of the parties concerned with a view to securing a friendly settlement of the matter on the basis of respect for human rights as defined in the Convention.[21] In case the Commission, is able to secure a friendly settlement a report is adopted by the full Commission and transmitted to the parties, the Committee of Ministers and the Secretary-General of the Council of Europe. The Commission also publishes such a report.[22]

If the solution is not reached, the Commission draws up a Report on the facts and states its opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention. The opinions of all the members of the Commission on this point may be stated in the Report.[23] The Report is then transmitted to the Committee of Ministers. It is also transmitted to the States concerned, who are not at

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15. Application Nos. 5577/72; 5533/72, 43 Collection of Decisions 122 at p. 146 (1973).
16. *Ibid.* at p. 147.
17. *Ibid* at p. 149.
18. Kevin Boyle and Hurst Haunum, "Individual Applications under the European Convention on Human Rights and the Concept of the Administrative Practice: The Donnelly case," AJIR, Vol. 68 (1974), p. 447 at p. 447.
19. *Ibid.* at p. 453.
20. Article 28 (a).
21. Article 28 (b).
22. In this convention the two cases against Belgium and Germany (The Boekmans and Parschke applications) in Yearbood of European Convention on Human Rights (1965), p. 410; (1966), p. 632 may be referred.
23. Article 31, para 1.

liberty to publish it.[24] While transmitting the Report to the Committee of Ministers the Commission may make such proposals as it thinks fit.[25]

Role of Committee of Ministers.—If the question was not referred to the Court in accordance with Article 48 of the Convention within a period of three months from the date of transmission of the Report to the Committee of Ministers, the Committee of Ministers could decide by a majority of the members entitled to sit on the Committee whether there has been a violation of the Convention.[26] If the Committee of Ministers decides that there has been a violation of the Convention, it could prescribe a period during which the contracting party concerned must take the measures required by the decision.[27] If the State concerned had not taken satisfactory measures within the prescribed period, the Committee of Ministers could decide by a simple majority what effect shall be given to its original decision and shall publish the Report.[28] The State Parties had undertaken to regard as binding on them any decision which the Committee of Ministers may take.[29] The Committee of Ministers is the highest political and executive body of the Council of Europe and also for ECHR. Its decisions are binding on State Parties of the Convention. It can order compliance with a decision of the Court or recommendation of the Commission.

In practice, the Commission, was by far the most important organ established by the ECHR. It received large number of petitions every year. Before 1973 it had already dealt with approximately 6,000 applications while the Court had considered only 10 cases. It may be noted that most of the applications that the Commission receives are individual applications and a very few are inter-State applications by the end of 1977, the Commission had received over 8,000 individual applications whereas only 11 inter-State applications had been received.

As noted above, the provisions relating to European Commission on Human Rights were deleted with effect from 1st November, 1998. The present position, therefore, is that there is no European Commission on Human Rights.

(2) The European Court of Human Rights.—As stated above with effect from 1st November, 1998 the only institution for the implementation of the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) is European Court of Human Rights. A detailed discussion of this Court will be made below under the heading "The Present System."

(ii) The Present System.—Under the new or the present system, European Court of Human Rights is the only institution for the implementation of the European Convention. It will be desirable to discuss here in detail the provisions of the European Convention relating to the Court.

European Court of Human Rights

Article 19 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 (hereinafter referred as the European Convention) provides for the setting up of a European Court of Human Rights which shall function on a permanent basis. For coming into being of the Court the original Convention required at least eight States Parties must accept the jurisdiction of the Court. This requirement

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24. Article 31, para 2.
25. Article 31, para 3.
26. Article 32, para 1, See also the Tenth Protocol which deleted the words "of two-thirds" from this provisions.
27. Article 32, para 2.
28. Article 32, para 3.
29. Article 32, para 4.

having being fulfilled in September, 1958, the Court was set up in January, 1959 but only the States accepting its jurisdiction could bring a case before the Court.

Composition of the Court.—The Court consists of a number of Judges equal to that of the contracting Parties.[30] The Judges shall be of a high moral character and must either possess the qualifications required for appointment to high judicial office or be juris consultants of recognised comptence. The Judges shall sit on the Court in their individual capacity.[31] The Judges shall be elected by the Parliamentary Assembly with respect to each State Party by a majority of votes cast from a list of three candidates nominated by the State Party.[32] The Judges shall be elected for a period of six years. However, the terms of office of one half of the Judges elected at the first election shall expire at the end of three years. The terms of the Judges shall expire when they reach the age of 70. The Judges shall hold office until replaced. They shall, however, continue to deal with such cases as they already have under consideration.[33] No Judge may be dismissed from his office unless the other Judges decide by majority of two-thirds that he has ceased to fulfil the required conditions.[34]

Plenary Court.—The Pleanary Court shall :

(a) elect its President and one or two Vice-presidents for a period of three years.

(b) set up Chambers, constituted for a fixed period of time.

(c) elect the Presidents of the Chambers of the Court, they may be re-elected;

(d) adopt the rules of the Court.

(e) elect the Registrars and one or more Deputy Registrars.[35]

Committees, Chambers and Grand Chamber

Committees.—To consider cases before it, the Court shall sit in Committees of three Judges, in Chambers of seven Judges and in Grand Chamber of seventeen Judges. The Court's Chambers shall set Committees for a fixed period of time.[36] They shall sit as an *ex officio* member of the Chamber and the Grand Chamber.[37]

A Committee, may, by a unanimous vote, declare inadmissible or strike out of its list cases of individual application submitted under Article 34 where such a decision can be taken without further examination. Such a decision shall be final.[38]

Chambers and their Powers.—If no decision is taken on the admissibility of individual application under Article 28 by the Committee, a Chamber shall decide on the admissibility and merits of *individual application* under Article 34. A Chamber shall also decide on the admissibility and merits of inter-State application submitted under Article 33. The decision on admissibility shall be taken separately unless the Court, in exceptional cases, decides otherwise.[39]

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30. Article 20 of the amended European Convention.
31. Article 21.
32. Article 22.
33. Artice 23.
34. Article 24.
35. Article 26.
36. Article 27, Para 1.
37. Article 27, Para 2.
38. Article 28.
39. Article 29.

Where a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto or where the resolution of a question before it might have a result inconsistent with the judgment previously delivered by the Court, the Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber, unless one of the parties to the case objects.[40]

The judgment of a Chamber shall become final :

(a) When the parties declare that they will not request that the case be referred to the Grand Chamber; or

(b) Three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or

(c) When the panel of the Grand Chamber rejects the request to refer under Article 43.

The final judgment shall be published.[41]

Grand Chamber and its powers.—The Grand Chamber consists of seventeen Judges.[42] The Grand Chamber shall also include the President of the Court, the Vice-Presidents, Presidents of the Chamber and other Judges chosen in accordance with the rules of the Court. When a case is referred to the Grand Chamber under Article 43, no Judge from the Chamber which rendered the judgment shall sit in the Grand Chamber with the exception of the President of the Chamber and the Judge who sat in respect of the party concerned.[43]

Where a case pending before a Chamber raises a question affecting the interpretation of the Convention or the Protocols thereto or where resolution of a question might have a result inconsistent with a judgment previously delivered by the Court, the Chamber may, at any time before it has rendered the judgment, relinquish jurisdiction in favour of the Grand Chamber unless one of the parties to the case objects.[44]

As regards the powers of the Grand Chamber, Article 31 of the European Convention provides that it shall :

(a) determine applications submitted under Article 33 or Article 34 when a Chamber has relinquished jurisdiction under Article 30 or when the case has been referred to it under Article 43. It may be noted here that Article 33 deals with "inter-State cases". Article 34 deals with "individual applications" and Article 43 provides that within a period of three months from the date of the judgment any party to the case may, in exceptional cases request that the case be referred to the Grand Chamber. A panel of five Judges of the Grand Chamber shall accept the request of the case raises a serious question affecting the interpretation or application of the Convention or the Protocols threreto, or a serious issue of general importance, if the panel accepts the request, the Grand Chamber shall decide the case by means of a judgment.

(b) Consider requests for advisory opinions submitted under Article 47. The General Chamber renders advisory opinions at the request of the Committee of Ministers.

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40. Article 30.
41. Article 44; *see also* Article 42.
42. Article 27 (1).
43. Article 27 (3).
44. Article 30.

Jurisdiction of the European Court of Human Rights.—Article 32 of the European Convention provides that the jurisdiction of the Court shall extend to all matters concerning interpretation and application of the Convention and the Protocols thereto which are referred to it as provided in Articles 33, 34 and 47.

In the event of dispute as to whether the Court has jurisdiction, the Court shall decide.

Thus the European Court may have following three types of jurisdiction :

(1) Inter-State cases (Article 33).

(2) Individual application (Article 34).

(3) Advisory opinions (Article 47).

1. Inter-State cases.—The States Parties may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another State Parties.[45]

2. Individual Applications.—The Court may receive from any person, non-government organisation or group of individuals claiming to be the victim of violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of the right.[46]

It may, however, be noted that the Court may deal with the matter after all domestic remedies have been exhausted according to the generally recognized rules of international law and within a period of six months from the date on which the final, decision was taken.[47]

Conditions or criteria for admissibility of individual application.—The Court shall not deal with any individual application submitted under Article 34 that :

(a) Is unanimous; or

(b) Is substantially the same as a matter that has already been examined by the Court or has already been submitted to another procedure of international investigation or settlement and contains no relevant; new information[48]

(c) Further, the court shall declare inadmissible any individual application submitted under Article 34 which it considers incompatible with the provisions of the Convention or Protocols thereto, manifestly ill-founded or an abuse of the right of application;[49]

(d) Lastly, the Court shall reject any application which it considers inadmissible under this Article (*i.e.*, Article 35). It may do so at any stage of proceedings.[50]

Just satisfaction.—If the Court finds that there has been a violation of the Convention or Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford the satisfaction to the injured party.[51]

Binding Force and Execution of Judgments.—Under Article 46 of the Convention, the High Contracting Parties have undertaken to abide by the final judgment

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45. Article 33.
46. Article 34.
47. Article 35 (1).
48. Article 35 (2).
49. Article 35 (3).
50. Article 35 (4).
51. Article 41.

of the Court in any case to which they are parties. Further, the final judgment of the Court shall be transmitted to the Committee of Ministers which shall supervise its execution.

3. Advisory opinions

The third type of jurisdiction possessed by the Court is that of rendering advisory opinions. As noted above, Article 31 provides that the Grand Chamber shall consider requests for advisory opinions submitted under Article 47. Article 47, which deals with advisory opinions, provides that the Court may at the request of the Committee of Ministers, give advisory opinions on legal questions Concerning the interpretation of the convention and the Protocols thereto.[52]

Such opinions shall not deal with any question relating to the content or scope of the rights or freedom defined in Section 1 of the Convention and the Protocols thereto, or with any other question which the Court or the Committee of Ministers might have to consider in consequence of any such proceedings as could be instituted in accordance with the consequence.[53] Further, decisions of the Committee of Ministers to request an advisory opinion shall require a majority vote of the representations entitled on the Committee.[54]

Article 48 provides that the Court shall decide whether a request for an advisory opinion submitted by the Committee of Ministers is within its competence as defined in Article 47.

Article 49 of the European Convention provides that the Court shall give reasons for its advisory opinion. If the advisory opinions do not represent in whole or in part, the unanimous opinion of the Judges, any Judge shall be entitled to deliver a separate opinion. Further advisory opinion of the advisory opinions shall be communicated to the Committee of Ministers.

Comparison between old and present or new system of enforcement of rights set forth in the European Conventions.—The old system continued upto 31st October, 1998. In consequence of the amendment of the European Convention by Protocol XI, the new system started with effect from 1st November, 1998.

A perusal of the above discussion, makes it clear that while in the old system (*i.e.*, before 1st November, 1998) there were two main bodies :

(i) Commission; and

(ii) The Court for the enforcement of rights set forth in the European Convention, in the present system, the Court is the only body to enforce rights set forth in the Convention. A pertinent question arises as to whether the present system has become weaker? The answer is obviously in the negative. No doubt the Commission had become very popular and had received a large number of applications whereas a very few cases had gone to the Court. But the Commission had its own limitations. It had no power to give binding decisions. It could only give its recommendations but its recommendation were not binding.

On the other hand amendment of the Convention by Protocol XI has enlarged the powers of the Court. Under Article 46 the States Parties to the European Convention have undertaken to abide by the final judgment of the Court in any case to which they are parties. Moreover, it is provided that the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution. The jurisdiction of the Court after the said amendment has become very wide. It has both contentions as well as

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52. Article 47, Para 1.

53. Article 47, Para 2.

54. Article 47, Para 3.

advisory jurisdiction. Under contentious jurisdiction it has power to consider (i) inter-State cases, as well as, (ii) individual application. Besides this, the Court has power to render advisory opinions at the request of Committee of Ministers. Under the old system, after a case was decided by the Commission, it could still go to the Court under certain conditions. Under the present systems, State Parties, individuals, non-governmental organizations or group of individuals can directly go to the Court and it need not be over-emphasized again that the final judgment of the Court is binding on the Parties to the case. Thus the present system of enforcement of human rights and fundamental freedom set-forth in the European Convention is much more effective and expeditious.

Some Important cases decided by the European Court of Human Rights

1. Lawless v. Ireland[55] .—This was the first case decided by the European Court of Human Rights. Its judgment was delivered on 14th November, 1960. In this case, the Court applied Article 15 of the European Convention which is relating to derogation from the obligations under the Convention on the ground of public emergency threatening the life of the nation.

2. Brogan v. United Kingdom.[56]—In this case, the Court applied Article 5 (3) of the European Convention on Human Rights (ECHR) which provides "Every one arrested or detained in accordance with the provisions of paragraph (1) (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial..." The Court held that there was a breach of Article 5 (3).

3. Handyside v. United Kingdom.[57]—This case was relating to right of reedom of expression contained in Article 10 of ECHR. In this case seizure of the book of Handyside his conviction and fine were held to be justified under Article 10 (2) on the ground of "protection of morals."

4. Lingens v. Austria.[58]—This case is also relating to Article 10 of the ECHR. This case was relating to an article published in a Magazine containing words such as 'basest opportunism' and 'immoral' about the Federal Chancellor of Austria. Considering all the aspects of the case and the backgrounds in which the said words were written the Court held that interference with Mr. Lingens" exercise of freedom of expression was unjustfied. The Court also awarded in favour of the applicant just satisfaction of 284,538,60 shillings under Article 50 of the Convention.

5. Soeuring v. United Kingdom.[59]—This case related to Article 3 of ECHR which prohibits 'extradition which may lead to death phenomenon' Soeuring a German national was charged of a murder in the State of Virginia. He fled away to U.K. his extradition was sought by the U.S. Soeuring resisted his extradition under Article 3 of the Convention. The Court upheld the plea of Soeuring.

6. Ireland v. United Kingdom.[60]—This case is also relating to Article 3 of ECHR which deals with freedom from torture and inhuman or degrading treatment. In this case the Court held that the techniques applied amount to a practice of inhuman and degrading treatment constituting a breach of Article 3.

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55. (1961) ECHR Ser. A. Vol, 3.
56. (1988) HECHR 117.
57. (1968) ECHR Ser. A, Vol. 24.
58. (1986) 8 ECHR 407.
59. (1989) 11 ECHR 439.
60. (1978) ECHR Ser. A, Vol. 25.

7. Wemhoff v. Federal Republic of Germany.[61]—This case related to the liberty of the person and involved the interpretation of Article 5 (3) and Article 6(1) of ECHR.

8. Golder v. United Kingdom.[62]—This case related to right of fair trial in Article 6 (1) and right of correspondent in Article 8 of ECHR on the basis of facts of the case, the Court held that there had been a breach of Article 6 (1) as well as a breach of Article of ECHR.

9. Sunday Times v. United Kingdom[63].—This case is relating to Article 10 of the ECHR which deals with freedom of Expression on the basis of facts of the case, the Court held that the restraint imposed was not justified under Article 10 (2).

Appraisal.—European Convention for Protection of Human Rights and Fundamental Freedoms (1950) is the first important regional convention on human rights, which goes beyond the Universal Declaration of Human Rights and gives effect to civil and political rights contained therein by binding commitments. Secondly, it precisely defines civil and political rights and clarifies the contents of these rightly by adding exceptions, limitations or restrictions to which such rights are subject. Thirdly, it provides machinery for the implementation of rights, namely, (a) Commission; (b) the Court and (c) The Committee of Ministers. Later on (*i.e.*, on 31st October, 1988) the Commission was abolished by Protocol XI.

The Commission was much more effective and a successful body than the "Human Rights Committee" established under the Inernational Covenant on Civil and Political Rights and the Human Rights Commission established under the United Nations. In the first place the Commission made efforts for securing a friendly settlement of the matter. In case the solution is not reached, the Commission transmitted its report including such proposals as it thought fit to the Committee of Ministers. The Committee of Ministers is the executive and political organ of the Council of Europe and as such it is a strong body which could decide whether there has been a violation of the Convention : If it decided affirmatively, it prescribes a period within which the contracting party concerned must make measures required by the Committee of Ministers. It could also decide what effect shall be given to its original decision and shall publish the report. The decision of Committee of Ministers is binding on State Parties because they have undertaken to regard as binding on them any decision which the Committee of Ministers may take. Such a body having teeth is conspicuous by its absence in the International Covenant on Civil and Political Rights and even under the U.N.

Fourthly, as regards the European Court of Human Rights, even the chance or possibility of a case going to court is definitely a great advance.

The Court now has very wide jurisdiction. It has both contentious as well as advisory jurisdiction. Under contentious jurisdiction it can consider and decide inter-State cases as well as individual applications. With the enlargement of the powers of the Court by Protocols and abolition of the Commission on 31st October, 1998, the Court is now the only organ for the enforcement of rights set forth in the European Convention. A national of a Contracting Party who is alleged to be a victim of the violations of the rights set forth in the European Convention may bring the case to the Court, once the case goes to the Court, the Parties to the case are bound by the decision of the Court. Under Article 46 of the European Convention the States Parties have undertaken to abide by the final judgment of the Court in any case to which they are Parties. Further, the final judgment of the Court is transmitted to the Committee of Ministers which shall supervise

61. (1968) ECHR Ser. A. Vol. 8.
62. (1975) ECHR Ser. A, Vol. 18.
63. (1979) ECHR Ser A, Vol. 30.

its executions. When the Court identifies a breach of the European Convention and there is difference in the law of the State Party and the Convention, it has been seen generally, there is a change in the national law of the State concerned. For example, after the Court found in *Dreland* v. *United Kingdom*,[64] that the five particular techniques of extracting confessions and information amounted to inhuman and degrading treatment the U.K. gave effect to the Court's judgment and modified the law relating to the said techniques. Yet another way to meet their obligations under the Convention several States parties have formally incorporated. European Convention on Human Rights and Fundamental Freedoms into their national law or to regard it as part of their own law.

If we compare the achievements or contributions of the ECHR and its drawback, we cannot but reach irresistible conclusion that its contributions and achievements far outnumber its drawbacks. Most of the drawbacks or weaknesses are not in fact those of the Convention of but because of the lack of will and determination of State Parties to make a proper use of the machinery provided for the implementation of the Convention. Thus as a whole, European Convention on Human Rights must be reckoned as great achievement in the field of protection of human rights the European Court of Human Rights has rendered a signal service by developing a body of case law concerning human rights. The decisions of the Court are binding and are generally complied by parties to the case. In case any State fails to comply with the judgment, the Committee of Ministers can ensure the compliance and enforcement of the judgment.

II. EUROPEAN SOCIAL CHARTER, 1961

As noted and seen earlier, the European Convention for the Protection of Human Rights and Fundamental Rights is concerned only with civil and political rights. Therefore, after its adoption and coming into force, the Council of Europe turned its attention to the protection of economic and social rights. The European Social Charter was, therefore, signed and adopted in October, 1961 and came into force on February 26, 1965.

Economic and Social Rights

Part I of the Eurpean Social Charter contains the following rights and principles :

1. Everyone shall have the opportunity to earn his living in an occupation freely entered upon.
2. All workers have the right to just conditions of work.
3. All workers have the right to safe and healthy working conditions.
4. All workers have the right to a fair remuneration sufficient for a decent standard of living for themselves and their families.
5. All workers and employers have the right to freedom of association in national or international organisations for the protection of their economic and social interest.
6. All workers and employers have the right to bargain collectively.
7. Children and young persons have the right to a special protection against the physical and moral hazards to which they are exposed.
8. Employed women, in case of maternity, and other employed women as appropriate , have the right to a special protection in their work.
9. Everyone has the right to appropriate facilities for vocational guidance with a view to helping him choose an occupation suited to his personal aptitude and interests.

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64. (1978) ECHR Sec. A, Vol. 25.

10. Everyone has the right to appropriate facilities for vocational trading.
11. Everyone has the right to benefit from any measures enabling him to enjoy the highest possible standard of health attainable.
12. All workers and their dependants have the right to social security.
13. Anyone without adequate resources has the right to social and medical assistance.
14. Everyone has the right to benefit from social welfare services.
15. Disabled persons have the right to vocational training, rehabilitation and resettlement, whatever the origin and nature of their disability.
16. The family as a fundamental unit of society has the right to appropriate social, legal and economic, protection to ensure its full development.
17. Mothers and children, irrespective of marital status and family relations, have the right to appropriate social and economic protection.
18. The nationals of any one of the Contracting Parties have the right to engage in any gainful occupation in the territory of anyone of the others on a footing of equality with the nationals of the latter, subject to restrictions based on cogent economic or social reasons.
19. Members who are nationals of a Contracting Party and their families have the right to protection and assistance in the territory of any other Contracting Party.

The Contracting Parties have accepted as the aims of their policy, to be pursued by all appropriate means, both national and international in character, the attainment of conditions in which the above rights and principles may effectively be released. Thus the nature of binding obligation taken by the Contracting Parties is vague and weak. Instead of directly accepting the above rights as binding, they have simply accepted the obligation of attainment of conditions in which the above rights may effectively be realized.

It may be noted that European Social Charter contains only social and economic rights. It does not contain any cultural rights. Thus as compared to International Covenant on Economic, Social and Cultural Rights, it is deficient in that respect. Secondly, it does not incorporate some social and economic rights which find mention in the International Covenant. For example, it does not contain the right of self-determination of peoples by virtue of which they may freely determine their political status and freely pursue their economic, social and cultural development. Similarly the European Social Charter is conspicuous for the absence equal right of men and women to the enjoyment of all economic, social and cultural rights, right of everyone to education, social insurance (though it talks of social security) etc.

However, Part II of the European Social Charter provides certain rights which the Contracting Parties undertake as provided for in Part III, to consider themselves bound by the obligations laid down therein. The first of these rights is the right to work contained in Article of Part II of the Charter. Article 1 provides that with a view to ensuring the effective exercise of the right to work, the contracting parties undertake :

1. to accept as one the primary aim and responsibilities the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment;
2. to protect effectively the right of the worker to earn his living in an occupation freely entered upon;
3. to establish or maintain free employment services for all workers;
4. to provide or promote appropriate vocational guidance training and rehabilitation.

Other rights are right to organize;[65] right to bargain collectively;[66] right to social security;[67] right to social and medical assistance;[68] right of family to social, legal and economic protection;[69] right of migrant workers and their families to protection and assistance.[70]

The above seven articles of the charter are fundamental in the sense that the parties have undertaken to be bound by at least five of them and to implement them fully and promptly. In addition to these rights the parties are required to select from the 12 further articles a certain number of either full articles or separate paragraphs, so that the party is bound by not less than 10 articles or 45 numbered paragraphs.

As in the European Convention for the Protection of Human Rights and Fundamental Freedoms, European Social Charter also permits derogation of the obligation under the Convention in time of war or other public emergency which threats the life of the nation. Derogation is permissible only to extent strictly required by the exigencies of the solution. This is however, subject to the condition that the measures taken in derogation are not inconsistent with its other obligations under international law. Besides this, the party availing the right of derogation is required to keep the Secretary-General of the Council of Europe fully informed of the measures taken by it and also stating the reasons thereof. When the measures have ceased to operate the party concerned shall inform the Secretary-General. The Secretary-General on his part shall inform other Contracting Parties and the Director-General of the International Labour Office of all the said communications received by him.[71]

Implementation of the Charter.—The enforcement scheme of the Charter is different and much weaker than that of the European Convention. It is more general and less effective. It constitutes of a Reporting Procedure. The Charter provides for the establishment of a Committee of Experts for examining the reports submitted by the State Partie. The States Parties have to submit a biennial report to the Secretary-General of the Council of Europe containing the measures they have taken to implement the rights accepted by them.[72] Copies of such report are also transmitted to those national organisations who are members of the International Organisation of Employers and Trade Unions. Comments on the said reports received from the National Organisations are then forwarded by the Contracting Parties to the Secretary-General.[73]

These reports and comments are then examined by the Committee of Experts.[74] The Committee of Experts comprises of not more than seven members who are appointed by the Committee of Ministers from a list of independent experts who are required to be persons of the highest integrity and recognized competence in international social questions. The persons of the said list are nominated by the Contracting Parties.[75] International Labour Organisation is requested to send one representative to participate in a consultative capacity in the deliberation of the Committee of Experts.[76] After the

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65. Article 5.
66. Article 6.
67. Article 12.
68. Article 13.
69. Article 16.
70. Article 19.
71. *See* Article 30.
72. Article 21.
73. Article 23.
74. *See* Article 24.
75. Article 25.
76. Article 26.

deliberations are complete and conclusions are reached, these conclusions alongwith the reports of the Contracting Parties are transmitted to a Sub-Committee of the Governmental Social Committee of the Council of Europe. The Sub-Committee consists of one representative of each of the Contracting Parties and National Organisations of Employers and International Trade Organisation.[77] The Sub-Committee after examining the said conclusions and reports of the Contracting Parties submits a report containing its conclusions to the Committee of Ministers.[78] The Committee of Ministers after consulting with the Consultative Assembly makes its recommendations to the Contracting Parties.[79]

As noted earlier, the implementation or enforcement scheme of the European Social Charter is weaker and less effective than that of the European Convention. However, both the European Convention and European Social Charter depend on the Council of Europe and especially its executive organ, the Committee of Ministers for the implementation.

III. AMERICAN CONVENTION ON HUMAN RIGHTS, 1969

Background.—The Bogota Charter of the Organisation of American States (OAS), the American Counterpart of the Council of Europe, was adopted by the ninth Inter-American Conference in 1948. Besides establishing new institutions of the OAS, the 1948 Bogota Conference also adopted the American Declaration on the Rights and Duties of Man. It is significant to note that this Declaration was adopted seven months before the adoption of the Universal Declaration of Human Rights. The main difference between the American Declaration and the Universal Declaration is that while the latter contains only rights, the former also contains articles on duties of man. In the American Declaration, while twenty eight articles proclaim the rights of man, eight articles deal with the duties of man. As against this, of 30 Articles of the Universal Declaration, only one article, namely, Article 29 deals with duties of man. The preamble of the resolution which embodied the American Declaration stated that the affirmation of the essential human rights formed the initial system of protection "suited to the present social and juridical conditions." It also recognized the need to strengthen that system in the international field as conditions become more favourable.

The Bogota Conference which adopted the American Declaration of the Rights and Duties of Man also requested the Inter-American Juridical Committee to prepare Statute for an American Court to guarantee the rights of man. But the Committee instead of preparing the draft statute recommended to the Juridical Council of the OAS that before purporting the draft statute a convention on human rights should be adopted because that would involve a radical transformation of the constitutional system of American Countries. Therefore, the Tenth Conference of the American States simply advised the Juridical Council of the OAS to continue its studies on the jurisdictional aspects of the protection of human rights with a view to analyse the possibility of the establishment of an Inter-American Court of Human Rights.

Five years after the Tenth Conference of the American States the meeting of the Consultation of the Foreign Ministers decided that keeping in view the progress achieved at the United Nations, and in Europe in respect of the international protection of human rights, action in this field should also be initiated by American State with this objective in view the meeting of the consultation of the Foreign Ministers established an Inter-American Commission on human rights and requested the juridical Council to prepare draft convention on Human Rights and a Statute of the Court of Human Rights. The Juridical Council accordingly prepared the draft convention on human rights.

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77. Article 27.
78. *Ibid.*
79. Article 29.

This draft was considered at the Second Special Inter-American Conference in Rio de Janiero in 1965. Two other drafts—the one submitted by Chile and other by Uruguay—were also considered. The Conference referred these drafts to the Council of the OAS so that an acceptable draft could be evolved after hearing the view of the Inter-Commission of Human Rights. Meanwhile another important development took place for the Inter-American Commission on Human Rights was empowered to receive and consider individual complaints of violation of certain basic human rights such as, right to life and liberty, freedom of expression, right to a fair trial, equality, before law and freedom from religion.

The Commission on Human Rights was formally recognized as a statutory organ of the OAS in the Third Special Inter-American Conference held at Bunes Aires in 1967. By 1968, the Commission has prepared a draft 'convention on human rights'. To adopt this convention, a Special Conference on Human Rights was called at San Jose, Costa Rica. on 22nd November, 1969, the Conference finally adopted the American Convention on Human Rights. The Convention came into force on July 11, 1978. Out of 32 members of the OAS, the Convention has been ratified by 21 member States. But these 21 States do not include the United States. According to the Preamble of the Convention the essential rights of man are based upon the attributes of human personality, are not upon one's being a national of a certain State and therefore they justify international protection in the form of a convention which should reinforce and complement the protection provided by the domestic law of the American States. Like the European Convention on Human Rights, the American Convention incorporates only civil and political rights.

Right Recognized under the Convention.—The American Convention on Human Rights, 1969, guarantees the following civil and political rights :

(1) the right to juridical personality;[80]

(2) the right to life;[81]

(3) the right to humane treatment;[82]

(4) freedom from slavery and involuntary servitude.[83]

(5) right to personal liberty;[84]

(6) right to a fair trial;[85]

(7) freedom from *ex post facto* laws;[86]

(8) the right to compensation for miscarriage of justice;[87]

(9) the right to privacy;[88]

(10) freedom of conscience and religion;[89]

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80. Article 3.
81. Article 4.
82. Article 5.
83. Article 6.
84. Article 7.
85. Article 8.
86. Article 9.
87. Article 10.
88. Article 11.
89. Article 12.

(11) freedom of thought and expression;[90]

(12) the right of reply;[91]

(13) the right of assembly;[92]

(14) freedom of association;[93]

(15) right of family;[94]

(16) the right to name;[95]

(17) rights of the child;[96]

(18) the right to nationality;[97]

(19) the right to property;[98]

(20) freedom of movement and residence;[99]

(21) right to participate in government;[100]

(22) the right of equal protection before law;[101] and

(23) the right of judicial protection;[102]

Like the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), the American Convention also contain a non-discrimination provision by guaranteeing the free and full exercise of the rights and freedoms recognized in the Convention without any discrimination on grounds of race, colour, sex, religion, political or other opinion, national or social origin, economic status, births or any other social condition. Yet another similarity with its European Counterpart is that under the American Convention also the State parties have undertaken to achieve progressively the full realization of the rights implicit in the economic, social, educational, scientific and cultural standards set forth in the charter of the Organization of American States. Besides this like the European Counterpart, the American Convention also permits the State parties to suspend rights and freedoms in time of war, public or other emergency that threatens the independence and security of a State Party. During the period of such an emergency the State Party may thus avail the right of derogating from the obligations under the Convention. But this is subject to the condition that the measures taken in derogation must not be inconsistent with other obligations under international law and that no discrimination is made on the ground of race, colour, sex, language, religion or social origin. Moreover, the State availing the right of derogation from the obligations under the

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90. Article 13.
91. Article 14.
92. Article 15.
93. Article 16.
94. Article 17.
95. Article 18.
96. Article 19.
97. Article 20.
98. Article 21.
99. Article 22.
100. Article 23.
101. Article 24.
102. Article 25.

Convention is not permitted to suspend certain specified rights and freedoms, namely, right to juridical personality (Article 3); right to life (Article 4); freedom from torture (Article 5); freedom from slavery (Article 6); freedom from *ex post facto* laws (Article 9); rights of the family (Article 17); right to a name (Article 18); rights of the child (Article 19); right to nationality (Article 20); and right to participate in government (Article 23). In other words, these rights are regarded so fundamental that no derogation is permissible in respect of these rights. Lastly, a State Party which avails the right of derogation is required to inform immediately the other State Parties through the Secretary-General of the OAS, of the provisions it has suspended and application thereof and the date fixed for termination of such suspension.[103]

Implementation of the Convention.—The American Convention on Human Rights, 1969, provides for two specialized enforcement mechanism—(i) Inter-American Commission of Human Rights; and (ii) Inter-American Court of Human Rights.

(*i*) *Inter-American Commission of Human Rights.*—The Commission is head quartered at the OAS in Washington, D.C. The Commission consists of seven members who are persons of high moral character and recognized competence in the field of human rights.[104] They are elected by the General Assembly of the OAS from a list of candidates nominated by the Governments of the member-States. They serve in their individual capacity and not as the representatives of their member-States.[105]

The main functions of the Commission are to promote respect for observance of human rights . The functions of the Commission include : developing on awareness of human rights among the peoples of State Parties; receiving and considering petitions and other communications and to submit annual report to the General Assembly of the OAS, requesting the government of the member States to furnish measures adopted by them to give effect to the Convention rendering of advisory opinions making recommendations to the governments of member States to adopt progressive measures of human rights in their domestic law and constitutional provisions and also to take appropriate measures to ensure observance of human rights; and preparing studies and reports.[106]

The Commission may receive petitions from any person or group of persons, or any non-governmental entity recognized in member States containing denunciations or complaints of violation of the Convention. It may also receive a complaint from a State party alleging that another State Party has committed a violation of human rights set out in the Convention. But such a procedure is optional. This is subject to the condition that a State Party which alleges that another State Party is violating human rights recognized under the Convention must have made a declaration recognizing the competence of the Commission to receive such complaints and the State Party against which complaint is made must have also made a similar declaration.[107] Moreover, a complaint is considered to be admissible only if it fulfils certain further conditions. In the first place, before making the complaint domestic remedies must have been exhausted. Secondly, the complaint must have been made within six months of the date of the alleged violation was noticed or final judgment. Thirdly, a petition on the same subject must not have been pending before any other international procedure for settlement.[108] Fourthly, the complaint or communication must not be anonymous or written in offensive language. Fifthly, it must not be the same complaint which was previously studied by the Commission. Sixthly and

103. Article 27.
104. Article 34.
105. Article 36.
106. Article 41.
107. Article 45
108. Article 46.

lastly, it must not be incompatible with the provisions of the Statute, the Regulations are obviously unfounded or referring to events or situation having no bearing to a violation or disregard of human rights by the Government against which it is made.[109]

After a petition is received, the Commission may request the government concerned, *i.e.* state against which complaint is made, to furnish information within a reasonable period. After the receipt of the information the Commission considers the complaint to take a decision as to whether grounds for the complaint exist. If it decides in negative, the matter is closed. In case, however, the decision is in affiramtive, the Commission proceeds to examine the matter so as to verify the facts. For this purpose, the Commission may conduct an investigation and may also ask the States concerned to furnish all requisite facilities.[110]

The main object of the Commission is to secure a friendly settlement. If a friendly settlement is made the Commission draws up a brief statement of the facts and the solution arrived at.[111] In case such a friendly settlement is not made, the Commission draws up a report containing the facts and its conclusions.[112] Then the report is transmitted to the States concerned. If within three months from the date of the transmission of the said report the matter is not settled or is not submitted to the Court either by the Commission or the States concerned, the Commission may, by votes of an absolute majority of its member draw up a report setting forth its opinion and conclusions on the question submitted for its consideration.[113] The Commission may also make recommendations to the State Party to take measures to remedy the situation within a prescribed period. The matter does not end here. After the expiry of said prescribed period, the Commission takes a decision, by the votes of an absolute majority of its members, as to whether the State concerned has taken adequate measures to remedy the situation.[114]

A persual of the above discussion shows that the Inter-American Commission on Human Rights performs two main functions : (i) the general educative function, *i.e.*, to develop an awareness of human rights among the peoples of America; and (ii) the administrative-cum-judicial functions, namely, to make recommendations to the governments of Member States, to prepare studies and reports, making requesting governments to furnish information, rendering advisory services, considering and deciding individual petitions and to submit annual reports to the General Assembly.[115]

(*ii*) *Inter-American Court of Human Rights.*—Like the European Court of Human Rights the Inter-American Court of Human Rights is not accessible to individuals. Again, like its European counterpart, the Inter-American Court is accessible only to the Inter-American Commission and to those State Parties who have expressly recognized its jurisdiction. The Inter-American Court consists of seven judges who are jurists of the highest moral authority of recognized competence in the field of human rights and are qualified for the appointment to the highest judicial office of the State. They ought to be nationals of the member States of the OAS and are elected in their individual capacity.[116] But no two judges can be the nationals of the same State. They are elected for a period of six years

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109. Article 47.
110. Article 48.
111. Article 49.
112. Article 50.
113. Article 51.
114. Article 51.
115. *See* also V.S. Mani, "Regional Approaches to the Implementation of Human Rights", IJIL, Vol. 21, No. 1 (1981), p. 96 at p. 105.
116. Article 52.

and can be re-elected only once.[117] The quorum of the Court is five judges.[118] The Commission has to appear in all cases brought before the Court.[119]

Contentious Jurisdiction.—The Court has two types of jurisdiction—(i) contentious and (ii) advisory. The contentious jurisdiction is optional. For availing this jurisdiction of the Court a State Party while ratifying or adhering to the Convention has to make a declaration recognizing as binding the jurisdiction of the Court on all matters concerning the interpretation or application of the Convention.[120] The powers of the Court are much wider than its European Counterpart. Cases before the Court may result in order for compensatory damages, permanent or temporary injunctive relief or both. If the Court arrives at a decision that there has been a violation of the rights or freedoms recognized by the Convention, it can order that the injured party be ensured the enjoyment of his right or freedom that was violated and in appropriate cases can order that violation of such right or freedom be remedied and fair compensation be given to the injured party.[121]

The States parties have undertaken to comply with the judgment of the Court in any case to which they are parties.[122] The judgment of the Court is "final and not subject to appeal."[123] However, the Court lacks the power to enforce its judgments and preliminary rulings and has to rely mainly on the OAS General Assembly. The Court may submit annual report to the General Assembly of the OAS specifying the particular cases in which its judgments have not been complied with by State Parties and may make its recommendations.[124] The Court has so far decided only a few cases.

In *Velasquez Rodriguez* Case.[125]—Regarding the detention and disappearance of a Honduran student the Court decided that the Honduran Government was responsible for violation of Articles 4, 5 and 7 of the Convention and therefore Honduras was liable to pay compensation to the student's family.

Advisory Jurisdiction.—Inter-American Court of Human Rights possesses advisory jurisdiction also. Member States of the OAS or certain Inter-American organs including the Commission may consult the Court with regard to the interpretation of the Convention or other treaties relating to protection of human rights in the American States. At the request of any such State the Court rnay give advisory opinion regarding the compatibility of its domestic laws with such international instruments.[126]Though the Court decided only a few contentious cases, it has given some advisory opinions. It has given some important advisory opinions having important bearing upon the interpretation of the Convention. For example, in its advisory opinion on Effect of Reservations on Entry into Force of the American Convention,[127] the Inter-American Court was requested to give its advisory opinion on the question : "From what moment is a State deemed to have become a party to the American Convention on Human Rights when it ratified or adheres to the Convention with one or more reservations : from the date of the deposit of instrument of ratification or adherence or upon the termination of the period specified in Article 20 of the Vienna Convention on the Law of Treaties?" While giving its advisory opinion the Court

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117. Article 54.
118. Article 56.
119. Article 57.
120. Article 62.
121. Article 53.
122. Article 66.
123. Article 67.
124. Article 65.
125. (1989) 28 ILM 291.
126. *See* Article 64.
127. (1982) 67 ILR 559.

emphasized that modern rights treaties in general, and the American Convention in particular are not multilateral treaties of the traditional type concluded to accomplish exchange of rights for the benefit of the contracting parties. Their object and purpose is the protection of the basic rights of individual human beings, irrespective of their nationality, both against the State of their nationality and all other contracting States. In concluding these human rights treaties, the *States can be deemed to submit themselves to a legal order which they, for the common good, assume various obligations, not in relation to other States, but towards all individuals' within their jurisdiction.*

The Court further emphasized that the Convention, unlike other international human right treaties, including the European Convention, confers on private parties the right to file a petition with the Commission against any State as soon as it has ratified the Convention (Article 44 of the Convention). By contrast, before one State may institute proceedings against another State, each of them must have accepted the Commission's Jurisdiction to deal with inter-State communications (Article 45). This *structure indicates the overriding importance the Convention attaches to the commitments of State Parties,* vis-a-vis *individuals which can be readily implemented without intervention of any other State.*

In view of the above observations, the Court concluded that viewed in this light and considering that the Convention was designed to protect the basic rights of individual human beings irrespective of their nationality, against States of their own nationality or any other State Party, the *Convention must be seen for what in reality it is a multilateral legal instrument of framework enabling States to make binding unilateral commitments not to violate the human rights of individuals within their jurisdiction.* The Court finally held unanimously that "the Convention enters into force for a State which relieves or adheres to it with or without reservation on the date of the deposit of its instrument of ratification or adherence."

Advisory Opinion Relating to Interpretation of Right to Life.—In its advisory opinion on *Restrictions to the Death Penalty,*[128] the Inter-American Court of Human Rights was requested by the Inter-American Commission to interpret Article 4 (right to life) of the Convention invoking Article 64 (1) thereof. While rendering an advisory opinion, the Court made certain observations about the advisory jurisdiction conferred on the Court by the American Convention. The Court observed that the advisory jurisdiction conferred on the Court by Article 64 of the Convention *is unique in contemporary international law. Neither the International Court of Justice nor the European Court of Human Rights has been granted as extensive advisory jurisdiction which the Convention confers on the Inter American Court. The Court emphasized that the Convention, by permitting Member States and OAS organs to seek advisory opinions, creates a parallel system to that provided for under Article 62 and offers an alternative judicial method of a consultative nature, which is designed to assist States and organs to comply with and apply human rights treaties without subjecting them to the formalism and sanctions associated with the contentions of judicial process. It would therefore be inconsistent with the object and purpose of the Convention and the relevant individual provisions, to adopt an interpretation of Article 64 that would apply to the jurisdictional requirements* of Article 62 and thus role it of its intended utility merely because of the possible existence of a dispute regarding the meaning of the provisions at issue in the request.

IV. AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS, 1981

African Charter on Human and People's Rights, also popularly known as Banjul Charter, was adopted on June 27, 1981 and entered into force on October, 1986. So far 49 States, of the 50 members of the Organisation of African Unity (OAU) and ratified or

128. (1983) 70 ILR 449.

acceded to it. The only State which has not so far ratified or acceded to the African Charter is Sahrawi Arab Democratic. A special feature of the African Charter is that along with rights, it also lays down the duties of the individuals. As noted earlier, even the American Convention contained an Article entitled "Relationship Between Duties and Rights". But the difference is whereas the American Convention did so very briefly or even casually, the African Charter enumerates the duties in detail laying greater emphasis on the duties of the individuals. This is evident from the preamble of the African Charter.

Preamble.—Through the Preamble the State Parties being the member of the OAU recognize, on the one hand, that fundamental human rights stem from the attributes of human beings, which justifies their international protection and on the other hand that the reality and respect of people's right should necessarily guarantee human rights. Emphasizing the duties , the preamble states "that the enjoyment of rights and freedoms also implies the performance of duties on the part of everyone." The preamble also emphasizes "the right to development and that civil and political rights cannot be dissociated from economic, social and cultural rights in their conception as well as universality and that the satisfaction of economic, social and cultural rights is a guarantee for the enjoyment of civil and political rights."

Human and People's Rights.—Chapter 1 of Part I of the African Charter contains the following rights :

(1) Equality before law.[129]

(2) Right to respect for life and integrity of person.[130]

(3) Right to the respect of the dignity inherent in a human being and the recognition of his legal status.[131]

(4) Right to liberty and security of person.[132]

(5) Right to have his cause heard including (a) right to appeal to competent national organs against violations of fundamental rights; (b) right to presumption of innocence until proved guilty. (c) right to defence; and the right to fair trial within a reasonable time by an impartial court or tribunal. (Article 7)

(6) Freedom of conscience, the profession and free practice of religion. (Article 8)

(7) Right to inform. (Article 9)

(8) Right to free association. (Article 10)

(9) Right to assemble free by with others. (Article 11)

(10) Right to freedom of movement and residence. (Article 12)

(11) Right to participate freely in the government of the country. (Article 13)

(12) Right to property. (Article 14)

(13) Right to work under equitable and satisfactory conditions. (Article 15)

(14) Right to enjoy state of physical and mental health. (Article 16)

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129. Article 3.

130. Article 4.

131. Article 5.

132. Article 6.

(15) Right to education and take part freely in the cultural life of community. (Article 17)

(16) Family to be the natural unit and basis of society and shall be protected by the State. (Article 18)

(17) Article to equality and prohibition of domination of a people by another. (Article 19)

(18) Right to existence including the unquestionable and inalienable right to self determination. (Article 20)

(19) Right to freely dispose of wealth and natural resources. (Article 21)

(20) Right to economic, social and cultural development. (Article 22, para 1)

(21) Right to development. (Article 22, para 2)

(22) Right to national and international peace and security. (Article 23)

(23) Right to a general satisfactory environment favourable to their development. (Article 24)

The African Charter provides that the Member States of the OAU Parties to the present Charter shall recognize the rights, duties and freedoms enshrined in the Charter and shall undertake to adopt legislative or other measures to give effect to them. (Article 1). The Charter also contains guarantee of non-discrimination. It provides that every individual shall be entitled to the enjoyment of the rights and freedoms recognized and guaranteed in the present charter without distinction of any kind, such as, race, ethnic group, colour, sex, language, religion, political or any other opinion national and social origin, fortune, birth or other status (Article 2). Further, the State Parties to the present Charter shall have the duty to guarantee the Independence of the Courts and shall allow the establishment and improvement of appropriate national institutions entrusted with the promotion and protection of the rights and freedoms guaranteed by the present Charter (Article 26).

Duties.—Chapter II of Part I of the African Charter lays down following duties of each individual :

(1) Duties towards family and society, the State and other legally recognized communities and international community. (Article 27, para 1)

(2) Each individual to exercise the rights and freedoms with due regard to the rights of others, collective security, morality and common interest (Article 27, para 2).

(3) Duty to respect and consider his fellow beings without discrimination, and to maintain relations aimed at promoting, safeguarding and reinforcing mutual respect and tolerance. (Article 28)

(4) Duty to preserve the harmonious development of the family and to work for the cohesion and respect of the family; to respect his parents at all times, to maintain them in case of need. (Article 29, para 1)

(5) Duty to serve his national community by placing his physical and intellectual abilities at its service. (Article 29, para 2)

(6) Duty not to compromise the security of State whose national or resident he is. (Article 29, para 3)

(7) Duty to preserve and strengthen social and national solidarity particularly when the latter is threatened. (Article 29, para 4)

(8) Duty to preserve and strengthen the national independence and the territorial integrity of his country and to contribute to its defence in accordance with the law. (Article 29, para 5)

(9) Duty to work to the best of his abilities and competence, and to pay taxes imposed by law in the interest of the Society. (Article 29, para 6)

(10) Duty to preserve and strengthen positive African Cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and in general, to contribute to the promotion of the moral well being of society. (Article 29, para 7)

(11) Duty to contribute to the best of his abilities, at all times and at all levels, to the promotion and achievement of African Unity. (Article 29, para 8)

African Commission on Human and People's Rights.—Article 30 of the African Charter provides for the establishment within the OAU an African Commission on Human and People's Rights as the mechanism to promote human and people's rights and ensure their protection in Africa. The Commission consists of eleven members to be chosen from amongst African personalities of the highest reputation known for their high morality, integrity, impartiality and competence in matters concerning human and people's rights, preference being given to persons having legal experience. They serve in their personal capacity.[133]

(12) There is also provision for the appointment of a Secretary to the Commission to be appointed by the Secretary-General of the Organisation of African Unity.[134] His main function is to provide for the staff and services necessary for the effective discharge of the duties of the Commission.

The functions of the Commission are following :

(1) To promote human and people's rights and in particular : (a) to collect documents, undertake studies and researches, organize seminars, symposia and conferences disseminate information, encourage national and local institutions concerned with human and people's rights and also in case of need, give its views or make recommendation to governments of State Parties to the present convention; (b) to formulate and lay down, principles and rules aimed at solving legal problems concerning human and peoples rights and fundamental freedoms upon which African governments may base their legislations and (c) to cooperate with other African and international institutions concerned with the promotion, and protection of human and people's rights.

(2) To ensure the protection of human and people's rights.

(3) To interpret all the provisions of the Charter at the request of a State Party, institutions of the OAU or an African Organisation recognised by the OAU.

(4) To perform any other task which may be entrusted to it by the Assembly of Heads of States and Governments.[135]

Implementation of the African Charter.—The African Charter provides mainly three main procedures—(i) the Reporting procedure; (ii) inter-State communications and (iii) communications other than those of State Parties concluding individuals—for the implementation of the provisions, of the Convention and the main machinery for implementation is the Commission.

(*i*) *Reporting procedure.*—State Parties to the African Charter have undertaken to submit every two years, beginning from the date of the Charter enters into force, a report

133. Article 31.

134. Article 41.

135. Article 45.

on the legislative or other measures they have taken to give effect to the rights and freedoms recognized and guaranteed under the Charter.[136]

(*ii*) *Inter-State Communications.*—The African Charter provides that if a State Party has good reasons to believe that another State Party has violated the provision of the Charter, it may bring the same to the notice of the State in writing. A communication to the same effect shall also be sent to the Secretary-General of the OAV and to the Chairman of the Commission. The State Party concerned against whom the said communication is sent is required to send a written explanation.[137] If the matter is not settled to the satisfaction of the two State parties concerned bilaterally or through other peaceful procedure within three months from which the complaint was originally made, either State will be entitled to refer the matter to the Commission through the Chairman notifying the other State concerned.[138] Further in case the State Party considers that another State Party is guilty of the violation of the provisions of the African Charter, it need not follow the above procedure and may refer the matter directly to the Commission through the Chairman to the Secretary-General of the OAU and the States concerned.[139] The Commission may ask the States concerned to submit all relevant information relating to the matter. The States concerned are permitted representation when their matter is being considered and may make written or oral representation.[140] It may be noted here that before dealing with the matter the Commission satisfies itself that before the complaint has been made all local remedies have been exhausted. However, the Commission may exempt from this requirement if it finds that the procedure of exhausting the said remedies would be unduly prolonged.[141] After making all efforts to reach an amicable settlement based on respect of Human and People's rights, the Commission, within a reasonable period, is required to draw a report containing the facts and its findings and transmit the report to the States concerned and communicate the same to the Assembly of Heads and Governments[142] will such recommendation which it deems useful or fit.[143]

If one or more communications reveal the existence of a serious or massive violations of human and people's rights, the matter is taken seriously and it shall bring the same to the notice of the Assembly of Heads of States and Governments which may in its turn ask the Commission to make an in-depth study of the said cases and submit a factual report including its findings and recommendations.[144]

(*iii*) *Other Communications (including individuals).*—African Charter provides that the Secretary of the Commission shall make a list of communications other than those of State parties before each session and transmit the same to the members of the Commission who shall decide by a simple majority of members, as to which Communication ought to be considered by the Commission.[145] Though this provision does not expressly mention individuals, obviously individuals communications are included in the term 'communication other than those of the States Parties.' It is further provided that

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136. *See* Article 62.
137. *See* Article 67.
138. Article 48.
139. Article 49.
140. Article 51.
141. Article 50.
142. Article 52.
143. Article 53.
144. Article 58.
145. Article 55.

communications relating to human and people's rights referred to in Article 55 received by the Commission, shall be considered if they :

1. indicate their authors even if the latter request anonymity;
2. are compatible with the Organization of African Unity, or with the present Charter;
3. are not written in disparaging or insulting language directed against the State concerned and its institutions or to the OAU;
4. are not based exclusively on news disseminated through the mass media;
5. are sent after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged;
6. are submitted within a reasonable period from the time local remedies are exhausted or from the date the Commission is seized with the matter; and
7. lastly, they do not deal with cases which have been settled by these States involved in accordance with the principles of the Charter of the OAV or the provisions of the present Charter.[146]

The Commission submits report of all its activities to the Assembly, of the Heads of States and Governments. All measures taken by the Commission remain confidential until such a time as the Assembly of Heads of States and Government otherwise decide. After considering the report by the Assembly of Heads of States and Governments, the Chairman gets the report published.[147]

Appraisal.—A special feature of the African Charter which distinguishes this regional convention from other regional convention in the enumeration of duties in detail. Liberty is a social contract. If a person wants to enjoy his rights, he will have to respect the right of others. Every right has a corresponding duty : Enumeration of duties is therefore a welcome feature. Unfortuntely the African Charter does not take the matter to its logical conclusion. After enumeration of the duties it stops there and does not provide for the enforcement of duties in case of breach. While providing for the implementation of the provisions of the Convention no provision whatsoever is made for the enforcement of duties. Even the functions
of the Commission are conspicuous of any mention of the enforcement of duties. Thus the provisions relating to duties are simply figurative or decorative lacking any substance the only provision (Article 1) obligating State Parties to recognize duties is to adopt legislative or other measure to give effect to them. But this is far from being effective.

Yet another deficiency or the point which distinguishes it from the European and American Conventions is that the African Charter has not established any court for the enforcement of human and people's rights thereby relying heavily on mediation, conciliation and arbitration which are considered more in keeping with the traditional African dispute resolution system.

The Commission as the main mechanism for the implementation of the provisions of the African Charter only performs essentially on fact finding and information providing role. The Commission can simply investigate and submit to the Assembly of Heads and Governments report on human rights violations. It can neither take a binding decision nor

146. Article 56.
147. Article 59.

can it enforce it. It is only the OAU Assembly which can decide and take necessary action.

Both inter-State and individual's communications are accepted upon ratification of the African Charter. Last but not the least, African Charter on Human and People's Rights is the International or regional Convention on Human Rights which specifically enumerates and protects people's rights.

V. OTHER REGIONAL ARRANGEMENTS FOR THE PROTECTION OF HUMAN RIGHTS

Following are some of the other regional Arrangements for the protection of human rights:

(i) Helsinkie Final Act (Final) Act of the Conference on Security and Cooperation in Europe, 1975.

(ii) The Arab Commission on Human Rights.

CHAPTER 66

NATIONAL PROTECTION OF HUMAN RIGHTS I.E., PROTECTION OF HUMAN RIGHTS UNDER INDIAN LAW

I. Human Rights and Indian Constitution

The Indian Constitution bears the impact of the Universal Declaration of Human Rights and this has been recognized by the Supreme Court of India. While referring to the Fundamental Rights contained in Part III of the Constitution, Sikri, C.J. of the Supreme Court, in *Kesavanand Bharti* v. *State of Kerala,*[1] observed : "I am unable to hold these provisions how 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."

Earlier, in *Golak Nath* v. *State of Punjab,*[2] the Supreme Court observed :

"Fundamental rights are the modern name for what have been traditionally known as 'natural rights."

The Supreme Court has also recognized the interpretative value of the Universal Declaration of Human Rights.[3] The Universal Declaration of Human Rights does not define the term 'human rights'. It refers them as "the equal and inalienable rights of all members of the human family". The framers of the Indian Constitution were influenced by the concept of human rights and guaranteed most of human rights contained in the Universal Declaration. The Universal Declaration of Human Rights contained civil and political as well as economic social and cultural rights. While Civil and Political rights have been incorporated in Part III of Indian Constitution, economic, social and cultural rights have been incorporated in Part IV of the Constitution. The following chart is being given below to indicate the human rights which have been incorporated in Indian Constitution.

SPECIFICALLY ENUMERATED RIGHTS

(I) Civil and Political Rights

	Universal Declaration of Human Rights	*Indian Constitution*
1.	Right to life, liberty and security of person (Art. 3)	...Article 21
2.	Prohibition of slavery, slavery trade etc. (Art. 4)	...Article 23
3.	Equality before law and non-discrimination (Art. 7)	...Articles 14 and 15 (1)
4.	Right to effective remedy (Art. 8)	...Article 32
5.	Right against arbitrary arrest, detention etc. (Art. 9)	...Article 22
6.	Right against *ex-post facto* laws [Art. 11 (2)]	...Article 20 (1)
7.	Right to freedom of movement [Art. 13 (1)]	...Article 10 (1) (d)
8.	Right to own property and not to be deprived of property (Art. 17)	...Article 19 (1) (f) (But it was omitted by the Constitution (42nd Amendment) Act. 1978)[4]

1. AIR 1973 SC 1461, 1536.
2. AIR 1967 SC 1643, 1656.
3. *Kishore Chand* v. *State of H.P.,* 1991 (1) SCJ 68, 76.
4. The Constitution (42nd Amendment) Act, 1978 which omitted Article 19 (1) (f) also inserted a new article *i.e.,* Article 300-A with a new Chapter *i.e.,* Chapter IV in Part XII of the Constitution after Article 300 with heading "persons not to be deprived of property save by authority of law". Thus 'right to property' is now contained in Article 300-A but it is not a fundamental right.

9.	Right to freedom of thought, conscience and religion (Art. 18)	...Article 25 (1)
10.	Right to freedom of opinion and expression (Art. 19)	...Article 19 (1) (a)
11.	Right to freedom of peaceful assembly and association [Art. 20 (1)]	...Article 19 (1) (b)
12.	Right to equal access to public service [Art. 21 (1)]	...Article 16 (1)
13.	Right to social security (Art. 22)	...Article 29 (1)
14.	Right to form and to join trade unions [Art. 23 (4)]	...Article 19 (1) (c)

The above chart shows that many of the civil and political rights enshrined in the Universal Declaration of Human Rights also find mention in Part III of the Constitution as fundamental rights. However, there are certain rights which are contained in the universal Declaration but have not been expressly mentioned in the Constitution. These rights are : (i) Right to be not subjected to torture, or to cruel, inhuman treatment or punishment (Article 5); (ii) Right to recognition everywhere as a person before the law (Article 6); (iii) Right to full equality to a fair and public hearing by an independent and impartial tribunal (Article 10); (iv) Right to be presumed innocent until found guilty according to law in a public trial [Article 11 (i)]; (v) Right to privacy (Article 12); (vi) Right to leave any country, including his own, and to return to his country [Article 13 (2)]; (vii) Right to nationality [Article 15 (1)]; (viii) Right to marry and found a family [Article 16 (1)]; (ix) Right to take part in the government of his country [Article 21 (1)].

Rights not specifically Enumerated or other Rights.—It would not be correct to contend that the above rights have not been incorporated in Indian Constitution, though they do not find express mention in the Constitution These are either subsumed under the existing fundamental rights or have been held to emanate from the existing rights under the theory of emanation. For example, it has been held that right to life and personal liberty enshrined in Article 21 of Constitution is of widest amplitude and several unenumerated rights fall within Article 21. These rights are :

(i) Right to go abroad;[5]

(ii) Right to Privacy;[6]

(iii) Right Against Solitary Confinement;[7]

(iv) Right Against Bar Fetters,[8]

(v) Right to Legal Aid.;[9]

(vi) Right to Speedy Trial;[10]

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5. *See Satwant Singh Sawheny* v. *D. Ramarathnam, A.P.U. Govt. of India, New Delhi,* (1967) 3 SCR 525, 540, 542 (FB) : AIR 1967 SC 1836; *Maneka Gandhi* v. *Union of India,* (1978) 1 SCC 248, 280-81, (S.B.) : AIR 1978 SC 597.

6. *See Kharak Singh* v. *State of U.P.,* (1964) 1 SCR 333, 349, 351 (SB) : AIR 1963 SC 1295 ; *Govind* v. *State of M.P.,* (1975) 2 SCC 148, 156-157 : AIR 1975 SC 1378; and *R. Rajagopal* v. *State of Tamil Nadu,* AIR 1995 SC 264, 276-277; *Khatri (II)* v. *State of Bihar,* (1981) 1 SCC 627, 632; *Sukh Das* v. *Union of India,* AIR 1986 SC 991, 993-994 : (1986) 2 SCC 401.

7. *See Sunil Batra* v. *Delhi Administration,* (1978) 4 SCC 494, 569 (FB).

8. *See Charles Gurumukh Sobhraj* v. *Delhi Administration,* (1978) 4 SCC 494, 577, 579 (FB).

9. *M. H. Hoskot* v. *State of Maharashtra,* (1978) 3 SCC 554, 556-557; *Hussainara Khatoon (iv)* v. *Home Secretary, State of Bihar, Patna,* (1980) 1 SCC 98, 105 : AIR 1979 SC 1369.

10. *Hussainara Khatoon (v)* v. *Home Secretary, State of Bihar, Patna,* (1980) SCC 81, 84 : AIR 1979 SC 1360; *Maneka Gandhi* v. *Union of India,* (1978) 1 SCC 248, 280-281 (S.B.) : AIR 1978 SC 597 : *A. R. Antulay* v. *R. S. Nayak,* AIR 1992 SC 1701 (SB).

(vii) Right against Handcuffing;[11]
(viii) Right Against delayed execution;[12]
(ix) Right Against custodial violence;[13]
(x) Right Against Public Hanging;[14]
(xi) Right to Health care or Doctor's assistance;[15]
(xii) Right to shelter;[16]

Other Rights which have been held to emanate from Article 21 are following :

(i) Right to know;[17]
(ii) Right to compensation;[18]
(iii) Right to Release and Rehabilitation of Bonded Labour;[19]
(iv) Right Against Cruel and Unusual Punishment;[20]
(v) Rights of Inmates of Protective Homes.[21]

Besides the declaration of above rights within the expanding ambit of Article 21, Article 21 has been recognized as of widest amplitude and has been applied in various fields such as Drugs[22]; Environment : Hazardous Chemicals[23]; Insane Persons[24]; Passports[25]; Atomic Energy Radiation[26]; Forests.[27]

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11. *See Prem Shankar Shukla* v. *Delhi Administration,* (1980) 3 SCC 526 : AIR 1980 SC 1535 ; *State of Maharashtra* v. *Ravikant S. Patil,* (1991) 2 SCC 373; *Sunil Gupta* v. *State of M. P.,* (1990) 3 SCC 119; *Aeltemesh Rein* v. Union of India, AIR 1988 SC 1768, 1769; *Khedat Mazdoor Chetna Sangathan* v. *State of .M. P.,* AIR 1985 SC 31.
12. *T. V. Vatheeswaran* v. *State of Tamil Nadu,* AIR 1983 SC 361 (2) : (1983) 2 SCC 68; *Sher Singh* v. *State of Punjab,* (1983) 2 SCC 344, 354-56; *Bachan Singh* v. *State of Punjab*; AIR 1982 SC 1325; *Trivenbeen* v. *State of Gujarat,* (1988) 4 SCC 574, 576; *Daya Singh* v. *Union of India,* AIR 1991 SC 1548 : (1991) 3 SCC 61.
13. *Sheela Barse* v. *State of Maharashtra,* (1983) 2 SCC 96, 99-100 : AIR 1983 SC 378; *Munna* v. *State of U.P.,* AIR 1981 SC 625; *Kishore Singh* v. *State of Rajasthan,* AIR 1981 SC 760; *Sheella Barse* v. *State of Maharashtra,* (1987) 4 SCC 373.
14. *Attorney General of India* v. *Lachma Devi,* AIR 1986 SC 467.
15. *Pt. Parmanand Katara* v. *Union of India,* AIR 1989 SC 2039; *Bandhua Mukti Morcha* v. *Union of India,* AIR 1984 SC 802 : (1984) 3 SCC 161.
16. *M/s. Shantistar Builders* v. *Narayan Khimalal Totame,* AIR 1990 SC 630 : (1990) 1 SCC 520; *U. P. Avas Vikash Parishad* v. *Friends, Co-op. Housing Society Ltd,* AIR 1996 SC 114; *Tekraj* v. *Union of India,* AIR 1988 SC 469.
17. *Reliance Petro-Chemicals Ltd.* v. *Proprietors of Indian Express Newspapers, Bombay, Pvt. Ltd.,* AIR 1989 SC 190, 202-203 : (1988) 4 SCC 592.
18. *Rudul Sahu* v. *State of Bihar,* AIR 1983 SC 1107 : (1983) 4 SCC 141; *Bhim Singh* v. *State of J. & K.,* (1985) 4 SCC 677; *M. Jhunjhunwala* v. *State of Bihar,* (1987) 1 SCC 395.
19. *Neerja Chaudhary* v. *State of M.P.,* (1984) 3 SCC 243, 255 : AIR 1954 SC 1099.
20. *See* the cases referred above under the heading "Right to Speedy Trial" and "Right Against delayed Execution".
21. *Upendra Baxi* (I) v. *State of U.P.,* (1983) 2 SCC 308 ; *Sheela Barse* v. *The Secretary, Children Aid Society,* AIR 1987 SC 656, 660; *Upendra Baxi* v. *State of U.P.,* AIR 1987 SC 191; *Vikram Deo Singh Tomar* v. *State of Bihar,* AIR 1988 SC 1782.
22. *See Vincent Parikuralangara* v. *Union of India,* AIR 1987 SC 990.
23. *See M. C. Mehta* v. *Union of India,* AIR 1987 SC 1086, 1089 (FB); *See also M.C. Mehta* v. *Union of India,* AIR 1987 SC 965.
24. *Miss Veena Sethi* v. *State of Bihar,* (1982) SCC 583.
25. *See Maneka Gandhi* v. *Union of India,* AIR 1978 SC 597.
26. *M. K. Sharma* v. *Bharat Electricals Ltd.,* AIR 1987 SC 1792.
27. *See Banwari Seva Ashram* v. *State of U.P.,* AIR 1987 SC 374 : (1986) 4 SCC 75.

Freedom of Information.—With reference to 'Right to know' referred above, it may be noted that the Parliament has enacted the Freedom of Information Act, 2002 (Act No. 5 of 2003). It received the assent of the President of India on 6.1.2003 and was published in Gazette of India on 7.1.2003.

The preamble of the Act runs as follows :

> "Act to provide for freedom to every citizen to secure access to information under the control of public authorities, consistent with public interest, in order to promote openness, transparency and accountability in administration and in relation to matters connected therewith."

Article 3 of the Act provides that subject to the provisions of this Act, all citizens shall have freedom of information. Article 6 of the Act provides that a person desirous of obtaining information shall make a request in writing or through electronic means, to the concerned Public Information Officer specifying the particulars of the information sought by him.

Article 7 lays down that on the receipt of a request under Section 6 the Public Information Officer shall, as expeditiously as possible, and in any case within thirty days of the receipt of the request either provid that information requested on payment of such fee as may be prescribed or refuse for any reasons specified in Section 8 (exemption from disclosure of information) and (Grounds of refusal to access to information in certain cases).

It is clear from the above discussion that the scope of human rights in the form of fundamental rights is far greater than that of Universal Declaration of Human Rights while doubts are expressed about the binding nature of rights proclaimed in the Universal Declaration, fundamental rights enshrined in Part III of the Constitution are not only binding, they are also enforceable through the Courts of law. They serve as limitations on the legislative and executive powers of the State. Article 13 (1) of the Constitution provides that all laws in force in the territory of India immediately before the commencement of this Constititution, in so far, as they are inconsistent with Part III, shall, to the extent of such inconsistency, be void. Further Article 13 (2) provides that the State shall not make any law which takes away or abridges the rights conferred by Part III and any law made in contravention of this clause shall to the extent of the contravention, be void.

(ii) Economic, Social and Cultural Rights

	Universal Declaration of Human Rights	*Indian Constitution*
1.	Right to work, to free choice of an employment, to just and favourable conditions of work etc. [Art. 23 (1)]	...Article 41
2.	Right to equal pay for equal work [Art. 23 (2)]	...Article 39 (d)
3.	Right to just and favourable remuneration [Art. 23 (3)]	...Article 43
4.	Right to rest to leisure (Art. 24)	...Article 43
5.	Right of everyone and a standard of living adequate for his and his family [Art. 25 (1)]	...Article 39 (a) & Article 47
6.	Right to education and free education in the elementary and fundamental stages [Art. 26 (1)]	...Article 41 & Article 45
7.	Right to a proper social order (Art. 28)	...Article 38

The above charter 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. However, the Constitution of India is conspicuous by

absence of express mention of certain rights proclaimed in the Universal Declaration such as right to special care and assistance to mothers and children and some social protection for all children, whether born in or out of wedlock [Article 25 (2)]; Parents' right to choose the kind of education for their children [Article 26 (3)]; Right of everyone to freely participate in the cultural life of the community to enjoy arts and to share in scientific advancement and its benefits [Article 27 (1)]; and right of everyone to the protection of the morale and material interests resulting from any scientific, literary or artistic production of which he is the author [Article 27 (2)].

As we have seen earlier in the case of fundamental rights, so also in respect of the above rights absence of express mention does not mean that these rights have not been incorporated in Indian Constitution. As a matter of fact, the above rights are either subsumed in the existing rights or are part thereof or have been expressed in a little different wording and having a little different scope. For example, Article 39 (f) charges the State to direct its policy towards securing "that children are given opportunities and facility to develop in a healthy manner and in conditions of freedom and dignities and that childhood and youth are protected against exploitation and against moral and material abandonment. Similarly, Article 42 makes "provision for just and humane conditions of work and maternity relief". Article 47 provides for the "Duty of the State to raise the level of nutrition and standard of living and to improve public health".

So far as human rights concerning economic, social and cultural aspects are concerned, the fact remains that Directive Principle of State Policy contained in Part IV of the Constitution are definitely much more exhaustive than the Universal Declaration. There are a number of principles and rights contained in Part IV of the Constitution which do not find mention in the Universal Declaration. Such rights and principles are : The ownership and control of the material resources of the community to be so distributed as best to subserve the common good [Article 39 (b)]; Operation of economic system not to result in the concentration of wealth and means of production to the common detriment [Article 39 (c)]; Equal Justice and free legal aid [Article 39-A]; Organisation of village panchayats (Article 40); Participation of workers in management industries (Article 43-A); Uniform Civil Code (Article 44); Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections (Article 46). Protection and improvement and safeguarding of forests (Article 48-A) etc. As the human rights provisions of the U.N. Charter and the Universal Declaration were influenced by the historical background especially the large scale violations of human rights and atrocities perpetrated during the Second World War, so also the concept of human rights in the form of Fundamental Rights and Directive Principles were influenced by the historical background and the conditions that prevailed in the sub-continent of India before the adoption of the Constitution.

Yet another feature of the Universal Declaration which deserves mention here is the emphasis on everyone's duties to the community in which alone the free and full development is possible. This provision is contained in Article 29 (1) of the Universal Declaration and is a welcome feature because liberty is a social contract. If a person wants to enjoy his rights in the community he will have to respect the rights of others. Indian Constitution when adopted in 1949, and came into force in 1950 was conspicuous by absence of any mention of duties. This was a great lacuna which was sought to be rectified later on. The Constitution (Forty-second Amendment) Act, 1976 which came into effect on 3-1-1977 inserted a new Part *viz.* Part IV-A entitled "Fundamental Duties" comprising of only one Article *viz.* Article 51-A. Because of the belated insertion and the position given to it under the Constitution, so far it has failed to make the desired effect. Nevertheless, the Fundamental Duties mentioned in clauses (a) to (j) of Article 51-A are more varied and exhaustive than the one mentioned in the Universal Declaration of Human Rights.

5. Enumerated and Unenumerated Human Rights.—Human rights in Indian Constitution can be classified into Enumerated and Unenumerated Human Rights. The

general practice is that in written Constitution Fundamental Rights are clearly enumerated. Indian Constitution has also followed this practice. But a pertinent question arises whether such enumeration is exhaustive or can other rights be evolved out of the existing fundamental rights.

In *Satwant Singh Sawhney* v. *D. Ramarathan,*[28] it was held by the Supreme Court by majority that the expression "personal liberty" in Article 21 of the Constitution includes the right to travel abroad and no person can be deprived of that right except according to procedure established by law. In *Maneka Gandhi* v. *Union of India,*[29] the special Bench of the Supreme Court affirmed the above decision. Delivering the judgment for himself and for Untwalia and Fazal Ali, JJ. (and Chandrachud, J. concurring), Bhagwati, J. 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. Now, it has been held, by this Court in *Satwant Singh's* case that 'personal liberty' within the meaning of Article 21 includes within its ambit the right to go abroad and consequently no person can be deprived of this right except according to procedure established by law. Further, thus, 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.[30]

Krishna Iyer, J., who also concurred with the views of Bhagwati, J. also agreed that 'personal liberty' includes within it the right to travel abroad. After quoting similar view from American judgments[31] which reached the same conclusion under the theory of *emanation,* Krishna Iyer, J. observed :

"To sum, personal liberty makes for worth of the human person. Travel makes liberty worthwile. Life is a terrestrial opportunity for unfolding personality, rising to higher states, moving to fresh woods and reaching out reality which makes our earthly journey a true fulfilment not a tale told by an idiot to full of sound and fury signifying nothing, but a fine frenzy rolling between heaven and earth. The spirit of Man is at the root of Article 21. Absent liberty other freedoms are frozen.[32]

Thus travelling abroad is a facet of personal liberty. It can be fettered or forbidden only by procedure established by law.[33]

Thus being influenced by the Ninth Amendment of the American Constitution, the Supreme Court of India has also applied the theory of emanation and has availed distinct and independent rights out of the existing fundamental rights. Following are some of the rights which have been evolved by being parts of or having emanated from one or more of fundamental rights :

(i) Right to travel abroad;[34] (Article 21)

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28. (1967) 3 SCR 525.

29. (1978) 1 SCC 248, 280 (SB) : AIR 1978 SC 597.

30. (1978) 1 SCC 248 at p. 281 : AIR 1978 SC 597.

31. *See Kent* v. *Dulles*, 357 US 116 : LED 1204 (1958); *Aptheker* v. *Secretary of State,* 372 US 500 : 12 LED 992, (1964) etc.

32. (1978) 1 SCC 248, 336 (SB).

33. *Ibid.* at p. 337.

34. *Satwant Singh Sawhney* v. *D. Ramarathnam, A.P.O. Govt. of India, New Delhi,* (1967) 3 SCR 525, 540, 540 (FB) : AIR 1967 SC 1836; *Maneka Gandhi* v. *Union of India,* (1978) 1 SCC 248, 280-281 (SB) : AIR 1978 SC 597.

(ii) Right to privacy;[35] [Articles. 21 and 19 (i) (d)]
(iii) Right against solitary confinement;[36] (Article. 21)
(iv) Right against bar fetters (Right to Human dignity);[37] [Articles 21, 14 and 19]
(v) Right to free legal aid in a criminal trial;[38] [Article 21, Article. 39-A]
(vi) Right to Speedy Trial;[39] [Article 21]
(vii) Right to against Handcuffing;[40] [Article 21]
(viii) Right against Delayed execution;[41] [Article 21]
(ix) Right against Custodial violence;[42] [Article 21]
(x) Right against Public Hanging;[43] [Article 21]
(xi) Right to Health care or Doctor's Assistance;[44] [Article 21]
(xii) Right to Shelter;[45] [Article 21]
(xiii) Right to pollution free environment;[46] [Article 21]
(xiv) Right to education of a child till he attains the age of 14;[47] [Arts. 21, 45 and 41]

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35. *Kharak Singh* v. *State of U.P.*, (1964) 1 SCR 333, 349, 351 (SB) : AIR 1963 SC 1295; *Govind* v. *State of M.P.*, (1975) 2 SCC 148, 156-157 : AIR 1975 SC 1378; *R. Rajagopal* v. *State of Tamil Nadu*, AIR 1995 SC 264, 276-277.
36. *Sunil Batra* v. *Delhi Administration, (I)*, (1978) 4 SCC 494, 569 (FB) : AIR 1978 SC 1675; *Deena* v. *Union of India*, AIR 1983 SC 1155; *Sher Singh* v. *State of Punjab*, AIR 1983 SC 465.
37. *Chries Gurumuk Sobhraj* v. *Delhi Administration*, (1978) 4 SCC 494, 577, 579 (FB) : AIR 1978 SC 1514; *Sunil Batra* v. *Delhi Administration II*, AIR 1980 SC 1579; *Kishore* v. *State of Rajasthan*, AIR 1981 SC 625.
38. *M. H. Hoskot* v. *State of Maharashtra*, (1978) 3 SCC 554, 556-557; *Hussainara Khatoon (IV)* v. *Home Secretary, State of Bihar, Patna*, (1980) 1 SCC 98, 105 : AIR 1979 SC 1369; *Sukh Das* v. *State of A.P.*, AIR 1986 SC 991.
39. *Hussainara Khatoon (v)* v. *Home Secretary, State of Bihar*, (1980) 1 SCC 81, 84 : AIR 1979 SC 1360; *Maneka Gandhi* v. *Union of India*, 78 SC 597 : (1978) 1 SC 248 (SB) ; *A. R. Antulay* v. *R. S. Nayak*, AIR 1992 SC 1701 (SB) ; *Raghubir* v. *State of Bihar*, (1986) 4 SCC 481.
40. *Prem Shankar Shukla* v. *Delhi Administration*, (1980) 3 SCC 526 : AIR 1980 SC 1535; *State of Maharashtra* v. *Ravikant S. Patil*, (1991) 2 SCC 373; *Sunil Gupta* v. *State of M.P.*, (1990) 3 SCC 119; *Allemesh Rein* v. *Union of India*, AIR 1988 SC 1768, 1769; *Khedat Mazdoor Chetna Sangathan* v. *State of M.P.*, AIR 1995 SC 31.
41. *T. V. Vatheeswaran* v. *State of Tamil Nadu*, AIR 1983 SC 361 (2_ : (1983) 2 SCC 68; *Sher Singh* v. *State of Punjab*, (1983) 2 SCC 344, 354-356; *Bachan Singh* v. *State of Punjab*, AIR 1982 SC 1325; *Triveniben* v. *State of Gujarat*, (1988) 4 SCC 574, 576; *Daya Singh* v. *Union of India*, AIR 1991 SC 1548 : (1991) 3 SCC 61.
42. *Sheela Barse* v. *State of Maharashtra*, (1983) 2 SCC 96, 99-100 : AIR 1983 SC 378; *Munna* v. *State of U.P.*, AIR 1981 SC 625; *Kishore Singh* v. *State of Rajasthan*, AIR 1981 SC 760; *Sheela Barse* v. *State of Maharashtra*, (1987) 4 SCC 373.
43. *Attorney General of India* v. *Lachma Devi*, AIR 1986 SC 467.
44. *Pt. Parmanand Katara* v. *Union of India*, AIR 1989 SC 2039; *Bandhua Mukti Morcha* v. *Union of India*, AIR 1984 SC 802 : (1984) 3 SCC 161 ; *Vincent* v. *Union of India*, (1987) 2 SCC 165.
45. *M/s. Shantistar Builders* v. *Narayan Khiamlal Totame*, AIR 1980 SC 630 : (1990) 1 SCC 520; *U. P. Avas Vikas Parishad* v. *Freinds' Co-op. Housing Society Ltd.*, AIr 1996 SC 114; *Tekraj* v. *Union of India*, AIR 1988 SC 469.
46. *M. C. Mehta* v. *Union of India*, (1987) 4 SCC 463.
47. *Unni Krishnan J.P.* v. *State of Andhra Pradesh*, AIR 1993 SC 2178 (FB), 2231-2232; *Miss Mohini Jain* v. *State of Karnakata*, AIR 1972 SC 1858 was partly overruled.

(xv) The Freedom of Press;[48] [Article 19 (a)]

(xvi) Right to know;[49] [Article 21]

(xvii) Right to compensation;[50] [Article 21]

(xviii) Right to Release and Rehabilitation of Bonded Labour;[51] [Articles 21, 23]

(xix) Right of Inmates of Protection Homes.[52] [Article 21]

The above list is simply illustrative and by no means exhaustive. However, it is clear from the above discussion that under Indian Constitution, besides the Fundamental Rights which have been enumerated under Part III of the Constitution some other fundamental rights have been evolved by being connected with or having emanated from one or more of fundamental rights.

• **India and International Conventions on Human Rights other than the International Covenants on Human Rights.**—Besides the International Covenants on Human Rights India has become party to other International Conventions on Human Rights. A brief mention of such conventions will be desirable here. India has become party to the following International Conventions :

1. International Convention on the Elimination of All Forms of Racial Discrimination.[53]
2. International Covention on the Suppression and Punishment of the Crime of Apartheid.[54]
3. Convention on the Political Rights of Women.[55]
4. Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices similar to Slavery.[56]
5. Convention on the Elimination of All Forms of Discrimination Against Women.[57]
6. Convention on the Prevention and Punishment of the Crime of Genocide.[58]
7. 1953 protocol amending the 1926 Slave Convention.[59]
8. International Convention against Apartheid in Sports.[60]
9. Convention on the Right of the Child.[61]

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48. *Express Newspapers* v. *Union of India*, AIR 1958 SC 578.
49. *Reliance Petrochemicals Ltd.* v. *Proprietors of Indian Express Newspapers, Bombay, Pvt. Ltd.*, AIR 1989 SC 190, 202-203 : (1988) 4 SCC 592.
50. *Rudul Shaha* v. *State of Bihar*, AIR 1983 SC 1107 : (1983) 4 SCC 141; *Bhim Singh* v. *State of J. & K.*, (1985) 4 SCC 677; *M. Jhunjhunwala* v. *State of Bihar*, (1987) 1 SCC 395.
51. *Neerja Chaudhry* v. *State of M.P.*, (1984) 3 SCC 243, 255 : AIR 1984 SC 1099.
52. *Upendra Baxi (I)* v. *State of U.P.*, (1983) 2 SCC 308; *Sheela Barse* v. *The Secretary, Children Aid Society*, AIR 1987 SC 656, 660; *Upendra Baxi* v. *State of U.P.*, AIR 1987 SC 191; *Vikram Deo Singh Tomar* v. *State of Bihar*, AIR 1988 SC 1782.
53. On December 3, 1968.
54. September 22, 1977.
55. November 2, 1961.
56. June 23, 1960.
57. July 9, 1993.
58. August 27, 1959.
59. June 23, 1954.
60. September 12, 1990.
61. December 11, 1992.

10. Convention for the Suppression of the Traffic in Person and of the Exploitation of the Prostitution of others.[62]
11. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment.[63]
12. International Convention Against Apartheid in Sports.
13. Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity.
14. Convention on the Nationality of Married Women.
15. Slavery Convention of 1926.
16. Slavery Convention of 1926 (as amended)

These conventions obligate the State Parties to submit periodic reports stating the measures they have taken to give effect to the provisions of the Convention. Like other States Parties India has also not submitted the requisite reports in time. Instead of emulating the examples of other State Parties, India should promptly submit the required reports so as to demonstrate to the whole world, that India is in forefront of the countries who have become not merely parties to the International Conventions on Human Rights but also faithfully perform their International obligations.

It is heartening to note that the National Human Rights Commission reviews these international conventions every year and reminds and impresses upon the Government the desirability to fulfil its obligations under these conventions.

II. International Covenants on Human Rights and the Indian Constitution

Relationship Between International Covenants on Human Rights and the Indian Law.—Before the adoption of the Indian Constitution the Indian fraction in respect of relation of International Law to Internal Law or Municipal Law was similar to the British practice. After the adoption and coming into force of Indian Constitution everything depended upon the provisions of the Constitution. Therefore, in order to know the position or relationship between International Law and Internal Law in India, it is necessary to see the relevant provisions of the Constitution. This is necessary because India ratified the two covenants on Human Rights—(i) International Covenant on Civil and Political Rights (1966); and (ii) International Covenant on Economic, Social and Cultural Rights (1966); on March 27, 1979. Thus internationally India has given its consent to be bound by the provisions of the said two International Treaties. But India has yet not incorporated them into its international law. A pertinent question therefore arises if at all or how far the provisions of the two Covenants are applicable in India. The answer to this question depends on the relevant provisions of the Indian Constitution and the interpretation of the Supreme Court thereof.

One of the relevant provisions of the Constitution in this connection is Article 51. It provides the following :

"The State shall endeavour to :

(a) promote international peace and security;
(b) maintain just and honourable relations between nations.
(c) *Foster respect for International Law and treaty obligations in the dealings of organized peoples with one another; and*
(d) encourage settlement of international disputes by arbitration."

For the purposes of the present discussion, the most important provision is contained in Article 51 (c). It is, however, significant to note that this Article specifically

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62. January 9, 1953.
63. October 14, 1997.

mentions separately, 'International Law' and 'treaty obligations'. It seems somewhat paradoxical that separate mention should have been made of 'treaty obligations' as they undoubtedly constitute integral part of International law. No explanation is found in the Constituent Assembly debates either as to intent of Article 51 or the meaning and scope of the words 'International Law' and 'treaty obligations'. According to Prof. C.H. Alexandrowicz the expression 'International Law', in the said paragraph connotes customary International and "treaty obligations" stand for obligations arising out of international treaties. This interpretation seems to be the most logical in the content of the article as well as the attitudes of the Indian Courts to questions of International Law.[64]

But Article 51 does not give any clear guidance regarding the position of International Law in India as well as the relationship of municipal law and International Law. Moreover, Article 51 is contained in Part IV of the Constitution which contains Directive Principles of State Policy. Article 37 of this Part clearly provides that the provisions contained in this part shall not be enforceable by any court. It has been aptly pointed out "This Article (Article 51) falls in the chapter on "Directive Principles of State Policy" which are non-justiciable secondly, it is doubtful if the expression 'State' includes the courts also within its ambit and the Directive Principles have been addressed to them too." However, it would be wrong to contend that Article 51 is of no relevance and provides no guidance at all. Article 37 which in its first part provides that the provisions contained in Part IV of the Constitution are non-justiciable adds in its latter part in unmistakable terms that the principles therein laid down are *"nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws."* The majority of constitutional experts in the country now subscribe to the view that simply because the principles contained in Part IV are non-justiciable, it cannot be successfully contended that they are of no significance or even of less significance than the fundamental rights contained in Part III of the Constitution which are justiciable. Amendments of the Constitution particularly XXIV and XXV amendments confirm this view. As noted above, the term "International Law" in Article 51 refers to international customary law. It is thus significant to note that both international customary law and treaty law have been treated on the same footing in Article 51. An analysis of judicial decisions shows that in India dualism is followed. Nevertheless a pertinent question arises as to whether the Constitution of India has altered this position which prevailed in pre-constitution period.[65] In this connection Article 372 (1) of the Constitution clearly provides, "Notwithstanding the repeal by this Constitution of the enactments referred in Article 395 but subject to other provisions of this Constitution, *all the laws in force* in the territory of India immediately before the commencement of this Constitution shall continue to be in force thereinbefore until altered or repealed or amended by a competent Legislature or other competent authority."

Before the adoption of the Constitution of India the British practice that customary rules of International Law are part of the law of the land, of course subject to certain conditions and exceptions, applied in India also. This practice continued even after the adoption and coming into force of the Constitution by virtue of the provisions of Article 372 until it was altered or repealed or amended by a competent Legislature or competent authority.[66] It has been aptly remarked : "it does not mean that the doors of Indian courts are entirely closed to the wide absorption of international customary law into municipal

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64. M. K. Nawaz, "International Law on the Contemporary Practice of India Some Perspectives", Proc. ASIL, April, 25-27, (1963), 275 at p. 278; *see* also C.H. Alexandrowicz, International Law in India," ICLO (1952), p. 292.

65. S. K. Agarwala, "India's Contribution to the Development of International Law—Role of Indian Court" in *Asian States and Development of Universal International Law*, Edited by R.P. Anand (1972), p. 73.

66. *See T. K. Varied* v. *State of Travancore Cochin*, AIR 1956 SC 142, 145.

law. Under the British rule in India, the English common law doctrines were widely applicable in many fields. The Constitution of India did not alter that position as it provided for the continued operation of the 'law in force' immediately preceding the commencement of the Constitution. Therefore, on the analogy of the English common law, the municipal courts of India have applied the provisions of the treaties entered into by India if they have been incorporated into municipal law through legislation and the well recognised principles of international customary law have been applied because they are supposed to form part of the law of the land. It is thus the *dualist* view of International law which has been commenced by the British and Indian courts' view *viz.*, that International Law can become a part of municipal law only by specific incorporation.[67] Thus, Article 51, of the Constitution of India, in so far as it requires the various organs of State to foster respect for international law and treaty obligations would seem to strengthen rather weaken the legacy of the common law principle that International law is a part of the law of the land. This is so, notwithstanding, the imprecise formulation of Article 51. And Constitutional declarations in India are not mere embellishments on paper. They reflect, "law in action."[68]

Thus so far as customary rules of International law are concerned the position prevailing immediately preceding the commencement of the Constitution continues even after coming into force of the Constitution of India. In India also customary rules of International are part of the municipal law provided that they are not inconsistent with any legislative enactment or the provisions of the Constitution of India. For example, some of the rights proclaimed by the Universal Declaration of Human Rights (1948) which have already become part of International customary International law such as, Right to Equality (Articles 1, 2 and 7), Prohibition Against Slavery or Servitude and Slave Trade (Article 4), Prohibition Against Torture or the Cruel, Inhuman or Degrading Treatment or Punishment (Article 5) and Prohibition Against Arbitrary Arrest, Detention or Exile (Article 9), may be treated or rather have already been treated and part of the land.

As regards the treaty obligations arising out of International treaties also India follows more or less the British dualist view and specific adoption theory. That is say, generally, international law can become part of municipal law only if it has been specifically adopted or incorporated.[69] Indian Parliament has already specifically adopted a number of international treaties and contentions such as Diplomatic Relations (Vienna Convention) Act, 1972, the Anti-Apartheid (United Nations Convention) Act, 1981, the Anti-Hijacking Act, 1982, *i.e.,* the Suppression of Unlawful act against the Safety of Civil Aviation Act, 1982 and the International Monetary Fund and Bank (Amendment) Act, 1982 under Article 253 of the Constitution of India.

As regards International treaties, the most relevant provision for the purpose of our present discussion is Article 253 of the Constitution. Article 253 entitled 'Legislation for giving effect to international agreements', provides the following :

> "Notwithstanding anything in the foregoing provisions of this chapter (*i.e.*, Chapter I of Part XI), Parliament has power to make any law for the whole or any part of the territory of India for implementing any treaty, agreement or convention with any other country or countries or any decision made at any international conference, association or other body."

In *Re Berubari Union and Exchange of Enclaves,*[70] the Supreme Court had to decide whether any legislation was necessary for the agreement relating to Berubari Union whereby Berubari Union and certain other Enclaves were to be given to Pakistan. Since it

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67. S. K. Agarwala, Note 2, at p. 73.
68. M. K. Nawaz, Note 1, at p. 275.
69. *See State of Madras* v. *C.G. Menon,* AIR 1954 SC 517, 519-520.
70. AIR 1960 SC 845.

involved the cession of Indian territory, the Supreme Court answered the question in affirmative. The Supreme Court observed : "...the question as how treaties can be made by a Sovereign State in regard to cession of a national territory and how treaties when made can be implemented would be governed by the provisions in the Constitution of the Country. Stated broadly, the treaty-making power would have to be exercised in the manner contemplated by the Constitution and subject to the limitations imposed by it. Whether the treaty made can be implemented by ordinary legislation or by the constitutional amendments will naturally depend on the provisions of the Constitution itself.[71]

But it would be wrong to contend that the implementation of every treaty would require legislative aid. For example, the implementation of an agreement or treaty for settlement of boundary which is in dispute or an agreement to implement an Award such as the Kutch Award based on an agreement between the two countries to settle disputed boundary would not require any legislative aid. "A treaty really concerns the political rather than the judicial wing of the State. When a treaty or award after arbitration comes into existence it has to be implemented and this can only be of all the branches of government to wit the Legislature; the Executive and the Judiciary, or any of them, possesses the power to implement it, if there is any deficiency in the constitutional system it has to be removed and the State must equip itself with the necessary power. In some jurisdictions the compromise read with the award acquires full effect automatically in the municipal law, the other body of municipal law notwithstanding. Such treaties and awards are *self-executing.* Legislature may nevertheless be passed in aid of implementation but is usually not necessary. "This was held by the Supreme Court in *Maghanbhai Iswarbhai Patel* v. *Union of India.*[72]

In *A. D. M., Jabalpur* v. *Shukla,*[73] one of the questions, *inter alia,* for consideration of the Supreme Court was whether Universal Declaration of Human Rights and the two International Covenants on Human Rights, 1966 were part of Indian Municipal Law. By majority the Supreme Court held that they were not part of Indian Municipal Law. In his dissenting opinion, however, H.R. Khanna, J., held that if there was a conflict between the provisions of an International treaty and the municipal law, it is the latter that will prevail. But if two constructions of the municipal law were possible the court should give that construction as might bring about harmony between Municipal law and International Law or treaty. In his view, the constitutional provision should be construed in such a way as to avoid conflict. The view expressed by H.R. Khanna, J., seems to be rational and better and accords with the current view. It may be noted here that by the time of this case India had not ratified the two Covenants on Human Rights. India ratified the two Covenants on March 27, 1979.

In *Jolly George Varghese* v. *Bank of Cochin,*[74] the Supreme Court held that in case of conflict between a provision of an International treaty such as Article 11 of the International Covenant on Civil and Political Rights to which India is a party and a provision of a State statute such as Section 51 (Proviso) and Order XXI, Rule 37, Civil Procedure Code, it is the latter which shall prevail, if the International Treaty in question has neither been specifically adopted in the municipal law nor has undergone transformation. Krishna Iyer, J., who delivered the judgment further observed :

> "The remedy for breaches of International Law in general is not to be found in the law courts of the State because International law *per se or proprio vigore* has not the

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71. Re *Berubari Union and Exchange of Enclaves,* AIR 1960 SC 845 at p. 857.

72. AIR 1969 SC 7893 : See also *Union of India* v. *Sukumar Sen Gupta,* AIR 1990 SC 1692.

73. AIR 1976 SC 1207.

74. AIR 1980 SC 470 : (1980) 2 SCC 360 : *See also* A. H. Robertson, *Human Rights In National and International Law,* p. 13.

force of law or authority of civil law till under its inspirational act actual legislation is undertaken. I agree that the Declaration of Human Rights merely sets a common standard of achievement for all people and all nations but cannot create a binding set of rules. Member States may seek through appropriate agencies to initiate action when these basic rights are violated but individual citizens cannot complain about their breach in municipal courts even if the country concerned has adopted the covenants and ratified the Operational Protocol. The individual cannot come to the court but may complain to the Human Rights Committee which in turn will set in motion other procedures. In short the basic rights enshrined in the International Covenants...may at best inform judicial institutions and inspire legislative action with member States, but apart from such deep reverence, remedial action at the instance of an aggrieved individual is beyond the area of judicial authority."[75]

Further, "The positive commitment of State Parties ignites legislative action at home but does not automatically make the Covenant an enforceable part of the *corpus juris* of India."[76]

It is, however, significant to note that Krishna Iyer, J., construed the said Section 51 of the Civil Procedure Code in such a way as to avoid conflict with Article 11 of the International Covenant on Civil and Political Rights, 1966. He observed :

"Article 11 of the International Covenant on Civil and Political Rights only interdicts imprisonment if that is sought solely on the ground of inability to fulfil the obligation. Section 51 of the Civil Procedure Code also declares that if the debtor has no means to pay he cannot be arrested and detained. If he has and still refuses or neglects to honour his obligation or if he commits acts of bad faith, he incurs the liability to imprisonment under Section 51 of the Code, but this does not violate the mandate of Article 11 of the Covenant on Civil and Political Rights. However, if he once had the means but now has not or if he has the money now on which there are other pressing claims, it is violative of the spirit of Article 11 of the Covenant to arrest and confine him to jail so as to coerce him into payment."

Thus Krishna Iyer, J., seems to be reaffirming the abovementioned view of H.R. Khanna, J., in *A.D.M., Jabalpur* v. *Shukla.* Thus if there is no conflict between municipal law and a provisions of an International treaty or where two constructions of municipal law are possible, Indian Courts can give effect to the provision of International treaty by giving harmonious construction.

In *Civil Rights Vigilance Committee, S.L.S.R.C. College of Law, Bangalore* v. *Union of India,*[77] the Karnataka High Court followed and quoted the above observations of the Supreme Court in *Jolly George's case.* In this case Geoff Boycott and Geoff Cook, the Cricket players of England were included in the M.C.C. team scheduled to visit India between November, 1981 and February, 1982 to play six matches at different places in India. These two players had links with South Africa which practised policy of *apartheid* The Government of India was a party to the Gleneagles Accord of June 2, 1977, entered into by the number of countries of the Commonwealth wherein they affirmed their full support for the International campaign against apartheid. Boycott and Cook, as seen from the booklet issued in May, 1981, by the United Nations under the title "centre against apartheid" were among the sportsmen blacklisted by the U.N. for having participated in sports events in South Africa. However, the Government of India allowed the English Cricket Team's the said two players to come to the country and to play matches as scheduled.

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75. *Jolly George Varghese* v. *Bank of Chochin,* AIR 1980 SC 470 at p. 474.
76. *Ibid.*
77. AIR 1983 Kant. 85.

The Civil Rights Committee presented a writ petition impugning the said action of the Government of India but the learned Single Judge dismissed holding, *inter alia,* that such impugned action being an act of State the Court had no jurisdiction to examine its validity and to grant the relief sought in the writ petition. Hence, the present appeal was made before the Division Bench. The Division Bench of the Karnataka High Court dismissed the appeal. Venkatchalaiah, J., who delivered the judgment for himself and D.M. Chandrasekhara, C.J., observed :

> "...that the provision in Article 51 is not enforceable by any court and if the Parliament does not enact any law for implementing the obligations under a treaty entered into by the Government of India with foreign countries courts cannot compel Parliament to make such law. In the absence of such law, Court cannot also, in our view, enforce obedience of the Government of India to its treaty obligations with foreign countries...the Government of India's obligations under the Gleneagles Accord and obligations attached to its membership of the United Nations, cannot be enforced, at the instance of citizens of this country or associations of such citizens, by courts in India, unless such obligations are made part of the law of this country by means of appropriate legislation."

The same view was affirmed by Chinnappa Reddy, J. of the Supreme Court in *Gramophone Company of India Ltd.* v. *Birendra Bahadur Pandey.*[78] Chinnappa Reddy, J. observed that in respect of any principle of International law the Parliament says 'no', the national Court cannot say 'yes'. National Court shall approve International Law only when it does not conflict with national law. In case, however, the conflict is inevitable, the National law shall prevail.

But the position will be different when there is no conflict between the International Convention and the domestic law. As pointed out by the Supreme Court in *Vishaka* v. *State of Rajasthan*[79] "In the absence of domestic law occupying the field to formulate effective measures to check the evil of sexual harassment of working women at all places of work the contents of International conventions and norms are significant for the purpose of interpretation of the guarantee of gender equality of right to work with human dignity in Articles 14, 15, 19 (1) (g) and 21 of the Constitution and the safeguards against sexual harassment implicit therein. *Any international convention not consistent with the fundamental rights and in harmony with its spirit must be read into these provisions to enlarge the meaning and content thereof, to promote the object of constitutional guarantee. This is implicit from Article 51 (c) and the enabling power of Parliament laws for implementing the International conventions, and norms by virtue of Article 253 read with Entry* 14 of the *Union List in Seventh Schedule of the Constitution.* Article 73 also is relevant. It provides that executive power of the Union shall extend to the matters with respect to which Parliament has power to make laws. The executive power of the Union is, therefore, available till the Parliament enacts legislation to expressly provide measures needed to curb the evil."[80]

In this case, the Supreme Court was dealing with the problem of sexual harassment of working women. Delivering the judgment of the three-Judges Bench of the Supreme Court, J.S. Verma, C.J.I., observed :

> "The meaning and content of the fundamental rights guaranteed in the Constitution of India are of sufficient amplitude to encompass all the facets of gender equality including prevention of sexual harassment or abuse. Independence of judiciary forms a part of our constitutional scheme. *The International conventions and*

78. AIR 1984 SC 667, 671.

79. AIR 1997 SC 3011.

80. *Ibid.* at pp. 3013-3014.

norms are to be read into them in the absence of enacted domestic law occupying the field when there is no inconsistency between them. It is now an accepted rule of judicial construction that regard must be had to international conventions and norms for construing domestic law when there is no inconsistency between them and there is a void in the domestic law."[81]

J. S. Verma, C. J. I., made the above observations in the context of International conventions on Human Rights in general and Article 11 of the Convention on the Elimination of All Forms of Discrimination Against Women in particular. What is true of this International Convention is also true of the International Covenants on Human Rights.

J. S. Verma, C.J.I., also referred to an earlier case, namely, *Nilabati Behera* v. *State of Orissa*,[82] and observed that in the case a provision in the International Covenant on Civil and Political Rights (ICCPR) was referred to support the view taken that 'an enforceable right to compensation is not alien to the enforcement of a guaranteed right', as a public law remedy under Article 32, distinct from the private law remedy in torts. *There is no reason why these international conventions and norms cannot, therefore, be used for construing the fundamental rights expressly Guaranteed in the Constitution of India which embody the basic concept of gender equality in all spheres of human activity.*

It may be noted that in *Nilabati Behera's case* the judgment was delivered by J. S. Verma, J. (as he then was) and Anand, J. had given a concurring opinion. In that case J. S. Verma, J. had referred to Article 9 (5) of the International Covenant on Civil and Political Rights (1966) which provides the following :

"any one who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation."

Reference may also be made here to a more recent case, namely, *Apparel Export Promotion Council* v. *A. K. Chopra*,[83] wherein Dr. A.S. Anand, C.J.I., referred with approval to the above case *viz., Vishaka* v. *State of Rajasthan,* for its *"Innovative judicial law making process."* In the present case, namely, *Appeal Export Promotion Council's case,* a superior officer was found by Departmental Authorities to be guilty of molesting and of having tried to physically assault a subordinate female employee. As a punishment he was dismissed from service. But the High Court held that the occurrence as alleged had not taken place. Though the High Court did not find any fault with finding as to unbecoming act of delinquent or with conduct of enquiry yet the High Court interfered with punishment of dismissal on the ground that since the delinquent had not "actually molested" and had "not managed" to make physical contact with her, the punishment of removal from service was not justified. The Supreme Court held that what punishment was required to be imposed in the facts and circumstances of the case, was a matter which fell exclusively within the jurisdiction of the competent authority and did not want any interference by the High Court. The entire approach of the High Court has been faulty. The impugned order cannot be sustained on this ground alone. Reversing the order of the High Court, the Supreme Court further observed that there is another aspect of the case which is fundamental and goes to the root of the case and concerns the approach of the High Court while dealing with cases of sexual harassment at the place of work of female employees.[84]

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81. *Vishka* v. *State of Rajasthan,* AIR 1997 SC 3011 at p 3015.
82. (1993) 2 SCC 746 : 1993 AIR SCW 2366 : AIR 1993 SC 1960.
83. AIR 1999 SC 625, 633.
84. *Ibid,* at p. 632.

Dr. Anand, C.J.I., further observed :

"In cases involving violation of the human right the Courts must for ever remain alive to the international instruments and conventions and apply the same to a given case when there is no inconsistency between international norms and the domestic law occupying the field. In the instant case, the High Court appears to have totally ignored the intent and content of the International conventions and norms while dealing with the case."[85]

Earlier Dr. Anand, C. J. I., observed :

"There is no gainsaying that each incident of sexual harassment, at the place of work, results in violation of the Fundamental Right to Gender Equality and the Right to Life and Liberty—The two most precious Fundamental Rights guaranteed by the Constitution of India. As early as in 1993 at the ILO Seminar held at Manila, it was recognized that sexual harassment of woman at work place was a form of gender discrimination against woman.' The contents of the fundamental rights guaranteed in our Constitution are of sufficient amplitude to encompass all facts 'of gender equality, including prevention of sexual harassment and abuse and courts are under a constitutional obligation to protect and preserve those fundamental rights. The sexual harassment of a female at the place of work is incompatible with the dignity and honour of a female and needs to be eliminated and that there can be no compromise with such violations, admits of no debate. The message of the International instruments such as the Convention on the Elimination of All Forms of Discrimination Against Women, 1979 (CEDAW) and the Beijing Declaration which directs all State Parties to take appropriate measures to prevent discrimination of all forms against women besides taking steps to protect the honour and dignity of women is loud and clear. The International Covenant on Economic, Social and Cultural Rights contains several provisions particularly important for women. Article 7 recognises her right to fair conditions of work and reflects that women shall not be subjected to sexual harassment at place of work which may vitiate working environment. These international instruments cast an obligation on the Indian State to gender sensitise its laws and the Courts are under an obligation to see the message of the International instruments is not allowed to be drowned. The Supreme Court has in numerous cases emphasized that while discussing constitutional requirements, Court and counsel must never forget the core principle embodied in the International Conventions and Instruments and as far as possible give effect to the principles in those international instruments. The Courts are under an obligation to give due regard to International Conventions and Norms for construing domestic laws more so when there is no inconsistency between them and there is a void in domestic law.[86] In a recent case namely, *Chairman Railway Board* v. *Mrs. Chandrima Das*,[87] the Supreme Court aptly observed, "The International Covenants and Declarations as adopted by the United Nations have to be respected by all signatory States and the meaning given to the words in those Declarations and Covenants have to be such as would help in effective implementation of those rights. The applicability of the Universal Declaration of Human Rights and principles thereof may have to be read, of need be, into the domestic jurisdiction," on the basis of the above discussion the legal position may be summarised as follows :

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85. *Apparel Export Promotion Council* v. *A. K. Chopra*, AIR 1999 SC at p. 634.

86. AIR 1999 SC 625, 633. *See* also with advantage—*Prem Shankar* v. *Delhi Administration*, AIR 1980 SC 1535; *Mackninnon Mackenzie & Co.* v. *Andrey. D. Costa*, (1987) 2 SCC 469 : (1987) 2 JT (SC) 34 : AIR 1987 SC 1281; *Sheela Barse* v. *Secretary, Children's Aid Society*, (1987) 3 SCC 50, 54 : AIR 1987 SC 656, 658-659; *Vishaka* v. *State of Rajasthan*, (1997) 7 JT (SC 384 : 1997) AIR SCW 3043 : AIR 1997 SC 3011; *People's Union for Civil Liberties* v. *Union of India*, (1997) 2 JT (SC) 311 : 1997 AIR SCW 1234 and *D. K. Basu* v. *State of West Bengal*, (1997) 1 SCC 416, 438 : 1997 AIR SCW 233, 248-249.

87. AIR 2000 SC 986, 997.

It is the constitutional obligation of the Courts not to ignore and to apply the provisions of International Conventions and Instruments on Human Rights in general, and International Covenants on Human Rights in particular to interpret the constitutional provision relating to human rights. If there is a conflict between a provision of an international treaty and a provisions of domestic law, the provisions of the domestic law shall prevail. But if two constructions of the provision of domestic law are possible, the Court should give harmonious construction so as to be in accord with International treaty. If no domestic law is occupying the field or there is void in domestic law, and the constitutional provisions (fundamental rights) are of sufficient or wide amplitude to encompass the provisions of international treaty the provisions of International treaty can be read into the constitutional provisions. It is on the basis of this legal position that the relationship between the International Covenants on Human Rights and Indian law including the Constitution of India which is the Supreme Law of the land, has to be appreciated and understood.

International Covenant on Civil and Political Rights (1966) and the Indian Constitution.—Part III of the Constitution of India confers upon individuals a number of basic human rights called the Fundamental Rights. The rights conferred upon individual under Part III, of the Constitution are called 'Fundamental Right' because they are not being secured by the ordinary law but by the Constitution which is supreme law of the land. Since they are secured by the Constitution they cannot be changed or modified by ordinary process of legislation. They can be changed or modified by constitutional amendments. *Secondly,* they serve as limitation or restriction upon the executive and legislative power of the State. This is made clear by Article 13 (2) which provides that the State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause, shall, to the extent of such inconsistency be void. Moreover, as provided by Article 13 (1), all laws in force in the territory of India immediately, before the commencement of this Constitution, in so far as they are inconsistent with the provisions of Part III, shall, to the extent of such inconsistency, be void. *Thirdly,* while an ordinary legal right belongs to the category of private law and deals with the relationship of two or more private citizens, a fundamental right belongs to the category of public law and it is the right which the individual possesses against the State. Only the courts which possess the power of judicial review can enforce the fundamental right. *Fourthly,* while an ordinary legal right is defined as an interest protected by law and is enforceable in the courts of law, a fundamental right is a right which is guaranteed by the Constitution itself. It cannot be changed by an ordinary process of legislation and can be altered or modified only by the amendments of the Constitution. Last but not the least, ordinary legal rights can be enforced against private citizens whereas a fundamental right is available and generally enforceable only against the State. In our Constitution, Article 32 of Part III of the Constitution guarantees the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III. Article 32 also provides that this right shall not be suspended except otherewise provided for by this Constitution. High Courts also have the power of judicial review. Article 226 (1) of the Constitution, therefore, provides that notwithstanding anything contained in Article 32, every High Court shall have the power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any Government, within those territories directions, orders or writs including in the nature of *habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III* and for any other purpose.

Many of the Civil and Political Rights contained in the International Covenant on Civil and Political Rights, 1966 are also enumerated in Part III of our Constitution as Fundamental Rights. These may be called Enumerated or Specified Fundamental Rights. Then there are a number of rights mentioned in the International Covenant on Civil and Political Rights (ICCPR) but are not enumerated in the Constitution. These may be called

Unenumerated Fundamental Rights for the purpose of our present discussion. These Unenumerated Rights, may be classified into two categories :

(1) The first category belongs to those rights which though not enumerated have been recognized as Fundamental Rights under the theory of Emanation or have been held to be part of existing or enumerated Fundamental Rights; such rights may be called as "Other Fundamental Rights and (2) The Second category comprises of such rights which have neither been enumerated in Part III of the Constitution nor have yet been recognized as Fundamental Rights by Courts. These may be called Unenumerated and Unrecognized Rights. We will now discuss each of these categories in a little greater detail.

(1) Enumerated Fundamental Rights.—By the term 'Enumerated Fundamental Rights', we mean the Civil and Political Rights which find mention in the International Covenant on Civil and Political Rights (ICCPR) and are also enumerated in Part III of the Constitution as Fundamental Rights. Such rights are following :

International Covenant on Civil and Political Rights, 1966 (ICCPR)	*Fundamental Rights in Part III of the Constitution*
Articles 6 (1) & 9(1)—Right to life and security of person	.....Article 21
Article 8 (3)—Freedom from forced labour	.....Article 23
Articles 9(2) and (3) and (4)—Freedom from unlawful arrest or detention	.....Article 22
Article 12 (1)—Liberty of movement and choice of residence	.....Article 19 (1) (d)
Article 14 (1)—Equality before Courts	.....Article 14
Article 14 (3) (g)—Not to be compelled to testify against himself or to confess guilt	.....Article 20 (3)
Article 14 (7)—Double jeopardy	.....Article 20 (2)
Article 15 (1)—Freedom from post facts	.....Article 20 (1)
Article 18 (1)—Right to freedom of thought, conscience and religion	.....Article 25
Articles 19 (1) and (2)—Right to freedom of Expression	.....Article 19 (1) (a)
Article 21—Right to peacable assembly	.....Article 19 (1) (b)
Article 22 (1)—Freedom of association	.....Article 19 (1) (c)
Article 25 (c)—Right to access to public services on general terms of equality	.....Article 16 (1)
Article 26—Equality before law	.....Articles 14 and 15 (1)
Article 27—Right of minorities to practice and profess their own culture, language and religion	.....Articles 29 and 30

The above table shows the Civil and Political Rights of the International Covenant on Civil and Political Rights which have also been enumerated as Fundamental Rights in Part III of the Constitution. Thus even before ICCPR was adopted in 1966, these human rights, were available to individuals in India as fundamental rights enshrined in Part III of the Constitution.

(2) Other Fundamental Rights.—By the term 'other Fundamental Rights' in the context of our present discussion means those Fundamental Rights though not

enumerated in Part III of the Constitution are yet Fundamental Rights because they have been recognised as such by the Courts, especially the Supreme Court of India. They have been recognized as Fundamental Rights either as part of the existing or enumerated Fundamental Rights as or by enalarging the meaning and scope of the enumerated Fundamental Rights. These are the rights which are enumerated in ICCPR (1966) and are also recognized as Fundamental Rights though not enumerated in the Constitution. For example the Fundamental Rights guaranteed...Article 21 containing the Right to life and liberty of person has attracted the greatest attention of the Supreme Court and a number of Fundamental Rights though unenumerated in Part III, have been recognized by enlarging the meaning and, scope of the Fundamental Rights of life and personal liberty. As aptly remarked by Bhagwati, J. in *Maneka Gandhi* v. *Union of India*,[88] the expression 'personal liberty' in Article 21 is of the widest amplitude and covers a variety of rights which 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.

In *Kharak Singh* v. *State of U.P.*,[89] it was held that 'Personal liberty, in Article 21 takes in all the right of man. In *Pathumma's case*,[90] the Apex Court observed that the court should endeavour to expand the reach and ambit of the fundamental rights rather than accentuate their meaning and content by process of judicial construction. Personal liberty in Article 21 is of widest amplitude.

Reference may also be made to another famous case, namely, *Unni Krishnan, J.P.* v. *State of Andhra Pradesh*,[91] wherein Sharma, C.J.I., aptly remarked that if endeavour has not been made till now to make Article 45 (containing to Directive Principle for free education of children upto the age of 14) reverberate with life and articulate with meaning the court should take the initiative and step in and to make the State obligated to ensure a right to free education of every child upto the age of 14 years. Therefore, by holding education as a fundamental right upto the age of 14 years the Supreme Court is simply reminding the State of its solemn endeavour, it has to take, under Article 45, within a prescribed time which time limit has expired long ago. The horizons of Article 21 are ever-widening and the final word on its conspectus shall never have been said.[92]

What is true of Article 21 is also true, though a lesser extent, of the Fundamental Rights contained in Article 14.

The other Fundamental Rights which though unenumerated in Part III of the Constitution and recognized by Court as distinct fundamental rights and enumerated in the International Covenant on Civil and Political Rights are following :

(1) *Right to travel abroad.*—Article 12 (2) of the International Covenant on Civil and Political Rights (ICCPR) provides that "everyone shall be free to leave and country including his own." Article 12 (3) further provides that this right shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order, public health or morals or the rights and freedoms of others, and are consistent with the other rights recognised in the present Covenant.

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88. (1978) 1 SCC 248, 290 (SB) : AIR 1978 SC 597 : *See also Sambhu Nath Sarkar* v. *State of West Bengal*, (1975) 1 SCR 778; *Haradhan Saha* v. *State of West Bengal*, AIR 1967 SC 1836; *Satwant Singh Sawhney* v. *D. Ramarathnam, APO, Govt. of India, New Delhi*, AIR 1967 SC 1836.

89. AIR 1963 SC 1295, 1301-02 : (1964) 1 SCR 332; *See also Munn* v. *Illinois*, (1877) 94 US 113.

90. AIR 1978 SC 771.

91. AIR 1993 SC 2178, 2196 to 2198 (FB).

92. *Ibid.* at pp. 2190-2191 ; *See also Vidyaranya Education Society Koppolu Prakasam Distt.* v. *Director of School Education*, AIR 1995 AP 295.

Right to travel has been held to be included in Article 21. This right has been recognized by the Supreme Court in *Satvant Singh* v. *D. Ramarathnam, APO, Govt. of India, New Delhi,*[93] and *Maneka Gandhi* v. *Union of India.*[94]

(2) *Right to Privacy.*—Right to privacy is contained in Article 17 (1) of the ICCPR. According to it, "No one shall be subjected to arbitrary, unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation." Article 17 (2) further provides that every one has the right to protection of the law against such interference of attacks.

Though not enumerated as fundamental right in part III of the Constitution, the Supreme Court has held it to be included in Article 21.[95]

In *Mr. 'X'* v. *Hospital 'Z'*[96] while dealing with doctor-patient relationship observed that the right to privacy may, apart from a contract also arise out of a particular specific relationship which may be commercial, matrimonial or even political relationship. Doctor-patient relationship though basically commercial is professionally, a matter of confidence, and, therefore, doctors are morally and ethically bound to maintain confidentiality. In such a situation, public disclosure of even private facts may amount to an invasion of the right of privacy, which may sometimes lead to the clash of one person's "right to be let alone" with another's right to be informed of disclosure of even true facts has tendency, to disturb a person's tranquillity. The right is not absolute and may be lawfully restricted for prevention of crime, disorder or protection of health or morals or protection of rights and freedom of others.

Thus when there is clash of two fundamental rights, as in the instant case (where a person was found to be HIV +), the appellant's right to privacy as part of right to life and Ms "Y's right to lead a healthy life which is her fundamental right under Article 21, the right which would advance the public morality or public interest, would alone be enforced through the process of Court for the reason that moral considerations cannot be kept at bay and the judges are not expected to sit as mute structures of clay, in the Hall, known as the Court Room, but have to be sensitive" in the sense that they must keep their fingers firmly upon the pulse of the accepted morality of the day.[97]

(3) *Right to Speedy Trial.*—Article 9 (3) of the ICCPR promptly that any one arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorised by law to exercise judicial powers and shall be entitled to trial within a reasonable time or to release. It shall not be the general rule that persons awaiting trial must be detained in custody; but released may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise for execution and judgment.

The Supreme Court has held that right to speedy trial is implicit in Article 21. This has been recognised and emphasized by the Supreme Court in a number of cases the more important of them are : *Hussainara Khatoon* v. *Home Secretary, State of Bihar,*[98] *Maneka Gandhi* v. *Union of India,*[99] *Hussainara Khatoon (iv)* v. *Home Secretary, State of*

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93. (1967) 3 SCR 525, 540, 542 (F.B.) : AIR 1967 SC 1836.

94. (1978) 1 SCC 248, 280, 281 : AIR 1978 SC 597, per Bhagwati, J.

95. *See Kharak Singh* v. *State of U.P.,* (1964) 1 SCR 333, 349, 351 (SB) : AIR 1963 SC 1295; *See also State of Maharashtra,* AIR 1991 SC 207, 211; *Govind* v. *State of M.P.,* (1975) 2 SCC 148, 156, 57 : AIR 1975 SC 1378; *R. Rajagopal* v. *State of Tamil Nadu,* AIR 1995 SC 264, 276-277.

96. AIR 1999 SC 495.

97. Ibid. at pp. 501-503.

98. (1980) 1 SCC 84 : AIR 1979 SC 1360.

99. AIR 1978 SC 597 (SB) : (1978) 1 SCC 248.

Bihar,[100] *Sher Singh* v. *State of Punjab*,[101] *A. R. Antulay* v. *R. S. Nayak*.[102]

(4) *Right to provide Legal Assistance.*—Right to provide legal assistance or legal aid has also been recognised as implicit in Articles 14, 21 and 39-A. This right has been recognized by the Supreme Court in a number of cases such as *M. H. Hoskot* v. *State of Maharashtra*,[103] *Hussainara Khatoon (iv)* v. *Home Secretary, State of Bihar*,[104] *Sukh Das* v. *Union of India*,[105] and *State of Maharashtra* v. *Manubhai Pragji Vashi*.[106]

(5) *Right not to be subjected to torture or to cruel inhuman or degrading treatment or punishment.*—This right finds mention in Article 7 of the ICCPR but has not been expressly enumerated in Part III of Indian Constitution. This right encompasses certain rights which have separately been recognized by the Supreme Court.

These separate rights are :

(i) Right Against solitary confinement.[107]

(ii) Right Against Bar Fetters.[108]

(iii) Right Against Handcuffing.[109]

(iv) Right Against Delayed Executions.[110]

(v) Right Against Custodial Violence.[111]

(vi) Right Against Public Hanging.[112]

(6) *Right not to be imprisoned for inability to fulfil a contractual obligation.*—According to Article 11 of the International Covenant on Civil and Political Rights (ICCPR) no one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation. Though the Constitution does not expressly enumerate this right in Part III, the Supreme Court has recognized this right in *Jolly George Varghese* v. *Bank of Cochin*.[113]

(7) *Right to Compensation for Unlawful Arrest and Detention.*—According to Article 9 (5) of ICCPR, "Any one who has been the victim of unlawful arrest or detention shall have

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100. (1980) 1 SCC 98, 107-108.
101. (1993) 1 SCC 344, 354, 355-356, 357.
102. AIR 1992 SC 170 (FB) : (1992) 1 SCC 225.
103. (1978) 3 SCC 544, 556-557.
104. (1980) 1 SCC 98, 105 : AIR 1979 SC 1369.
105. AIR 1986 SC 991 : (1986) 2 SCC 401.
106. AIR 1996 SC 1, 10.
107. *See Sunil Batra* v. *Delhi* Administration, (1978) 4 SCC 494, 569 (FB).
108. *See Ibid* and *Charles Gurumukh Sobharaj* v. *Delhi Administration*, (1975) 4 SCC 494, 577, 579 (FB).
109. *See Prem Shankar Shukla* v. *Delhi Administration*, (1980) 3 SCC 526; *Aeltemesh Rein* v. *Union of India*, AIR 1980 SC 1535 : 1980 3 SCR 855; *Khedat Mazdoor Chetna Sangh* v. *State of M.P.*, AIR 1995 SC 1.
110. *T. V. Vatheeswaran* v. *State of Tamil Nadu*, AIR 1983 SC 381 (2) : (1983) 2 SCC 68; *Sher Singh* v. *State of Punjab*, (1988) 4 SCC 574, 575 ; *Madhu Mehta* v. *Union of India*, AIR 1989 SC 2299 : (1989) 4 SCC 62.
111. *See Sheela Barse* v. *State of Maharashtra*, (1983) 2 SCC 96, 99-100; *Sheela Barsee* v. *Union of India*, AIR 1986 SC 1773; *Munna* v. *State of U.P.*, AIR 1982 SC 806; *Kishore Singh* v. *State of Rajasthan*, AIR 1981 SC 625.
112. *See Attorney General of India* v. *Lachma Devi*, AIR 1986 SC 467, 468.
113. AIR 1980 SC 470; *See also Xarier* v. *Canara Bank Ltd.*, 1969 KLT 927, 931, 933.

an enforceable right to Compensation. This right has not been expressly enumerated in Part III of Indian Constitution. In the course of time the Supreme Court has recognized this right in a number of cases; the cases which deserve special mention in this connection are :

Rudul Shah v. *State of Bihar,*[114] *Sebestion M. Hongray* v. *Union of India,*[115] *Bhim Singh M.L.A.* v. *State of J. & K.,*[116] *Smt. Nilabati Behera alias Lalita Behera* v. *State of Orissa,*[117] *Saheli, A Women's Resources Centre* v. *Commr, Police, Delhi Police Headquarter,*[118] and *State of Maharashtra* v. *Ravi Kant S. Patil.*[119]

(8) *The Right to Human Dignity.*—This Right finds mention in Article 10 (1) of the ICCPR. This right has also not been enumerated in Part III of Indian Constitution but the Supreme Court has recognized this right as emanating from Articles 14, 19 and 21. The Supreme Court has recognised and applied this right in a number of cases such as *Jolly George Varghese* v. *The Bank of Cochin,*[120] and *Sobhraj* v. *Supdt. of Jail, New Delhi.*[121]

(3) Unenumerated (but not yet recognized) Human Rights.—This category consists of those of human rights which are enumerated in the International Convention on Civil and Political Rights but are neither enumerated in Indian Constitution as Fundamental Rights nor have yet been recognized as Fundamental Rights emanating from existing Fundamental Rights by the Supreme Court. These human rights are those relating to the rights not to be subjected to medical and scientific experimentation (Article 7); Prohibition of death sentence for crimes committed by person below eighteen years of age and its execution on pregnant women [Article 6 (5)], Special protection treatment of juvenile persons [Article 10 (2) (b) and Article 14 (4)]; Right to marry and to found a family [Article 23 (2)]; Right of self-determination [Article 1 (1)]. (India has made reservation about this right). Prohibition of slavery and slave trade [Article 8 (1)] and prohibition of propaganda of war [Article 20 (1)] which are enumerated in the International Covenant on Civil and Political Rights.

It has consistently been recognized by the Supreme Court that the help of International Covenants on Human Rights, and for that matter all other International Conventions on Human Rights which have been signed and ratified by India, can be taken in interpreting constitutional provisions relating to human rights. If there is a conflict between the provision of an International Convention and provision of Indian Constitution or Indian law obviously the provision of Indian Constitution or Indian Law shall prevail. But if there is no conflict between the two and the relevant provision of provisions (relating to Fundamental Rights) are of wide amplitude to encompass the provisions of the International Convention relating to Human Rights, the provisions or International Convention can be read into the fundamental rights. This has been held by the Supreme Court in several cases such as *Jolly George Verghese* v. *Bank of Cochin,*[122] *Vishaka* v.

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114. (1983) 4 SCC 141 : AIR 1983 SC 1086.
115. (1984) 1 SCC 339.
116. (1985) 4 SCC 677 : AIR 1986 SC 494.
117. AIR 1993 SC 1960.
118. (1990) 1 SCC 422.
119. (1991) 2 SCC 373 : (1991) AIR SCW 871.
120. (1980) 2 SCC 360 , 367-368 : AIR 1980 SC 470.
121. (1978) 4 SCC 494; *Sunil Batra* v. *Delhi Administration,* AIR 1978 SC 1675; *Maneka Gandhi* v. *Union of India* , (1978) 1 SCC 248 : AIR 1978 SC 597; *Sunil Batra* v. *Delhi Administration II,* AIR 1980 SC 1579; *Kishore* v. *State of Rajasthan,* AIR 1981 SC 625.
122. AIR 1980 SC 470 : (1980) 2 SCC 360.

State of Rajasthan,[123] and *Appeal Export Promotion Council* v. *A. K. Chopra,*[124] which have been discussed in detail earlier.

RESTRICTIONS OF HUMAN RIGHTS AND FUNDAMENTAL RIGHTS

No human right is or can be absolute. Human rights like other rights, are subject to reasonable restriction. Liberty is a social contract. If I want to exercise my rights in the society, I will have to respect similar rights of others. This obviously implies restriction upon one's rights. This is also clear from the perusal of human rights recognized in the International Covenant on Civil and Political Rights. For example, Article 12 (1) of the Covenant recognizes everyone's right to liberty of movement and freedom to choose his residence and Article 12 (2) incorporates the freedom of everyone to leave any country, including his own. But Article 12 (3) makes it clear that the above-mentioned shall not be subject to any restrictions except *those which are provided by law are necessary to protect national interests, security, Public Order (ordre public) public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present covenant.* Though this provision begins negatively the purpose in fact is to emphasise the restrictions which can be imposed on the exercise of the freedom. Similarly, Article 19(2) recognizes the right to freedom of expression. But Article 19 (3) provides that the exercise of the rights provided for in Paragraph (2) of this Article carries with it special duties and responsibilities. It may therefore be subject to *certain restriction but these shall only be such as are provided and are neessary*:

(*a*) *For respect of the rights or reputation of others.*

(*b*) *for the protection of national security or of public order (ordre public), or of public health or morals.*

What is true of the human rights recognized in the International Covenant on Civil and Political Rights is also true of the Fundamental Rights guaranteed in Part III of Indian Constitution. For example Article 19(1) guarantees to all citizens right (a) freedom of speech and expression; (b) to assembly peaceably and without arms; (c) to form associations or unions; (d) to move freely thoughout the territory of India; (e) to reside and settle in any part of the territory of India; and (g)[125] to practise any profession or to carry on any occupation, trade or business. But clauses (2) to (6) of Article 19 provide for restrictions which can be imposed or which can be invoked to protect a law violating any of the several freedoms guaranteed in Article 19, clause (1).

But the restrictions thus imposed cannot be arbitrary and must be reasonable and the grounds of restrictions specified in the relevant clause must be satisfied. What is true of Article 19 is true also of other Articles incorporating fundamental rights. But no fundamental right is absolute. Reasonable restriction can be validly imposed. The restrictions imposed cannot be arbitrary. Articles 14 and 19 strike at arbitrariness. It has been consistently held by the Supreme Court that the restrictions must not only be reasonable, they must also be fair and just. This is by combined reading of Articles 14, 19 and 21.

EMERGENCY PROVISIONS IN THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND THE INDIAN CONSTITUTION

Article 4 of the International Covenant on Civil and Political Rights provides the following :

"In time of emergency *which threatens the life of the nation* and the existence of which is *officially proclaimed* the State Parties to the present Covenant *may*

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123. AIR 1997 SC 3011..
124. AIR 1999 SC 625.
125. Sub-clause (f) was omitted by Section 2 of the Constitution (Forty-Fourth Amendment) Act, 1978 (w.e.f. 20-6-1979).

take measures derogating from their obligations under the present Covenant to the extent *strictly required by the exigencies* of the situations, provided that such *measures are not inconsistent with their other obligations of under International Law and do not involve discrimination solely on the ground race, colour, sex, language, religion or social origin.*

2. No derogation from Articles 6, 7, 8 (paragraphs 1 and 2) 11, 15, 16 and 18 may be made under this provision.

3. Any State Party to the present Covenant availing itself of the right of derogation *shall immediately inform the other State Parties the present Covenant* through the intermediary of the Secretary General of the United Nations, *of the provisions from which it has derogated and of the reasons by which it was actuated. A further communication* shall be made through the same intermediary on the date on which *it terminates such derogation.*"

Article 4 as noted above permits State Parties to the Covenant to derogate from their obligations under the Covenant but makes it subject to following conditions :

(i) In the first place, derogation from obligations under the Covenant is permissible only in *time of public emergency which threatens the life of the nation.* It may be noted here that provisions of Article 4(1) as noted above the similar to Article 15 (1) of the European Convention for Protection of Human Rights and Fundamental Freeedoms (1950). Article 15 (1) uses the words "In time of war or other public emergency threatening the life of the nation..." In *Lawless* v. *Ireland,*[126] the European Court of Hurnan Rights has defined the words, "Other public emergency threatening the life of the nation" as referring "to an exceptional situation of crisis or emergency which affects the whole population and constitutes a threat to the organised life of the community of which the community is composed" and in another cases the word "exceptional' has been defined as the situation in which "the normal measures permitted by the Convention for the maintenance of public safety, health and order are plainly inadequate."[127] Thus the words "public emergency which threatens the life of the nation" would seem to include the grounds, war or external aggression or armed rebellion, failure of constitutional machinery and financial emergency on which emergency can be proclaimed under Indian Constitution.

(ii) *Secondly* the existence of the emergency must be officially proclaimed. It is not sufficient to say that public emergency threatening the life of the nation exists.

(iii) *Thirdly,* no derogation from the following obligations contained in following Articles of the Covenant is permissible :

(a) Article 6 (Inherent right to life of every human being).

(b) Article 7 (Right of every one not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment).

(c) Article 8 (paras 1 and 2) (Prohibition of slavery, slavery trade and servitude).

(d) Article 11 (Prohibition of imprisonment merely on the ground of inability to fulfil a contractual obligation).

(e) Article 15 (Prohibition of application of *post facto* laws to persons guilty of criminal offence).

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126. (1961) ECHR Ser. A. Vol 3, para 28.

127. *See* the *Greek* case, (1969) ECHR, Para 153.

(f) Article 16 (Right of every one to be recognized everywhere as a person before law).

(g) Article 18 (Right to freedom of thought, conscience and religion).

(iv) *Fourthly,* measures derogating from their obligations under the Covenant must be to the extent strictly required by the exigencies of the situation.

(v) *Fifthly,* measures taken in derogation from the obligations under the Covenant must be consistent with their other obligations under International law.

(vi) *Sixthly,* measures taken in derogating from obligations under the Covenant must not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin.

(vii) *Seventhly,* the State Party availing the rights of derogation must immediately inform other State parties, through the Secretary General of the United Nations, of the provisions from which it has derogated and of the reasons by which it was actuated.

(viii) *Eighthly,* and *lastly,* a further communication must be made, through the same intermediary on the date on which it terminates such derogation.

Under Indian Constitution the President may, by Proclamation, make declaration of emergency on any one of the following grounds :

(1) if *security of India or any part of the territory thereof is threatened,* whether by war, *or external aggression or armed rebellion,* (Article 352).

(2) Failure of constitutional machinery in States. (Article 356)

(3) If financial stability or credit of India or any part of the territory thereof is threatened.

As regards emergency on the ground of "war or external aggression or armed rebellion" Article 352 (1) provides :

"If the President is satisfied that a grave emergency exists whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or [128][armed rebellion], he may, by Proclamation make a declaration to that effect [129][in respect of the whole of India or of such part of the territory thereof as may be specified in the Proclamation.]"

Explanation to the above provision which was substituted by Forty-fourth Amendment of the Constitution provides that a Proclamation of Emergency declaring that the security of India or any part of the territory thereof is threatened by war or external aggression or armed rebellion may be made before the actual occurrence of war or any such aggression or rebellion, if the President is satisfied that there is imminent danger thereof.

Article 359 confers power on the President to suspend enforcement of the rights confered by Part III of the Constitution during emergencies. Article 359 (1) provides that where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any Court for the enforcement of such of [130][the rights conferred by Part III (except Articles 20 and 21) as may be mentioned in the order and all proceedings pending in any court for the enforcement of the rights so mentioned shall remain

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128. Subs. by the Constitution (Forty-fourth Amendment) Act, 1978, Section 37, for "Internal disturbance" (w.e.f. 20-6-1979).

129. *Ins.* by the Constitution (Forty-second Amendment) Act, 1976, Section 48 (w.e.f. 3-1-1977).

130. *Subs.* by the Constitution (Forty-fourth Amendment) Act, 1978, Section 40 (w.e.f. 20-6-79).

suspended for the period during which the proclamation is in force or for such shorter period as may be specified in the order.

It may also be noted that the words "armed rebellion" in Article 352 (1) were substituted by the Forty-fourth Amendment, 1978, in place of the words "internal disturbance". The latter words *i.e.,* "internal disturbance" are of much wider import than the words "armed rebellion". "Emergency was proclaimed in the country for the first time in 1962 as the security of India was threatened because of Chinese attack. It was proclaimed again in 1971 because of Indo-Pak war on the ground of threat to the security of India and external aggression. On June 26, 1975 emergency was again declared in India but this time on the ground of "internal disturbance". This emergency which continued upto March, 1977 raised a lot of controversies. It was alleged to be the misuse of emergency powers. During the emergency, right to move any court for the enforcement of fundamental rights guaranteed by Articles 19, 21 and 22 was suspended. This led to a very dangerous situation because it conferred arbitrary powers on the Government to violate the fundamental rights of the citizens with impunity. Exactly the same thing happened. A large number of people who opposed the Government or were critical to the policies and functioning of the Government were arrested and detained in jails. Their position was very helpless because they had no remedy at all against the deprivation of their fundamental rights, especially of their life and personal liberty. It may be recollected that Article 4 of the International Covenant on Civil and Political Rights while permitting State Parties derogation from the obligations under the Covenant does not permit them to derogate from their obligations in respect of certain human rights including the inherent right to life "recognized in Article 6 which specifically provides *inter alia* "No one shall be arbitrarily deprived of life."

But in India during the emergency of 1975 right to life and personal liberty guaranteed in Article 21 of the Constitution was flagrantly and with impunity, violated by the State. Even Judiciary seemed to be helpless. This is evident from the case of *AD.M. Jabalpur* v. *Shivakant Shukla.*[131] In this case petitions were filed by various persons detained under Section 3 (1) of MISA praying for the issue of writ of *habeas corpus.* When the said petitions came up for hearing in respective High Courts, on behalf of the Government a preliminary objection to their maintainability was raised on the ground that the detenus in substance had been claiming the enforcement of Article 21 for having been deprived of their personal liberty in violation of the procedure established by law and the right to move the court for the enforcement of that right which had been suspended by the Presidential order of June 27, 1975. But this preliminary objection was rejected for some or the other reason by the High Courts of Allahabad, Bombay, Delhi, Karnataka, M. P., Punjab and Rajasthan. On the other hand, the High Courts of Andhra Pradesh, Kerala and Madras had upheld the preliminary obligation. The present appeal was, therefore, filed by the State and the petitioners in the Supreme Court.

Delivering the judgment Ray, C.J. observed that the effect of suspension or enforcement of fundamental rights is that an individual cannot move any court for the enforcement of his fundamental right to personal liberty for the time being. In view of the Presidential order dated June 27, 1975 under clause (1) of Article 359 of the Constitution no person has *locus standi* to move any writ under Article 226 before a High Court for *habeas corpus* or any other writ or order or direction to enforce any right to personal liberty of a person detained under the Act on the ground that the order of detention or the continued detention is for any reason not under or in compliance of the Act or is illegal or *mala fide* . Ray, C.J., also held that Article 21, is the sole repository of rights to life and personal liberty against the State. Any claim to a writ of *habeas corpus* is enforcement of Article 21 and is, therefore barred by Presidential order.[132]

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131. (1976) 2 SCC 521 : AIR 1976 SC 1207 (FB).

132. *A.D.M. Jabalpur* v. *Shivkant Shukla,* (1976) 2 SCC 521 at pp. 591-592, Similar views were expressed by Beg., J. (at p. 602) and Bhagwati, J. (at p. 689).

Thus by a majority (of 4 to 1) decision (H. R. Khanna, J. dissenting) the Constitution Bench held that in view of the Presidential order dated June 27, 1975, no person has any *locus standi* to move any writ petition under Article 226 before a High Court for *habeas corpus* or any other writ or order or direction to challenge the legality of an order of detention on the ground that the order is not under or in compliance with the Act or is illegal or is vitiated by *mala fides* factual or legal or is based on extraneous considerations.

It may be submitted that a very peculiar situation had arisen when the Attorney General argued, rather asserted, that since the right to enforce fundamental rights including the right to personal liberty had been suspended, the Court became powerless to entertain a petition for the enforcement of right to personal liberty even though in pursuance of the Presidential order or any rule or order made thereunder the lives of certain persons have been taken by the State. Unfortunately the Constitution Bench in terms accepted this argument. There is no denying the fact that in the name of emergency of 1975 grave atrocities were committed and deprivation of human rights of the people was made in a large scale and in a ruthless manner. In view of the majority of the Constitution Bench there was no remedy left for the loss of person or property of persons during the operation of the Proclamation of Emergency. It may be submitted here that it is wrong to say that Article 21 is the sole repository of the right to life and liberty. If the view that Article 21 is the sole repository of right to life and personal liberty is accepted disastrous consequences would follow, as they did during the emergency of 1975.

As rightly pointed out by H.R. Khanna, J., in his dissenting view, the effect of the suspension of the right to move any court for the enforcement of the right conferred by Article 21 is that when a petition is filed in a court, the court would have to proceed upon the basis that no reliance can be placed upon that Article for obtaining relief from the court during the period of emergency. However, Article 21 cannot be considered to be the sole repository of the right to life and personal liberty which is the most precious right of human beings in civilized societies governed by the rule of law. Sanctity of life and liberty was not something new when the Constitution was drafted. It represented a facet of higher values which mankind began to cherish in its evolution from the state of tooth and claw to a civilized existence. Likewise, the principle that no one shall be deprived of life and liberty without the authority of law was not the gift of the Constitution.[133]

Further, even in the absence of Article 21 of the Constitution, the State has got no power to deprive a person of his life or liberty without the authority of law. This is essential postulate and basic assumption of the rule of law. Without such sanctity of life and personal liberty, the distinction between a lawless society and governed by laws would cease to have any meaning. Khanna, J., therefore and rightly too rejected the view that when right to enforce the right is suspended the result would be that there would be no remedy against deprivation of a personal life and liberty by the State even though such deprivation is without the authority of law or even in flagrant violation of the provisions of law. The right not to be deprived of one's life or liberty without the authority of law was not the creation of the Constitution. Such right existed before the Constitution came into force."[134]

Khanna, J., therefore, expressed the view that there is no sufficient ground to interfere with the view taken by all the nine High Courts which went into the matter, that the Presidential order of June 27, 1975 did not affect the maintainability of the *habeas corpus* petitions to question the legality of the detention orders that such petitions could be proceeded with despite that order. Concluding his judgment, Khanna, J., aptly remarked that a dissent in a Court of last resort, is an appeal to the brooding spirit of the

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133. *A.D.M. Jabalpur* v. *Shivkant Shukla*, (1976) 2 SCC 521, at pp. 747-448.

134. *Ibid*, at pp. 749, 751.

law, to the intelligence of a future day, when a later decision may possibly correct the error into which the dissenting Judge believes the court to have been betrayed.[135]

It may be noted that what was hoped by Khanna, J., proved to be correct. The error committed by the majority of the judges of the Constitution Bench was later on but with a difference in the sense that the error was corrected by the Legislature and not by the Judiciary. After the emergency was over, elections were held. The then ruling Congress party was voted out of power and the Janata Party won by overwhelming majority. One of the first works performed by the Janata Party was to amend the Constitution to correct the said error. It was provided that even when a Proclamation of emergency is in operation, the enforcement of fundamental rights is conferred by Articles 20 and 21 that is to say, in Article 359 (1), after the words "enforcement" words, "the rights conferred by Part III except Articles 20 and 21 "were inserted by Section 40 of the Constitution (Forty-Fourth Amendment) Act, 1978 with effect from 20-6-1979. Similarly, the said words were also inserted in clause (1-A) of Article 359 which had been inserted by Section 7 of the Constitution (Thirty-eighth Amendment) Act, 1975 retrospectively. Article 20 deals with protection in respect of conviction for offences (such as *ex post facto* laws, double jeopardy) and Article 21 guarantees protection of life and personal liberty. Thus more or less the provisions of Constitution have become consistent with the Article 4 of the International Covenant on Civil and Political Rights, 1966.

INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS (1966) AND INDIAN CONSTITUTION.

While civil and political rights are contained in the International Covenant on Civil and Political Rights (ICCPR) the economic , social and cultural rights are contained in a separate Covenant called the International Covenant in Economic, Social and Cultural Rights (ICESCR). Though it is recognized both categories of rights are inter related to each other yet there is a vast difference between them, while civil and political right by their very nature can be directly enforced, economic, social and cultural rights can be achieved only progressively. Article 2(1) of the ICCPR provides that each state party the present Covenant undertakes to *respect and to ensure to all individuals within its territory and subject to its jurisdiction* the rights recognised in the present Covenant. On the other hand, Article 2 (1) of 1 ICESCR provides that each State party to the present Covenant *undertakes to take steps, individually and through international assistance and cooperation,* especially economical and technical, to the *maximum of its available resources, with a view to achieving progressively the full* realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. Thus the full realization of the economic, social and cultural rights is dependent upon the availability of resources and the parties to the Covenant have undertaken to take steps to *achieving progressivey the full realization of the rights recognized in the Covenant.* That is why, the enforceability of economic, social and cultural rights cannot be ensured in the same as that of civil and political rights.

In India as pointed earlier under the Chapter, "Human Rights and Indian Constitution" most of the economic, social and cultural rights have been included in Part IV of the Indian Constitution entitled "Directive Principles of State Policy". As the title of the chapter suggests that they are principles rather than rights. As compared with fundamental rights incorporated in Part III of the Constitution which are justiciable. Directive Principles of State Policy are non-justiciable. Article 37 of Part IV of the Indian Constitution makes it clear by providing that the provisions contained *in this part shall not be enforceable by any court.* However, the latter part of Article 37 adds *but the principles therein laid down are nevertheless fundamental for the governance of the country and it shall be the duty of the State to apply these principles in making laws."* Before the 25th

135. *A.D.M. Jabalpur* v. *Shivkant Shukla* (1976) 2 SCC 521 at p. 777.

Amendment of the Constitution and *Kesavanand Bharti's* case,[136] the first part of Article 37, was generally emphasized. But after the 25th Amendment which was upheld by the *Kesvananad Bharti's case.* the emphasis has shifted to the latter or second part of Article 37. The 25th Amendment of the Constitution, inserted Article 31-C which provided that notwithstanding anything contained in Article 13, no law giving effect to the policy of the State towards securing the principles laid down in Article 39 (b) and (c) shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Article 14 or Article 19. However, the words "and no law containing a declaration that it is for giving effect to such policy shall be called in question in any court on the ground that it does not give effect to such policy" were struck down as unconsitutional by Supreme Court in *Kesavanand Bharti's case* as it barred judicial review which is one of the basic features of our Constitution.

Thus to some extent at least even Directive Principles of State Policy can also be enforced. They can be enforced by passing legislation by a competent Legislature which has jurisdiction over the subject matter. They can also be enforced by being connected with one or more of fundamental rights. Thus the enforceability of Directive Principles of State Policy is far better and more effective than that of economic, social and cultural rights incorporated in the International Covenant on Economic, Social and Cultural Rights (1966).

Now let us see whether the economic, social and cultural rights already found mentioned in Part IV of our Constitution are incorporated in ICESCR. For this purpose a comparative chart is being given below :

Indian Constitution	*International Covenant on Economic, Social and Cultural Rights.*
Article 39 (d)	Article 7 (a) (i)—fair wages and equal remuneration.
Article 39 (f)	Article 10 (3)—special protection of children.
Article 41	Articles 6 (1)—right to *wear.*
Article 42	Articles 7 (b) and 10 (2)—decent living.
Article 43	Article 7 (a) (ii) and 7 (d)—rest and leisure.
Article 45	Article 13 (2) (a)—right to compulsory primary education.
Article 47	Article 11—right to adequate standard of living.

There are a number of Directive Principles such as Equal Justice and Free Legal Aid (Article 39-A). Organisation of Village Panchayats (Article 40), Uniform Civil Code (Article 44), Promotion of educational and economic interests of Scheduled Castes, Scheduled Tribes and other weaker sections (Article 46), Protection and Improvement of Environment and safeguarding of forests and wild life which are found in Indian Constitution but are conspicuous of their absence in the ICESCR. On the other hand, there are certain rights such as right of everyone to social security, including social insurance (Article 9), Right to take part in cultural life, right to enjoy benefits or scientific progress and its applications and right to benefit from the protection of the moral and material interests resulting from any scientific, literary or production of which he is the author (Article 15, para 1) which are incorporated in ICESCR but do not find mention in the Indian Constitution. Since India has signed and ratified both the International Covenants,

136. (1973) 4 SCC 225.

India thought to incorporate the said rights by amending the Constitution except of course those about which India has made the declaration (*i.e.*, reservation).

India's Declaration (Reservation) while acceding to the two International Covenants on Human Rights

While according to the ICCPR and ICESCR on 27th March, 1979, India made reservation in respect of following matters:

(i) Regarding Right of Self-determination

(ii) *Regarding enforceable right of compensation* : This reservation has lost its significance because as noted earlier, in the course of time the Supreme Court of India has recognized and enforced this right in a number of cases.

(iii) Law Relating to Foreigners.

(iv) Right to form Trade Unions and join Trade Union of Choice; Right to liberty of movement and freedom to choice residence etc.

(v) Equal opportunity for promotion in Employment.

III. Protection of Human Rights under Protection of Human Rights Act, 1993 : National Human Rights Commission, Human Rights Courts etc.

Introduction.—In pursuance of a resolution of the General Assembly adopted in 1966, the Economic and Social Council asked the Human Rights Commission of the U.N. to consider the question of creation of National Commission of Human Rights to perform certain functions relating to the observance of the International Covenant on Human Rights. This question was also considered by the Commission in 1970 and the Commission recommended that the question of establishment of National Commission of Human Rights in each member State of the U.N. ought to be decided by each government of the member State keeping in view the traditions and institutions of each country. Since then the Human Rights Commission has several times stressed the need of the creation of National Commission of Human Rights in each member State. Vienna Declaration and Programme of Action adopted by the Vienna Conference on Human Rights on June 25, 1993 recommended that every State ought to provide an effective framework of machinery or institution to provide remedies in case of violations of human rights. It was after the said World Conference that several States including India have established National Commission of Human Rights to redress human rights grievances or violations.

Some western States and America have used human rights as an instrument of their policy even though their own record of human rights, especially that of America, is far from satisfactory. According to a weekly magazine published in China, America encourages other States to respect human rights even though America has not yet ratified two International Covenants on Human Rights (1966) and 15 other separate conventions on Human Rights including that on Right of the Child. It deserves mention here that China and India have signed and ratified both the International Covenants on Human Rights (1966). America has been found guilty of even violating American Convention on Human Rights (1969). But despite this, the American Congress has imposed sanctions several times on those States whose standard or record of human rights is not as per American standards. America also pressurizes International Financial Institutions which grant loans to not to give or grant loan or financial aid to such States.

So far as the question of compliance of rules of Universal Human Rights by America is concerned, America argue that ratified convention will have the same effect as that of American Federal Laws and that it will invalidate some of the State laws which are inconsistent with it. Moreover, American spokesmen contend that human rights are higher than sovereignty and are enforceable even beyond the limits of national territories. Amnesty International has also confirmed that America is guilty of violations of human rights and several examples of this can be cited in this connection. Yet America claims to be the champion of human rights all over the world. Thus America's Practices of human rights is not only discriminatory but also uses human rights as an instrument to harass

and even coerce other States. While on one hand America criticizes India and China in respect of alleged violations of human rights, it has so for adopted a hiberal and biased attitude about human rights violations in Pakistan even though Pakistan's record of human rights is not only unsatisfactory but also deplorable.

The western countries and America, in particular, criticized India for violation of human rights by Indian armed and security forces especially in the State of Jammu and Kashmir. Though it is now well recognized that terrorism is a serious violation of human rights yet these countries especially America never lost an opportunity to criticize India whenever Indian Security Forces sought to deal sternly with extremists and ullras in Jammu and Kashmir, in North Eastern States and Andhra Pradesh. In order to meet this criticism, apart from other reasons, India decided to establish a National Commission of Human Rights for the redressal of grievances of human rights violations. On 28, September, 1993, the President of India promulgated an Ordinance which established a National Commission of Human Rights. Thereafter, a Bill on human rights was passed in the Lok Sabha on December 18, 1993 to replace the Ordinance earlier promulgated by the President. This Bill received the assent of the President on January 8, 1994 and was published in the Gazette of India, Extraordinary, Part II, Section 1, on January 10, 1994. Thus the Protection of Human Rights Act (No. 10 of 1994) came into force. But since the National Commission of Human Rights has already been established and certain acts in pursuance of the Ordinance had already been performed, Article 1 (3) provided that the Act shall be deemed to have come into force on the 28th day of September, 1993. Section 1 (2) provides that the Act extends to the whole of India provided that it shall apply to the State of Jammu and Kashmir only in so far as it pertains to the matters relatable to any of the entries enumerated in List I or List III in the Seventh Sechedule to the Constitution applicable to that State.

The Preamble of the Act makes it clear that it is an Act to provide for the constitution of National Human Rights Commission; Commissions in States and Human Rights Courts for better protection of human rights and for matters connected therewith or incidental thereto.

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. Thus for the purposes of the Act, 'human rights' are rights relating to *life, liberty, equality and dignity* of the individual guaranteed in the Constitution or embodied in the International Covenants and enforceable by courts in India. Thus, the Act gives a very narrow definition of 'human rights' and does not even include all the fundamental rights guaranteed by the Constitution. It simply includes the fundamental rights relating to the life, liberty equalities and dignity guaranteed in the Constitution or embodied in International Covenants on Human Rights and enforceable in India. For example, it does not include fundamental rights of prohibition of employment of children in factories etc. (Article 25), Protection of interests of minorities (Article 29), Right of Minorities to establish and administer educational institutions. As regards the words "embodied in the International Covenants and enforceable by courts in India", they certainly widen the scope of Human Rights (fundamental rights) enforceable by Courts in India. As pointed out in the preceding chapter human rights enforceable by courts in India can be divided into three categories : (i) Enumerated Fundamental Rights; (ii) other Fundamental Rights; and (iii) Unenumerated Rights.

The term 'Enumerated Fundamental Rights' means the human rights embodied in the International Covenants on human rights, especially the International Covenant on Civil and Political Rights and which are specified as Fundamental Rights in Part III of the Constitution. The term 'other Fundamental Rights' means the human rights embodied in the International Covenants and recognized as Fundamental Rights by courts in India even though they have not been specified as Fundamental Rights in Part III of the Constitution such as the right to privacy, right to travel abroad, right to compensation etc.

These have been discussed in detail in earlier chapter. The term 'Unenumerated Rights' means the human rights which have been enumerated in the International Covenants but are neither enumerated as Fundamental Rights in the Constitution nor have been so far recognised as Fundamental Rights as courts in India, one may, however, add that even unenumerated rights may in future be recognized as Fundamental Rights in a particular case. For example, in *Vishaka* v. *State of Rajasthan,*[137] the three-Judge Bench of the Supreme Court has recognized the right of Gender Equality and guarantee against sexual harassment and abuse of working women at their work places as emanating from Articles 14 and 21 of the Constitution. But once such a right is recognized as a fundamental right emanating from existing or specified Fundamental Rights it ceases to be in the category of 'Unenumerated Rights' and comes in the second category of Rights namely 'other Fundamental Rights'. But before such a right is included in the definition of 'human rights' a condition precedent is that it must be embodied in the International Covenants. Since Section 2(f) defines "International Covenants as the International Covenants on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights adopted by the General Assembly of the United Nations on 16th December, 1966, the said right must be embodied in these two International Covenants and not in any other International Convention on Human Rights for the purpose of definition of 'human rights' as given under Protection of Human Rights Act, 1993 (Act No. 10 of 1994).

NATIONAL HUMAN RIGHTS COMMISSION

Constitution.—The National Human Rights Commission is constituted by the Central Government to exercise the powers conferred upon, and to perform the functions assigned to it under the Act.[138] The Commission consists of :

(a) a Chairperson who has been the Chief Justice of the Supreme Court;

(b) one Member who is, or has been the Judge of the Supreme Court;

(c) one Member, who is, or has been the Chief Justice of a High Court;

(d) two Members to be appointed amongst persons having knowledge of, or practical experience in, matters relating to human rights.[139]

Besides these, the Chairperson of National Commission for Minorities, the National Commission for the Scheduled Castes and Scheduled Tribes and the National Commission for women shall be deemed to be Members of the Commission for the discharge of functions specified in clauses (b) to (j) of Section 12.[140]

The Act also makes provision for a Secretary-General who shall be the Chief Executive Officer of the Commission and shall exercise such powers and discharge such functions of the Commission as it may delegate to him.[141]

As pointed out by the Supreme Court in *Paramajit Kaur* v. *State of Punjab,*[142] the Chairman of the Commission in his capacity as a Judge of the High Court and then as a Judge of the Supreme Court and also as Chief Justice of India, and so also two other members who have held high judicial offices as Chief Justice of High Courts, have throughout their tenure, considered, expounded and enforced the Fundamental Rights and are, in their own way, experts in the field. The Commission is truly an expert body to

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137. AIR 1997 SC 3011 ; *See also Apparel Promotion Council,* v. *A. K. Chopra,* AIR 1999 SC 625.
138. Section 3 (1), Protection of Human Rights, Act, 1993.
139. Section 3 (2), *ibid.*
140. Section 3 (3).
141. Section 3 (4).
142. AIR 1999 SC 340, 343.

which a reference can be made by the Supreme Court under Article 32 and once such a reference has been made no prohibition under the Protection of Human Rights Act will affect the jurisdiction of the Commission to investigate a case referred to it by the Supreme Court.

Headquarters of the Commission.—The headquarters of the National Human Rights Commission (NHRC) is located at Delhi. The Commissioner may, however, with the previous approval of the Central Government establish offices at other places in India.[143] The Commission shall ordinarily hold its meetings and sittings in its offices located at Delhi.[144] However, it may, in its discretion, hold its meeting at any other place in India if it considers it necessary and expedient.[145] The Commission or some of the Members may transact business at places outside its headquarters as and when previously approved by the Chairperson, provided that if the parties are to be heard in connection with an enquiry under the Act at least two Members shall constitute the bench of the Commission for such purpose.[146]

Appointment of Chairperson and other Members.—The Chairperson and other Members are appointed by the President by warrant under his hand and seal after obtaining the recommendations of Committee consisting of :

(a) Prime Minister—Member
(b) Speaker of the House of People—Member
(c) Minister in Charge of Ministry of Home Affairs in the Government of India—Member
(d) Leader of the Opposition in the House of the People—Member
(e) Leader of the Opposition in the Council of States—Member
(f) Deputy Chairperson of the Council of States—Member

A Sitting Judge of the Supreme Court or Sitting Chief Justice of a High Court can be appointed only after consultation with the Chief Justice of India.[147]

It is further provided that no appointment of a Chairperson or a Member shall be invalid by reason of any vacancy in the above Committee headed by the Prime Minister.[148]

Term of Office of Members.—A person appointed as chairperson shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of seventy years, whichever is earlier.[149] A person appointed as a Member shall also hold office for a term of five years from the date on which he enters upon his office and shall be eligible for re-appointment for another term of five years. This is however, subject to the condition that no Member shall hold office after he has attained the age of seventy years.[150] Further, on ceasing to hold office, a Chairperson or a Member shall be ineligible for further employment under the Government or the Government of any State.[151] This is indeed a welcome feature of the Act. Such a provision ought to be compulsory in respect of the offices of Speaker of the Lok Sabha, Deputy Speaker of the Rajya Sabha, Chief Election Commission and Governors of States.

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143. Section 3 (5).
144. Regulation 3, The National Human Rights Commission (Procedure) Regulation, 1994.
145. Retulation 4, *ibid.*
146. Regulation 12, *ibid.*
147. Section 4 (1) of Protection of Human Rights Act, 1993.
148. Section 4 (2) of the Act.
149. Section 6 (1).
150. Section 6 (2).
151. Section 6 (3)

Removal of a Member of the Commission.—The Chairperson or any other Member of the Commission can be removed from his office by order of the President on the ground of proved misbehaviour or incapacity after the Supreme Court, on reference being made to it by the President, has, no inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chairperson or such other Member, as the case may be, ought on any such ground be removed.[152] But despite this provision or notwithstanding this provision the President may by order remove from office the Chairperson or any other Member if the Chairperson or such other person, as the case may be :

(a) is adjudged an insolvent; or

(b) engages during his term of office in any paid employment outside the duties of his office; or

(c) is unfit to continue in office by reason of infirmity of mind or body; or

(d) is of unsound mind and stands so declared by a competent Court; or

(e) is convicted and sent to imprisonment for an offence which in the opinion of the President involves moral turpitude.[153]

In the above cases, it will not be necessary for the President to refer the matter to the Supreme Court and obtain its report before ordering the removal of a Chairperson or a Member.

Procedure of the Commission.—The Commission shall meet at such time and place as the Chairperson may think fit.[154] The Commission shall regulate its own procedure.[155] All orders and decisions of the Commission shall be authenticated by the Secretary-General or any other officer of the Commission duly authorised by the Chairperson in this behalf.[156]

Functions of the Commission.—The Commission shall perform all or any of the following functions, namely :

(a) inquire, *suo motu* or on a petition presented to it by a victim or any other person on his behalf, into complaint of :
  (i) violation of human rights or abetment thereof; or
  (ii) negligence in the prevention of such violation by a public servant;

(b) intervene in any proceeding involving any allegation of violation of human rights pending before a court with the approval of such court;

(c) visit under intimation to the State Government any jail or any other institution under the control of the State Government, where persons are detained or lodged for purposes of treatment, reformation or protection to study the living conditions of inmates and make recommendations therein;

(d) review the safeguards provided by or under the Constitution or any law for the time being in force for the protection of human rights and recommend measures for their effective implementation.

(e) review the factors, including acts of terrorism, that inhibit the enjoyment of human rights and recommend appropriate remedial measures.

(f) study treaties and other international instruments on human rights and make recommendations for their effective implementation.

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152. Section 5 (1).
153. Section 5 (2).
154. Section 10 (1).
155. Section 10 (2).
156. Section 10 (3).

(g) undertake and promote research in the field of human rights.

(h) spread human rights literacy among various sections of the society and promote awareness of the guards available for the protection of these rights through publications, the media, seminars and other available means.

(i) encourage the efforts of non-governmental organisations and institutions working in the field of human rights; and

(j) such other functions as it may consider necessay for the promotion of human rights.[157]

But there are certain matters which are not subject to the jurisdiction of the Commission. The Commission cannot enquire into any matter which is pending before a State Commission or any other Commission duly constituted under any law for the time being in force.[158] Besides this, the Commission or the State Commission shall not *enquire into any matter after the expiry of one year from the date on which the act constituting violation of human rights is alleged to have been committed.*[159] This provision or inhibition of the Commission contained in Section 36 (2) of the Act came for consideration before the Supreme Court in *Paramjit Kaur* v. *State of Punjab.*[160] One of the main questions for consideration before the Court was whether the inhibition contained in Section 36 (2) would apply to the Commission even when the Supreme Court under Article 32 of the Constitution referred a matter of alleged violation of human rights to the Commission?

In *N.C. Dhoundial* v. *Union of India,*[161] a three-Judge Bench of the Supreme Court held that Section 36(a) of the Act thus places an embargo against the Commission enquiring into any matter after the expiry of one year from the date of alleged act violative of human rights. The caption or the marginal heading to the section indicates that it is a jurisdictional bar. Periods of limitation, though basically procedure in nature can also operate as fetters on jurisdiction in certain situations. The language employed in the marginal heading is another indicator that it is a jurisdictional limitation. It is a settled rule of interpretation that the section heading or marginal note can be relied upon to clear any doubt or ambiguity in the interpretation of provisions and to discern the legislative intent.

Further, the bar under Section 36(2) is sought to be got over by the Commission by invoking the theory of continuing wrong and the recurring cause of action. According to the Commission, every violation of human right is a continuing wrong until and unless due reparation is made. The Supreme Court found it difficult to accept this proposition propounded by the Commission. Speaking for the three-Judges Bench, P. Venkatarama Reddy, J. observed that the short answer to this view point is that such a view, if accepted, makes Section 36(2) practically a dead letter. Moreover, looking to the language employed in section 36(2) the concept of continuing wrong could not at all be pressed into service in the instant case. The time limit prescribed is referable to the alleged 'act' constituting the violation of human rights. In a case like illegal detention, the offensive act must be deemed to have been committed when a person is placed under detention and it continues under legal detention. The commission of offensive act is complete at a particular point and it does not continue to be so even after the unauthorized detention ends.[162]

In this case one Mr. Ashok Kumar Sinha, an officer of the Telecom Department at Ranchi on 3.3.1994 he was arrested and later on produced before the Magistrate and

157. Section 12.

158. Section 36 (1).

159. Section 36 (2).

160. AIR 1999 SC 340.

161. AIR 2004 SC 1272, 1278.

162. *Ibid.*

remanded to police custody. It was not in dispute that the complainant was produced before the Special Judge on 3.4.1994 and remand was obtained in accordance with the procedure prescribed by law. The Supreme Court held that the alleged act of unauthorized detention which gives rise to violation of human rights ceased on 3.4.1994 and it does not perpetuate thereafter. It is not the effect of illegal detention which is contemplated by Section 36(2) but it is the illegal act itself. It would be a contradiction in terms to say that the arrest or detention beyond 3.4.1994 was in accordance with law and at the same time the arrest/detention continued to be wrongful. It cannot, therefore, be brought under the category of continuing wrong which is analogous to the expression 'continuing offence' in the field of criminal law, one year period for taking up the enquiry into the complaint, therefore, comes to an end by 3.4.1995. Just as in the case of Section 473, Cr. P.C., there is no provision in the Act to extend the period of limitation of one year.

Before concluding the discussion, the Supreme Court said it would like to clarify in reiteration of what was said by the Supreme Court in *Paramjit Kaur* v. *State of Punjab,*[163] that in a case where the NHRC proceeds to investigate and inquire into the violation of human rights pursuant to the directions of the Supreme Court under Article 32 of the Constitution, the bar contained in Section 36(2) will not apply because in such an event NHRC does not function under the provisions of the Act but as an 'expert body' aiding the Supreme Court in the discharge of its constitutional power under Article 32.[164]

Interpreting the order of the Supreme Court.—The Commission observed that the shackles and limitations under the Act are not attracted to the Commission, as it in the above context does not function under the provisions of the Act but under the remit of the Supreme Court. The provisions of the Act do not bind or limit the powers of the Supreme Court in exercise of its powers under Article 32. It is, therefore, reasonable to hold that the Supreme Court designated the Commission as a body *sui generis* to carry out the functions and determine issues entrusted to it by the Supreme Court. To read the order otherwise is to render it otiose.[165]

Agreeing with the above interpretation of the Commission, the Supreme Court held that the power and jurisdiction of the Supreme Court under Article 32 of the Constitution cannot be curtailed by any statutory limitation including those contained in Section 36 (2) of the Act. If the Supreme Court can exercise that power unaffected by the prohibition contained in Section 36 (2), there is no reason why the Commission, at the request of the Supreme Court, cannot investigate or look into the violations of human rights even though the period of limitation indicted in Section 36 (2) might have expired. In such a situation, the Commission will not be affected by the bar contained in Section 36 (2) and it will be well within its rights to investigate the matter referred to it by the Supreme Court.[166] Further, in deciding the matters referred by the Supreme Court, National Human Rights Commission is given a free hand and is not circumscribed by any conditions. Therefore, the jurisdiction exercised by the National Human Rights Commission in these matters is of special nature not covered by enactment or law, and thus acts *sui generis.*[167] The Commission is also a body *sui juris* created under an Act made by Parliament for examining and investigating the questions and complaints relating to violation of human rights, as also the negligence on the part of any public servant in preventing such violations.[168]

In this case, the writ petition had been filed by the Union of India for clarification of the order dated 12th December, 1996 passed by the Supreme Court in Writ Petitions

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163. (1999) 2 SCC 131 : AIR 1999 SC 340.
164. AIR 2004 SC 1272, 1279.
165. *Paramjit Kaur* v. *State of Punjab,* AIR 1999 SC 340 at p. 342.
166. AIR 1999 SC 340 at 343.
167. *Ibid.* at pp. 343-344.
168. *Ibid* at p. 344.

(Criminal) Nos. 447 of 1995 and 497 of 1995, by which a request was made to the National Human Rights Commission to examine the flagrant violation of human rights on a mass scale in the State of Punjab as disclosed in the CBI Report submitted to the Supreme Court in the aforesaid writ petitions.

Powers relating to inquiries.—While inquiring into complaints under this Act, the Commission possesses all the powers of a Civil Court trying a suit under the Code of Civil Procedure, 1908 (5 of 1908), and in particular in respect of the following matters, namely :

(a) summoning and enforcing the attendance of witnesses and examining them on oath;

(b) discovery and production of any document;

(c) receiving evidence on affidvits;

(d) requisitioning any public record or copy thereof from any court or office;

(e) issuing commissions for the examination of witnesses or documents;

(f) any other matter which may be prescribed.[169]

The Commission also has power to require any person, subject to any privilege which may be claimed by that person under any law for the time being in force, to furnish information on such points or matters as, in the opinion of the Commission may be useful for, or relevant to, the subject-matter of the enquiry and any person so required shall be deemed to be legally bound to furnish such information within the meaning of Sections 176 and 177 of the Indian Penal Code (45 of 1860).[170]

The Commission or any other officer not below the rank of a Gazetted Officer, especially authorised in this behalf by the Commission may enter any building or place where the Commission has reason to believe that any document relating to the subject-matter of the inquiry may be found, and may seize any such document or take extracts or copies therefrom subject to the provisions of Section 100 of the Code of Criminal Procedure, 1973 (2 of 1974) in so far as it may be applicable.[171]

It is also provided that the Commission shall be deemed to be a Civil Court and when any offence as is described in Section 175 (omission to give notice or information to public servant by person legally bound to give it), Section 178, Section 179, Section 180 or Section 228 of the Indian Penal Code (45 of 1860) is committed in view or presence of the Commission, the Commission may, after recording the facts constituting the offence and statement of the accused as provided for in the Code of Criminal Procedure, 1973 (2 of 1974) forward the case to a Magistrate having jurisdiction to try the same and the Magistrate to whom any such case is forwarded shall proceed to hear the complaint against the accused as if the case has been forwarded to him under Section 346 of the Code of Criminal Procedure, 1973.[172]

Further, every proceeding before the Commission shall be deemed to be a judicial proceeding within the meaning of Sections 193 and 228, and for the purposes of Section 196 of the Indian Penal Code (45 of 1860), and the Commission shall be deemed to be a Civil Court for all the purposes of Section 195 (which deals with Prosecution for contempt of lawful authority of public servants for offences against public justice and for offences relating to documents given in evidence) and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).[173]

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169. Section 13 (1).
170. Section 13 (2).
171. Section 13 (3).
172. Section 13 (4).
173. Section 13 (5).

Investigation.—The Commission may for the purpose of conducting any investigation pertaining to the inquiry, utilise the services of any officer or investigation agency of the Central Government or any State Government with the concurrence of the Central Government or the State Government, as the case may be.[174] For the purpose of investigating into any matter pertaining to the inquiry, any officer or agency whose services are utilised under Section 14 (1) noted above, may, subject to the direction and control of the Commission :

(a) summon and enforce attendance of any person and examine him;

(b) require the discovery and production of any document;

(c) requisition any public record or copy thereof from any office.[175]

But it may be noted here that no statement made by a person in the course of giving evidence before the Commission shall subject him to, or be used against him in, any civil or criminal proceeding except a prosecution for giving false evidence by such statement.

This is however, subject to the proviso that if the statement :

(a) is made in reply to a question which he is required by the Commission to answer, or

(b) is relevant to the subject-matter of the inquiry, then it may be used against him in any civil or criminal proceeding.[176]

The officer or agency whose services are utilized under Section 14 (1) noted above, shall investigate into any matter pertaining to the inquiry and submit a report thereon to the Commission which such period as may be specified by the Commission in this behalf.[177] The Commission shall satisfy about the correctness and the facts stated and the conclusion, if arrived at, the said report submitted by the officer or agency and for this purpose the Commission may make such inquiry (including the examination of the person or persons who conducted or assisted in the investigation), as it thinks fit.[178]

Procedure for dealing with complaints.—Regulation 8 of the National Human Rights Commission (Procedure) Regulations, 1994[179] 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;[180]

(b) with regard to matters which are subjudice;

(c) which are vague, anonymous or pseudonymous;

(d) which are of frivolous nature; or

(e) those which are outside the purview of the Commission.[181]

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174. Section 14 (1).
175. Section 14 (2).
176. Section 15.
177. Section 14 (4).
178. Section 14 (5).
179. These Regulations were made by the National Human Rights Commission in exercise of the powers conferred on it by sub-section (2) of Section 10 of the Protection of Human Rights Act, 1993 (No. 10 of 1994).
180. *See* Section 36 (2) of the Act.
181. *See* also Section 36 (1) of the Act.

(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 English 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 complaints 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 would be set down for inquiry by it or should be investigated into.

(7) On every complaint on which a decision is taken by the Chairperson/Commission to either hold an inquiry or investigation, the Secretariat shall call for report/comments from the concerned Government/authority giving the latter a reasonable time therefor.

(8) On receipt of the comments of the concerned authority, 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 concerned Government/authority and the petitioner as provided for in Sections 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 opinon 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 may allow. 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 of 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 Chair person 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.

Steps after inquiry.—After the inquiry under the Act is complete the Commission may take any of the following steps :

(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 concerned Government or authority the initiation of proceedings for prosecution or such other action as the Commission may deem fit against this concerned person or persons.

(2) Approach the Supreme Court or the High Court concerned for such directions, orders or writs as that court may deem necessary'.

(3) Recommend to the concerned Government or authority 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 provision of clause (5) provide a copy of the inquiry report to the petitioner or his representative.

(5) The Commission shall send a copy of its enquiry report together with its recommedations to the concerned Government or authority and the concerned Government authority shall, within a period of one month, or such further time as the Commission may allow, forward its comments on the report, including the action taken or proposed to be taken thereon, to the Commission.

(6) The Commission shall publish its enquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission.[182]

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 had taken a decision in any of its earlier meeting, excepting the items on which no further action is called for.

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 procedure 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.

Annual and special reports of the Commission.—The National Human Rights Commission is required to 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 should not be deferred till submission of the annual report.[183] After the annual report is submitted by the Commission, the Central Government and the State Government, as the case may be, shall cause the annual and special reports of the Commission to be laid before each House of Parliament or the State Legislature respectively, as the case may be, along with a memorandum of action taken or proposed to be taken on the recommendations of the Commission and the reasons for non-acceptance of the recommendations, if any.

The first annual report of the Commission, dealing with the period of establishment of the Commission in October, 1993 to 31st March, 1994, was submitted to the Central Government on 3rd June, 1994. During this period Shri Justice Ranganath Misra, retired Chief Justice of the Supreme Court was the Chairperson of the Commission. The second annual report, for the period from 1st April, 1994 to 31st March, 1995 was submitted in

182. Section 20 (1).

183. Section 20 (2)

June, 1995. During this period also Shri Justice Ranganath Misra continued to be the Chairperson of the Commission. Justice R.N. Misra retired on November, 1996 and was succeeded by Shri Justice M.N. Venkatachaliah, the former Chief Justice of India, who assumed office as the Chairperson of Commission on November 26, 1996.

As per annual report of the Commission as compared to 496, complaints received during October, 1993 to 31st March, 1994 . The Commission received 6835 complaints for the period 1st April, 1994 to 31st March, 1995, thus recording $6\frac{1}{2}$ times increase, keeping in view that the first annual report was only for a period of 6 months. It may be noted that besides 6835 complaints in accordance with the Commission's directive to report all incidents of custodial death or rape within twenty-four hours, District Magistrates and Superintendents of Police informed the Commission of 152 such instances as having occurred in police or judicial custody during the period under review while the number of such cases has been registered as 152, the actual number of persons involved as 174. The Commission thus had a total of 6,987 new cases before it in 1994-95, out of these new cases 5,710 were considered by the Commission and 1,277 were pending consideration at the end of March, 1995. Out of 5,710 cases, 2,483 cases were dismissed *in limine,* 1567 were disposed of with directions and 276 were concluded following the consideration of reports received from the concerned authorities upon directions of the Commission. At the end of the year, 1,384 cases of the year, 1994-95 were pending final disposal, along with 86 other cases which had been registered in the year 1993-94.

During the period, 1994-95, protection of civil liberties remained the central preoccupation of the Commission. As regards the protection of civil liberties, the Commission gave its special attention to the following subjects or offences :

(a) Review of Terrorist and Disruptive Activities (Prevention) Act, 1987;
(b) Human Rights in Areas of Insurgency and Terrorism,
(c) Systematic Reforms : Police
(d) Systematic Reforms : Prisons and other Centres of detention.
(e) Custodial Deaths, Rape and Torture.

As regards the review of laws, implementation of treaties and other International Instruments of human rights, the Commission conducted a review of them and made a number of recommendations, some of which are as follows :

(i) The Commission urged and recommended the demise of Terrorist and Disruptive Activities Act, 1987 (TADA)[184].

(ii) The Commission recommended that India should accede to the 1984 Convention Against Torture and Other Forms of Cruel, Inhuman and Degarding Treatment or Punishment.

(iii) The Commission observed that India has become a party to a number of International conventions on human rights such as International Covenants on Civil and Political Rights, and Economic, Social and Cultural Rights of 1966, Convention on the Suppression and Punishment of the Crime of Apartheid, 1973, Convention on the Elimination of All Forms of Racial Discrimination, 1965, Convention on the Elimination of All Forms of Discrimination Against Women, 1979 and Rights of Child, 1989. With the

184. It may be noted here that in July, 2001 the National Human Rights Commission reviewd the Prevention of Terrorism (POT) Bill, 2000 introduced by the Government in the Parliament on the lapse of Terrorist Disruption Activities (Prevention) Act (TADA). The Commission unanimously expressed the view that there is no need for government to enact POT Bill, 2000 or any similar bill.

ratification of these treaties, India is obligated to submit periodic reports to the treaty bodies concerned but in certain instances these reports are over due, in other they are imminently required. State Parties including India, ought to undertake appropriate legislative, administrative and other measures for the implementation of the rights recognized in these conventions and should fulfil other obligations such as submitting periodic reports in time.

(iv) The Commission recommended the adoption of appropriate legislation on compulsory primary education, matched with the necessary resources required for this purpose.

(v) The Commission also recommended the strengthening the provisions of the Child Labour (Prohibition and Regulation) Act which had already been drafted.

Besides making the above recommendations, the Commission also devoted its attention in respect of promotion of Human Rights Literacy and Awareness and it showed its impact in coming years. After the 1994-95 annual report, the Commission has submitted seven reports. During the year 1995-96, the Commission received 10,195 complaints and during the year 1996-97 it received as many as 20,514 complaints. Similarly, there has been phenomenal increase in number of complaints in subsequent years of the credit, if not all, goes to the Human Rights Literacy and Awareness Programme of the Commission. During the last some few years the Commission has performed varied activities relating to observance of human rights. In the last two annual reports the Commission has made a number of recommendations including the amendments of Protection of Human Rights Act, 1993, especially Sections 2 (1) (d), 2 (1) (f), 11 (1) (b) and 11 (2) (together with Section 32), Section 13 (1) (f), Sections 18, 30 and 36 so as to remove ambiguities and impediments concerning its competence and authority; revision of Indian Prison Act and making a new All India Jail Manual incorporating reforms in the prison system starting a movement or a wide scale programme of human rights, literacy and awareness through Doordarshan and AIR; improving the status of women, improving the status of the Scheduled Caste and Scheduled Tribes and minorities and starting of a large scale programme of social regeneration to rectify the ancient societal wrongs.

1997—1998.—During the year 1997-1998 the number of complaints registered with the Commission recorded an increase of nearly 80 per cent. As against 20,514 complaints received during 1996-1997, the Commission received 36,791 complaints. Thus including 4,010 cases which were pending consideration at the beginning of the year, the Commission had a total of 40,802 cases that required its consideration in 1997-98. During this period the Commission devoted its attention to various subjects including Human Rights in area of Terrorism and Insurgency, Custodial death, Rape and Torture, Video-filming of Post-mortem Examination and Revision of Autopsy, visits of police lock-ups, systematic reforms of police, prisons, study of health conditions of prisoners, Formulation of Draft Prison Bill, visits to Remand Homes and Human Rights and Administration of criminal justice.

1998—1999.—During the year 1998-1999 the Commission received 40,724 complaints as against 36,791 received during the preceding year. During the year 1998-1999 the Commission reviewed the Child Marriage Restraint Act, 1929 and Protection of Human Rights Act, 1993. As regards the latter Act, the Commission requested Justice A.M. Ahmadi, former Chief Justice to head a high level Advisory Committee consisting of human rights activists and legal experts to study the Act on several points and suggest amendments.

1999-2000.—During 1999-2000, the Commission received 49541 complaints apart from 1093 complaints relating to custodial death/rapes during the same year. The number of cases which remained pending as on 1.4.1999 were 1093. Thus there were 51,159

complaints for the consideration of the Commission. Out of these complaints the Commission considered 47819 complaints and 3340 remained pending. The Commission made a number of recommendations including those relating to the amendment of Protection of Human Rights Act, 1993. It may be remembered, as referred earlier, National Human Rights Commission had established a high-level Advisory Committee under the chairmanship of Mr. Justice A.M. Ahmadi, former Chief Justice of India to assess the need for structural changes and amendments to the Protection of Human Rights Act, 1993 and submit its report. The Advisory Committee submitted its report to the Commission on 18th October, 1999. After careful consideration, the Committee presented its recommendations in the form of a Draft Amendment Bill. After consideration of it in detail, the Commission sent its report to the Government in March, 2000. Some of the salient recommendations are following :

(i) Commission to be empowered to transfer complaints before it to respective State Commissions ;

(ii) To amend definition of 'armed forces' to exclude para-military forces in Section 2, sub-section 1(a);

(iii) To amend Section 30 in order to empower human rights Courts at the district level to award compensation or relief to affected persons ;

(iv) To amend Section 36(2) to provide for enquiry into a complaint of human violation by National and State Commissions even after the expiry of one year from the date of occurrence subject to there being good and sufficient reasons for the same;

(v) To amend Section 18 to enable payment of interim compensation at any state during the pendency of the enquiry;

(vi) To amend Section 21 to make it mandatory for every State to have a State Human Rights Commission, to reduce the number of members of State Commissions and to enable State Commissions to have common members.

(vii) To prescribe three months' time limit from the date of submission of the reports of the NHRC and State Commissions to be placed before the Parliament and State Legistatures and for reports to be made public after three months, even if not placed before legislative bodies;

(viii) To amend Section 36(1) to provide for the NHRC to take cognizance of and inquire into violation of human rights, notwithstanding the cognizance taken thereof, by a State Human Rights Commission or any other Commission (excluding a Commission appointed under Commission of Inquiries Act), with a view to providing the Commission an over arching ability to oversee the issues of human rights violation and their remedies ;

(ix) To add a proviso to Section 36(1) to provide for the NHRC to entertain, either *suo motu* , or at the instance of an aggrieved person, any matter already considered and decided by any other Commission except on the question of quantum of compensation, with a view to giving Commission, a certain power of judicial superintendence and power similar to those exercised by the Supreme Court *vis-a-vis* the High Courts under Article 136 of the Constitution, in order to prevent any miscarriage of justice in any case of human rights violation.

In their concluding observations, Justice J.S. Verma, Chairperson and other members of the Commission observed that the Commission's recommendations, opinions, directions and guidelines must be seen in the deeper content of the objective for which it was established, which was to ensure the 'better protection' of human rights in the country. The positions that the Commission has taken, the view that it has expressed, and the guidelines it has issued have all had the central purpose of ensuring that the authorities of the State and all public servants act more effectively to 'better protect' constitutional guarantees and international human rights norms, as interpreted under the judgments of the Supreme Court of the country.

2000—2001.—During the year 2000-2001, the Commission received 71555 complaints including 1,045 complaints relating to custodial deaths/rapes and 3,340 complaints were pending. Thus the Commission had 74,899 cases for consideration. Out of these the Commission considered 60,827 cases and number of cases pending consideration as on 1.4.2000 were 14,612.

The Commission headed by Justice J.S. Verma, former Chief Justice of India considered a large number of subjects such as civil liberties, reviews of laws such a Prevention of Terrorism Bill, 2000, Child Marriage Restraint Act, 1929, Protection of Human Rights Act, 1993 etc. and implementation of Treaties and other International Instruments, Right to Health Rights of the Vulnerable Manual Scavenging, problems of Denotified and Nomadic Tribes etc. As regards the Protection of Human Rights Act, 1993, the Commission observed that it is the view of the Commission that the Protection of Human Rights Act, 1993 is in serious and urgent need of amendment if the purpose of the Act, 'the better protection' of human rights is to be achieved. The Commission formulated its own views on the amendments that were required to be made to the Act and transmitted these to the Government in March 2000 requesting that they be acted upon without delay.

2001—2002.—During the year 2001-2002, the NHRC received 69,083 cases and 1305 cases of custodial death. Thus a total of 70388 cases or complaints were received. During this year also the Commission devoted its attention to large number of subjects including civil liberties right to health, rights of women and children, rights of the vulnerable such as disabled and elderly persons and promotion of human rights literacy. The Commission also took upon the task of review of laws such as Prevention of Terrorism Ordinance, 2001, Child Marriage Restraint Act, 1929 and Protection of Human Rights Act, 1993. As regards the last Act of 1993, the Commission observed in its report that it is a matter of deepest regret to the Commission that over two years later, proposals sent by the Commission are still pending for consideration before the Central Government, despite the chairperson having personally drawn attention to this matter, both publicly and privately, at the highest reaches of the Government. It may be noted here that when the Government does not want to do a particular thing or to delay the same, it appoints a committee that is what the Government has exactly done. It has appointed a committee of Joint-Secretaries which has already held four meetings on 20.7.2000, 1.11.2000, 16.2.2001 and 13.7.2001. The committee has yet to finalise its recommendations.

The Commission also considered the implementation of international treaties and other instruments of human right such as Protocols to the Convention on the Rights of the Child, Protocols to the Geneva Convention, Convention against Torture and Convention and Protocol on the Status of Refugees.

The Commission also considered the situation in Gujarat. The Commission took *suo motu* action on this matter on 1st March 2000, on the basis of media reports, both print and electronic. About the riots in Gujarat, the Commission concluded that in its opinion, there could be no doubt that there had been a comprehensive failure on the part of the State Government to control the persistent violation of the rights to life, liberty, equality and dignity of the people of that State. The Commission remained deeply disturbed by persisting press reports that charge-sheets filed thus far in respect of certain grave incidents lacked credibility inasmuch as they were reported to depict the victims of violence as the provocateurs in as the provocateurs that FIRs were neither promptly nor accurately recorded in respect of atrocities against women, including acts of rape, that compensation for damaged property was often set at unreasonably low amounts, that pressure was being put on certain of the victims to the effect that they could return to their homes only if they dropped or altered the cases they had lodged. While yet others were being pressured to leave the relief camps even though they were unwilling to do so in the absence of viable alternatives.

It may be noted that the Commission had decided that the chairperson should lead a team of the Commission to Gujarat between 19th-22nd March, 2002, and it was pursuant to this that the detailed report of the State of Gujarat was received on 28th March, 2002. This is good and commendable as far as it goes. But it is surprising that there is not word, much less condemnation of the gruesome incident of burning of the railway compartment wherein 59 persons lost their lives. Moreover, the angle that the riots could be in retaliation or reprisal of the said tragic incident was not considered at all. Nevertheless it has to be noted that there was complete failure of State machinery for it could not stop riots for such a long time.

Last but not the least, the Commission noted that at the time of writing of the present annual report that the report had not been placed before each House of the Parliament, together with a Memorandum of action taken in accordance with the procedure envisaged under Section 20(2) of the Protection of Human Rights Act, 1993. The cycle of delay has, once again, been repeated worse still, the delay in tabling the annual report before Parliament has resulted in a corresponding delay in releasing its contents to the public. In the process, both the elected representatives of the people of India and the people of India themselves have, in effect, been denied timely and comprehensive information on the work and concerns of the Commission.

2002—2003.—The annual report of the Commission could not be released as it has yet to be laid before the Parliament. The delay in doing so has become a persist practice of the Government. In its annual report for the year 1999-2000, on the basis of the report of the Advisory Committee headed by Justice A.M. Ahmadi, former Chief Justice of India, recommended that a period of three months' time limit from the date of submission of reports of the NHRC and State Commission to be placed before the Parliament and State Legislatures be prescribed and for reports to be made public after three months, even if not placed before legislative bodies.

As compared to 496 complaints in 1993-1994 (in six months), in 2001-2002 it received 70388 complaints *i.e.* more than 70 times. During these years the Commission has performed commendable works in various fields. It has not only won the confidence of the people but has aroused great hopes, especially in the vulnerable ones.

Evaluation of the work of the National Human Rights Commission.—The National Human Rights Commission has rendered a signal service for the cause of observance of human rights, especially in the field of civil liberties. For example its work in the field of prevention of castodial deaths, rape and torture has been quite praiseworthy. Its direction to all District Magistrates and Superintandents of Police to report to the Commission all incidents of custodial death or rape within twenty-four hours has made a very salutary impact in preventing such incidents. Moreover, it is a sort of forewarning to the Police officers that if they misuse their powers or commit excesses, they may be penalised for this. Besides this the Commission has handled some cases of alleged custodial death in such an effective manner that it has inspired the confidence of the people. For example in the case of *Alleged Custodial Death of Madan Lal in Delhi*[185] the Commission took cognizance of this case *suo motu* and appointed Shri R.C. Chopra, a member of Higher Judicial Service to investigate the matter. The report dated 11th March, 1994 submitted by Mr. Chopra inferred that Sri Madan Lal had died as a result of a physical assault on his person, while he was in custody within a police station for which an Assistant Sub-Inspector and three Constables were held *prima facie*, responsible. The Commission accepted this report and recommended to the NCTD *inter alia*, the investigation of the case be handed over to the CBI, department action against the ASI of the police station concerned be taken and *interim* compensation of Rs. 59,000/- should be paid to the dependants of the deceased within one month, without prejudice to the compensation that may be claimed in accordance with law. Subsequently *i.e.*, on 30th

185. *See* Annual Report of the National Human Rights Commission for the Year 1994-95.

May, 1994, the Government of the NCTD conveyed its acceptance of the recommendations of the Commission.

To quote only one more of the many cases handled by the Commission reference may be made to the *Alleged Rape in Custody by an Assistant Sub-Inspector of Delhi Police* (July, 1994).[186] According to the case reported in the annual report of the Commission for the year (1994-95), in July, 1994, pursuant to its circular of 14th December, 1993, the Commission received a report from Dy. Commissioner of Police, South District, New Delhi about a custodial rape by an ASI of the Delhi Police Force. The victim had been brought to the police station by another ASI, as she had got lost on her way to her parents home but no report was made in the daily diary of the police station of the victim having been taken to the police, nor was due care taken to ensure the return of the victim to her family. The ASI who brought the victim to the police station was accordingly placed under suspension. The victim was raped by another ASI who took her to his house in the residential quarters of Paharganj Police Station. The ASI who committed the rape was arrested and the case was sent to Court for trial. The Commission also received a complaint and a report on this incident from the People's Union for Democratic Rights (PUDR), Delhi.

The Commission, on a perusal of a report of the Government of NCTD, and also the report of the PUDR, directed the Government to explain as to why the woman was detained at the police station for the night, how it was that there was no supporting entry for her detention at the police station, and what steps had been taken or were proposed to be taken to ensure that women were not called to and detained at the police station for investigation particularly at night. The Government of NCTD subsequently reported that there had been a lapse on the part of duty officers both at P.S. Hauz Khas and at P.S. Okhla for not recording the victims presence in the police station and also not for informing her family members of her whereabouts. Departmental enquiry into the lapses has also been ordered against the concerned police officials. Instructions not to call women for interrogation at the night, and to depute women police officers if a woman is called for interrogation to a police station at an odd hour have been reiterated by the Government NCTD for strict compliance by all concerned officers.

Cases such as the above handled by the Commission have led to the evolution of the rule that women should not be called at police station for interrogation or otherwise at night and in case it is urgent and necessary there should be arrangement of lady police officers.

The above two cases are simply illustrative of the signal services rendered by the Commission in the field of civil liberties. The Commission has become a sort of indirect but effective check on the misdeeds, excesses, abuse of power by police. Now police officials will have to think several times before attempting such misadventures. Thus the work of the Commission deserves praise and encouragements. All impediments in its competency and autonomy ought to be removed promptly. The Government ought to heed seriously all the recommendations of the Commission.

Reference may also be made here to the order of the NHRC dated 11th June, 1998 regarding the complaints of *Pasum Kashmir Movement and All India Kashmir Samaj.*[187] The coram of the Judges comprised of Justice Sri M. N. Venkata Challiah, (Chairperson), Justice Sri V. S. Malimath (Member) and Sri Virendra Dayal (Member). The complaint of Pasum Kashmir Movement was first brought to the attention of the Commission on 7th March, 1994 and then again on 7th June, 1994. The complaint of All India Kashmir Samaj was lodged with the Commission on 13th June, 1994. One of the main legal questions considered by the Commission was whether the killings etc. of Kashmiri Pandits amounted to Genocide within the meaning of the Genocide Convention.

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186. *See* Ibid.

187. *See* Case No. 938/94-95/NHRC & 1181/94-95/NHRC.

The Commission considered the definition of Genocide given in the Convention. According to Article II of the Genocide Convention.

".....Genocide means any of the following acts committed *with the intent to destroy in whole or in part,* a national, ethnical, racial or religious group, as such :

(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group."

The Commission also considered the implications of "intent to destroy, in whole or in part," in the above definition. The Commission expressed the view that the killings and "ethnic cleansing" of the Kashmiri Pandits must be seen in the context of the deeper intent to secure the seccession of the State of Jammu and Kashmir. The crimes committed against the Kashmiri Pandits are, by any yardstick, deserving of the strongest condemnation. And there can be no gainsaying the acute suffering and deprivation caused to the community. But against the stern definition of the Genocice Convention, the Commission expressed the opinion that acts akin to Genocide have occurred in respect of Kashmiri Pandits, but the crimes against the Kashmiri Pandits, grave as they undoubtedly are, fall short of the "ultimate" crime Genocide.

A pertinent question arises as to whether what happened after the brutal burning of about 54 persons belonging to the majority community constitutes Genocide? If the Commission's opinion is considered to be a guide, the violent acts occurring aftermath of Godhra cannot by any way come within the definition of "Genocide". But Human Rights activists, critics of Modi Government of Gujarat, a large part of media and of course, the Congress headed by Sonia Gandhi are wrongly terming it "Genocide." The Godhra incident was the worst example of brutality and what happened subsequent to that was even worse. But by no stretch of definition it can be termed "genocide". No doubt they can come under the definition of "Crimes Against Humanity". If we follow the reasoning of the National Human Rights Commission the worst type of intention that can be ascribed to RSS activists and BJP workers (although that it is debatable question) is to teach the minority community a lesson that Godhra incident be not repeated in future. Indeed their intent was not to destroy, whole or in part, the minority and as such their acts cannot come within the definition of the term 'Genocide' and what happened aftermath of Godhra must be looked in the context of Godhra.

Nevertheless, it is the duty of all (including the Government and the opposition) to ensure that stern action must be taken against all those who took part in violence and was committed violation of human rights. No one including the people of majority community are entitled to take law into their own hands. If they do so law must deal sternly with them. The so-called and self styled champions and activists of human rights instead of helping the minority are spoiling the situation and obstructing the restoration of normalcy. Law can take its proper course only after normalcy is restored. As pointed out by Commission, there was complete failure of state machinery. Even the FIRs filed lacked credibility. What was worse was that even the courts failed to render impartial justice. The Supreme Court was pained and shocked by this and has transferred the trial of some cases in other courts of other States.

It cannot but be conceded that the Commission has no teeth and it can take no action directly. It can only recommend and the Government may or may not accept its recommendation. This position is far from satisfactory. In a country where the Government can make or give excuses and can express difference of opinion in respect of the Implementations of the report of the Joint Parliament Committee with regard to Bank Security Scam, the recommendations of the Commissions are not sufficient and the Government can any time for political or other reason avoid to implement the

recommendation of the Commission or may not pay serious heed to it, the powers given to the Commission under Section 18 after completion of an inquiry are just insufficient. Thus there is much force in the criticism that the Commission has no teeth and it can only make recommendations. Its recommendations are not binding on the Government or the authority concerned.

However, it may be noted that even though the Commission can neither render a decision like a court nor can its decisions be enforced like judgments yet it would not be correct to say that the National Human Rights Commission is a weak or impotent body. Headed by a former Chief Justice of India and consisting of Judges of Supreme Court and Chief Justices of High Courts, its recommendation commands great respect. It is a statutory autonomous body and derives its power and authority from an Act of Parliament. The Central or State Government will have to think several times before deciding to avoid or refuse to implement the recommendations of such an august body. It also deserves mention here that under Section 18 (6), it is mandatory for the Commission to publish its inquiry report together with the comments of the concerned Government or authority, if any, and the action taken or proposed to be taken by the concerned Government or authority on the recommendations of the Commission. Such report when published creates strong public opinion. Obviously no Government in a democratic country like ours can afford to resist or avoid such public opinion. Therefore, instead of being reluctant or repulsive, the Government will be too willing to accept and implement the recommendations of the Commission.

Yet another point to be noted here is the narrow definition of 'human rights' given under the Act. It limits human rights to only the rights relating to 'life, liberty, equality and dignity of the individual guaranteed by the Constitution." The Commission has recommended amendments of Protection of Human Rights Act, 1993 but it is disheartening to note that the NDA Government did not pay proper heed to it. Now the Government has changed and the present coalition Government headed by Congress may again take considerable time to do the needful.

This definitely limits the scope of the Commission to ensure the observance of human rights. However, the redeeming feature is found in the words "or embodied in the International Covenant and enforceable by courts in India." Even though these words are also qualified by words "the rights relating to life, liberty, equality and dignity of the individual", they certainly widen the scope of the human rights about the observation of which the Commission will have jurisdiction. This is because of the fact that the Supreme Court has recognized a number of separate and independent fundamental rights as being either part of the existing fundamental right or rights or emanating from them. Moreover, the Supreme Court has recognized in a number of cases referred earlier that International Conventions on Human Rights can be used in interpreting the constitutional provisions and one or more existing fundamental rights are of wide amplitude to include the provisions of International Conventon, they can be read into the existing fundamental rights. Thus, new fundamental rights such as right to gender equality and prohibition of sexual harassment of working women at their places of work, can be recognized in future by the Supreme Court.

Thus it may be concluded that despite several shortcomings and drawbacks in the Act, the Commission, in practice, has proved to be an effective body for the observance of human rights in the country. Within a short period. *i.e.,* only a few years, it has performed creditable and praiseworthy works. It has rendered a signal service for the observance of human rights, especially in the field of custodial violence and deaths, false encounters by police, abuse or misuse of powers by Police officials, rape cases, review of Acts and Statutes such as Terrorist and Disruptive Activities (Prevention) Act, 1987 (TADA) and Prevention of Terrorism (POT) Bill, 2000. Most of the recommendations of the Commission have so far been accepted. If some of its recommendations have not so far been accepted and acted upon, the fault is not of the Commission but lies somewhere

else, *i.e.*, with the concerned Government or authority : It is therefore desirable that the Central or State Government should pay serious heed to the recommendation of the Commission and unless there are some very strong or cogent reasons for not accepting the recommendation, the Government should generally accept and promptly implement the recommendations of the Commission.

State Human Rights Commission.—According to Section 21 (1) of the Protection of Human Rights Act, 1993, a State Government may constitute a body to be known as the...(the name of the State) Human Rights Commission to exercise the powers conferred upon, and to perform the functions assigned, to State Commission under Chapter V of the Act. The wording of this provision, especially the word 'may' indicate that it is not compulsory for the States to establish State Human Rights Commission. Thus it depends upon the discretion of the State. While under Section 3 of the Act, it is compulsory and mandatory for the Central Government to constitute a body to be known as the National Human Rights Commission for Section 3 uses the words "shall constitute", it is simply optional under Section 21 (1) for the State to constitute a State Human Rights Commission. This is a great defect and weakness of the Act. Since most of the violations of human rights take place in State territories, it should have been compulsory and mandatory for the States to establish State Human Rights Commissions. It is because of this flaw in the Act that many States have yet not established State Human Rights Commissions. Only a few States, namely West Bengal, Assam, Madhya Pradesh, Tamil Nadu and Himachal Pradesh have so far established State Human Rights Commission by the end of March, 1997. Subsequently the Government of Punjab State has established such a Commission but Uttar Pradesh has simply notified the Constitution of a State Commission. Later on the example of above-mentioned States has been followed by the Government of Jammu and Kashmir. In its annual report of 1995-96. The National Human Rights Commission (NHRC) has recommended that State Commissions be established at an early date in the remaining States also.

The Commission has, therefore, recommended that it should be mandatory for every State to establish State Human Rights Commission.

Constitution of State Human Rights Commission.—The States Human Rights Commission shall consists of :

(a) a Chairperson who has been a Chief Justice of a High Court;

(b) one member, who is, or has been a Judge of a High Court;

(c) one Member who is, or has been a District Judge in that State;

(d) two Members to be appointed from amongst persons having knowledge of, or practical experience, in matters relating to human rights.[188]

The Act also makes provision for the appointment of a Secretary who shall be the Chief Executive Officer of the State Commission and shall exercise such power and discharge such functions of the State Commission as it may delegate to him.[189]

Headquarter of the State Commission.—The headquarters of the State Commission has not been fixed or settled by the Act. It should have been at the State capital like that of NHRC which is at national capital. It has been left to the discretion of the State Government to fix or settle the place. The Act simply provides that it shall be at such place as the State Government may by notification, specify.[190]

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188. Section 21 (2).

189. Section 21 (3).

190. Section 21 (4).

Jurisdiction of the State Commission.—Sub-section (5) of Section 21 provides that a State Commission may inquire into violation of human rights only in respect of matters relatable to any of the Entries enumerated in List II and List III in the Seventh Schedule to the Constitution. This is however subject to a proviso that if any such matter is already being inquired into by the Commission (*i.e.*, NHRC) or any other Commission duly constituted under any law for the time being in force, the State Commission shall not inquire into the said matter.

But according to the second proviso in relation to Jammu and Kashmir Human Rights Commission, this sub-section (*i.e.*, sub-section (5) of Section 21) shall have effect as if that the words and figures "List II and List III in the Seventh Schedule to the Constitution the words and figures "List III in the Seventh Schedule to the Constitution as applicable to the State of Jammu and Kashmir in respect of matters in relation to which the Legislature of that State has power to make laws" had been substituted.

The territorial jurisdiction of the National Human Rights Commission or the Commission has not been specifically mentioned or clarified in any provision of the Act although the wording of Section 12 in general indicate and imply that it extends to the whole territory of India. However, negatively Article 36 (1) curtails the jurisdiction by providing that the Commission shall not enquire into any matter which is pending before a State Commission or any other Commission duly constituted under any law for the time being in force. Besides this, Section 36 (2) provides that both the Commission and the State Commission shall not enquire into any matter after the expiry of one year from the date on which the Act constituting violation of human rights is alleged to have been committed.

The Commission has also recommended amendment of Article 36. As regards Article 36(1) the Commission has recommended that the Commission should to allowed to enquire into any matter notwithstanding the matter may be pending before a State Commission or other Commission except an Enquiry Commission established under Commission of Enquiry Act. As regards Article 36(2), the Commission has recommended that it should be entitled to enquire into any matter even though one year has elapsed.

Thus it is certain that a State Commission cannot inquire into violation of human rights in respect of matters relatable to any of the Entries enumerated in List I. This is clear from sub-section (5) of Section 21 of the Act. But the National Commission may inquire into violation of human rights only in respect of matters relatable to any of the Entries enumerated in List also but also in respect of Entries enumerated in List II and List III. Thus there are chances of conflict between the jurisdiction of the Commission or State Commission. But there is no provision for coordination of activities of both the Commmssion nor there is any provision for the resolution of conflict if any, arises. The Act should have made clear provisions in this respect.

Yet another vague provision in this respect is the use of the words "or any other Commission duly constituted under any law for the time being in force." This provision can be misused by the Central or State Government by constituting a Commission under any other law for the time being in force to oust the jurisdiction of the Commission or State Commission so as to keep it away from serious cases of alleged violation of human rights for political or other resons.

The Commission has done commendable works during a brief period of nine years. If the Commission is facing certain problems in performing its task of 'better protection' of human rights assigned to it, it is the duty of the Government to solve them. Sooner the Government performs its duty the better. The appointment of a committee of Joint Secretaries which has held four meetings each after a gap of 4 to 6 months and has yet to finalise its report, is not the proper way for a democratic Government to perform its duty. By adopting such an attitude the Government is obstructing the work and progress of the Commission. A democratic Government ought to endeavour to play the role of guarantor

and protector of human rights. This can be done by assisting and helping the NHRC by acting on its recommendations rather than obstructing and delaying things.

Appointment of Chairperson and other members of State Commission.—The Chairperson and other Members of State Commissions are to be appointed by the Governor under his hand and seal after obtaining the recommendation of a Committee consisting of :

(a) Chief Minister—Chairperson
(b) Speaker of the Legislative Assembly—Member
(c) Minister-in-Charge of the Department Home in that State—Member
(d) Leader of the Opposition in the Legislative Assembly—Member

But where there is a Legislative Council in State, the Chairman of that Council and the Leader of the Opposition in that Council shall be Members of the Committee. It is also made clear that no sitting Judge of a High Court or a sitting Judge shall be appointed except after consultation with the Chief Justice of the concerned State.[191] It is also made clear that no appointment of a Chairperson or Member shall be invalid merely by reason of any vacancy in the Committee.

Removal of a Member of the State Commission.—The Chairperson or any other Members can only be removed from his office by order of the President on the ground of misbehaviour or incapacity after the Supreme Court, on a reference being made to it by the President has on inquiry held in accordance with the procedure prescribed in that behalf by the Supreme Court, reported that the Chairperson or such other Member, as the case may be, ought on any such ground to be removed. This is however, subject to the provision of sub-section (2) of Section 23.[192] Sub-Section (2) of Section 23 provides that notwithstanding anything contained in sub-section (1) of Section 23 the President may by order remove from office the Chairperson or any other Member if the Chairperson or such other Member as the case may be :

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

That is to say, for the grounds mentioned in sub-section (2), the President can remove the Chairperson or any other Member without making a reference to the Supreme Court.

Term of office of Members of the State Commissions.—A person appointed as Chairperson or as a Member is appointed for a term of five years from the date on which he enters upon his office or until he attains the age of seventy years, whichever is earlier. While the Chairperson after completion of his term of five years, is ineligible for re-appointment. A person appointed as a Member is eligible for another term of five years subject to the condition that no Member shall hold office after he has attained the age of seventy years.[193]

Annual and Special Reports of State Commission.—The State Commission is required to submit an annual report to the State Government and may at

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191. Section 22 (1)
192. Section 23 (1).
193. Section 24.

any time submit special reports on any matter which in its opinion, is of such urgency or importance that it should not be deferred till the submission of the annual report.[194] After the annual and special reports are submitted by the State Commission, the State Government shall cause them to be laid before each House of the State Legislature where it consists of two Houses, or where such Legislature consists of one House, before that House alongwith a memorandum of action taken or proposed to be taken on the recommendations of the State Commission and the reasons for the non-acceptance of the recommendations, if any.[195]

Human Rights Courts in Districts.—Section 30 of the Protection of Human Rights Act, 1993 provides for a Human Rights Court in each district. It provides that for the purpose of providing speedy trial of offences arising out of violation of human rights the State Government may, with the concurrence of the Chief Justice of the High Court, by notification, specify for each district a Court of Session to be a Human Rights Court to try the said offences. But no such Court shall be specified if (a) a Court of Session is already specified as a special court; or (b) a special court is already constituted for such offences under any other law for the time being in force.

The Act also makes provision for a special Public Prosecutor for every Human Rights Court. Section 31 of the Act provide that for every Human Rights Court, the State Government shall, by notification, specify a Public Prosecutor or appoint an advocate who has been in practice as an advocate for not less than seven years, as a special Public Prosecutor for the purpose of conducting cases in that Court.

While Section 31 is mandatory, Section 30 is optional. The provisions contained in Section 30 is very weak, for it uses the word 'may' that is to say, it is not mandatory for the State Government to establish Human Rights Courts in each District. That is why, only a few States, namely Andhra Pradesh, Assam, Sikkim and Tamil Nadu have notified such courts and only two States, namely, Tamil Nadu and Assam have established such Court in Madras and Guwahati respectively, other States have not so far, taken any action in this connection. Sometime back D. R. Karthikeyan, the Director General (Investigation) of National Human Rights Commission said that the greatest number of complaints of violation of human rights come from Uttar Pradesh. Despite this, District Human Rights Courts have not yet been established in Uttar Pradesh. Subsequently, however, such courts have also been notified in Uttar Pradesh.

Section 30 which provides for establishment of District Human Rights Courts does not lay down the jurisdiction of such courts. It also does not lay down as to what procedure shall be followed by such courts. This ambiguity will create problems when the cases for alleged violation of human rights are actually conducted in such Courts.

Evaluation of Protection of Human Rights Act, 1993 (Act No. 10 of 1994).—Apart from the Constitution for the protection and observance of human rights, enactment of the Protection of Human Rights Act, 1993 is an important milestone and should be welcomed. However, it cannot but be remarked that it is certainly a weak effort for it suffers from certain defects and shortcomings. In the first place, there are certain ambiguities and impediments concerning the competence and autonomy of the National Human Rights Commission (NHRC). In its very first annual report for the period ending on March 31, 1994, the Commission recommended the amendment of Sections 2 (1) (d) and 2 (1) (f), 11 (1) (b) and 11 (2) (together with Section 32), Section 13 (1) (f), Sections 18, 30, 36, so as to remove ambiguities and impediments concerning its competence and autonomy of the Commission. These recommendations were reiterated by the Commission in its annual report for the year 1994-95 and the Commission even regretted

194. Section 28 (1).

195. Section 28 (2).

that action had yet not been taken to give effect to these recommendations and urged that measures be taken without further delay. Unfortunately even this has proved insufficient to awaken the Government from its slumber. This attitude of the Government is not conducive for the proper observance and protection of human rights in the country.

The NHRC has set up an advisory committee under the Chairmanship of former Chief Justice of India, A.M. Ahmadi to suggest revisions in the Protection of Human Rights Act, 1993.

Secondly, the definition of 'human rights' given in Section 2 (d) is very narrow. As pointed earlier, it is not proper to limit the human rights only to the rights relating to life, liberty, equality and dignity of the individual even though they are the most important basic human rights.

Thirdly, a serious defect of the Act is that establishment of State Human Rights Commissions has not been made mandatory. Section 21 (1) which provides for the establishment of State Human Rights Commission uses the words "may constitute...". This defect ought to be rectified as soon as possible. It is probably because of this, *inter-alia,* only a few States have so far established State Human Rights Commissions. This provision should be mandatory in the same way as Section 3 of the Act which makes it mandatory for the Central Government to constitute National Human Rights Commission.

Fourthly, jurisdiction of the Human Rights Court; has not been specified in the Act. It is not clear what cases will be conducted in such courts and what procedure shall be followed in such courts.

Fifthly, it has been criticized, and rightly too, that the NHRC has no teeth. Though it has been entrusted with the important task of ensuring observance of human rights, the powers conferred on it are not sufficient. It has no power to take a binding decision. It can only recommend. Even though it concludes that violation of human rights has taken place but instead of giving a binding decision it may under Section 18 simply recommend to the concerned Government or authority for the initiation of proceedings for prosecution or other action, or approach the Supreme Court or High Court concerned for such directions, orders, or writs as that court may deem necessary recommend or the concerned Government or authority for grant of some interim relief to the victim of the family. The concerned Government or the authority is not bound to accept the recommendation or may accept the recommendation with certain modifications as it may deem fit. If the Government is really serious and sincere about the observance of human rights. It should give some teeth to NHRC so to make it an effective and useful body.

Sixthly, NHRC has no independent and separate investigating agency and has to utilize and rely upon the service of any officer or investigating agency of the Central Government or of the State Government with the concurrence of the Central Government of the State Government as the case may be.

Last but not the least, it is not proper and just to specify a Sessions Court as Human Rights Courts because these courts are already over-burdened with large number of cases. Therefore, cases of alleged violations of human rights will not receive in such court the priority and importance they deserve nor their expeditious disposal can be ensured in such courts. Separate Human Rights Court under the Protection of Human Rights Act, 1993 ought to be established to achieve the desired results.

Despite the above shortcomings and weakness, National Human Rights Commission (NHRC) has performed praiseworthy and commendable work within a short period. It has rendered signal service in respect of custodial deaths, rape, torture, false police encounters and other police excesses. Recently, *i.e.,* on March 10, 1999 Chairperson of the NHRC former C.J.I. M.N. Venkatachaliah launched Human Rights Cells in the police headquarters as an effective in-house system to deal with the rising number of cases of custodial violence in the country." While inaugurating the project, NHRC Chairman C.J.I. M.N. Venkatachaliah said that the Commission received about 4,000 complaints of omission and commission of the public servants and a majority of them pertained to police

brutality and custodial violence. NHRC Chairman further added that 'Human Rights Cells' will be run by policemen with their own geninus, own resources and own consciousness would go a long way in strengthening the foundation of democracy in the country." These Cells would be headed by an officer not below the rank of the Inspector-General of Police or Additional Director-General of Police who would be designated as "IGP/ADGP (Human Rights)". Though the NHRC would be consulted while nominating them, they would work under the State Government. Works such as these have enhanced the utility and significance of NHRC. Its circular or direction to all the District Magistrates and Superintendents to report to NHRC within twenty-four hours all cases of custodial deaths and rape in their jurisdiction has produced desired results. Now police officials will think several times before committing excesses or misusing or abusing their powers. All credit for this goes to NHRC.

Similarly, in March, 1999, NHRC has issued a directive to all State Governments to immediately ensure medical examination of prison inmate in accordance with the proforma designed by it and monthly reports of progress be communicated to Commission. This has been done to contain the alarming spread of contagious diseases like tuberculosis in jails. Even though the prison rules require medical examination of the inmates after admission but it is a distressing situation that the conduct of such initial examination is more an exception than the normal. That is why, the NHRC had to issue such directions in view of the seriousness of the situation of infectious disease and the gravity of the problem of cross-infection which has the prospect that persons upon being held innocent at the end of the day or after serving the sentence may find themselves in a worse position health-wise than when they entered the prison. It is such welfare activities of the NHRC which have instituted the confidence of the people in it and its utility and necessity.

Similarly the NHRC has recommended the amendment of Sections 2(1)(a), 18,21, 30, 36(1) and 36(2) of the Protection of Human Rights Act, 1993 but the Government has yet to act on it. The former chairperson of NHRC, Justice J.S. Verma asked in January, 2003 the Governments (Centre and States) to review and amend the rules and regulations that have discriminatory provisions or lack enabling provisions for the enjoyment of full range of human rights by persons with disabilities.

It may, therefore, be concluded that with certain amendments in the Act so as to remove the existing defects and shortcomings and streamlining the machinery of protection and observance of human rights, Protection of Human Rights Act, 1993 can become an ideal Act for the better protection of human rights in the country.